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TESTIMONY

ON

S.B. 2900, S.D. 1- RELATING TO POST CONVICTION PROCEEDINGS

March 13, 2012

The Honorable Gilbert S.C. Keith-Agaran
Chair
The Honorable Karl Rhoads
Vice Chair
and Members
House Committee on Judiciary

Chair Keith-Agaran, Vice Chair Rhoads and Members of the Committee on Judiciary:

S.B. 2900, S.D. 1, Relating to Post Conviction Proceedings, proposes to establish a 5-year time limitation on filing habeas corpus petitions, with exceptions, and prohibit successive petitions, with exceptions.

The Department of the Prosecuting Attorney, County of Maui, SUPPORTS the passage of this bill. A defendant's right to file a habeas corpus case in Hawaii is provided through the State Constitution, Hawaii Revised Statutes Chapter 660 and Hawaii Rules of Penal Procedure (HRPP) Rule 40. We do not dispute this right; but we believe that limitations on time and successive petitions should be imposed in most cases.

We frequently receive HRPP Rule 40 petitions for cases that where completed over seven years prior to the filing of the petition. State law provides that records may be disposed, usually after seven years. This creates a problem, where a defendant complains about his or her case, and the records, both ours and those held by the courts, are no longer in existence. The problem

of the availability of witnesses is also an important issue. Finally, this situation also affects the peace of mind of crime victims.

Currently, federal law provides a one-year limitation for habeas corpus cases in both state and federal criminal cases, with exceptions, and provides a limition on successive petitions. SB 2900 has basically the same provisions as federal law, with the exception that the time limitation would be five years instead of one year. The Permanent Committee on the Rules of Penal Procedure, consisting of representatives of the Judiciary, the Attorney General, the state Public Defender, the county prosecutors, and private defense counsel, approved an amendment to HRPP Rule 40 to impose a five-year limitation on such filings. However, the Hawaii Supreme Court rejected the rule amendment, holding that such a provision must be provided by the Legislature.

The limitation on successive petitions are necessary, because many defendants who are serving long sentences file numerous petitions. These petitions almost always involve issues that were previously ruled upon, waived, or are frivolous. The amount to time and resources used to address these petitions is an unnecessary burden for the county prosecutors.

We believe that S.B. 2900, S.D. 1 will help ensure that review of convictions and custody issues can be done while files and witnesses are available. It also promotes the finality of judgments and sentences, while allowing defendants a reasonable time to challenge judgments and custody. We ask that the committee PASS S.B. 2900, S.D. 1, with an amendment to make the effective date July 1, 2012.

Thank you very much for the opportunity to provide testimony on this bill.

CHARLENE Y. IBOSHI
PROSECUTING ATTORNEY

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# TESTIMONY IN SUPPORT OF SENATE BILL 2900, SD1
## A BILL FOR AN ACT RELATING TO POST CONVICTION PROCEEDINGS

Hearing before Committee on Judiciary
Tuesday, March 13, 2012, 2:00PM
State Capitol, Conference Room 325
Rep. Gilbert S.C. Keith-Agaran, Chair
Rep. Karl Rhoads, Vice Chair

TO Representatives Keith-Agaran and Rhoads and Members of the Committee:

Thank you for the opportunity to comment in support of SB 2900, SD1.
This bill is the culmination of nearly a decade's worth of work on the issue of reasonable time limits for post-conviction relief under Rule 40, Hawai'i Rules of Penal Procedures. The Judiciary's Permanent Committee on the Hawai'i Rules of Penal Procedures has reviewed the issue of post-conviction filings' time limits comprehensively and with much debate. The Judiciary's Permanent Committee is comprised of trial judges from all the circuits, the State Public Defender, prosecutors and private defense counsels. Both the Permanent Committee on the Hawai'i Rules of Penal Procedures and the Committee on Circuit Court Criminal Rules have approved the establishment of reasonable time limits.

The current bill, SB2900 SD1, passed out of the Senate Judiciary & Labor Committee with a vote of Ayes, 25 Nos, 0. SB2900, SD1 fosters the timely disposition of issues previously known to defendants and allows for some reasonable finality, especially for victims, in the criminal justice system. The current bill encourages an early, more careful and comprehensive assessment of cases, assuring victims some measure of finality. The five year limit was debated extensively, and is longer then the federal one year limitation. The five year limit contemplated the conclusion of the direct appeal taking a few years after the charging of the case. The rule encourages all parties to investigate and assess the cases fully and raise the issues early, including ineffective assistance of counsel. Defendants' rights are protected: SB2900 SD1 specifically allows for post-conviction complaints without restriction in the event new factual evidence is discovered that could not have been known or discovered previously, or in the event of a previously unavailable new rule of constitutional law under the Constitutions of the United States or the State of Hawai'i.

In 2007 the Hawai'i Supreme Court determined that it is within the constitutional authority of this Legislature (under Article I, Section 15) to enact the proposed amendments to the habeas corpus law, HRS Chapter 660. The Supreme Court's reasoning is found in its November 27, 2007 Order, attached hereto. Thus, only the Legislature can act on this proposal, which will be of great value in the administration of justice.

During the 2008 Legislature, this issue was considered under proposed SB2967. A Justification Sheet was submitted which summarizes the key arguments. A copy of that Justification Sheet is attached hereto.

Thank you for considering our testimony and for your responsiveness in support judicial economy and finality of judgments while protecting the rights of defendants.

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

In the Matter of the

HAWAI'I RULES OF PENAL PROCEDURE

FILED

2007 NOV -7 AM 10:33

CLERK, APPELLATE COURTS
STATE OF HAWAI'I

ORDER

(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy, JJ.)

The Permanent Committee on Rules of Penal Procedure and Circuit Court Criminal Rules proposed amendments to Rule 40 of the Hawai'i Rules of Penal Procedure (HRPP) that would add the following two sections:

> **(j) Time limits.** A five (5) year period of limitation shall apply to a petition filed for post-conviction relief under this rule. The limitation period shall run from the last of:
>
> (1) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (2) the date on which the impediment to filing an application created by a governmental action in violation of the Constitution of the State of Hawai'i or the Constitution of the United States that prevented the filing of the petition for post-conviction relief was removed;
>
> (3) the date on which a newly created constitutional rule under the Constitution of the State of Hawai'i or the Constitution of the United States was initially recognized and made retroactively applicable to cases on collateral review by the Supreme Court of the State of Hawai'i or the Supreme Court of the United States; or
>
> (4) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence; and the newly discovered evidence, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by a preponderance of the evidence that no reasonable fact finder would have found the petitioner guilty of the offense.
>
> **(k) Successive petitions.** A claim presented in a second or successive post-conviction petition under this rule that was not presented in a prior petition shall be dismissed unless:
>
> (1) the petitioner shows that the claim relies on a previously unavailable new rule of constitutional law under the Constitution of the State of Hawai'i or the Constitution of the United States, made retroactive to cases on collateral review by the Supreme Court of the State of Hawai'i or the Supreme Court of the United States; or

> (2) the factual basis for the claim could not have been discovered previously through the exercise of due diligence, and the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

After study and consideration of the comments we received, including consideration of the Legislature's authority with regard to the privilege of the writ of habeas corpus, we believe adoption of the proposal would be inappropriate. *See* HRPP Rule 40(a) ("The post-conviction proceeding established by this rule shall encompass all common law and statutory procedures for the same purpose, including habeas corpus and coram nobis . . .."); Article VI, Section 7 of the Hawai'i Constitution ("The supreme court shall have power to promulgate rules and regulations in all civil and criminal cases for all courts relating to process, practice, procedure and appeals, which shall have the force and effect of law."); and Article I, Section 15 of the Hawai'i Constitution ("The power of suspending the privilege of the writ of habeas corpus, and the laws or the execution thereof, shall never be exercised except by the legislature, or by authority derived from it to be exercised in such particular cases only as the legislature shall expressly prescribe."). Therefore,

IT IS HEREBY ORDERED that the proposed amendments to HRPP Rule 40 are rejected.

DATED: Honolulu, Hawai'i, November 7, 2007.

SB. NO. 2967

JUSTIFICATION SHEET

DEPARTMENT: ATTORNEY GENERAL

TITLE: A BILL FOR AN ACT RELATING TO HABEAS CORPUS.

PURPOSE: To establish a statute of limitations for the filing of habeas corpus actions challenging convictions, judgments, sentences, and other matters related to custody.

MEANS: Add a new section to chapter 660, Hawaii Revised Statutes.

JUSTIFICATION: In addition to a direct appeal to the Intermediate Court of Appeals and the Hawaii Supreme Court and the filing of a writ of habeas corpus with the United States District Court, individuals convicted of crimes in state courts may also challenge their convictions, sentences, and other matters related to custody by filing in state courts petitions for post-conviction relief pursuant to Hawaii Rules of Penal Procedure Rule 40 and chapter 660, Hawaii Revised Statutes. Currently, there is no statute of limitations on petitions for post-conviction relief. Defendants can, and do, file challenges to their convictions and custody long after the actual events at issue, making it difficult to address the merits of the challenges and, if necessary, to hold retrials or new hearings. Establishing a five-year statute of limitations, would ensure that challenges to convictions and matters of custody could be reviewed and decided when the record and witnesses are more likely to remain available. In comparison, there is a one-year statute of limitations on the filing of a federal writ of habeas corpus, with numerous tolling periods for various reasons. The Permanent Committee on Rules of Penal Procedure and Circuit Court Criminal Rules recently proposed amending

Rule 40 of the Hawaii Rules of Penal Procedure to add a statute of limitations as in this bill, but the Hawaii Supreme Court rejected the proposal, indicating, in part, that this was a matter for the legislature.

Impact on the public: There should be a positive impact on the public as it promotes finality to convictions and sentences in a more reasonable timeframe. Further, in the event that reconsiderations or retrials are found to be necessary, evidence is more likely to be intact closer to the time of the offense involved.

Impact on the department and other agencies: The department, the various county prosecuting attorney(s) offices and the Judiciary should benefit from an anticipated drop in the filing of petitions for post-conviction relief and a focusing of resources on current relevant issues.

GENERAL FUND: None.

OTHER FUNDS: None.

PPBS PROGRAM DESIGNATION: None.

OTHER AFFECTED AGENCIES: Judiciary and the various county prosecuting attorney(s) offices.

EFFECTIVE DATE: Upon approval.

# COMMUNITYALLIANCE ON PRISONS
## 76 North King Street, Honolulu, HI 96817
Phone/E-Mail: (808) 533-3454 / kat.caphi@gmail.com


**COMMITTEE ON JUDICIARY**
Rep. Gilbert Keith-Agaran, Chair
Rep. Karl Rhoads, Vice Chair
Tuesday, March 13, 2012
2:00 p.m.
Room 325

**STRONG OPPOSITION TO SB 2900 SD1 - Rule 40 - Post Conviction Proceedings**

Aloha Chair Keith Agaran, Vice Chair Rhoads and Members of the Committee!

My name is Kat Brady and I am the Coordinator Community Alliance on Prisons, a community initiative promoting smart justice policies for more than a decade. This testimony is respectfully offered on behalf of the 6,000 Hawai`i individuals living behind bars, always mindful that almost 1,800 individuals are serving their sentences abroad, thousands of miles away from their loved ones, their homes and, for the disproportionate number of incarcerated Native Hawaiians, far from their ancestral lands.

SB 2900 SD1 establishes time limits for filing habeas corpus complaints and limits successive complaints. Provides and exemption from the time limits for any motion, petition, or appeal filed pursuant to part XI, of chapter 844D, Hawaii Revised Statutes.

Community Alliance on Prisons is in strong opposition to this measure that the right of an incarcerated person to bring a Rule 40 lawsuit after 5 years, even if they find new evidence that was not available when they were convicted

Such a limitation on the ability to seek relief in the courts for a wrongful conviction is patently unfair and potentially penalizes a petitioner for circumstances which might be beyond his/her control. Because of the drastic nature of the five-year limitation and the accompanying ban against successive petitions, the circuit court will inevitably be forced to conduct full hearings, thus increasing the workload of the already overburdened courts.

Many of the people who have been exonerated through the Innocence Project served decades in prison before evidence was found to confirm their innocence. The Hawai`i Innocence Project's work to release Alvin Jardine on Maui is proof of this – he served 20+ years in prison for a crime he did not commit – false eyewitness identification led to his conviction and the DNA that was discovered decades later led to his release.

New research on eyewitness identification has brought to light the problems with false identification – in fact of the 289 exonerations, 75% involved false eyewitness identification.

One of the best criminal justice blogs, "Grits for Breakfast", out of Texas states:
http://gritsforbreakfast.blogspot.com/2012/02/cca-laments-disconnect-between-changing.html

> The disconnect between changing science and reliable verdicts that can stand the test of time has grown in recent years as the speed with which new science and revised scientific methodologies debunk what had formerly been thought of as reliable forensic science has increased. The potential problem of relying on today's science in a criminal trial (especially to determine an essential element such as criminal causation or the identity of the perpetrator) is that tomorrow's science sometimes changes and, based upon that changed science, the former verdict may look inaccurate, if not downright ludicrous. But the convicted person is still imprisoned. Given the facts viewed in the fullness of time, today's public may reasonably perceive that the criminal justice system is sometimes unjust and inaccurate. Finality of judgment is essential in criminal cases, but so is accuracy of the result--an accurate result that will stand the test of time and changes in scientific knowledge.

Statistics from the Hawai`i Judiciary clearly illustrate that the number of Rule 40 lawsuits has decreased dramatically in Hawai`i: 1st Circuit from 99 in 2004 to 44 in 2007; 2nd Circuit from a high of 35 in 2005 to 11 in 2007; 3rd Circuit from 22 in 2004 to 9 in 2007.

Is the purpose of this bill to cover the mistakes made by prosecutors? If so, why would the legislature want to promote injustice?

This is truly puzzling to us.

We, therefore, implore this committee to HOLD this unjust measure.

Mahalo for the opportunity to testify.

AMERICAN CIVIL LIBERTIES UNION of HAWAI'I

| | |
|---|---|
| Committee: | Committee on Judiciary |
| Hearing Date/Time: | Tuesday, March 13, 2012, 2:00 p.m. |
| Place: | Conference Room 325 |
| Re: | *Testimony of the ACLU of Hawaii in Opposition to S.B. 2900, SD1, Relating to Post Conviction Procedures* |

Dear Chair Keith-Agaran and Members of the Committee on Judiciary:

The ACLU of Hawaii opposes S.B. 2900, SD1, because it places in jeopardy the right to a fair trial for individuals whose liberty is at stake.

Habeas corpus is a procedural tool that ensures the state adheres to basic constitutional standards like the right to competent counsel, a jury that is fairly composed, and that the state does not engage in conduct intended to conceal evidence or witnesses from the accused. Unfortunately, errors of constitutional magnitude affecting the fundamental fairness of trials do occur. By cutting short the time limit for the filing of habeas petitions after the imposition of a sentence, the state would be denying sentenced inmates a reasonable and realistic opportunity to seek habeas relief and ultimately deprive defendants of their constitutional rights.

The mission of the ACLU of Hawaii is to protect the fundamental freedoms enshrined in the U.S. and State Constitutions. The ACLU of Hawaii fulfills this through legislative, litigation, and public education programs statewide. The ACLU of Hawaii is a non-partisan and private non-profit organization that provides its services at no cost to the public and does not accept government funds. The ACLU of Hawaii has been serving Hawaii for over 45 years.

Thank you for this opportunity to testify.

Sincerely,

Laurie A. Temple
Staff Attorney
ACLU of Hawaii

American Civil Liberties Union of Hawai'i
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VIRGINIA E. HENCH, Hawai`i Innocence Project
2515 Dole Street, Honolulu, HI 96822
Phone: (808) 383-9792
sk8legal@prodigy.net

STRONG OPPOSITION TO SB 2900 SD1 - RULE 40 - POST CONVICTION PROCEEDINGS

COMMITTEE ON JUDICIARY
Rep. Gilbert Keith-Agaran, Chair
Rep. Karl Rhoads, Vice Chair
Tuesday, March 13, 2012
2:00 p.m.
Room 325

Honorable Chair Keith-Agaran, Honorable Vice Chair Rhoads and Honorable Members of the House Judiciary Committee:

SB 2900 SD1 establishes time limits for filing habeas corpus complaints and limits successive complaints, with an exemption from the time limits for any motion, petition, or appeal filed pursuant to part XI, of chapter 844D, Hawai`i Revised Statutes.

The Hawai`i Innocence Project strongly opposes this measure and strongly requests that this committee HOLD this measure.

This bill bars prisoners from bringing a Rule 40 lawsuit after 5 years, even if they find new evidence that was not available when they were convicted, and even if that evidence establishes that the person is actually, factually innocent of the crime. (It should be noted that Hawai`i does not have state *habeas corpus*, which has been subsumed into H.R.P.P. Rule 40).

As you may know, exonerations have been the subject of intense international scrutiny. In May of this year, Professor Samuel Gross of the University of Michigan will be releasing his updated study of exonerations, first released in 2003. Professor Gross's updated study covers 1,300 exonerations since 1989, describing at least 873 in detail.

Of these 1,300 exonerations, **1,010 were non-DNA cases**. I have attached a letter from

Professor Gross describing a handful of non-DNA exonerations which took far more than 5 years. Hundreds more will be detailed in the study to be released in May.

Only 290 cases of the 1,300 studied were exonerations by DNA. The reason is simple: the great majority of criminal cases do not have biological material available for DNA testing.

In the cases of many non-DNA exonerees, a decade or more passed before the evidence could be found to clear them. These innocents would still be in prison if they had been subject to the harsh and arbitrary limits being considered by this Committee today. A few examples:

Roger and Jacqueline Latta, convicted of murder in Indiana, served eleven years each for murder before new forensic science proved that the victim had not been murdered, and had died in a non-arson fire.

Beverly Monroe, convicted of murder in Virginia, also served eleven years for murder before witheld evidence came to light, establishing that the victim had committed suicide, and had not been murdered.

Lyn DeJac, convicted in Buffalo NY of strangling her teenaged daughter based on flawed pathology results, was exonerated in 2008 when an accurate pathological examination established that DeJac's daughter died of a cocaine overdose, and no homicide had occurred.

Darryl Burton, convicted of murder in Missouri, served 23 years in prison for a murder he did not commit, but for which he was misidentified. He was exonerated when the real killer, by then in prison for other murders, admitted to the killing for which Burton had served nearly a quarter of a century.

There is no justice in keeping innocent persons in prison simply because the evidence that would prove their innocence came to light after an arbitrary deadline. Suppressing access to justice can never be the right thing to do.

Rule 40 filings are a minuscule part of the courts' docket. Though Hawai`i has approximately 6000 prisoners, the Judiciary's records reflect a mere 99 Rule 40 Petitions filed in the First Circuit in 2004, and that number plummeted more than 50% to a mere 44 petitions, three years later. The Third circuit saw a similar dramatic drop in Rule 40 filings in the same time period, from a high of 35 petitions in 2005, to a mere 11 petitions three years later. In the Second Circuit, the drop was even more dramatic, falling from 22 in 2004 to a mere 9 petitions three years later.

If SB2900 becomes law, Hawai`i's courts will likely face hundreds or even thousands of new prisoner filings. Every convicted person, innocent or not, will feel that they have no choice but to file a Rule 40 petition within the deadline, whether or not they have a fully developed or valid case. The explosion in litigation that this law will produce will be expensive: the county prosecutors will have to respond to all these "just in case" petitions, and the courts and their staff will find their already strained resources strained even further. The cost to society will be even greater: the flood of filings that this law will produce will make it even more difficult for courts to separate the meritorious claims from those without merit.

It is not by chance that Rule 40 does not have a time limit. Only a few years ago, in November, 2007, the Hawai`i Supreme Court rejected a proposed rules amendment which would have imposed a deadline on post-conviction petitions. A copy of that order is attached to my testimony and incorporated herein by reference.

Post-conviction proceedings are the mechanism for introducing for new evidence, and these proceedings were created because mistakes are made, and innocent people are convicted. As it now stands, Rule 40 limits successive filings, so there is a disincentive for a prisoner to file a "just in case" petition. The management of court cases is clearly an area in which the Supreme

Court has greater experience and knowledge of its needs, and the Legislature should defer to the Court on such matters. There should be no deadline for innocence.

We, therefore, implore this committee to VOTE DOWN, or at least, to HOLD this unwise, unjust, and ill-conceived measure. Thank you for receiving and considering my testimony.

Respectfully submitted,

Virginia E. Hench, Director
Hawai`i Innocence Project

ATTACHMENTS:

Nov. 7, 2007 Hawai`i Supreme Court Order Rejecting Rule 40 Deadlines
March 12, 2012, Letter from Professor Samuel Gross Re: Non-DNA Exonerations

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

In the Matter of the

HAWAI'I RULES OF PENAL PROCEDURE

FILED

2007 NOV -7 AM 10:33

ORDER

(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy, JJ.)

The Permanent Committee on Rules of Penal Procedure and Circuit Court Criminal Rules proposed amendments to Rule 40 of the Hawai'i Rules of Penal Procedure (HRPP) that would add the following two sections:

> (j) Time limits. A five (5) year period of limitation shall apply to a petition filed for post-conviction relief under this rule. The limitation period shall run from the last of:
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> (1) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
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> (2) the date on which the impediment to filing an application created by a governmental action in violation of the Constitution of the State of Hawai'i or the Constitution of the United States that prevented the filing of the petition for post-conviction relief was removed;
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> (3) the date on which a newly created constitutional rule under the Constitution of the State of Hawai'i or the Constitution of the United States was initially recognized and made retroactively applicable to cases on collateral review by the Supreme Court of the State of Hawai'i or the Supreme Court of the United States; or
>
> (4) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence; and the newly discovered evidence, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by a preponderance of the evidence that no reasonable fact finder would have found the petitioner guilty of the offense.
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> (2) the factual basis for the claim could not have been discovered previously through the exercise of due diligence, and the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

After study and consideration of the comments we received, including consideration of the Legislature's authority with regard to the privilege of the writ of habeas corpus, we believe adoption of the proposal would be inappropriate. *See* HRPP Rule 40(a) ("The post-conviction proceeding established by this rule shall encompass all common law and statutory procedures for the same purpose, including habeas corpus and coram nobis . . . ."); Article VI, Section 7 of the Hawai'i Constitution ("The supreme court shall have power to promulgate rules and regulations in all civil and criminal cases for all courts relating to process, practice, procedure and appeals, which shall have the force and effect of law."); and Article I, Section 15 of the Hawai'i Constitution ("The power of suspending the privilege of the writ of habeas corpus, and the laws or the execution thereof, shall never be exercised except by the legislature, or by authority derived from it to be exercised in such particular cases only as the legislature shall expressly prescribe."). Therefore,

IT IS HEREBY ORDERED that the proposed amendments to HRPP Rule 40 are rejected.

DATED: Honolulu, Hawai'i, November 7, 2007.

**UNIVERSITY OF MICHIGAN**
**LAW SCHOOL**
HUTCHINS HALL
ANN ARBOR, MICHIGAN 48109-1215

SAMUEL R. GROSS
THOMAS AND MABEL LONG PROFESSOR OF LAW

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March 12, 2012

To: Virginia Hench, Esq.
Re: Non-DNA exonerations that were initiated more that 5 years after the end of direct review

You asked about non-DNA exonerations that were initiated more than 5 years after the conclusion of direct review of the underlying criminal convictions. I have attached short summaries of 10 such cases including a total of 14 defendants, two of whom were exonerated posthumously.

These cases are from the National Registry of Exonerations, a joint project of the University of Michigan Law School and the Center on Wrongful Convictions at the Northwestern University School of Law. I am the editor of the Registry, which will be publicly released in about six weeks.

We have data on nearly 900 exonerations in the United States from 1989 through the present; more than 60% of them did not involve DNA. Unfortunately there is no simple way to identify cases that fit the criteria you describe. The cases I have listed are the first ones I could easily spot. At a guess, at least 75 of the non-DNA exonerations we know about were initiated more than five years after the end of direct review, and possibly 150 or more.

Yours truly,

Samuel R. Gross

srgross@umich.edu

# Some Non-DNA Exonerations Based on Proceedings that Were Commenced Five or More Years After the End of Direct Review

## 1. Jerry Pacek

Shortly before midnight on November 17,1958, 13-year-old **Jerry Pacek** was walking home from his girlfriend's home late at night when he heard moans coming from a neighbor's yard in Brackenridge, Pennsylvania, a steel mill town about 20 miles from Pittsburgh.

When he went to investigate, he saw a man rise up and flee on foot. In the yard, Pacek discovered 52-year-old Lillian Stevick. She had been beaten savagely and died 45 minutes later on a hospital operating table.

Though only 13, Pacek was physically larger and he had been shaving since the age of 10. Police brought him in for questioning because he said he had found the victim.

Pacek denied committing the crime and passed two polygraph examinations.

But after 17 hours of interrogation, he provided a confession. He would later say he believed that his girlfriend would be arrested if he told the truth. At the time, his girlfriend was 20 years old and Pacek's parents had obtained a court order forbidding her from seeing him. Pacek later said that he gave the statement to protect his girlfriend and because he believed the court would recognize it as false and release him. The statement contained inconsistencies—at one point he said he committed the murder with a metal object, and then changed it to a hatchet.

The reason for the change was the failure of police to find a murder weapon at the scene. The chief homicide investigator found a rusty, mud-covered hatchet in the woods 100 yards from where the victim was killed.

Pacek was charged with the crime as an adult. During the trial, he was made to re-enact the murder at the crime scene, pretending to beat a female police officer who posed as the victim. Although tests on the hatchet eliminated it as the murder weapon, it was entered into evidence as one of the types of weapons that could have been used.

Pacek was convicted on April 19, 1959 and he was sentenced to 10 to 20 years in prison.

Pacek's attorney dropped the appeal, but never told Pacek, who assumed it had been denied. He was released from prison in November 1968 after serving 10 years.

In 1990, Jim Fisher, a former FBI agent and criminology professor at Edinboro University, in Edinboro, Pennsylvania, took an interest in the case. He began investigating and amassed considerable evidence suggesting Pacek's innocence, including that Pacek's clothes were clean, despite evidence that blood spattered as far as 25 feet from the victim. In addition, he bore no scratch marks, though it appeared that fragments of the attacker's flesh were lodged under the victim's fingernails.

In December 1990, Allegheny County law enforcement re-opened the case. Pacek was hypnotized for five hours to help police produce a sketch of the man he saw the night of the murder.

On September 12, 1991, the Pennsylvania State Pardons Board voted unanimously to pardon Pacek. The pardon was approved by Gov. Robert P. Casey on November 15, 1991.

Pacek filed a civil wrongful conviction lawsuit, but it was dismissed.

Police developed two suspects in the murder and said that they found a heavy metal object in a Brackenridge basement that might have been the murder weapon. DNA testing was unsuccessful and no one was ever charged with the murder.

Two attempts to pass legislation to compensate Pacek failed to pass. Pacek died November 24, 2004.

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**2. James Richardson**

On Oct. 25, 1967, **James Joseph Richardson** and his wife, Annie Mae, left their home in Arcadia, Florida, for their jobs as fruit pickers in an orange grove. Before they left, Annie Mae told their next-door neighbor and some-time baby sitter, Betsy Reese, to serve their seven children lunch when they came home from school.

After eating the lunch of rice and beans with hog jowl gravy, the children, six girls and one boy ages 2 to 11, went back to school and soon became ill. They foamed at the mouth and shook violently. The children were taken to a nearby hospital, but all but one died within hours. The seventh child died the next day.

Autopsies showed the deaths were caused by parathion, a powerful insecticide that was in the children's lunch.

Richardson, 31, came under suspicion after he told DeSoto County Sheriff Frank Cline that he had talked to an insurance agent two days earlier to talk about getting $500 policies on each of the children, a $1,000 policy on his wife and a $2,000 policy for himself.

The day after the children became ill, authorities searched Richardson's residence and nearby buildings, but found nothing. But the next day, Reese—the baby sitter—and another man were seen squabbling over a bag of parathion. They told authorities they found it in Richardson's shed.

Cline went to a grand jury with the insurance card and the bag of parathion, as well as witnesses who said Richardson had appeared calm and not upset over the deaths. The grand jury returned an indictment for the murder of just one of the children. Richardson was arrested immediately.

A week later, three cell mates told authorities that Richardson had confessed to putting the poison in the children's food.

At trial, two of the jailhouse informants—both of whom received reductions in their prison sentences for testifying—said that Richardson told them he put the parathion in the food. One said Richardson claimed he was angry at his wife for having a lesbian affair with Reese, the baby sitter—a claim that was never verified.

The third informant had been shot to death prior to the trial, but his statement was read to the jury.

On May 31, 1968, after less than two hours of deliberation, Richardson was convicted and sentenced to death in Florida's electric chair.

Four years later, the U.S. Supreme Court outlawed the death penalty as it was being applied as unconstitutional. Richardson's sentence was commuted to 25 years to life in prison.

In 1988, lawyers for Richardson, including Mark Lane, who had written a book about the case called "Arcadia," (and later would investigate the assassination of President John F. Kennedy and survive the Jonestown massacre in Guyana) sought a new trial.

The lawyers said they had affidavits saying that Reese, who was living in a nursing home, had confessed to workers there that she had poisoned the children.

Further, Lane said that he had obtained exculpatory evidence that he asserted had been suppressed by Sheriff Cline and DeSoto County State's Attorney Frank Schaub—a charge both men denied. The only living jailhouse snitch had recanted, saying he had been coerced by a sheriff's deputy into implicating Richardson.

The documents were turned over to the Florida governor's office and Dade County State's Attorney Janet Reno was appointed as a special prosecutor to examine the case.

On April 25, 1989, a judge set aside Richardson's conviction, ruling that the suppressed evidence had prevented him from getting a fair trial. "The court...finds that if certain evidence had been disclosed to the defense there is a definite probability the outcome of the trial would have been different," said Judge Clifton Kelly.

Defense attorneys at Richardson's trial were never told that Richardson had never purchased any life insurance—he didn't have the money. Also withheld were conflicting statements by two of the jailhouse snitches (one died prior to trial and one died after the trial).

Reno said Reese, who at the time of the crime was on parole for fatally shooting her second husband (her first husband died after eating a meal she prepared for him, but she was not charged), had a motive for inflicting harm on the Richardson family. Reese's husband had left her for a cousin of Richardson, Reno said.

Richardson was released from prison and on May 5, 1989, Reno announced the dismissal of the case.

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**3. Peter Limone, Louis Greco (posthumous), Enrico Tameleo (posthumous), and Joseph Salvati**

On March 10, 1965, Boston-based FBI agents used a wiretap to eavesdrop on a conversation in which Vincent "Jimmy" Flemmi and Joseph "The Animal" Barboza requested permission from a New England mafia boss to kill Edward Deegan, a small-time criminal who had insulted mob members. Barboza was acting as an FBI informant at the time, and agents were interested in developing a similar relationship with Flemmi. In order to protect these informants, the FBI did nothing to prevent the murder, and on March 12, Deegan was killed. His body was found that

night in an alley in Chelsea, Massachusetts. He had been shot six times, and at least three different weapons had been used.

In conversations with FBI agents, Barboza and Flemmi named six people who had been involved in Deegan's murder. According to Barboza, the contract murder was ordered by **Peter Limone**, a bookie and nightclub manager, and carried out by **Louis Greco. Enrico Tameleo,** a top mafia aide, supposedly sanctioned the crime, while several other people were also involved in the complex conspiracy. Barboza and Flemmi admitted that they, too, were involved, but because of their special relationship with the FBI, they were never prosecuted. Barboza testified before a grand jury on October 25, 1967, and six men were indicted for Deegan's murder.

All six defendants were tried at the same time. Based primarily on Barboza's testimony, all six were convicted on July 31, 1968. Greco, Limone and Tameleo were sentenced to death. However, their sentences were reduced to life in prison in the wake of the Supreme Court's 1972 decision in Furman v. Georgia, which invalidated all death sentences then pending in the United States.

In the years following the convictions, important evidence came to light indicating the innocence of **Limone, Greco, Tameleo** and **Joseph Salvati**, who was convicted of being an accessory to murder and given a life sentence. Barboza signed an affidavit on July 28, 1970, stating that these four men were not involved in the murder. On April 9, 1976, a lawyer who had worked with Barboza signed an affidavit stating that Barboza had admitted to giving false testimony about Limone's role in the crime. These were followed by other affidavits by witnesses and lawyers who said they had lied during trial or had known that Barboza gave false testimony. In 1976, Barboza was shot and killed in San Francisco, California.

Individually, the four men filed numerous appeals, but were repeatedly denied relief. Tameleo died in prison in 1985 and Greco in 1995. In the spring of 1997, Salvati's sentence was commuted and he was released on parole.

In the summer and fall of 2000, a special prosecutor investigating the FBI's use of informants came across numerous documents from 1965 demonstrating that agents knew Barboza and Flemmi had committed the murder without the involvement of Greco, Limone, Tameleo or Salvati – including reports made directly to FBI Director J. Edgar Hoover. In December of 2000, a Massachusetts Superior Court judge held a hearing to consider releasing Limone based on information in these memos, and on January 5, 2001, Limone was released. All charges against Limone and Salvati were dropped on January 31, 2001.

In 2003, the Massachusetts House Committee on Government Reform condemned the FBI for failing to turn over documents that would have exonerated Limone. The District Attorney's Office that originally prosecuted the case posthumously dismissed charges against Louis Greco in 2004 and against Enrico Tameleo in 2007. The federal government awarded $100 million in compensation to Limone, Salvati and to the estates of Greco and Tameleo. This award was affirmed by the United States Court of Appeals for the First Circuit Court in 2009.

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**4. Roland Gibson**

In December 1967, a yellow cab driver was shot and killed in his taxi during an armed robbery in New Orleans. A fingerprint lifted from the rear window of the cab led police to Lloyd West and an acquaintance who said West and an AWOL soldier named Roland were together the night of the murder. Police confirmed that an Army soldier named **Roland Gibson** went AWOL two days before the murder. West eventually confessed to his involvement in the murder, but identified Gibson as the triggerman and testified against him at trial. Gibson was convicted of first-degree murder by a jury in 1968 and sentenced to life in prison.

After Gibson was convicted, West recanted his testimony. He signed an affidavit stating that he had lied at trial, falsely accusing Gibson in order to avoid the death penalty, and that Gibson was not involved in the murder. Gibson's attorney filed a motion for a new trial based on West's recantation as well as a supplemental police report that was withheld from the defense. Twenty-

five years after Gibson was convicted, the court granted Gibson's motion and the prosecution decided not to retry him. Charges were dismissed in March 1993.

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**5. John Duval and Betty Tyson**

In May 1973, Timothy Haworth was found bludgeoned and strangled to death in Rochester, New York. Police believed he had left his hotel the previous evening in search of a prostitute. Police picked up known transvestite prostitute **John Duval** and prostitute **Betty Tyson**. Both Duval and Tyson signed confessions, but later recanted, saying police had beaten them into confessing. Two teenage acquaintances of Tyson's were taken into custody and held for seven months. They testified at the trials that they saw Tyson and Duval with the victim shortly before the murder. Tyson and Duval were convicted of second-degree murder in separate trials and sentenced to 25 years to life in prison.

In 1997 one of the teenage witnesses recanted, saying police had coerced his testimony, and a previously unknown police report was discovered which documented that the other teenage witness stated he had not seen Tyson and Duval with the victim. In May 1998, Monroe County Judge John J. Connell overturned Tyson's conviction because police suppressed the report contradicting a key witness. Duval's conviction was overturned in April 1999 by Judge David Egan for the same reason. Prosecutors decided not to retry Tyson, who had maintained her innocence, but they pursued the charges against Duval because he had twice told the parole board that he had committed the murder. Duval was acquitted by a jury in February 2000.

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**6. Edward Baker**

On December 20, 1973 Steven Gibbons was bound, strangled, and stabbed to death with an ice pick in the course of a robbery at his home in Philadelphia. A man named Donahue Wise – a

schizophrenic with a drug habit and a long criminal history – was arrested for the crime. Wise implicated seventeen year old **Edward Baker** and another man as his accomplices.

Baker was arrested and confessed. He claimed that he had been beaten by police, and told that if he confessed he would be allowed to go home. This confession was later rules inadmissible in evidence because of improper police conduct. The three suspects were tried separately. Wise testified against the two others under a deal that provided that he would only serve three years in prison for his role in the murder.

At trial Baker claimed he was at a wake in a different part of the city at the time of the crime. His attorney did not challenge Wise's account of the crime, or call character witnesses who would have supported Baker. There was no physical or forensic evidence against Baker. Nonetheless, based on Wise's testimony, he was convicted by a jury of first degree murder, burglary, robbery and conspiracy, on September 27, 1974. He was sentenced to life in prison.

Post-conviction relief failed and Baker spent the next 24 years in prison. The third man convicted of the crime had his conviction reversed on other grounds, was retried and sentenced to a short term in prison, and subsequently died. Centurion Ministries eventually accepted Baker's case and was able to convince Wise to officially recant in 1996. Many witnesses corroborated Wise's recantation, since Wise also admitted that he had lied to other people both before the Gibbons murder investigation and in the intervening years. Wise eventually told the court that he had lied about who was involved in order to get a short sentence, and he identified the real criminals who took part in the killing.

In September of 1997, after an evidentiary hearing, a state trial court ordered a new trial. Baker was not released until December 14, 1999, after a prolonged fight with prosecutors over bail. Prosecutors initially planned to retry Baker, but the trial was repeatedly delayed as they appealed adverse rulings on Baker's request for bail. In the meantime, in addition to Wise's recantation, advocates for Baker located twelve other witnesses who substantiated Baker's alibi. Before a new trial could be held Wise, the only person ever to implicate Baker, died. Prosecutors then offered a plea bargain to Baker, but he refused. Finally, on February 11, 2002 the prosecution

dismissed all of the charges against Baker in exchange for an agreement not to seek compensation.

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## 7. Freddie Lee Gaines

In 1972, two Birmingham, Alabama, residents – Johnnie Swanson and Mary Wright – were shot and killed during a robbery of their apartment. A third woman survived because the shooter's gun jammed. The survivor initially remembered few details about the crime, but later identified **Freddie Lee Gaines** as the shooter. In accordance with the governing Alabama law at the time, Gaines was tried separately for the two murders. In October 1974, a jury convicted Gaines of second-degree murder in the death of Wright, and he was sentenced to 30 years in prison. Gaines was acquitted of Swanson's murder in 1976.

In July 1985, Gaines was released from prison for good behavior. Five years later, in August 1990, Larry Dennis Cohen was arrested on drug charges, and eventually gave the authorities a detailed confession of the 1972 murders. Based on this new evidence of innocence, the prosecution moved to vacate Gaines's conviction. The trial court granted the motion in February 1991, and all charges were dismissed. In 1996, Gaines received $1 million in compensation from the state legislature, and in February 2005, he received a full pardon.

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## 8. Edward George Carter

On October 24, 1974, a man sexually assaulted and robbed a pregnant student at knifepoint in a washroom at Wayne State University in Detroit, Michigan.

The victim identified 19-year-old **Edward George Carter** in a photo lineup which contained multiple copies of his photograph. She also identified him in an in-person line-up although all of the other members of the line-up looked distinctly different.

Carter was represented by an appointed attorney who had only practiced for 18 months prior to his trial. She met with him at the preliminary hearing and the day before his bench trial. The attorney failed to request an analysis of fingerprints found at the scene. She also failed to note that serology tests showed the semen was not Carter's blood type.

He was convicted in on January 3, 1975, after a trial that lasted less than a day, and sentenced to life in prison.

In the mid-2000s, after all of his appeals and requests for post-conviction relief had failed, Carter began inquiring about the possibility of obtaining DNA testing, but was informed that the biological evidence could not be found. However, police did locate the fingerprint evidence and fingerprints from a railing in the washroom were submitted to the FBI's Automated Fingerprint Identification System. Those prints were matched to a convicted sex offender who was in prison for similar crimes during the same time period as the attack for which Carter was convicted. Two of those crimes occurred on the Wayne State campus.

In April 14, 2010, an attorney at the University of Michigan Clinical Law program filed and the Wayne County Prosecuting Attorney file a joint motion to vacate the conviction. It was granted, the charges were dismissed and Carter was released that day.

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## 9. Keith Harris

On December 4, 1978, two armed black men invaded a filling station in Caseyville, Illinois, near East St. Louis, and demanded all the cash on hand. After the attendant, Mark Resmann, gave them about $200, one of the robbers began firing. Resmann suffered seven gunshot wounds, but survived. In the ensuing weeks, police showed Resmann seven photo arrays. From the seventh, he identified **Keith Harris**, of Belleville, as the man who shot him.

By the time Harris was arrested on January 19, 1979, it had become obvious that the crime was but one of a series of such crimes in the vicinity — seven in all. The only thing that distinguished the Caseyville crime from the others was that the victim survived. Not only was the modus operandi the same, but ballistics tests showed that Resmann and the six victims who died all had been shot with the same weapon.

Harris's family paid $5,000 to a private lawyer who met with him the first time on the eve of the trial. Had the lawyer done an investigation, he would have discovered that the crime spree had not stopped with Harris's arrest. There had been four additional murders, bringing the death toll to ten. Nonetheless, the trial proceeded, Resmann identified Harris in court, and the jury deliberated only minutes before finding him guilty. St. Clair County Circuit Court Judge John J. Hoban sentenced him to 50 years in prison.

What Harris would not know for years to come was that the authorities had ample reason to doubt his guilt before his trial. In 1979, Richard Holman and Girvies Davis confessed to all of the murders and the attempted murder of Resmann. Harris did not learn of the confessions until two decades later when a former Illinois State Police investigator, Alva Busch, brought the case to the attention of the Downstate Innocence Project. Based on the project's reinvestigation of the case, Governor George H. Ryan granted Harris a pardon based on innocence in 2003.

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## 10. Randall Dale Adams

After running out of gas on November 27, 1976, **Randall Dale Adams** was walking along Fort Worth Avenue in Dallas, Texas, when 16-year-old David Harris picked him up in a stolen car. The two ended up spending several hours together, smoking marijuana, drinking, and watching porn at a drive-in theater before Harris dropped Adams off at the motel where he was staying. Later, Harris was pulled over for driving without headlights. He shot Officer Robert Wood at least four times, killing him. A second officer, Teresa Turko, was drinking a milkshake in the patrol car at the time. As Harris sped away, she shot at his car, but missed. After bragging to friends that he'd killed a cop, Harris was brought in for questioning. When told that the bullets

that had killed Wood matched Harris's .22, Harris claimed that Adams had fired the gun, and that he had been a passenger at the time.

Adams was questioned by the police, and signed a statement detailing his activities on the day of the crime. At trial, police used this statement as an admission of guilt because Adams mentioned that he had been near the intersection of the shooting earlier in the day. Three eyewitnesses – all strangers to Adams – testified against him at trial. A couple, Emily and Robert Miller, said they saw the car after it had stopped, but before the shooting. They identified Adams as the only person in the car at the time. Emily Miller testified that she had identified Adams from a lineup. It was later revealed that she was unable to identify him until a police officer told her who to pick, that in exchange for her testimony robbery charges against her daughter had been dropped, and that she had originally claimed the man she had seen was Mexican or African-American (Adams was white.) The third eyewitness said that he had seen two people in the car, and that Adams was in the driver's seat. A jury convicted Adams of murder.

At sentencing, Dr. James Grigson testified that Adams would be dangerous unless executed, and based upon this testimony, Adams was sentenced to death. Dr. Grigson, known as "Dr. Death," provided nearly identical testimony in over 100 other death penalty cases, leading him to be sanctioned twice by the American Psychiatric Association, which takes an official position that the threat of future violence is impossible to predict and that it is unethical for psychiatrists to give testimony claiming to make such predictions.

In 1985, documentary filmmaker Errol Morris came to Texas to make a film about the notorious Dr. Grigson. In the course of his research on Grigson, Morris interviewed Adams, and became so intrigued by his story that he decided to make a film about Adams instead. Looking closely into the Adams case, Morris uncovered information about prosecutorial misconduct, hidden exculpatory evidence, and Harris's criminal activity subsequent to the murder of Officer Wood. Among other violent crimes, Harris had been convicted of murder and sentenced to death. If not for the false conviction of Adams, Harris might have been arrested for the murder of Officer Wood, and another murder prevented. Harris was ultimately executed on June 30, 2004.

Based on the evidence discovered by Errol Morris, attorneys for Adams filed a motion for a new trial in 1988, and at the three-day hearing, Harris recanted his testimony against Adams. On March 1, 1989, the Texas Court of Appeals granted Adams a new trial. Three weeks later, Adams was released on his own recognizance, and two days after that, the district attorney dropped all charges. Morris's documentary, The Thin Blue Line, tells the story of Adams's case.

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March 11, 2012

Representative Gilbert Keith-Agaran
Chairman, Judiciary Committee
Hawaii House of Representatives
Hawaii State Capitol, Room 302
415 South Beretania Street
Honolulu, Hawaii 96813

Re: Written Testimony In
Opposition To Senate Bill 2900, S.D. 1

Dear Chairman Keith-Agaran and Committee Members:

I am a criminal defense attorney in Hawaii, and a Lecturer in Law at the University of Hawaii's William S. Richardson School of Law. I am one of the teachers of the Hawaii Innocence Project course at our law school. The following is my written testimony in opposition to Senate Bill 2900, S.D. 1, "A Bill For An Act Relating To Post-Conviction Proceedings." That bill will be heard before your committee at 2:00 p.m. on Tuesday, March 13, 2012, in Conference Room 325 of the State Capitol. Because of a previously scheduled professional commitment, I regret that I will be unable to testify in person at that hearing.

There are serious flaws in Senate Bill 2900, S.D. 1, not the least of which is that it makes no provision for habeas corpus relief after five years for a person who is actually innocent. The bill provides for some DNA exoneration for persons who are beyond the five-year bar, but that limited exception only applies to DNA exoneration pursuant to Part XI of H.R.S. Chapter 844D. DNA cases are arguably the most straightforward to litigate, yet the average time served by DNA exonerees is about 13 years. Of the approximately 285 persons who have been exonerated across the nation as a result of the work of Innocence Projects, most of these exonerees have been found to be actually innocent as a result of post-conviction DNA testing. However, only a fraction of criminal cases involve biological evidence that can be subjected to DNA testing, and even when such evidence exists,

it is often lost or destroyed after direct appeals have been concluded.

Since they do not have access to a definitive test like DNA, many wrongfully convicted people have a slim chance of ever proving their innocence. However, those who have been exonerated were cleared after courts found serious defects in eyewitness identification procedures (about seventy-five percent), dishonest snitch/informant testimony, crime lab errors, false confessions, ineffective assistance of counsel, as well as police and prosecutorial misconduct. See generally Scheck, Neufeld & Dwyer, Actual Innocence: When Justice Goes Wrong And How To Make It Right (2003). The figures add up to more than one-hundred percent because in many cases there are multiple bases on which courts have exonerated wrongfully convicted individuals.

As a good example of a "miscarriage of justice" based on (inter alia) police and prosecutorial misconduct, please see the recent decision of Senior United States District Judge James C. Turk in Hash v. Johnson, No. 7:10-CV-00161, 2012 Westlaw 628266, -- F. Supp. 2d -- (W.D. Va. February 28, 2012). Hash was convicted of capital murder -- even though there was a "complete lack of physical evidence connecting Hash to the crime" and "contradictory testimony" by prosecution witnesses -- and then "sentenced to life imprisonment without the possibility of parole." Hash was a mere fifteen years old at the time of the murder, and was only nineteen years old when he was charged with the murder. Judge Turk wrote: "Hash alleges that he has been imprisoned in violation of his right to due process because the Prosecution and the Culpeper [Virginia] authorities concealed their arrangement with prosecution witness Paul Carter, and more generally, engaged in a pattern of nondisclosure and deception during the prosecution of Hash's case. Hash further alleges that his trial counsel rendered constitutionally ineffective assistance of counsel by failing to investigate Carter and failing to present an alternate theory of the crime at trial. For the reasons stated herein, Hash's request for habeas relief with respect to each of his claims is GRANTED." [Underlining added.]

The extensive and disturbing evidence of impropriety in Hash's case presented in the Hash v. Johnson opinion

included, but was not limited to: (1) "key" prosecution witness Paul Carter "testified falsely at trial when he stated that he expected 'nothing' in exchange for his testimony"; (2) "Investigator Jenkins [subsequently] admitted there was a deal with Carter for his testimony prior to Hash's trial," yet the prosecution had failed to disclose that important fact to Hash; (3) in closing argument, the prosecutor actually "bolstered" Carter's false testimony with further statements that were "false" and "misleading" (such as that "no promise had been made" to Carter and "no such promise could in fact be made"), so that "Carter's testimony coupled with the [prosecutor's] closing argument 'constitutes false evidence of which the prosecutor knew or should have known'"; (4) there were various troubling "inconsistencies between Carter's statement to Investigator Jenkins and the evidence" in the case, and Investigator Jenkins later "admitted that 'more should have been done' to verify Carter's story"; (5) "prior to the federal habeas proceedings, Culpeper authorities denied any suggestion that Hash was transferred to the Albemarle-Charlottesville Regional Jail to put him in contact with known prison informant Carter," but in fact the purpose of the transfer was to have informant Carter obtain incriminating information from Hash; (6) the prosecution "failed to disclose a deal with [key prosecution witness] Weakley, made for his testimony against Hash"; (7) Weakley was "impermissibly coached" on how to answer questions; (8) in Weakley's subsequent recantation of his testimony -- a recantation that was "reliable" and "corroborated by independent evidence" -- Weakley stated "that he has no personal knowledge of the murder," that he has "no reason to believe Hash had anything to do with it," and "that all the details of the Scroggins murder were provided to him by the Culpeper authorities"; and (9) both "Weakley and [another key prosecution witness] Shelton failed polygraph examinations regarding their statements implicating Hash," yet "these exams were not disclosed to Hash." In sum, the court recognized that there was a "cavalcade of evidence that Hash has come forward with demonstrating police and prosecutorial misconduct."

Unfortunately, what happened to young Mr. Hash is all too common. If the five-year bar were applied to the facts in Mr. Hash's case, he would not be able to obtain relief from Hawaii courts, even though he apparently is actually innocent.

Hash was sentenced in **2001** and his conviction was affirmed on direct appeal in **2002**, but the federal habeas corpus petition that produced new evidence in discovery and resulted in relief from his unconstitutional conviction was not filed until **2010**.

Three organizations submitted compelling written testimony to the Hawaii Senate's Committee on Judiciary and Labor in opposition to Senate Bill 2900: (1) the Office of the State Public Defender, (2) the Community Alliance On Prisons, and (3) the American Civil Liberties Union of Hawaii. That written testimony can be accessed on the internet at http://www.capitol.hawaii.gov/measure_indiv.aspx?billtype=SB&billnumber=2900, and I adopt and incorporate it by reference herein. The following points are particularly pertinent.

The written testimony of the State Public Defender's Office emphasizes that (1) Senate Bill 2900 "is patently unfair and potentially penalizes a petitioner for circumstances which might be beyond his/her control"; (2) "statistics compiled from actual Judiciary files illustrate that such petitions [for post-conviction relief] had actually been on the decrease in recent years" (underlining in original); (3) "the imposition of a strict time limitation could very well have the opposite effect and increase petition filings, since defendants will become concerned about the time lapse even if they are unsure about the grounds for their petition"; (4) the new provisions in the bill will "increase the workload of the circuit courts and the complexity of post-conviction proceedings," and also will "potentially lead to more cases on appeal" from circuit court rulings; (5) "the bill ignores the fact that it is fairly commonplace these days" for defendants "to be exonerated far more than five years following their convictions," indeed, sometimes after spending "decades" in prison; and (6) the time limitation imposed by the bill is "arbitrary."

The written testimony of the Community Alliance On Prisons points out (1) that if enacted, Senate Bill 2900 will "diminish the quality of justice in Hawaii"; (2) that "statistical evidence demonstrat[es] that the current system is not being abused" and is not "in need of an overhaul"; and (3) that "just last year, the Hawaii Innocence Project's work freed an innocent man" who was incarcerated for two decades "for a crime he did not commit" (referring to State of Hawaii

v. Alvin Francis Jardine, III, Criminal No. 91-0004 (Circuit Court of the Second Circuit)).

The written testimony of the American Civil Liberties Union of Hawaii stresses (1) that Senate Bill 2900 "places in jeopardy the right to a fair trial for individuals whose liberty is at stake"; (2) that "habeas corpus" is an especially important "procedural tool," because it "ensures the state adheres to basic constitutional standards like the right to competent counsel, a jury that is fairly composed, and that the state does not engage in conduct intended to conceal evidence or witnesses from the accused"; (3) that "errors of constitutional magnitude affecting the fundamental fairness of trials do occur"; and (4) that by "cutting short the time limit for the filing of habeas petitions after the imposition of sentence, the state would be denying sentenced inmates a reasonable and realistic opportunity to seek habeas relief and substantially deprive defendants of their constitutional rights."

Chairman Keith-Agaran and Judiciary Committee members, for all of the foregoing reasons, please do everything within your power to ensure that Senate Bill 2900, S.D. 1, does not become law.

Alternatively, if your committee does decide to report favorably on Senate Bill 2900, S.D.1, please at least amend the bill to extend its unreasonably short five-year time limit to a less harsh ten-year time limit. In my view, that would be a more fair and balanced compromise between the positions of the bill's supporters and the bill's opponents. Also, please add a complete exception from the time bar for cases involving a claim of a defendant's "actual innocence," and please delete the language of the bill under the heading "Successive petitions." There is no need to limit the reach of justice for the wrongfully convicted.

Very truly yours,

LAW OFFICES OF BROOK HART
A Law Corporation

Brook Hart

BROOK HART

# Testimony for SB2900 on 3/13/2012 2:00:00 PM

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

**Sent:** Sunday, March 11, 2012 11:30 AM

**To:** JUDtestimony

**Cc:** mattrifkin28@gmail.com

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Testimony for JUD 3/13/2012 2:00:00 PM SB2900

Conference room: 325
Testifier position: Oppose
Testifier will be present: No
Submitted by: Matthew Rifkin
Organization: Individual
E-mail: mattrifkin28@gmail.com
Submitted on: 3/11/2012

Comments:
I am a resident of Hawaii County and I strongly oppose this bill.

A person in prison should be allowed to file a Rule 40 lawsuit at any time if new evidence is found that would effect the case. Do not try to limit a person's rights to file such a claim to five years. There have been many cases that were over turned after much longer periods.
It is unfair to limit the ability of a person wrongfully convicted to seek relief.

Do not pass this bill.

# Oppose SB 2900 SD1PO- ST-CONVICTION PROCEEDINGS/RULE 40 LAWSUITS a JUD (3.13), FIN

Jolene [jm2day@yahoo.com]

**Sent:** Saturday, March 10, 2012 11:55 PM

**To:** JUDtestimony

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**STRONGLY OPPOSE**

**SB 2900 SD1PO- ST-CONVICTION PROCEEDINGS/RULE 40 LAWSUITS a JUD (3.13), FIN**

Jolene Molinaro

## SB 2900 SD 1

Catherine Lampton [clampton@hawaii.rr.com]

**Sent:** Monday, March 12, 2012 9:09 AM

**To:** JUDtestimony

---

Aloha Sirs:

I am writing today in strong opposition to SB 2900 SD 1 because:

- This bill limits the right of an incarcerated person to bring a Rule 40 lawsuit after 5 years even if they find new evidence that was not available when they were convicted

- Such a limitation on the ability to seek relief in the courts for a wrongful conviction is patently unfair and potentially penalizes a petitioner for circumstances which might be beyond his/her control

- Because of the drastic nature of the five-year limitation and the accompanying ban against successive petitions, the circuit court will inevitably be forced to conduct full hearings, thus increasing the workload of the already overburdened courts

- Many of the people who have been exonerated through the Innocence Project served decades in prison before evidence was found to confirm their innocence

- The Hawai`i Innocence Project's work to release Alvin Jardine on Maui is proof of this – he served 20+ years in prison for a crime he did not commit – false eyewitness identification led to his conviction and DNA that was discovered decades later led to his release

- The bill states that a claim presented in a second or successful complaint shall be dismissed unless the claim relies on a previously unavailable new rule under the Hawai`i or US Constitution

- New research on eyewitness identification has brought to light the problems with false identification – in fact of the 289 exonerations, 75% involved false eyewitness identification

- Statistics from the Hawai`i Judiciary clearly illustrate that the number of Rule 40 lawsuits has decreased dramatically in Hawai`i: 1st Circuit from 99 in 2004 to 44 in 2007; 2nd Circuit from a high of 35 in 2005 to 11 in 2007; 3rd Circuit from 22 in 2004 to 9 in 2007

- Is the purpose of this bill to cover the mistakes made by prosecutors? If so, why would the legislature want to promote injustice?

Thank you for your time and effort to bring justice to every member of our community,

Catherine Lampton
Keaau 96749

# SB 2900 SD1

Robert Petricci [nimo1767@gmail.com]

**Sent:** Sunday, March 11, 2012 6:32 PM

**To:** JUDtestimony

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- Such a limitation on the ability to seek relief in the courts for a wrongful conviction is patently unfair and potentially penalizes a petitioner for circumstances which might be beyond his/her control

- Because of the drastic nature of the five-year limitation and the accompanying ban against successive petitions, the circuit court will inevitably be forced to conduct full hearings, thus increasing the workload of the already overburdened courts

- Many of the people who have been exonerated through the Innocence Project served decades in prison before evidence was found to confirm their innocence

- The Hawai`i Innocence Project's work to release Alvin Jardine on Maui is proof of this – he served 20+ years in prison for a crime he did not commit – false eyewitness identification led to his conviction and DNA that was discovered decades later led to his release

- The bill states that a claim presented in a second or successful complaint shall be dismissed unless the claim relies on a previously unavailable new rule under the Hawai`i or US Constitution

- New research on eyewitness identification has brought to light the problems with false identification – in fact of the 289 exonerations, 75% involved false eyewitness identification

- Statistics from the Hawai`i Judiciary clearly illustrate that the number of Rule 40 lawsuits has decreased dramatically in Hawai`i: 1st Circuit from 99 in 2004 to 44 in 2007; 2nd Circuit from a high of 35 in 2005 to 11 in 2007; 3rd Circuit from 22 in 2004 to 9 in 2007

- Is the purpose of this bill to cover the mistakes made by prosecutors? If so, why would the legislature want to promote injustice?

# Testimony for SB2900 on 3/13/2012 2:00:00 PM

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

**Sent:** Sunday, March 11, 2012 10:27 PM

**To:** JUDtestimony

**Cc:** evernw@aol.com

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Testimony for JUD 3/13/2012 2:00:00 PM SB2900

Conference room: 325
Testifier position: Oppose
Testifier will be present: No
Submitted by: Evern Williams
Organization: Individual
E-mail: evernw@aol.com
Submitted on: 3/11/2012

Comments:
I strongly oppose this bill because it perpetuates injustice on innocent persons. A person should be allowed to prove their innocence no matter how many years have passed. Prosecutors should not be allowed to get away with their mistakes and wrongfully incarcerate the innocent.