



## Postconviction DNA Testing Is at Core of Major NIJ Initiatives

by Nancy Ritter

**D**NA technology has become one of the most powerful tools to ensure that justice is done through our criminal justice system. It helps identify offenders and eliminate innocent suspects. Increasingly, DNA is also used to exonerate the wrongly convicted.

When this issue of the *NIJ Journal* went to press, postconviction DNA testing had been used to exonerate 225 people in the United States, according to the Innocence Project. (See “Wrongfully Convicted: One Man’s Story,” page 19.) But using DNA in a postconviction environment presents many challenges.

One challenge is finding old biological evidence that may — or may not — have been retained. Although many jurisdictions have a policy of retaining old swabs and other biological evidence, many do not. And, even in old cases in which biological evidence

may still exist, actually locating it can be difficult. (See “Wrongfully Convicted: One Lawyer’s Perspective,” page 21.)

Biological evidence remains stable when it is properly collected and stored, and scientific advances in DNA technology make it possible to reanalyze evidence in closed and cold cases. But proper maintenance and storage of evidence can be a challenge for police agencies and forensic laboratories with limited space and even more limited budgets. The good news is that there is a national trend to reevaluate the way biological evidence is preserved.

Another challenge is the many samples that still await DNA testing in crime labs and police evidence rooms across the country. (See [www.dna.gov](http://www.dna.gov) for more on NIJ’s ongoing efforts to reduce the backlog of evidence samples.)

And, finally, even if evidence was tested for DNA at the time of an investigation and trial, new, more sensitive techniques may have been developed since then that could yield different results. For example, hair — which previously only could be examined microscopically — can now be tested for DNA.

## Overcoming Barriers to Postconviction DNA Testing

Today, the responsibility for requesting DNA testing on a closed case lies primarily with the person convicted. Although 44 states have laws to allow postconviction DNA testing, the conditions under which this can be done vary widely. Some states allow testing if the DNA technology was not available at the time of trial and a DNA test could demonstrate “actual innocence.” Other states permit testing if there is a reasonable probability of a favorable verdict or if DNA exclusion would be relevant to the defense.<sup>1</sup>

It is possible that the nation’s highest court will soon have something to say about the right to postconviction DNA testing. In November 2008, the U.S. Supreme Court agreed to review a case regarding a person’s constitutional right to have DNA tests of evidence after conviction. William Osborne, an Alaskan man who was found guilty of a 1993 kidnapping and rape, is claiming a right to have advanced DNA testing performed — methodologies that were not available at the time of his trial — to prove his innocence. The 9th Circuit Court of Appeals agreed with Osborne (who currently is serving a 26-year sentence), but the state appealed that decision to the Supreme Court, arguing that the lower court wrongly created a federal right to postconviction DNA testing.<sup>2</sup>

The National Institute of Justice (NIJ) is working to solve some of the challenges in postconviction DNA testing. In 2008, NIJ awarded nearly \$8 million to five states — Arizona, Kentucky, Texas, Virginia and Washington — to identify eligible cases and help defray the costs of postconviction DNA testing.<sup>3</sup> States can use the money to review murder and rape cases, locate evidence, or analyze DNA in cases in which

## WRONGFULLY CONVICTED: ONE MAN’S STORY

by Dwayne Dail

### Editor’s Note:

*On September 4, 1987, a man cut through the screen of a bedroom window in Goldsboro, North Carolina. The 12-year-old girl who was sleeping in the room heard him and ran for the door. She didn’t make it. The man held a knife to her throat and raped her. Dwayne Allen Dail was 20 years old when he was sentenced to two life sentences plus 18 years for the crime. On August 28, 2007, Dail was exonerated by DNA evidence after serving more than 18 years in prison. Dail — and his lawyer, Christine Mumma (see “Wrongfully Convicted: One Lawyer’s Perspective,” page 21) — spoke at the NIJ Conference last summer. Here, in his own words, is Dail’s story.*

On an unusually warm November day in 1987, I was standing in a friend’s yard with some friends when a woman elbowed her way through our circle, instead of walking around us. I was a cocky and sarcastic 19-year-old, so I said, “Excuuuuuse me!” She turned around and blasted me so much so that she kind of scared me. I just backed up and let her say her piece. After she had gone, one of my friends told me that I’d have to excuse her because her daughter had been raped the month before, and she was very upset.

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the innocence of a convicted person may be demonstrated through DNA. As these five states proceed with their work, NIJ will monitor their efforts and identify lessons learned for the rest of the country.

Although those five grants were an important first step, NIJ is seeking to help many more states apply for federal assistance.<sup>4</sup> Last year, NIJ assembled a steering committee of criminal justice experts from the American Judicature Society, the Innocence Project, the National Association of Criminal Defense Lawyers, the National District Attorneys Association and other key stakeholders. The committee helped NIJ develop the agenda for a symposium to identify strategies to overcome challenges presented by postconviction cases in state and local jurisdictions. The symposium was held in January 2009 and was attended by prosecutors, defense lawyers, laboratory personnel and Innocence Project advocates from nearly all 50 states. The symposium was videotaped and is available at <http://projects.nfstc.org/postconviction>.

In another significant initiative, NIJ is funding the evaluation of postconviction programs in Virginia and Arizona. The study will analyze the exonerations — through DNA testing

of retained forensic evidence — of people who were wrongly convicted of rape, murder and non-negligent manslaughter. The study will consider potential probative predictors of people who may have been wrongfully convicted — such as coerced confession, eyewitness misidentification or ineffective assistance of counsel — by examining cases that primarily occurred before DNA testing was readily available. One of the primary goals of the study will be to answer a critical policy question: What proportion of defendants with retained forensic evidence might be exonerated if that evidence were tested?

The study is designed to identify connections between case characteristics and the likelihood that DNA testing would produce results that could exonerate a convicted defendant. These findings, which are expected in late 2010, could be particularly important if it turns out that there are statistical associations between case attributes and innocence, as this information could then be used by states to prioritize cases for postconviction DNA analysis.

## How Wrongful Convictions Happen

Finally, NIJ is planning to fund an independent review of the exonerations of people who were wrongfully convicted to help our nation better understand how eyewitness testimony, false confessions, poor forensic examinations and investigative practices, and other issues relate to wrongful convictions. Although researchers have collected data on many confirmed cases of wrongful conviction, much of the data is anecdotal. Also, data on pre-DNA-era convictions decrease over time — memories fade, case files are lost, and parties and witnesses die — closing the window on the opportunity to collect crucial information about the characteristics of these cases.

Therefore, NIJ intends to fund an analysis of court records, police reports, newspapers and other published information to determine how people are wrongfully convicted, focusing particularly on cases of DNA exonerations in our country to date. The project

is expected to look at data from three stages of cases of wrongful conviction: the investigation, the trial and postconviction.

- **Investigation:** What happens during the early stages of what becomes a wrongful conviction? How did the investigators identify the suspect(s)? What forms of evidence did investigators collect? Had they identified the person who turned out to be the actual offender? Why did investigators focus on one person over another?
- **Trial:** After the suspect who turned out to be not guilty was identified, what happened when the prosecutor became involved in the case? Was there a grand jury indictment or an information/complaint? What types of evidence were presented? Was there a jury trial or did the person plead guilty (false confession)? Did the wrongly convicted person testify? What type of representation did the person have?
- **Appeal and Remedy:** After a person was wrongfully convicted, what did he do, or what should he (or his counsel) have done? For example, what claims were raised during appeal? How was the wrongful conviction demonstrated? What happened, and how long did it take from the time the conviction was proven to be wrongful to the time of release? What release mechanisms were used (for example, retrial, court order or pardon)? What compensation, if any, was given?

## The Search for the Truth

Justice is the goal of all Americans, and DNA analysis of evidence is a vital tool in our ongoing search for the truth. Wrongful convictions are also a public safety issue because when the innocent are convicted, the guilty remain free to commit other crimes.

Nearly 13 years ago, NIJ published *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*.<sup>5</sup> Many

of the challenges discussed in that report are as relevant today as they were then, including:

- Maintaining the highest standards for the collection and preservation of DNA evidence.
- Ensuring that the DNA testing methodology meets rigorous scientific criteria for reliability and accuracy.
- Ensuring the proficiency and credibility of forensic scientists so that their results and testimony are of the highest caliber and are capable of withstanding exacting scrutiny.

Through its postconviction research projects, NIJ is working to ensure that the standards of evidence collection and preservation and the reliability, accuracy and accessibility of DNA testing enable our nation's criminal justice practitioners to make appropriate use of this rapidly advancing and increasingly available technology.

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## Notes

1. Rules governing DNA testing for federal inmates are contained in the Justice for All Act of 2004, available at [www.usdoj.gov/olp/pdf/jfaa2004.pdf](http://www.usdoj.gov/olp/pdf/jfaa2004.pdf).
2. Osborne maintains that if the more definitive DNA testing that is now available were to be performed on semen and pubic hair from the assault, his innocence would be proven. The pending case is *District Attorney's Office for the Third Judicial District v. Osborne* (a review of the 9th Circuit's ruling in *Osborne v. District Attorney's Office for Third Judicial District*, 521 F.3d 1118 (9th Cir. 2008)). Alaska is one of six states that does not have a statute specifically prescribing conditions under which prisoners can obtain postconviction DNA testing.
3. In 2007, NIJ issued its first "Postconviction DNA Testing Assistance Program" solicitation, which included program eligibility requirements under the Justice for All Act (JFAA). Section 413 of JFAA requires state applicants to demonstrate that they adhere to stringent guidelines for preserving biological evidence and that measures are in fact taken by all jurisdictions within the state to preserve such evidence. Only three states offered proposals in response to the 2007

## WRONGFULLY CONVICTED: ONE LAWYER'S PERSPECTIVE

by Christine Mumma, J.D.

### Editor's Note:

*Christine Mumma, Dwayne Dail's lawyer, spoke at last year's annual NIJ Conference. Mumma is the Executive Director of the North Carolina Center on Actual Innocence and the Executive Director of the North Carolina Chief Justice's Criminal Justice Study Commission. Here are excerpts from her July 23, 2008, remarks.*

About three weeks after the rape, the [rape victim's] mother saw Dwayne drive by the apartment complex. Dwayne was looking for his friends, but the mother thought he was looking up at their apartment complex at their window. She took down the license plate and called the police and said, "I know who raped my daughter."

You can imagine that she was completely focused on who had done this to her 12-year-old daughter. She gave the police the license plate number — and the police said that her daughter had to be the one to ID the attacker, as she (the mother) was not there.

Three weeks after that — six weeks after the rape — the mother saw Dwayne in the parking lot with his friends. She walked through the parking lot with her daughter and basically said, 'Is that him?' And it became "him" in the child's mind.

Misidentification is the leading factor in wrongful conviction across the country. It's present in 75 percent of the wrongful convictions. Cross-race ID has its own very unique issues. On top of that, in Dwayne's case, you had 2:30 in the morning, a young victim, woken in the middle

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solicitation, and none was able to meet this eligibility requirement; therefore, NIJ was unable to make any awards. In 2008, however, the Consolidated Appropriations Act allowed NIJ to ease the section 413 requirements for funds appropriated for fiscal years 2006–2008. States must now certify only that they have a policy or practice in place that is intended to provide for postconviction testing and preservation of biological evidence in the most serious cases.

4. NIJ's funding opportunities are available at [www.ojp.usdoj.gov/nij/funding/welcome.htm](http://www.ojp.usdoj.gov/nij/funding/welcome.htm).
5. The report is available at [www.ncjrs.gov/pdffiles/dnaevid.pdf](http://www.ncjrs.gov/pdffiles/dnaevid.pdf).

## About the Author

Nancy Ritter is the editor of the *NIJ Journal*. She has 30 years of experience in the criminal and civil justice field, including as an award-winning legal journalist.



*Preservation of evidence has to be a priority because science is changing so much that we may be able to solve crimes tomorrow even if we can't solve them today.*

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of the night, very little lighting, a short-interval exposure, weapon focus and trauma. You had all the factors that can cause a misidentification.

Of course, when you have the victim sit on the stand at the trial and point and say, "That's the man who raped me," that's incredibly powerful evidence for a jury.

### On Forensic Evidence

The only "forensic evidence" in Dwayne's case — and I use quotations very purposefully — was the microscopic comparison of hair. Hair was taken from a throw rug in front of the victim's bed; the rug had been bought used three years prior. They vacuumed it and obtained hairs: 40 African-American hairs and three Caucasian.

The letter Dwayne referred to from his attorney (see "Wrongfully Convicted: One Man's Story," page 19) was before they had identified the three Caucasian hairs. Two of the pubic hairs were determined not to match Dwayne, and they determined the other hair — a head hair — was microscopically consistent and therefore could not exclude Dwayne. So that was the forensic evidence that was presented at trial.

### On Preservation of Evidence

The rape kit was destroyed in 1994. The other evidence — the bed sheets and the child's nightgown — was put into a bag after trial, taken back to the police station and put on the wrong shelf. Thanks to a mistake, it was put on a shelf with murder evidence — only murder evidence is preserved — and an inventory was not done for 18 years.

We made countless phone calls and visits asking about that evidence and were constantly told there is no evidence in rape cases, only murder cases. We never dreamed that someone had not actually gone in and checked the shelves to make sure. Then one day, we called when they happened to be doing an inventory, and they had discovered the evidence in Dwayne's case.

### On Selecting Dail's Case

The North Carolina Center gets about 1,200 inquiries a year — and that doesn't count all the mail, people asking for help with sentencing or anything like that. That's 1,200 innocence claims a year that we have to go through. We run about a 95 percent rejection rate.

The things that highlighted Dwayne's case for us were the eyewitness identification — the weakness of that ID — and the fact that he turned down a very, very attractive plea offer. He was dragged from the courtroom by his ankles claiming innocence. He constantly claimed innocence throughout the entire time he was in prison. The weakness of the forensic evidence, the fact that there was a rape kit taken, these were all things that go on our checklist to say this is a case that we need to pursue.

There are many cases, however, where I believe there is a credible claim of innocence and the evidence has absolutely been destroyed ... and there's nothing we can do. Proper collection, storage, preservation and notice of destruction should be the top priority item not only for innocence claims, but for cold case resolution, for rape victims and murder victims and victims of violent crimes. Forensic science in general is changing so much that we'll be able to solve those crimes tomorrow even though we can't solve them today. So, preservation of evidence has to be a priority.

### On DNA Evidence 18 Years Later

Semen was found on the inside seam of the child's nightgown; it excluded Dwayne and matched someone else in CODIS (Combined DNA Index System), who was in prison, serving time as a habitual felon after more than 12 convictions for breaking and entering, as well as convictions for secret peeping, forgery, larceny and charges for a separate incident of first-degree rape. Had we not had that DNA hit, Dwayne's case probably would not have moved as quickly as it did.

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The next day, I went over to my mom's house to visit. A police detective had been there, left his card and asked that I give him a call. He asked me to come to the police station to answer some questions. I had no idea what it was about.

At the police station, they asked me where I was on September 4. That had been a few months prior and I could not remember exactly where I was on that night, so that's what I told the detective. Then, they gave me a court order to submit hair, saliva and blood samples, which I did without a problem and without a worry. Some weeks later, I received a letter from my attorney, saying that I could consider the case over with and that it was obviously a black perpetrator. I had never considered it a "case" to begin with, so it was very easy for me to consider it over with. I hardly gave it another thought and it eventually just faded from all thought.

Months later — on May 13, 1988 — I was having dinner at my mom's house, reading the local newspaper, when I saw an article saying that I had been indicted for first-degree rape, first-degree sex offense, first-degree burglary, indecent liberties with a minor, and a lewd and lascivious act. I drove to the police department, but they said they had no idea what it was all about, so then I drove to the Wayne County Sheriff's office. There, I was taken to a basement, handcuffed to a heating pipe, and fingerprinted. I was taken in front of a magistrate where I pleaded my innocence to no avail and was sent to jail with no bond. I spent four days in jail, getting my brains beat out on several occasions, waiting for my bond hearing, which was on the following Tuesday morning.

At my bond hearing, the judge gave me a \$5,000 bond and I was bailed out by my family. For several weeks afterward, I would wake up screaming from nightmares and was more scared than I had ever been. I spent almost a year out on bond, awaiting trial.

Before my trial began in March 1989, I was offered a plea bargain: I could plead no contest to the misdemeanor and take three years' probation. But I turned that plea bargain down, because I had not done anything, and I was not pleading anything but not guilty.

My trial started on Monday. I was convicted on Wednesday. On Thursday, I was sentenced to two life sentences and 18 years and, on Friday, I was sent to Central Prison in Raleigh, N.C.

I will never be able to remember that Wednesday, Thursday and Friday. I have been shown letters that I wrote to my family on those three days, but I have no recollection whatsoever of writing those letters. I was extremely out of my mind for a long time. It took me a long time before I could get myself back together.

I was taken to Polk Youth Institution in Butner, N.C., where I was processed, and during the orientation process, a programmer was roughing us up a little bit verbally. I was just trying to ignore that, trying not to cry in front of all these people that I had to spend the remainder of my natural life with. Then the programmer said, "It is your fault that your mothers are at home with broken hearts and crying."

That was more than I could take. My mother had to be taken out of the courtroom just the day before and was hospitalized — and it was not my fault — so I stood up, and I cussed him out. I started crying and screaming. The programmer let me vent, then he told everybody to go back to the block — "except you" — and he pointed at me. That may have saved my life. I wish that I could remember his name. He was a very good man.

He was, like, "What is *wrong* with you?!"

So, I told him about my week.

He asked me if I was scared, and I said, "Yes, I was scared." He asked me if I would feel safer in a smaller block around less violent inmates. And I said "Yes,

*I knew the power of DNA and the science — I had read so many stories by that time, so many books, so many magazine articles about the power of DNA.*

please. Any kind of help that you can give me, I will appreciate." So he took me to the sergeant's office, and they told me to sign a paper. I had no idea what "protective custody" was, but I signed myself into protective custody.

They did put me into a smaller block with less threatening inmates. It was a lot less threatening, but it was no less terrifying. I immediately began writing letters to the governor, to senators, to newspapers. My family began the campaign that took us almost 19 years of writing every newspaper, Dear Abby, Oprah, everyone.

I spent two or three months at Polk in protective custody. When I came up for a custody review, they asked me if I wanted to remain in protective custody or if I wanted to go into the regular population. So far, nothing had happened to me in protective custody, so I stayed in protective custody. I was sent from Polk to Blanch Youth Institution, which is somewhere in the mountains of North Carolina, built back in the twenties. It was very old and decrepit, and it should have been razed many, many years ago. I was placed into a single cell. I stayed in that cell for about eight months. I had never been so confined in my life. There is no way that someone who has not gone through it could understand what the mental torture of being locked up for 23 hours and 45 minutes a day — alone — is like. It is a terrible, terrible feeling.

During that time, my family and I continued writing letters. I began reading everything that I could about cases like mine and ran across a mention of DNA evidence, which was new. I wrote my attorney and asked her about DNA evidence. I wanted a DNA test, but she told me that I had to wait for my direct appeal.

So, I turned 21 at Blanch, and after six months, I had another review. They asked me if I wanted to remain in protective custody or if I wanted to go into the regular population. I did not think that I was going to survive anyway, so I chose to

take my chances in the regular population. I could not take any more of that box.

Since I had turned 21, they sent me to an adult prison, Eastern Correctional in Maury, N.C. In comparison to Polk and Blanch, Eastern was a new institution — freshly painted, floors waxed. The inmates there were older and seemed much calmer and relaxed and actually polite. You heard, "Excuse me," whereas everywhere else that I had been, you had to walk around a corner very broadly because you never had any idea of what was on the other side of that corner.

I stayed at Eastern for a few months, started taking a couple of classes and met a few people who became friends. I became comfortable, and because of that — because I became too comfortable — I was raped. I let my guard down. I was not as vigilant as I could have been, and as a result, I was raped and beaten. That was just the beginning of a long, long road of brutalities that I suffered.

I was transferred maybe 18 times to 16 different prisons.

I wrote my attorney continuously. I wrote the governor every day. Every day, I wrote the governor about my innocence. I wrote the President. And I got no response, no help, no one was willing to do anything.

Then, I read about a Virginia case in *USA Today* about a man who had requested a DNA test, but the evidence in his case had been destroyed. I immediately wrote my attorney, and I asked her to please file an injunction so that the evidence in my case could not be destroyed. I said I wanted a DNA test done. She wrote me back and promised me that she would. I did not hear back from her, so after a few weeks, I wrote her again. I did not hear back from her.

In 1995, my family was told that evidence in my case had been destroyed the year before. I knew the power of DNA and the science — I had read so many stories

by that time, so many books, so many magazine articles about the power of DNA — so, when I heard that the evidence in my case had been destroyed, I felt like my life was actually over.

Then, in 2001, my sister heard about the North Carolina Center on Actual Innocence. We immediately contacted them, and they sent me an application. I knew that it's very rare that a case is accepted for investigation, but when my case was accepted, I started counting the days until I was going home.

In 2004, the center wrote me back, saying there was nothing they could do for me, that the evidence had been destroyed. They had inquired on every angle that they could, but the evidence in my case had been destroyed. They had contacted the victim — which was a very rare circumstance — and the victim was not interested in speaking about it. And of course, you cannot push that. She had been a 12-year-old child.

So, my family and I started doing the only thing that we could. We started looking for ways to make parole, which I was eligible for in 2009. But part of my being able to make parole would have been going through a sex offender class and expressing remorse to the parole board — and I just could not do that. I *would* not do that. My attorney told me that I would have to do that, and I told him I would just have to die a very old man in prison because I was not going to admit guilt for a crime that I did not commit.

On August 1, 2007 — a day I'll never forget — I was called to the visitation area. That's when Chris Mumma introduced herself as the executive director of the North Carolina Center, which kind of threw me because they had written me three years before that the evidence in my case had been destroyed and there was nothing they could do. Chris said that evidence in my case had been destroyed, "or so we had been told" — twice.

*Mine was the fastest exoneration in the nation — my DNA test results came back one day, and I was exonerated the next.*

Then, she said, "Mr. Dail, we have found evidence in your case, and we're going today to put our hands on it."

I fell out of my chair and just burst into tears because I knew the evidence meant freedom. Evidence meant that I was going home, and I knew that.

Chris said, "Dwayne, I want to be sure. I need you to look me in the eye and tell me if there's any way that this evidence can link you back to this crime. You need to let me know now because it's going to hurt you as much as it can help you."

I told her, "Test anything and everything you can find. Test it. You test it fast ... and when am I going home?"

On August 27, Chris told me, "Dwayne, your wait is over. You're going home tomorrow." I was released the very next morning. Mine was the fastest exoneration in the nation — my test results came back one day, and I was exonerated the next.

Throughout the years I was in prison — as a child rapist and it was a cross-racial crime ... that should not matter, but unfortunately, it does: I was convicted for raping a 12-year-old black girl, and everyone in prison knew that — I endured many, many, many unimaginable things, things that are very hard to discuss, things that are very hard to deal with to this day. But the most important thing to me is that I survived. I'd like to think that I'm on my way back to being the same person that I was before all this happened. It's a long, hard road, but I'm on that road.