RHODE ISLAND PUBLIC DEFENDER

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June 3, 2011

The Honorable Lincoln D. Chafee
Governor of the State of Rhode Island & Providence Plantations
The Statehouse
Providence, RI 02903

RE: House Resolution #2011-H-5068
[Senate Resolution #2011-S-0371]

Dear Governor Chafee:

The Office of the Public Defender (OPD) is proud to lend its support to Representative Martin and Chairman McCaffreys' efforts to pardon John Gordon for the murder of Amasa Sprague, a crime for which he was convicted and ultimately executed for on Valentine's Day, 1845. The OPD welcomes the opportunity to participate in this effort to attempt to right what it believes is a terrible wrong while considering how continued changes, improvements, and reforms to our state's criminal justice system can help prevent something like the travesty of justice that was the Gordon Case from ever happening again.

We should start with the proposition that given the state of the evidence compiled and the passage of time, the kind of absolute certainty of factual innocence available in modern day wrongful conviction and post charge exoneration cases exposed by DNA testing is not possible[1]. As is well known,

[1] While the OPD's support of the resolutions is based primarily on the lack of fairness, accuracy, and reliability of the proceedings that resulted in John Gordon's conviction and execution, the fact that DNA testing is not available in his case does not preclude an argument that he is factually innocent. Indeed, since 2007, the OPD has collected and disseminated information about seven (7) proven cases of factual innocence based upon mistaken eyewitness identification in which a criminal defendant spent days, weeks, months, or years in prison until they were exonerated for a crime they did not commit. In only one of these cases was modern DNA testing done and a second from the 1980's involved less discerning serological testing. *See, LIST OF WRONGFUL*

these cases, both in Rhode Island and across the United States, have helped inform the OPD's legislative efforts to improve the quality of justice while ensuring fairness in our state's criminal justice system[2]. These efforts include legislation addressing two of the leading causes of modern day wrongful convictions and post charge exonerations, mistaken eyewitness identification and false confessions.

- Mistaken Eyewitness Identification - In 2010 the General Assembly enacted *RIGL Sec. 12-1-16*, legislation introduced at the request of the OPD creating a task force of criminal justice stakeholders empowered to identify and make recommendations for "best practices" for conducting both live and photo lineups and show-ups. The task force completed its work; unanimously approved eleven (11) recommendations including that its life be extended for sixteen (16) months; and circulated its final report as required by statute on December 27, 2010. The task force report, believed to be one of the best of its kind in the country, is available on the OPD's website[3] along with the minutes of its meetings; information provided to it by experts in the field; and other supporting materials. Most important, an increasing number of Rhode Island law enforcement agencies are adopting written policies that contain many of the "best practices" recommended by the report. The legislation introduced at the request of the OPD that would amend *RIGL Sec. 12-1-16* in order to extend the life of the task force is **House Bill #2011-H-5090** and

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CONVICTION AND POST CHARGE EXONERATION CASES ATTRIBUTABLE TO MISTAKEN EYEWITNESS IDENTIFICATION (Winter, 2007; Revised, March, April, 2008). This document has been submitted to various legislative committees and the Governor's Office over the last several years. This collection does not include Rhode Island's two most high profile cases of this type, that of Warwick Police Detective Jeffrey Scott Hornoff and the American Tubing and Webbing Co. Fire. *See, Hornoff, City settle suits in wrongful imprisonment, The Providence Journal, 8/17/06; Steven A. Drizin, Fighting frame-ups – Videotape all police interrogations, The Providence Journal, 3/6/03* (op-ed piece by law professor and false confession expert Drizin concerning the American Tubing and Webbing Co. Fire in which a 9 year old boy falsely confessed to setting the fire). And most recently yet another post charge exoneration case attributable to mistaken eyewitness identification has been exposed through the efforts of the OPD. *See, Milkovits, Jailed for another's crime, E. Prov. man's charges dropped, The Providence Journal, Tuesday, 4/5/11; Milkovits, Woonsocket police face questions in robbery investigation, The Providence Journal, Sunday, 4/3/11*

[2] The most up to date treatment of this issue is the recently published *Brandon L. Garrett, Convicting The Innocent: Where Criminal Prosecutions Go Wrong (Harvard University Press, 2011).* The "raw" data supporting Professor Garrett's conclusions regarding false confessions, mistaken eyewitness identification, flawed forensics, and unreliable informants is available free of charge at *http://www.law.virginia.edu/innocence. See also, Gross, et al, Exonerations In The United States 1989 Through 2003, 95 Journal of Criminal Law and Criminology 2 (2005); http://www.innocenceproject.org/ (website of The Innocence Project, last visited on 3/14/11)*(eyewitness misidentification single greatest cause of wrongful convictions nationwide, playing a role in more than 75% of convictions overturned through DNA testing; in about 25% of DNA exoneration cases, innocent defendants made incriminating statements, delivered outright confessions or plead guilty)

[3] *http://www.ripd.org/cjcommunity/taskforcelegislation.htm (last visited on 6/3/11)*

Senate Bill #2011-S-0218. At this writing an amended version, **Senate Bill #2011-S-0218, Substitute "A",** has passed both the House and Senate and is awaiting final action by the Senate. **House Bill #2011-H-5090** has passed both the House and the Senate Judiciary Committee and is also awaiting final action by the Senate.

- False Confessions - In order to address the problem of false confessions, in both 2009 and 2010 the General Assembly passed legislation introduced at the request of the OPD requiring the electronic recording of custodial interrogations in their entirety in capital cases. On both occasions the legislation was vetoed by Governor Carcieri. Identical legislation was again introduced at the OPD's request this year, **House Bill #2011-H-5366** and **Senate Bill #2011-S-0331.** Most recently in January the OPD began a series of unprecedented meetings with Attorney General Kilmartin and members of his staff. The results of this successful effort are memorialized in an amended version of the legislation specifically **Senate Bill #2011-S-0331, Substitute "A"** and **House Bill #2011-H-5366, Substitute "A"**. As of this writing the former has passed both the Senate and House and has been transmitted to the Governor; the latter has passed the House and is awaiting a hearing before the Senate Judiciary Committee. This compromise legislation would establish a task force of criminal justice stakeholders primarily made up of members of the law enforcement community and would be empowered to address the desirability of written policies, procedures, training, and / or additional legislation regarding the electronic recording of custodial interrogations in their entirety statewide.

For the reasons stated herein, the OPD believes that if even some of these and other criminal justice reforms that it has proposed over the years had been present in 1844-1845, the travesty of justice that is the Gordon Case might not have occurred.

The OPD has undertaken a careful examination of the trial record and other secondary sources in the Gordon Case. It believes that many of the causes of modern day wrongful convictions and post charge exonerations were present. These include the lack of fairness of the proceedings; mistaken eyewitness misidentification; and the poor quality or availability of what passed for forensic science at the time. Their presence calls into question the accuracy and reliability of the jury's verdict. Stated in another way, John Gordon's Trial had fatal flaws which compromised the court's ability to discern the truth. The OPD believes that this can be stated with certainty, for the following reasons:

- John Gordon's fate was not decided by a jury of his peers. At the time of the Gordon Trial only those who owned land could vote and serve on juries, effectively excluding naturalized citizens, most of whom were poor, from serving on juries. This not only denied Gordon a jury made up of a fair cross section of the community but effectively eliminated the Irish and other minority

groups from serving on it. Of course in modern times land ownership is no longer a pre-requisite for voting or jury service. And most recently in 2003 the General Assembly enacted legislation amending *RIGL Sections 9-9-1, 1.1* (persons liable to service and qualifications of jurors). Introduced at the request of the OPD in an effort to address systematic ethnic and racial disparity in the composition of juries, this legislation expanded the sources from which jury lists are compiled to include operator's drivers licenses, Rhode Island identification card, state income tax returns and unemployment compensation as evidence. The OPD believes and in 2003 the General Assembly apparently agreed that a diverse jury reflecting the ethnic and racial makeup of the community it speaks for is better able to ascertain where the truth lies.

- John Gordon was misidentified. John and William Gordon were tried together; Nicholas, the alleged ringleader, would be tried separately. Nicholas Gordon would be the central figure in John and Williams' trial. John and William had only been in the country six months and would have no reason to murder Sprague but for their brother's grudge[4]. A critical witness for the State, Susan Field, testified about prior threats that she had heard Nicholas make against Amasa Sprague. She testified that although present on this occasion, John did not respond or acquiesce to these threats. However when asked to identify them at trial she positively identified John as William and William as John.

- Modern day advances in forensic science could have prevented John Gordon's conviction and execution. Using a modern survey text of available applications as a baseline[5], it can be seen that what passed for forensic science in the 1840's was in fact unreliable; misleading; or non-existent. This is particularly troubling in the Gordon Case as such evidence, when available, was presented to the jury as definitive evidence of guilt. This includes:

    - *Forensic Serology and Pathology* – Beginning in the early 1900's the science of serology and the related discipline of blood stain analysis allowed for blood typing and the interpretation of blood stains, respectively. In the forensic science context both are extraordinarily important in the investigation of crime and can be used to connect the perpetrator to a crime scene or other evidence. Because Amasa Sprague was not only shot in the wrist but brutally beaten to the point

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[4] The State of Rhode Island brought Nicholas Gordon to trial in October, 1844 and again in April, 1845. On both occasions the jury was unable to reach a unanimous verdict. *http://murderbygasslight.blogspot.com/2010/07/amasa-sprague.html* (a website compendium of information, resources, and discussion of notable 19th Century American murders; last visited on 3/14/11)

[5] *Richard Saferstein, Ph.D., CRIMINALISTICS: An Introduction to Forensic Science, 6th Ed. (Prentice Hall, 1998); see especially Ch. 8, Hair, Fibers, and Paint; Ch. 12, Forensic Serology; Ch. 14, Fingerprints; Ch. 15, Firearms, Tool Marks, and Other Impressions.*

of his face being unrecognizable, a great deal of blood was present at the crime scene, on his person, and presumably on that of the perpetrator and her / his clothing as well. Not only were these modern scientific techniques regarding blood unavailable, but the trial record reveals that Mr. Sprague's hands and fingers were not examined during what passed for an autopsy. In the present day a victim's hands are commonly examined and may reveal the presence of "defense wounds"; fingernail scrapings can also be taken and connected to the attacker via standard serological (A, B, O typing) or DNA testing. These are critical in a case such as this where there was ample evidence that Mr. Sprague, a large man, attempted to fight off his attackers. And articles of clothing with red stains purported to have been worn by John Gordon during the murder was presented to the jury as containing the blood of Mr. Sprague. Later it was determined that the stains could have been a red dye from a mill where John Gordon worked or the blood of a turkey that he killed for Christmas dinner. In the 1840's no definitive tests existed to make this determination.

- *Fingerprints, Firearms, Tool Marks, and Other Impressions* – Whether it be fingerprints, firearms, tool marks, or other forms of "impression" evidence, all have this in common – an "unknown" sample connected with a crime is compared to a "known" sample unique to a particular person or crime scene evidence. And while there was ample opportunity for such comparisons to take place in the Gordon Case, that which was presented to the jury was at best, incomplete, and at worst, misleading.

    - Two firearms were recovered from the crime scene. Efforts to connect them to the Gordon's were based solely on the vagaries of the testimonial evidence of witnesses, some of whom were enemies of the Gordon's or friends of the Sprague's. Systematic efforts to identify, classify, and categorize fingerprints for use in criminal investigations did not begin until 1883 and thus were unavailable in the Gordon Case. The ability to <u>definitively</u> connect these weapons to the Gordon's or the crime scene via fingerprint evidence or an examination of a firearms and related components for tool mark impressions did not exist.

    - In the 20th Century, and as standardized manufacturing techniques became commonplace, the comparison between "known" and "unknown" crime scene samples became frequent parts of criminal investigations. In the case of firearms, tool marks, and shoe impression evidence, these allow for the comparison of markings imparted to an article during

manufacture (known as "class" characteristics) to evidence obtained from a crime scene, such as bullets, casings, and shoe and boot prints. Changes made to an article after manufacture (e.g. damage to the sole, heel, or tread, known as "accidental" characteristics) can lead to near positive identification between "known" and "unknown" crime scene samples. Such analyses were unavailable in the Gordon Case. But to make matters worse what was presented to the jury was done so in a manner that was both misleading and overreaching. For example, the most damaging piece of evidence against John Gordon was boot prints in the snow and ice that lead, supposedly uninterrupted, from the crime scene to the Gordon home. In fact, a more thorough later examination revealed that there were at least two interruptions in this boot print trail, and for considerable distances. And the ability to make a definitive comparison of a properly preserved boot print and any "class" and "accidental" characteristics they might contain to the boots recovered from the Gordon home as was done during the investigation and at trial simply did not exist[6],[7].

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[6] The difficulty in making such a comparison, even in modern times, and especially with boot prints left in snow and ice, can be seen when one considers the minimum requirements for such an analysis to take place:1) photograph of the impression 2) taking a "cast" of the impression using dental stone or wax 3) proper preservation of the "cast" impression 4) comparison of the "cast" impression to the footwear using paper, ink, or powder, similar to that used in taking, preserving, and comparing known and latent fingerprints. *See, Richard Saferstein, Ph.D., CRIMINALISTICS: An Introduction to Forensic Science, 6th Ed. (Prentice Hall, 1998), Ch. 15, Firearms, Tool Marks, and Other Impressions* at pp. 492-499. Additionally, the Gordon trial record does not definitive information about temperatures during the times in question.

[7] Even in modern times impression evidence can be problematic. For example, in response to scandals at various forensic laboratories across the country (including the FBI; West Virginia; Oklahoma; Houston, TX; and the Duke Lacrosse Case) the United States Congress requested that the prestigious National Academy of Science (created at the request of President Lincoln during the Civil War) conduct a review of these services. Its comprehensive report, *Strengthening Forensic Science In The United States: A Path Forward (February, 2009)*(hereafter, "*NAS Report*") has called into question some of the basic assumptions of "uniqueness" and "positive identification" between "known" and "unknown" samples upon which impression evidence is based. Pre-publication the *NAS Report* was cited as authoritative by the United States Supreme Court in one of the most important forensic science cases ever decided, *Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (U.S. 2009)*(defendant's 6th Am. right to confront and cross examine requires that witness conducting forensic science analysis be made available for cross examination). Justice Scalia, in writing the majority decision, justified the need for cross examination by relying upon the *NAS Report*, stating that because the majority of laboratories producing forensic evidence are administered by law enforcement agencies where the laboratory administrator reports to the head of the agency, forensic scientists often are driven in their work by a need to answer a particular question related to the issues of a particular case and therefore may sacrifice appropriate methodology for the sake of expediency or alter the evidence in a manner favorable to the prosecution. *Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2536 (U.S. 2009).* As has been discussed herein, many of these same problems regarding, bias, subjectivity, and interpretation of "raw" data were present in the Gordon Case.

- *Hair and Fiber* – Unknown in the 1840's, in modern times hair and fiber analysis can help connect a piece of evidence to a particular person. An oversized overcoat and other clothing supposedly worn by John Gordon during the murder would seem particularly susceptible to collecting the hairs of or contributing its fibers to the wearer. Thus a critical piece of evidence, both during the investigation and at trial was at best useless and at worst misleading.

- John Gordon did not receive a fair trial. In our day it is unthinkable that the same court responsible for convicting a defendant and sentencing him to death would then act as an appellate court tasked to pass upon the sufficiency of the evidence and the fairness of the trial. And yet that is exactly what happened in John Gordon's Case[8]. Biased statements and prejudicial rulings by the trial judge that should have been the subject of a successful appeal were ignored, thus calling into question not only the fairness, but the reliability and accuracy of the jury's verdict. These include:

  - A hyperbolic and inflammatory statement regarding the scale of the crime was made to the jury by the trial judge. This statement, that, "a most atrocious murder has been committed....no crime has ever come to my knowledge of such atrocity. It has no parallel in the annals of the State, nor one which can exceed it in the annals of any one of the United States" served no useful purpose; inflamed the passions of the jury; and had the appearance of impropriety on the part of the court.

  - When instructing the jury on how to evaluate the credibility of witnesses the trial judge intimated that the testimony of the native born was more reliable than that of John Gordon's "countrymen".

  - Another instruction singling out and disparaging the testimony of John Gordon's mother, his alibi witness.

    It is therefore no surprise then that in a nine day trial in which the jury heard the testimony of 102 witnesses it took only 75 minutes for it to reach its verdict.

- Other factors calling into question the reliability and accuracy of the verdict.

  - "Tunnel Vision". Good police work requires that an investigation should go where the evidence leads. Stated in another way, identifying a suspect and then seeking out evidence of their guilt is the opposite of what should be done. And yet that is exactly what happened in the Gordon Case. In an extraordinarily complex case involving

[8] The decision of the Supreme Court of Rhode Island sitting as an appellate court in John Gordon's Case is reported at *State v. John Gordon, 1 RI 179 (September Term, 1844).*

circumstantial evidence that eventually required nine days of trial and the testimony of 102 witnesses, the Gordon brothers were arrested about two days after the murder took place. Only then did the authorities and ordinary citizens, including some in the employ of the Sprague Family, begin collecting evidence in earnest. It is therefore not surprising that this evidence was assembled and interpreted in such a way as to lead in the direction of the Gordon's while other evidence inconsistent with their guilt was ignored including:

- another person by the name of "Big Pete" (who also had a disagreement with Amasa Sprague and eventually disappeared from Rhode Island) was never sought, questioned, or investigated

- another set of footprints in the snow that also lead away from the crime scene but in the opposite direction of the Gordon home were also ignored

- Unfair Pre-Trial Publicity. Less than three days after the murder the *Providence Journal* breathlessly reported that the case appeared solved and that the evidence against the Gordon's was strong, stating that, "it is now the settled opinion that they are the guilty parties." Despite what must have been pervasive public opinion as to the guilt of the defendants an examination of the trial record reveals that jurors were not questioned by counsel or the court about their prior knowledge of the case.

Some have said that it is a waste of time and resources to re-visit the case of someone who was executed more than 166 years ago, especially in difficult economic times such as these. The OPD strongly disagrees. However inadequate and imperfect that attempt may be, there is no better time than the present to attempt to right what the OPD believes and most agree was a horrible wrong perpetrated by our state's criminal justice system upon a person who was poor and powerless. An examination of the trial record and other sources reveals that the State of Rhode Island spared no expense in its attempt to identify, convict, and execute the Gordon's[9]. Despite its best efforts, this attempt was only 1/3 "successful" in that while John was convicted and executed, William was acquitted and Nicholas case never resolved to anyone's satisfaction. In contrast, the expenditure of a few hours in the present day publicly discussing, debating, and reviewing the case and the lessons it teaches in public forums to help ensure that a travesty of justice such as this never happens again in our state, is not too

[9] This includes not only John and William Gordon's Trial but two subsequent attempts by the State of Rhode Island to convict and execute Nicholas Gordon, both of which ended in "hung" juries. *http://murderbygasslight.blogspot.com/2010/07/amasa-sprague.html* (a website compendium of information, resources, and discussion of notable 19th Century American murders; last visited on 3/14/11)

much too ask. Moreover, it is never too late to attempt to rectify what most perceive as a great injustice, however inadequate and imperfect that attempt may be.

The Office of the Public Defender respectfully submits that John Gordon should be pardoned for the murder of Amasa Sprague, a crime that in all probability he did not commit. The passage of time, while complicating a definitive answer to that question, does provide the benefit of hindsight. We now know beyond a shadow of a doubt that John Gordon's investigation, arrest, trial, and execution was prejudiced and unfair and was based on evidence that was unreliable and inaccurate. Pardoning him now provides an imperfect but the best and only legally available remedy for righting these horrible wrongs.

Thank you for your consideration of the Office of the Public Defender's position in this important matter.

Respectfully Submitted,

John J. Hardiman
Public Defender

CC: Kenneth Procaccini, Esq.
Policy & Legislative Analyst
Office of the Governor

SOURCES

Available Online or Upon Request

1. *LIST OF WRONGFUL CONVICTION AND POST CHARGE EXONERATION CASES ATTRIBUTABLE TO MISTAKEN EYEWITNESS IDENTIFICATION (Winter, 2007; Revised, March, 2008 and April, 2008)* compiled by the Office of the Public Defender.

2. *Hornoff, city settle suits in wrongful imprisonment, The Providence Journal (Rhode Island) August 17, 2006*

3. *Steven A. Drizin, Fighting frame-ups – Videotape all police interrogations, The Providence Journal (Rhode Island) March 6, 2003*

4. *Milkovits, Jailed for another's crime, E. Prov. man's charges dropped, The Providence Journal, Tuesday, 4/5/11; Milkovits, Woonsocket police face questions in robbery investigation, The Providence Journal, Sunday, 4/3/11*

5. Final Report of the *TASK FORCE TO IDENTIFY & RECOMMEND POLICIES & PROCEDURES TO IMPROVE THE ACCURACY OF EYEWITNESS IDENTIFICATION* created by *RIGL §12-1-16,* available at the OPD website along with the minutes of its meetings; information provided to it by experts in the field; and other supporting materials, *http://www.ripd.org/cjcommunity/taskforcelegislation.htm (last visited on 6/3/11)*

6. *Garrett, Convicting The Innocent: Where Criminal Prosecutions Go Wrong (Harvard University Press, 2011).* The "raw" data supporting Professor Garrett's conclusions regarding false confessions, mistaken eyewitness identification, flawed forensics, and unreliable informants is available online free of charge at http://www.law.virginia.edu/innocence.

7. *Gross, et al, Exonerations In The United States 1989 Through 2003, 95 Journal of Criminal Law and Criminology 2 (2005)*

8. *Website of The Innocence Project. http://www.innocenceproject.org/* (last visited on 3/14/11)

9. *Richard Saferstein, Ph.D., CRIMINALISTICS: An Introduction to Forensic Science, 6th Ed. (Prentice Hall, 1998)*

10. *THE TRIAL OF JOHN AND NICHOLAS GORDON FOR THE MURDER OF AMASA SPRAGUE IN THE SUPREME COURT OF RHODE ISLAND, MARCH TERM, 1844, Reported by Edward C. Larned and William Knowles, 2nd Ed. by Sidney S. Rider (1884)*(referred to herein as "the trial record")

11. *THE JURY TRIAL OF JOHN AND NICHOLAS GORDON BEFORE THE RHODE ISLAND SUPERIOR COURT (MARCH, 1844)*, TRIAL TRANSCRIPT EDITED BY JOSEPH H. PARYS, ESQ. (1986)

12. *Charles and Tess Hoffman, Brotherly Love: Murder and the Politics of Prejudice in Nineteenth-Century Rhode Island (University of Massachusetts Press, Boston, 1993)*

13. *Patrick T. Conley, Ph.D., Esq., Death Knell for the Death Penalty: The Gordon Murder Trial and Rhode Island's Abolition of Capital Punishment. Rhode Island Bar Journal 34 (May 1986); reprinted and expanded upon in Patrick T. Conley, Ed. Liberty and Justice:*

A History of Law and Lawyers in Rhode Island (Providence, 1998), Chapter 17, pp. 274-283.

14. Compendium of information, resources, and discussion of notable 19th Century American murder cases. *http://murderbygasslight.blogspot.com/2010/07/amasa-sprague.html* (last visited on 3/14/11)

15. *National Research Council, Strengthening Forensic Science In The United States: A Path Forward (February, 2009)*

16. *Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (U.S. 2009)*(defendant's 6th Am. right to confront and cross examine requires that witness conducting forensic science analysis be made available to testify at trial)

17. *State v. John Gordon, 1 RI 179 (September Term, 1844).*Decision of the Supreme Court of Rhode Island sitting as an appellate court in John Gordon's Case.

18. Stories from *The Providence Journal* about the Gordon Case:

    a. April 9, 1844 and April 19, 1844. "Gavel to Gavel" trial coverage.

    b. January 5, 1900. Concerning the location of John Gordon's gravesite.

    c. May, 1933. Six part series in the *Providence Evening Bulletin* about the Gordon Case by Garrett Byrnes.

    d. *Bob Wyss, They did not know what they were doing, The Providence Sunday Journal Magazine, July 19, 1981*

    e. 2011. A variety of stories about the Gordon Case; reviews of the play by Ken Dooley about it; and an editorial in favor of pardoning John Gordon from February 6, 2011