

March 19, 2007

Hon. Joseph R. Lentol  
New York State Assembly  
LOB 632  
Albany, NY 12248

Dear Assemblyman Lentol:

This letter is to urge the Codes Committee to follow up on the Innocence Project's model legislation aimed at improving the preservation of biological evidence.

The retention of DNA evidence in criminal cases has received extensive national media coverage during the last year. The high profile exonerations of two men imprisoned in New York, Alan Newton and Scott Fappiano, received a substantial amount of attention around the state and were the focus of the October 10, 2006, hearing held by the Standing Committee on Codes, on which you serve as chairperson.

At the hearing, it was clear that there is significant room for improvement in the way that law enforcement agencies, particularly the New York City Police Department, store evidence.

According to the testimony of Peter Neufeld, Co-Director of the Innocence Project ("the Project"), which seeks to exonerate wrongfully convicted persons through the testing or re-testing of existing biological evidence, the Project has had to close 46 percent of their cases in New York State due to an inability to locate the crucial biological evidence for DNA testing.<sup>i</sup>

As a way to improve a system that Neufeld described as "inconsistent at best and a travesty at worst,"<sup>ii</sup> the Project formulated model legislation aimed at improving the preservation of biological evidence.<sup>iii</sup>

During its 2006-2007 term, the New York City Bar's Committee on Criminal Justice Operations has closely examined this issue and the Project's model legislation. The key provisions of this legislation call for the preservation of all biological evidence during all periods which a convicted person or his or her co-defendants are subject to incarceration, civil commitment, probation, parole and mandated registration as a sexual offender.<sup>iv</sup> In addition, if any biological evidence were to be destroyed before the expiration of the above-listed time periods, the state must give written notification 180 days prior to said destruction to all parties involved, as well as the public defender, the Attorney General, and the District Attorney for the county of conviction.<sup>v</sup> Any one of those parties may stop the destruction of said evidence by requesting it be retained. Remedies for non-compliance with the notice requirement include contempt, granting of a new trial, dismissal of charges or a modification of the sentence.<sup>vi</sup>

We certainly agree with Mr. Neufeld's assessment that changes need to be made to the current system.

Even so, our Committee cannot fully endorse certain key provisions of the Innocence Project's legislation, as written. Their model legislation would create a substantial and possibly untenable burden on law enforcement agencies in that it requires the storage of biological evidence for long periods of time. Because most cases involving DNA evidence are very serious crimes carrying decades long or life sentences and lifetime parole, probation or registration as a sex offender, a large quantity of evidence will accumulate that, without additional funding and legislation creating a modern cataloguing and storage system, will add to the existing problems that law enforcement agencies face in tracking and storing biological evidence.

The requirement that law enforcement agencies provide 180 days notice before destroying evidence will likely do little to reduce the mountain of evidence that will fill storage rooms across New York State. Each party to the underlying prosecution, including the defendant and co-defendants and their attorneys, holds a veto over the destruction. In practice, it seems unlikely under most scenarios that a convicted person or his attorney would allow evidence to be destroyed while that convicted person is still facing the consequences of his conviction.

Finally, the model legislation's remedies for non-compliance with the legislation's preservation requirements are vague and severe. There are no guidelines that would allow judges to uniformly apply the sanctions from case to case and nothing differentiating between instances of accidental disposal or misplacement of evidence versus deliberate destruction. Allowing a judge to grant a new trial or dismiss charges altogether because evidence has been destroyed not only creates the risk of an unduly harsh and unjust sanction, but also runs counter to the public policy interest in preserving the finality of a criminal conviction.

Despite the adjustments needed on the Project's model legislation, there is little debate that there needs to be improvement in the way biological evidence is stored and preserved in New York State. The Innocence Project's model legislation provides a sound framework for making such improvements a reality. Of course, as stated above, much additional work is needed to create a workable statute that will resolve the current system's problems without imposing a statutory regime that impedes the fair and efficient administration of justice.

Sincerely,

Robert S. Dean  
Chair  
Committee on Criminal Justice  
Operations

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<sup>i</sup> Testimony of Peter Neufeld, Co-Direct, Innocence Project, Before the New York State Assembly Standing Committee on Codes, October 10, 2006, p. 5.

<sup>ii</sup> Id. at p. 2

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<sup>iii</sup> “Biological evidence” is defined in the Project’s model legislation as “evidence that was collected in connection with a criminal investigation that may contain biological material, including but not limited to semen, blood, saliva, hair, skin tissue, fingernail scrapings, bone, bodily fluids, or any other identified biological material, and the biological material found is from a victim of the offense that was the subject of the criminal investigation or may reasonably be used to incriminate or exculpate any person for the offense.” Model Legislation, 2007 State Legislative Sessions: An Act to Improve the Preservation and Accessibility of Biological Evidence, the Innocence Project Inc., p. 2.

<sup>iv</sup> Model Legislation, 2007 State Legislative Sessions: An Act to Improve the Preservation and Accessibility of Biological Evidence, the Innocence Project Inc., p. 3.

<sup>v</sup> Id. at pp. 3-4.

<sup>vi</sup> Id. at p. 5.