

American Bar Association

ADOPTED BY THE HOUSE OF DELEGATES

July 10-11, 2000

Criminal Justice (Report No. 115)

RESOLVED, That the American Bar Association urges federal, state, local and territorial jurisdictions adhere to the following Principles concerning Biological Evidence collected in conjunction with the investigation of a criminal case:

- 1. All biological evidence should be preserved.**
- 2. All biological evidence should be made available to defendants and convicted persons upon request and, in regard to such evidence, such defendants and convicted persons may seek appropriate relief notwithstanding any other provision of law.**
- 3. All necessary funding to accomplish these principles should be provided.**
- 4. Appropriate scientific and privacy standards should be developed to guide the preservation of biological evidence.**

REPORT

From its inception, the American system of criminal justice has held inviolate the protection of the innocent. The nightmare that haunts the sleep of every practitioner in the criminal arena is the wrongful conviction of the innocent defendant. The presumption of innocence, requirement of a unanimous jury verdict, Fourth Amendment protections and the right to counsel, to name a few, all serve to insulate citizens from the possibility of being wrongfully convicted. But the adversarial system has always been subject to the flaws of human perception, bias, prejudice and error. With the recent development of DNA testing, however, science presents an opportunity to both improve the reliability of the criminal justice system, and to reveal the errors of the past.

In response to the growing importance of the role that DNA analysis plays in the identification of perpetrators of crime, and in exonerating the wrongfully convicted, the American Bar Association Criminal Justice Section formed, in the autumn of 1999, an Ad Hoc Committee on DNA ("Committee"). The Committee noted that the ABA has no policy specifically pertaining to DNA and other biological evidence. Accordingly, it examined the unique challenges and benefits that DNA evidence presents to the criminal justice system and developed a set of principles for the use of DNA and biological evidence. Those principles were reviewed by the Criminal Justice Section Council ("Council") at its April 1, 2000 meeting and revised. The revised principles approved by the Council are set forth in the "Recommendation" that accompanies this "Report."

These principles are not comprehensive on the subject of DNA and biological evidence. However, it was recognized by the Criminal Justice Section Council that some foundational principles urgently needed to be presented to the ABA House of Delegates as the basis for fundamental policy on the issue.

This urgency stems from the rapidly emerging use of such evidence in criminal cases and a recognition of the potential value it has in bringing an added measure of justice to such cases. It is also necessitated by the existence of pending legislation (e.g. S2703, The Innocence Protection Act of 2000 in the 106th Congress). It is important that the American Bar Association be a player in shaping such legislation. It cannot do so without the requisite relevant Association policy.

Recognizing that the principles set forth in this "Recommendation" are not comprehensive, the Committee proposed development of broader and more detailed standards. The Council agreed with this proposal and is now engaged in the preliminary stages to assess the need and feasibility of developing such standards as part of the *American Bar Association Standards for Criminal Justice*.

A drafting task force could address various issues. For example, it might set forth minimum scientific standards and protocol for the collection, packaging, storage, apportioning, testing, analysis, report writing and testimony with regard to DNA and other biological evidence. The development of such standards could make a significant contribution to the way criminal cases are investigated and tried in the future. They could also be of value to persons other than

lawyers and judges who are involved in handling criminal cases. All agencies and personnel coming into contact with potential DNA samples, beginning with initial collection at the crime scene, through sample testing, storage and disposal could benefit from such standards.

The Committee also recognized the need to study the apparently emerging instances of convicted persons who are exonerated by DNA and other biological evidence. The Council agreed and approved development of a Section project under the auspices of a "blue ribbon" panel to assess this trend, determine whether any systemic changes to our justice system are required, and recommend remedial measures that may be needed to establish the innocence of persons erroneously convicted and rectify the results of such convictions.

While DNA evidence has acted as the harbinger of truth for many of the erroneously convicted, exoneration of these people should not be confused with vindication of the criminal justice system, nor should it end the search for truth. Rather, the opportunity that science has provided must be a touchstone to learn from the failures of the past and to make the criminal justice system more just. The exoneration of the wrongfully convicted is no small feat and, when taken on the whole, it represents the system's ability to correct itself. But true vindication of the system is not complete until the lessons of the wrongfully convicted are fully understood and widely disseminated. It is for these reasons and in search of this purpose that the Section endorsed the creation of the "blue ribbon" panel.

Principles for the Use of DNA Evidence

The rapid advance of science and technology has dramatically altered the manner in which all phases of the criminal justice system operate. Prosecutors, defense counsel, judges and the police have all been aided in the search for justice by innovations in the computer, the forensic sciences and even the video camera.

DNA testing in particular, like many new technologies, has opened doors to amazing possibilities while at the same time challenging the human ability to perceive, to judge and to weigh facts. Because the criminal justice system relies profoundly upon human judgment and perception in its search for the truth, it is essential that some general principles be established that enunciate how, when and by whom new technologies, such as DNA analysis, should be utilized within the criminal justice system. In adopting this recommendation the American Bar Association recommends the following principles for biological evidence:

A. Preservation of Collected Evidence

Potential biological and DNA samples collected in the course of an investigation should be preserved. It is especially important that they be preserved at least until the convicted person is acquitted or any period of sentence, probation or parole has expired. Where biological evidence is to be destroyed or discarded, it should be done so only after notice has been given to the relevant convicted person so that they may have the opportunity to preserve such evidence.

The 1996 National Institute of Justice report¹ ("NIJ Report") highlighted the increased utilization of DNA evidence in the justice system and the importance of setting and maintaining high standards in the forensic sciences. In studying the cases of twenty-eight postconviction exonerations in fourteen states and the District of Columbia, the NIJ Report highlighted the practice of some states in destroying evidentiary materials once convicted persons have exhausted their appeals.² In the instances of several exoneration cases it has been only by sheer fortune, or even accident, that the ultimately exculpatory evidence had been retained and recovered.³

Where biological evidence is retained it is essential that precautions be taken to prevent sample degradation and that a proper chain of evidence be documented. As part of its 1996 report, the National Institute for Justice collected DNA analysis related data, involving 21,621 cases in all, from nineteen state, local and federal laboratories. Among the findings were that 16% of the tests performed were inconclusive, "often because the test samples had deteriorated or were too small."⁴

Unlike testimonial evidence biological and DNA evidence, if collected and preserved properly, do not degrade over time and are not subject to the limits of human perception or bias. These types of evidence also present the justice system with a unique opportunity for self-evaluation and correction. By failing to properly document and preserve biological evidence their potential value to our system of justice will be lost.

B. Availability to Defendants

Making DNA and other biological evidence available to defendants at trial and to convicted persons for post conviction proceedings and investigations is essential. The lesson to be learned from the NIJ Report is credible and clear: DNA evidence has provided concrete, reliable evidence establishing conclusively a significant number of cases where the judicial process has failed. Because it retains reliability over time, DNA evidence challenges the foundation upon which restrictions of post conviction relief have historically been predicated.

"The strong presumption that verdicts are correct, one of the underpinnings of restrictions on post conviction relief, has been weakened by the growing number of convictions that have been vacated because of exclusionary DNA results."⁵ More than sixty-five wrongful convictions have been identified and reversed, in the United States and Canada, in the seven years since DNA testing has been made widely available.⁶ Among the individual case studies in the NIJ Report, the average length of incarceration of the wrongfully convicted was seven years.⁷ More recently

¹ EDWARD CONNORS, ET AL., National Institute of Justice, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (1996).

² NIJ Report, p. 26.

³ See *id.* at Chpt. iv for an overview of each case studied and the problems with lost or destroyed evidence in each.

⁴ *Id.* at 20.

⁵ National Commission on the Future of DNA Evidence, POSTCONVICTION TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS, xiv (1999).

⁶ S2703, The Innocence Protection Act of 2000

⁷ NIJ Report, at iii

the average time of incarceration in postconviction exoneration cases was determined to be over nine and one half years.⁸ Taken independently, each of these failures is a tragedy that no citizen should have to endure, it is time from their lives that can never be returned. Collectively, however, these cases represent an opportunity that the criminal justice system cannot afford to ignore in its pursuit of justice.

Despite the volume of post conviction exonerations that have rested upon DNA evidence, only two states currently authorize postconviction DNA testing for inmates⁹ and most states require that a motion for new trial based upon newly discovered evidence be brought within six months of sentencing.¹⁰ It is of note that the bulk of postconviction exonerations are concentrated in the two jurisdictions that do authorize postconviction DNA testing where a reasonable probability exists that the tests will exonerate the inmate.¹¹

Due to the recent advent of DNA testing, the application of strict time limitations on the review of newly discovered evidence creates a risk that significant numbers of wrongful convictions could go on unchallenged. In addition, these strict time limits and arcane procedural structures tend to needlessly protract the legal process in credible, science based exoneration cases, thereby increasing cost, wasting judicial resources and lengthening potentially unjust prison sentences. By guaranteeing to all defendants early and open access to biological and DNA evidence, no matter when such evidence is discovered, and by modernizing post conviction relief time limitations in light of this type of evidence, we can further insure the equitable dispensation of justice.

C. Financing

The American Bar Association has long recognized the need for adequate funding of all aspects of the criminal justice system. The judiciary, the prosecution and the defense all need adequate funds to ensure that justice is dispensed equitably.

Funding for the preservation and testing of DNA and other biological evidence, while also making this evidence available to the defense, benefits all facets of our justice system. It ultimately will produce savings. These savings are financial, because resources will not be devoted to the retrial and incarceration of the innocent. But these savings will also be recognized in the credibility of the justice system because the innocent will be set free.

⁸ SCHECK, BARRY ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION, AND OTHER DISPATCHES FROM THE WRONGFULLY CONVICTED, App. 2, (2000).

⁹ (only Illinois and New York statutorily authorize such testing) *Id* at App.2.

¹⁰ S2703, The Innocence Protection Act of 2000, p.4.

¹¹ Scheck et al, app.2.

CONCLUSION

Biological and DNA evidence pose both great challenges and opportunities to our justice system, neither should be squandered. Adoption of this recommendation by the Association will allow our voice to be heard on a topic that is critical to the credibility and future of the justice system. With so much at stake, the American Bar Association can ill afford not to take the lead.

Bruce M. Lyons
Criminal Justice Section Chair
July, 2000

GENERAL INFORMATION FORM

To Be Appended to Reports with Recommendations

Submitting Entity: Criminal Justice Section Council

Submitted By: Bruce M. Lyons, Criminal Justice Section Chair

1. Summary of Recommendation(s).

The recommendation urges federal, state, local and territorial jurisdictions to agree to three principles concerning biological evidence in criminal prosecutions: the preservation of biological evidence; availability to defendants of biological evidence with the unfettered right to seek appropriate relief for wrongful conviction; provision of all necessary funding for the purpose of seeking such relief.

2. Approval by Submitting Entity.

The Criminal Justice Council approved this resolution, as amended, at its Spring Meeting, April 1, 2000, in Park City, Utah.

3. Has this or a similar recommendation been submitted to the House or Board previously?

This resolution has not been submitted to the House of Delegates or the Board of Governors. The ABA currently has no policy on biological evidence, nor has any similar policy been contemplated by the House or Board in the past.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

The Association currently has no relevant policies on this topic.

5. What urgency exists which requires action at this meeting of the House?

As described within the report, biological evidence, and particularly DNA, is playing an increasingly important role within the criminal justice system. The recent development of recent scientific technology has enabled the criminal justice system to identify the innocent and guilty with high level of certainty. Of particular urgency and concern is the

identification of a growing number of cases involving convictions of innocent persons. In many of the cases involving these convicted persons, officials have discovered that biological evidence was only mistakenly retained or that, had proper funding been made available or the rules of criminal procedure more amenable, the wrongfully accused would be vindicated much more swiftly. This resolution would allow the Association to actively assist federal, state, local and territorial jurisdictions in their respective endeavors to recognize the nature and significance of biological evidence within the criminal justice system.

6. Status of Legislation. (If applicable.)

There are currently bills pending in the United States Senate and House of Representatives concerning the DNA evidence in the criminal justice system. Neither versions have made it out of their respective committees.

7. Cost to the Association. (Both direct and indirect costs.)

Adoption of this resolution would not result in direct costs to the Association. The only anticipated costs would be indirect costs that might be attributable to lobbying to have the recommendation implemented or adopted at the relevant jurisdictional level. These indirect costs cannot be estimated, but should be negligible since lobbying efforts would be conducted by existing staff members who are already budgeted to lobby for Association policies.

8. Disclosure of Interest. (If applicable.)

No known conflict of interest exists.

9. Referrals.

Concurrently with submission of this report to the ABA Policy Administration Office for calendaring on the July 2000 House of Delegates agenda, it is being circulated to the following:

Standing Committees:

Legal Aid and Indigent Defendants

Sections, Committees, Commissions and Forums:

Coordinating Group on Bioethics and the Law
Coalition for Justice
 Committee for State Justice Initiatives
Government and Public Sector Lawyers Division
Individual Rights and Responsibilities
Judicial Division
 National Conference of Federal Trial Judges
 National Conference of State Trial Judges
Litigation
Science and Technology
State and Local Government Law
Young Lawyers Division

Affiliated Organizations:

The Conference of Chief Justices
The Federal Bar Association
National Association of Attorneys General
National Association of Criminal Defense Lawyers, Inc.
National Bar Association, Inc.
National Conference of Commissioners on Uniform State Laws
National District Attorneys Association
National Legal Aid and Defender Association

10. Contact Person. (Prior to the meeting.)

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