Summer 2011

MCADP NEWS

Massachusetts Citizens Against the Death Penalty, Inc.

Illustration: Detail of Bartolomeo Vanzetti and Nicola Sacco from the cartoon of a mural by Ben Shahn. © Estate of Ben Shahn, licensed by VAGA, NY, NY.

From the Chairman & the President

David M. Ehrmann & Jim Rooney

Greetings! If you missed the last Ehrmann Award event at Harvard this past December and the presentation of an excerpt of the stage version of Dead Man Walking, you can see a few photographs from it in this edition of the newsletter. We are happy to share with you a note of appreciation from Sister Helen Prejean, and an update on the activities of the Dead Man Walking School Theatre Project from Steven Crimaldi. As with all events involving Sister Helen, it was thought provoking, moving, and inspiring.

A few Sundays ago, Jim Rooney gave a talk at the newly renovated Community Church in Copley Square on the state of the death penalty. Reviewing the changes that have occurred over the last 15 years, he focused on the impact the work of Hugo Bedau, the Northwestern University Journalism School, and the Innocence Project have had on identifying instances in which people have been wrongly convicted of potential capital crimes and the impact this work has had on dramatically changing the tenor of the debate on the death penalty. Although the failures of the justice system to prevent wrongful convictions have helped raise doubt about the viability of the death penalty, few, if any would wish anyone to sit in prison or on death row for a crime he or she did not commit. Thus, the remainder of this issue of the newsletter focuses on efforts that can be made to correct the problem of wrongful convictions.

First, the state's public defender office, the Committee of Public Counsel Services announces its own Innocence Program. Second, Jonathan Broun, attorney and guest contributor from North Carolina, writes about the experience of

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Public Defender Establishes Innocence Program

Mike Hussey

Supporters of the abolition of the death penalty in Massachusetts have been encouraged for many years by the work of the Innocence Project in states across the nation. These largely volunteer groups, including the New England Innocence Project based in Boston, have worked tirelessly to free those unjustly convicted of murder and other serious offenses. Besides working to free inmates wrongfully convicted, their work has strengthened the argument that the criminal justice system is flawed in many respects and that the death penalty, the ultimate punishment, is an unacceptable punishment option.

Recently, the work of the non-profit and pro-bono New England Innocence Project has been complemented by a program developed by the Committee for Public Counsel Services (CPCS), the Commonwealth's public defender agency, and funded by the Department of Justice.

The purpose of the CPCS Innocence Program is to obtain exonerations for indigent Massachusetts state defendants who are actually innocent of the crimes of which they have been convicted. An individual may have the misfortune of falling into this category either because no crime was committed, or because the crime was committed by someone other than the defendant. Although much attention has been focused on exonerations based on DNA evidence, a case may be eligible for assistance from the CPCS Innocence Program whether or not DNA evidence might be available to establish innocence. Highest priority is given to cases involving serious felonies, including murder, for which the defendant is currently serving a substantial sentence. The Dept of Justice funds are used, in part, to conduct forensic analyses and to secure expert and investigative services for cases accepted by the program.

Anyone concerned about a particular individual who may have been wrongfully convicted in Massachusetts is encouraged to call the Innocence Program at 617-482-6212.

Debra Krupp, Director of the Innocence Program, said "We have promising leads in several cases." Attorney Krupp pointed out that, as in many death penalty cases, reexamination is being conducted of cases in which "junk science" or unreliable expert opinions were given at trial regarding the reliability of ballistics, arson, bite mark, and cause of death evidence. "We are working on a broad range of cases," Attorney Krupp added, "including many cases in which convictions may have been based on mistaken identifications." ■

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North Carolina's DNA Statute

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Over the past twenty years, at least seven North Carolina inmates convicted of rape or murder have been released from prison because DNA testing demonstrated that they were innocent. In response to some of these cases, the North Carolina General Assembly in 2001 passed N.C. Gen. Stat. 15A-269 which gives access to DNA testing to inmates when a favorable result could demonstrate their innocence. The North Carolina experience demonstrates why such a law is important to ensure that innocent people are not permanently incarcerated or executed. Our experience also demonstrates why such a law by itself is not enough.

Two of the most famous cases of DNA exoneration in North Carolina are Ronald Cotton and Daryl Hunt. In 1984, Ronald Cotton was convicted of rape and burglary after the victim of the rape positively identified him as the man who raped her. Eleven years later, Mr. Cotton was freed after more than a decade of incarceration when DNA testing exonerated him and identified the actual rapist. The rape victim, Jennifer Thompson-Cannino, now travels around the United States lecturing about the problems of misidentification. In 2009, Mr. Cotton and Ms. Thompson-Cannino's book *"Picking Cotton"* was published about their experiences, and the problems with eyewitness identifications.

Another case from North Carolina that reached national prominence was that of Darryl Hunt. Mr. Hunt was twice convicted of the brutal 1984 murder and rape of Deborah Sykes. In 1994, DNA testing was ordered in the case. The tests demonstrated that Mr. Hunt was not the contributor of the DNA found on Ms. Sykes's body. Yet prosecutors still resisted either releasing Mr. Hunt or granting him a new trial. Finally, in 2004 the DNA profile from the crime scene was run against the state database and it turned out it match the DNA profile of a North Carolina inmate who was incarcerated for an unrelated murder. That man confessed to being Ms. Sykes's sole killer. After twenty years of imprisonment for a murder he did not commit, Mr. Hunt was released. His ordeal became the subject of a documentary, The Trials of Darryl Hunt that was featured on HBO.

Jonathan E. Broun

In a way, Mr. Cotton and Mr. Hunt were lucky. They were allowed to have DNA tests in their cases at a time when not every inmate was given access to such tests. The North Carolina General Assembly, however, passed a law that makes it easier for an inmate to get such tests. Under this law, an inmate may ask the trial court that convicted him to allow DNA testing that conforms to the FBI's testing standards if the biological evidence to be tested is "material to the defendant's defense," "related to the investigation or prosecution that resulted in the judgment," and either was not tested previously or the currently proposed test is more accurate or a reasonable probability exists that a new test would contradict the prior results. The trial court must grant the motion for DNA testing if these stated conditions have been met, and if the "DNA testing being requested had been conducted on the evidence, there exists a reasonable probability that the verdict would have been more favorable to the defendant," and if the inmate "has signed a sworn affidavit of innocence."

What this statute means in effect is that an inmate can get the court to order a DNA test if he can establish that biological evidence was material to his case, a DNA test was not conducted in his original case (or if it was, there is reason to doubt that tests reliability), a favorable test would mean there was a reasonable probability the result would have been different, and the inmate is maintaining his innocence. Since the law has been passed, one death row inmate, Rex Penland, had his convictions and death sentence vacated because of a favorable DNA test that was obtained under this statute. Mr. Penland, who always maintained his innocence, was given a plea deal in which he was allowed to maintain his innocence and receive what was in effect a time served sentence. Thus, Mr. Penland went from facing the death penalty to freedom after being incarcerated for fifteen years.

While North Carolina's DNA statute is a good step to ensure that innocent people are not executed, the statute itself is not enough to ensure that innocent people are not executed or spend the rest of their life in prison. Not every murder case involves biological evidence that can be tested by DNA, or where DNA evidence can be decisive for either side. There have been several North Carolina death row inmates who have been exonerated by means other than by DNA. One reform that has helped North Carolina inmates who cannot look to DNA testing for relief is a requirement that, after conviction, the state must disclose the complete files of all prosecutorial and law enforcement agencies. One of the people this reform helped was Alan Gell. Mr. Gell was convicted of killing a man in the victim's own home. The body was found while Mr. Gell was in jail on unrelated non-violent charges. After two fifteen year old girls claimed they were with Mr. Gell when he murdered the victim, the state argued that the victim was killed before he was incarcerated. Mr. Gell was charged, convicted of first degree murder, and sentenced to death. During the post conviction process, the State had to disclose both the prosecutor's and law enforcement's complete files. What Mr. Gell's counsel learned is that the prosecutor's had not disclosed the fact that eighteen witnesses had told law enforcement officers they had seen the victim alive after Mr. Gell had already been locked up. The prosecution had also never disclosed a tape recording of the two girls who testified against Mr. Gell, in which one of the girls told the other something to the effect that "We have to make up a story about Alan." As a result of this evidence, Mr. Gell received a new trial, and was subsequently acquitted of all charges.

Another reason why DNA testing is not enough by itself is that it relies on competence and good faith of the people who collect evidence and who analyze DNA. North Carolina's experience is that

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Ehrmann Award Program Special Event

The Dead Man Walking School Theatre Project joined Massachusetts Citizens Against the Death Penalty and the Harvard Law and Divinity Schools for a showcase event on December 4, 2010.

Dead Man Walking: An Afternoon Encounter with Capital Punishment in America included engagement with this critical topic through a theatrical reading of excerpts from *Dead Man Walking*, followed by a conversation featuring esteemed panelists, and the MCADP annual awards ceremony honoring actor/author Tim Robbins. Over 300 people joined us at Harvard for this event!

Sister Helen Prejean returned to Boston in April to speak at Boston University and St. Cecelia's Catholic Church and at these events continued the discourse on the death penalty in Massachusetts and worked to involve more young people with MCADP.

To learn more about the Dead Man Walking School Theatre Project, please visit our website at www.dmwplay.org.

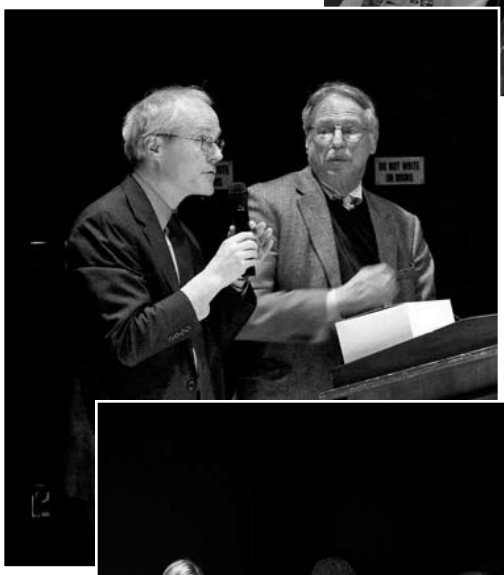
In addition to these springtime events in Boston, the Dead Man Walking School Theatre Project will work with Harvard University to produce a full production of *Dead Man Walking* during the fall semester; as well to coordinate a death penalty focused retreat for college students that will take place at Boston College on November 5, 2011.

Thank you for your continued support. We could not continue this work without you!

Steven Crimaldi
National Coordinator, The Dead Man Walking School Theatre Project

Constance Putnam introducing the Bedau Award.

Sr. Helen Prejean, sitting next to Delbert Tibbs, panelist, exonerated from death row.



Jim Rooney presenting the Bedau Award to Professor Michael Meltsner of Northeastern University School of Law.

Laura Klivan, Harvard student in the role of Sr. Helen.

The Harvard cast with Sr. Helen.

Photos by Alex Buchanan

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North Carolina with that state's efforts to give those incarcerated who claim innocence access to DNA testing. Note that he suggests that states go further than this because DNA is not going to be the telling factor in many cases. Surprisingly and sadly, Massachusetts has yet to go even this far. It along with Oklahoma are the only two states not to guarantee post-conviction DNA testing to prisoner who have some basis to claim innocence. Bills pending in the house and Senate (H2165 and S753) would change that. Let your representative and senator know you support this worthy effort.

Finally, Reverend Jonathan Tetherly, MCADP Board Member, brings to our attention another bill that would address the broad question of what to do to prevent miscarriages of justice in the future. The sensible thing to do when society discovers that it has erroneously imprisoned someone is to figure out how to prevent it from happening in the future. Since 1861 when the British government established a council to inquire why the first transatlantic cable failed after two weeks of service, we have had inquiry panels. But this approach is novel in the world of criminal justice. Yet it has occurred. After Stephanie Moulton, a 25 year old mental health counselor, was murdered by a schizophrenic client at a state-funded group home on January 20, 2011, the Massachusetts commissioner of mental health established a task force to review the system's safety and training procedures. The time has come to take the same steps when a wrongful conviction comes to light. ■

Your Membership is Important!

Please renew your membership, if you haven't done so recently, and encourage others to join.

House Bill H2270 - An Act to Establish the Massachusetts Innocence Commission

Over twenty years ago, Hugo Bedau and Michael Radelet published a study in the Stanford Law Review showing, to the amazement of many, that at least 350 people had been wrongfully convicted of crimes that were potentially capital crimes. One of the chief ways that they identified such wrongful convictions was by focusing on instances in which the state had conceded error. While justice is restored to some degree by freeing a person wrongfully incarcerated, it is rare indeed that any systematic effort is made thereafter to determine what went wrong and how to fix it. Such efforts are routine when an airplane crashes, for instance, and the changes that have come about as a result of these investigations have made consistent progress in improving the safety of air travel. The criminal justice system could benefit by the same level of scrutiny.

Now there is an opportunity in Massachusetts to achieve this. Through the promotion of the Massachusetts Conference of the United Church of Christ, H. 2270 has been submitted for consideration in this session of the legislature by Rep. Benjamin Swan of Springfield. The bill has five co-sponsors, from both sides of the aisle. The bill is currently in the Judiciary Committee, and a hearing was held on July 6, 2011. The summary by Rep. Swan identifies the goal of the legislation: "This bill will establish a commission, known as the Massachusetts Innocence Commission, which will analyze the circumstances of innocent persons being charged, prosecuted, convicted and incarcerated. The Commission shall advise the legislature concerning the causes and factors associated with such wrongful convictions, and recommend reforms to investigative, prosecutorial, judicial and other processes; and shall propose remedial legislation with the goals of reducing the likelihood that innocent persons are convicted of crimes."

Please call your senator and representative in support of this legislation. ■

Rev. Jonathan C. Tetherly, Board Member, MCADP

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their competence and good faith cannot be assumed. In 2010, Greg Taylor who was serving a life sentence for murder, was exonerated in a hearing initiated by North Carolina's Innocence Commission. One of the key pieces of evidence against Mr. Taylor was testimony by a State Bureau of Investigation (SBI) agent that initial tests showed blood in Mr. Taylor's truck. What jurors and defense counsel never knew was that the SBI had conducted confirmatory tests that found no blood in the truck. The SBI agent had testified that there was blood in the truck without mentioning that further tests showed that this was not true. As a result of Taylor's case, an audit was ordered of the SBI, and it was discovered that in over 200 cases the SBI had either withheld or misrepresented the results of blood tests that would have been favorable to the defendant. In three of those cases, the defendants had already been executed.

A law that allows inmates to gain access to DNA testing is an essential tool to fight false convictions. However, it is only a first step. There must also be steps taken to ensure that cases are properly reviewed where biological evidence does not exist. And in many states, steps must be taken to reform the criminal crime labs that collect and analyze biological evidence. ■

[For further information on exonerations in North Carolina, visit the website of the North Carolina Center on Actual Innocence, www.nccai.org.]

Note of appreciation: The Board of MCADP thanks Jonathan for his contribution to this newsletter.