



Barry C. Scheck, Esq.
Peter J. Neufeld, Esq.
Directors

Maddy deLone, Esq.
Executive Director

Innocence Project
100 Fifth Avenue, 3rd Floor
New York, NY 10011

Tel 212.364.5340
Fax 212.364.5341

www.innocenceproject.org

April 2, 2008

Suggestions Concerning External and Independent Crime Laboratory Oversight

Dear Members of the Task Force to Conduct a Review of California's Crime Laboratory System:

Thank you for allowing me to attend your meeting today. The Innocence Project appreciates your Task Force's great promise and its commitment to improving the delivery of forensic scientific services in California.

Furthermore, we respect the challenges you face as, in keeping with your statutory mandate, you "review and make recommendations as to how best to configure, fund, and improve the delivery of state and local crime laboratory services in the future." We believe that if the Task Force recognizes the importance of independent and external crime lab oversight, it only will advance the Task Force's ability to promote lab efficiencies, funding and improved forensic science service delivery throughout California.

The Innocence Project is a national litigation and public policy organization dedicated to exonerating wrongfully convicted people through DNA testing and reforming the criminal justice system. Our organization takes lessons learned from wrongful convictions and promotes procedural and policy reforms that can help prevent future wrongful convictions. One critical lesson we have learned is that effective oversight of forensic disciplines can ensure the quality of forensic evidence, but also provides a vehicle for effectively communicating to policymakers the needs of a jurisdiction's forensic community.

The Importance of Independent, External Entities

The Task Force should encourage crime labs to identify and empower oversight entities positioned independently and externally of them. Oversight bodies – which can take on many forms that I will further delineate below – can illuminate the challenges of forensic laboratories and their employees. Independent oversight entities would be uniquely enabled to comment on

state and local labs' broad-ranging forensic concerns such as backlogs in analysis, staffing shortages and training needs. Their objective voices could collectively relay those concerns to lawmakers. Such efforts can only bolster the good-faith endeavors of the state's forensic community, which regularly juggles substantial caseloads while struggling for the funding, equipment and staffing it deserves. Moreover, they would be consonant with the continued fulfillment of your Task Force's mission to consider the configuration, funding, and improved delivery of state and local crime laboratory services.

In other states, we have observed that independent and external oversight bodies monitor forensic laboratories' effectiveness, efficiency, reliability, accuracy and ability to adhere to the highest scientific standards. The entities simultaneously promote increased cooperation and coordination among forensic laboratories and other agencies. As the legislature identified in creating your Task Force, forensic analyses play an increasingly important role in criminal justice systems nationwide. To wit, comprehensive tracking and support of forensic work can ensure an effective use of forensic resources and the quality of forensic evidence.

Moreover, with oversight by independent and external entities, the courts and the public can be certain that forensic concerns are addressed in a way that ensures forensic evidence offered in future cases will accurately contribute to determinations of guilt or innocence.¹ One way to achieve such improvements is through investigation. The oversight entity on its own – or via delegation to another agency – can conduct independent investigations of allegations. These enable jurisdictions to identify the root causes of demonstrated forensic problems and employ remedies that can prevent them from resurfacing. As such, they help to strengthen and streamline criminal investigations and prosecutions – all while preventing future wrongful convictions.

An Added Benefit: Oversight Entities Can Improve Compliance with an Important Federal Forensic Grant Program

As a precondition for receiving funds under the Paul Coverdell Forensic Science Improvement Grant Program,² each lab that receives Coverdell monies must have an entity in place to conduct independent, external investigations upon receiving allegations of serious negligence or misconduct.³ California labs have been granted several million dollars of funding under the Coverdell program, and since 2004, recipient labs have been required to have independent investigative entities to continue receiving the monies.

Enforcement of this requirement undoubtedly will be more robust in coming years, and the

¹ A recently released study by University of Virginia School of Law professor Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev 55, 81 (2008), indicates that 113 (57%) of the nation's first 200 wrongful convictions proven by post-conviction DNA testing involved forensics at trial, including serological analysis of blood or semen, expert comparison of hair evidence, soil comparison and bite mark evidence.

² Paul Coverdell Forensic Science Improvement Grants are awarded to States and units of local government to help improve the quality and timeliness of forensic science and medical examiner services. (See <http://www.ojp.usdoj.gov/nij/topics/forensics/nfsia/welcome.htm#description>.)

³ See 42 U.S.C. 3797(k) (4).

failure of California labs to comply with the provision could put Coverdell funding in jeopardy. The U.S. Department of Justice's Office of the Inspector General (OIG) has written two reports that raised significant concerns regarding the enforcement, nationwide, of the external investigations provision.⁴ And in January of this year, the U.S. Senate's Committee on the Judiciary held a hearing in Washington that included significant discussion of the oversight requirement. Therein, the chairman of that committee, Sen. Patrick Leahy of Vermont, voiced his resolve to see enforcement bolstered.

What Constitutes Effective Independent and External Oversight?

There is no single way for a jurisdiction to institute effective independent and external oversight. Indeed, jurisdictions around the country handle such matters in a variety of fashions, and their decisions reflect the distinct voices and opinions of crime lab stakeholders in each locality. But all of them are inherently, in their structure and positioning, independent and external of the labs they oversee.

1. In Massachusetts, for instance, the state has sited crime laboratory oversight with its *State Auditor's office*;
2. Maryland passed a law last year that places oversight authority for crime labs under the state's *department of health and mental hygiene*;
3. New York State has a *Commission on Forensic Science*, and it has delegated the authority to conduct Coverdell investigations to the *New York State Inspector General*.
4. We are joined today by Mr. Frank Dolejsi of Minnesota, whose state has implemented a *Forensic Laboratory Advisory Board*.
5. And Texas has a *Forensic Science Commission* that was created specifically to investigate allegations of serious forensic negligence or misconduct.

Uniting these varied oversight entities is a recognition that significant errors are more likely to be revealed by bodies that are distinctly separate from the employees or management of the labs they supervise. It is crucial to note that a state or locality need not create a new apparatus to provide external and independent oversight – although it may choose to do so. Many jurisdictions across the country instead have tasked existing entities with such oversight.

We do suggest, however, that it may be more in keeping with your Task Force's mandate to encourage efficiency if it were to support a statewide independent and external oversight entity. If your task force were to encourage determinations of oversight at the local level, that could result in the very inefficiencies and redundancies your Task Force is intended to eliminate across the state.

Concerns with Using Internal Affairs for Independent and External Oversight:

Surveys conducted separately by the Innocence Project and by the U.S. Department of Justice's

⁴ Please see the two reports, published respectively in December 2005 and January 2008, at <http://www.usdoj.gov/oig/reports/OJP/e0602/> and <http://www.usdoj.gov/oig/reports/OJP/e0801/final.pdf>.

OIG each revealed that most of California's laboratories named internal affairs entities to conduct investigations into allegations of serious negligence or misconduct in the context of their Coverdell certifications. But by definition, an *internal affairs* investigation is not an *external* investigation. As such, the Innocence Project is concerned about the use of internal affairs entities to conduct independent and external investigations. We have yet to observe a local police department or crime laboratory internal affairs division conduct a crime lab investigation completely free from influence, if not supervision, by its upper laboratory management. Internal investigations carried out in Virginia, Montana and New York all were compromised by conflicts of interest or by the involvement of laboratory management. A recent internal affairs investigation conducted in this state underscores this reality.

Jeffrey Rodriguez (Santa Clara County, CA):

In Santa Clara County, the entity designated to conduct independent and external investigations is the de facto internal affairs arm of the District Attorney's Office: its Bureau of Investigation. (The crime lab in Santa Clara County is a division of the District Attorney's office.)

A robbery case prosecuted by the Santa Clara District Attorney's office, against Jeffrey Rodriguez, involved forensic evidence and testimony that was credibly alleged to have been plagued by serious negligence or misconduct. Pursuant to the certification made under the California Coverdell grant application, the Northern California Innocence Project (NCIP) petitioned the District Attorney (DA), Ms. Delores Carr, who is also a member of this Task Force. They asked her to have her Bureau of Investigation scrutinize the seemingly error-prone fiber analysis methods at her lab that were crucial to Mr. Rodriguez's conviction.

In the Rodriguez case, Mark Moriyama of the Santa Clara District Attorney's crime laboratory asserted – both in written reports and in testimony – that oil-like deposits on Mr. Rodriguez's jeans connected Mr. Rodriguez to a robbery. Mr. Rodriguez was found guilty, but the conviction ultimately was overturned. In consideration of potential re-trial, other government experts from outside the lab deemed Mr. Moriyama's findings regarding the oil-like deposits insupportable. Based upon the questions raised by those subsequent analyses of the deposits, the District Attorney decided not to re-try the case against Mr. Rodriguez. Later, the courts ultimately declared Mr. Rodriguez factually innocent of the crime.

It is its allegation of forensic negligence or misconduct that it filed with Ms. Carr, the NCIP called for an investigation of Mr. Moriyama's work to assess whether the lab had relied on errant analysis to convict Mr. Rodriguez in the first place, and whether problems with fiber analysis may have tainted other cases the lab handled. Several months later, the DA's office published a report in response to the NCIP's allegation. However, that report did not provide an objective analysis of Mr. Moriyama's forensic work. Rather than focusing on whether a problem occurred, and, if so, why and what remedial measures might be appropriate, the report instead defended the propriety of Mr. Rodriguez's conviction and the role of Mr. Moriyama's testimony therein.

In particular, the report did not adequately explain how Mr. Moriyama's forensic analysis

deviated so dramatically from the examinations of other analysts who looked at the same fiber evidence and could not corroborate his conclusions. The DA's report also failed to provide guidance that might prevent recurrence of a forensic error.

The investigative shortcomings troubled many, including the editorial board of the San Jose Mercury News. It wrote on November 9th of last year that Ms. Carr "could have turned the complaint over to an outside expert or the state Attorney General's Office. That would have signaled to the community that when it comes to addressing problems with prosecutions, her office has nothing to hide and no one to protect."

Internal affairs divisions can be compromised by conflicts of interest that undermine their objectivity when they must report their results to the public. It is one thing for an entity's internal management to determine how to conduct itself based on its own internal reviews, but yet another to provide the public with assurances of quality when there is potential fiscal liability and political risk.

The Shortcomings of Turning to a Locality's District Attorney to Oversee the Locality's Labs

The Innocence Project similarly believes that district attorneys or other prosecutors should not be the oversight entities for the labs in their jurisdictions – even if, as opposed to District Attorney Carr's, those labs operate outside the prosecutors' chains of command. DAs typically rely on the laboratories in their jurisdictions for forensic results, and as such, they lack the necessary independence and externality that makes oversight worthwhile. Indeed, such DAs are faced with inherent conflicts of interest that can otherwise obscure the information necessary to ensure the integrity of forensic results.

Jimmy Ray Bromgard (Montana):

The case of Jimmy Ray Bromgard of Montana, the 111th person exonerated by post-conviction DNA testing, illustrates the problem. The testimony of the state's Department of Justice crime lab director Arnold Melnikoff played a crucial role in sending Bromgard to prison for a young girl's rape. Although he lacked a scientific basis for asserting so, Melnikoff testified that microscopic comparisons of hair evidence demonstrated a one-in-ten-thousand chance that two hairs found on the child's bedding belonged to someone other than Bromgard.

At the request of the Innocence Project, a peer review committee of the nation's top hair examiners reviewed Melnikoff's testimony, issued a report concluding that his use of statistical evidence was junk science and urged Montana's Attorney General to independently audit Melnikoff's work in other cases. Two more Montana inmates were exonerated by DNA in two other criminal cases in which Melnikoff had offered the same fabricated statistics he offered against Bromgard. Moreover, at the request of the prosecution, the FBI hair unit re-examined the hairs in the Bromgard case and concluded that Mr. Bromgard was – in direct contradiction of Melnikoff's findings – excluded as the source of the hairs.

Yet even then, the Montana Attorney General refused to order an external independent audit.

Instead, he conducted his own internal review, employing a retired law enforcement officer who had relied on Melnikoff to make cases and at least one state crime lab employee who had been trained by Melnikoff. His report concluded there was no reason to re-examine the evidence in Melnikoff's other cases.

Ultimately, it was revealed that, before the state Attorney General had assumed that post, he had been a county prosecutor who had used Melnikoff as his expert witness in numerous cases that either he personally tried or supervised. This made it difficult for him to investigate crime lab matters with absolute objectivity that was required.

Accreditation by a Laboratory Organization, Alone, Should Not Be Considered Sufficient External and Independent Oversight

The Innocence Project believes that the grant of accreditation by a laboratory accrediting organization (such as ASCLD/LAB, over which Mr. Dolejsi presides, or Florida's Forensic Quality Services) certainly encourages lab improvements and efficiencies. Nevertheless, in and of itself, such a grant of accreditation is insufficient to provide external and independent oversight. Although unquestionably, such accrediting organizations fulfill critical roles in the overall improvement of the delivery of forensic services, they are not structured to provide laboratories with independent and external oversight. Indeed, routine internal audits and external inspections currently mandated by such organizations do not (nor are they meant to) substitute for independent and external oversight of a laboratory.

Nevertheless, the Innocence Project considers it completely acceptable for an independent and external oversight entity to delegate the role of investigations to an accrediting body – so long as that oversight entity signs off on the findings of such an outsourced investigation before any of its recommendations is implemented. ASCLD/LAB, for instance, conducted such an investigation when it audited the Virginia Department of Forensic Science's handling of the Earl Washington case. Mr. Washington, of course, was a death-row inmate in Virginia who came within days of execution, only to be exonerated with post-conviction DNA testing results.

Oversight Entities Should Adopt a Consistent Investigatory Process:

Finally, although we do not suggest a specific type of independent and external oversight entity that the Task Force should encourage, we offer a model ***process*** that the entity (or its delegate) could use for any investigation concerning serious forensic negligence or misconduct that might proceed under its watch. Any such investigation should:

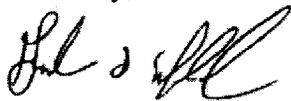
1. identify the source(s) and the root cause(s) of the alleged problems;
2. identify whether there was serious negligence or misconduct;
3. describe the method used and steps taken to reach the conclusions in parts 1 and 2;
4. identify corrective action to be taken;
5. where appropriate, conduct retrospective re-examination of other cases which could involve the same problem;

6. conduct follow-up evaluation of the implementation of the corrective action, and where appropriate, the results of any retrospective re-examination;
7. evaluate the efficacy and completeness of any internal investigation conducted to date;
8. determine whether any remedial action should be adopted by other forensic systems; and
9. present the results of Parts 1-8 in a public report.⁵

Conclusion:

External and independent crime lab oversight can bolster the quality of California's forensic sciences in a number of significant ways. We encourage the Task Force to consider its multitude of merits and gladly would provide you with materials to supplement this testimony. Thank you for your consideration.

Sincerely,



Gabriel S. Oberfield, J.D., M.S.J.
Research Analyst / Policy Department
(212) 364-5347
goberfield@innocenceproject.org

⁵ This proposed process derives from a 2007 document of the U.S. Government Accountability Office – “Government Auditing Standards: January 2007 Revision,” available at <http://www.gao.gov/govaud/d07162g.pdf> (last visited March 31, 2008). See sections 3.01-3.39.