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Kansas House Committee on Corrections and Juvenile Justice
300 SW 10th Ave.
Topeka, KS 66612-1504

Re: **SB 40: Amending provisions relating to DNA evidence – Testimony in Opposition**

Dear Chairman Rubin and Members of the Committee:

Based on the Innocence Project's experience and close study of the nation's 302 DNA exonerations, we strongly urge the Kansas Legislature not to change the language of the state's post-conviction DNA testing access statute as proposed in SB 40.

This legislation is surely well intentioned, but by requiring that post-conviction DNA testing results "exonerate," rather than "be favorable to," the petitioner, **this legislation would have the unfortunate consequence of fostering injustice and undermining public safety.** Virtually the only type of case in which post-conviction DNA testing results can, on their own, "exonerate" a petitioner are single perpetrator rape cases.

As such, **if the language contained in this legislation had been applied to the cases of the nation's 302 innocent individuals who were exonerated after post-conviction DNA testing, almost half of them might not have been allowed to prove their wrongful convictions.** Instead, those innocent people would have remained languishing in prison and borne the false stigma of guilt for the rest of their lives.

Refusing to allow judges to order such testing in appropriate cases undermines public safety as well. In nearly half of the nation's wrongful convictions, post-conviction DNA testing not only freed the innocent, but also enabled identification of the real perpetrators of those crimes. Of the nation's DNA exonerations, 125 actual perpetrators have been identified in 146 underlying cases. Those actual perpetrators went on to be convicted of 130 additional crimes, including 70 sexual assaults, 32 murders, and 28 other violent crimes while the innocent sat behind bars for the original offenses of those real perpetrators.

Take, for example, the tragic wrongful conviction of Texan, Michael Morton. Convicted in 1987, he spent nearly 25 years in a Texas prison for the murder of his wife, Christine Morton. In June 2011, a judge finally ordered DNA testing on a bandana found near the Morton home after the murder. That testing revealed that the bandana had traces of Christine's blood and hair. It also contained the DNA of another, unknown male.

The DNA testing results alone may therefore not have been enough to exonerate Mr. Morton. But the unknown male's DNA profile was then run through the national DNA databank and matched a convicted felon from California, who also had a criminal record in Texas. Further investigation by Morton's lawyers revealed that a pubic hair from the unknown male was also found at the scene of the murder of Debra Masters Baker in Travis County, Texas. Mrs. Baker was, like Christine Morton, bludgeoned to death in her bed; her murder occurred two years after Christine's death, while Mr. Morton was in prison.

The post-conviction DNA testing alone in Mr. Morton's case would not have "exonerated" him, but instead, only have been "favorable" to him. Because the judge was able to order such testing, however, the real perpetrator in that crime was identified—but only after having committed another murder. Twenty-five years later, the innocent Mr. Morton is free, and the real perpetrator has finally been convicted.

There are other instances where post-conviction DNA testing of probative crime scene evidence has been favorable to the convicted person, but was not enough to exonerate him—and yet, because of that DNA testing, other information came to light that ultimately revealed the wrongful conviction of the petitioner and led to his exoneration.

Consider the case Damon Thibodeaux, who was sentenced to death for the New Orleans-area murder of his half-cousin, Crystal Champagne, based largely on his recanted confession. Mr. Thibodeaux spent 15 years in prison for the crime before his exoneration through DNA testing in September 2012. Mr. Thibodeaux was among the suspects brought in for questioning by police after the murder. After eight ½-hours of interrogation, he gave a recorded statement confessing to consensual and non-consensual sex with the victim and then to beating and murdering her. This confession was inconsistent with the crime in numerous details. Although forensic examiners could find no evidence of semen in the victim's body, a detective theorized that a sexual assault still could have occurred and that post-mortem maggot activity had consumed and degraded the evidence. Additionally, two eyewitnesses testified that they saw someone pacing near where the body was found. They both selected Mr. Thibodeaux from a photo array and identified him in court.

In 2007, based on evidence of Thibodeaux's innocence, the Jefferson Parish District Attorney's Office initiated a joint reinvestigation with the Innocence Project and the rest of Mr. Thibodeaux's legal team. The parties conducted multiple rounds of DNA and forensic evidence testing of the crime scene and other physical evidence and interviewed numerous fact witnesses. The eyewitnesses who identified Thibodeaux as the man they had seen pacing near the crime scene had already seen Mr. Thibodeaux's photo in the news media before taking part in the identification procedure. Moreover, they revealed that the sighting had occurred the day after the body was found, when Mr. Thibodeaux was already in custody. DNA testing performed by Dr. Edward Blake and other forensic experts concluded that there was no evidence connecting Mr. Thibodeaux to the murder and that, contrary to his statement, the victim had not been sexually assaulted. DNA testing on both Mr. Thibodeaux and Ms. Champagne's clothing confirmed that he could not have been the perpetrator. DNA on a cord in a tree hanging above Ms.

Champagne's body, which had tested positive for blood in the original investigation, revealed male DNA that did not belong to Mr. Thibodeaux. The reinvestigation further confirmed that his confession was false in every significant aspect and included a thorough examination of the reasons why Thibodeaux had falsely confessed, including exhaustion, psychological vulnerability, and fear of the death penalty. The prosecution's own expert had concluded that Mr. Thibodeaux falsely confessed based on fear of the death penalty.

It was only in combination with these facts that post-conviction DNA testing *helped* to prove Mr. Thibodeaux was actually innocent of the crime for which he had been wrongly convicted. The Jefferson Parish District Attorney ultimately agreed with that finding, and decided to join with the Innocence Project in seeking to vacate Mr. Thibodeaux's conviction and ultimately, exonerate him.

Like DNA itself, related policy issues can be complicated. We appreciate the sponsor's worthy intentions in the filing of this legislation, but urge you not to limit access to post-conviction DNA testing in Kansas in this way. Indeed, the move in states across the nation is to remove, not create, obstacles to post-conviction DNA testing.

Thank you for your consideration. If you have any further questions, please do not hesitate to contact me at ssaloom@innocenceproject.org or (212) 364-5394.

Respectfully submitted,

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