

October 27, 2009

To: Sen. Cynthia Stone Creem and Rep. Eugene L. O'Flaherty
and members of the Joint Committee on the Judiciary

From: Jeremy E. Gruber, President
Council for Responsible Genetics

Senate Bill 1659 - An Act to Provide Access to Forensic and Scientific Analysis

Introduction:

My name is Jeremy Gruber and I am the President of the Council for Responsible Genetics (CRG). Founded in 1983, CRG is a national non-profit organization based in Cambridge, Massachusetts that studies the social, ethical and environmental implications of genetic technologies. CRG seeks to distribute accurate information and represent the public interest on emerging issues in biotechnology. CRG also publishes a bimonthly magazine, *GeneWatch*, the only publication of its kind in the nation. Among other accomplishments, CRG played a leading role in enacting Massachusetts' genetic discrimination law and I worked closely with Senator Kennedy in leading the successful effort to pass the Genetic Information Nondiscrimination Act in Congress. CRG has assisted policymakers at the federal and state levels to formulate policies on various topics related to genetics and has played a leading role in educating the public on issues ranging from forensic DNA databases to cloning and biological weapons.

Testimony:

"Justice is the end of government. It is the end of civil society. It ever has been, and ever will be pursued, until it be obtained, or until liberty be lost in pursuit." Madisons's declaration in Federalist no. 51 is as relevant today as it was during his own time. The principles of liberty that he espoused long preceded the Due Process Clause of our Constitution, they served as the very bedrock of the founding of this nation. Threats to liberty remain ever present today; nowhere more so than in the interplay between cutting-edge technology and its ability to both promote and undermine freedom. New genetic technologies, in particular, pose unprecedented challenges as well as benefits to human integrity, individual liberty and the health of the biosphere. The questions that these technologies raise affect all of us.

Massachusetts has a long and proud tradition of understanding and responding to these challenges. As a world leader in genetic research our state recognized early on both the potential for improvements in the human condition that such research offered as well as the potential for harm. In 1995, long before most states had studied this issue, this body created the Special Committee on Genetic Information

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Policy to do so. The Council for Responsible Genetics worked hard with the Committee and the entire legislature and in 2000, the state of Massachusetts passed the strongest and most comprehensive law in the country safeguarding the confidentiality of genetic information and protecting against its misuse. Only last year did Congress catch up and pass similar legislation. I worked for 12 years leading that effort and working with the lead sponsor Senator Kennedy. As the debate over federal legislation progressed, the Massachusetts law regularly served as a standard to aspire to and even after the passage of a federal law, Massachusetts citizens still have the strongest protections in the country.

They have these protections because well over ten years ago, this body appreciated the tremendous identification potential that DNA offers. This body recognized that genetic information describes our individual lineage, pre-disposition to certain diseases and conditions, and physical characteristics. It responded by ensuring that the citizens of Massachusetts were given back control over their own DNA, ensuring that it was not used improperly and protecting its privacy.

The citizens of Massachusetts have an equally strong interest, indeed an even stronger interest in actually using their own DNA to prove their innocence after they have been convicted of a crime. Yet no statutory protections exist. The Council for Responsible Genetics believes that all people have the right to DNA tests to defend themselves in criminal proceedings. DNA testing is a powerful scientific tool; there is perhaps no development in criminal law as important as DNA testing for proving guilt or innocence. New technologies and methods for DNA analysis have improved our ability to successfully analyze aged, degraded or otherwise compromised evidence. While we must remain vigilant that DNA samples are handled properly and that safeguards against mistakes are adopted, we must ensure that post conviction DNA testing is available. Forty-seven states have recognized such and passed post-conviction DNA testing laws. Massachusetts stands in poor company with Alaska and Oklahoma as the only states that have failed to act in this area.

The first exoneration through DNA testing occurred in 1989. That's twenty years ago. Since then, 240 people in the United States alone have been exonerated by DNA testing after they were convicted of a crime including a number of individuals who had originally pled guilty and almost twenty people on death row. The innocent individuals had served an average of 12 years in prison before exoneration and release. Consider the case of Neil Miller, convicted of aggravated rape and breaking and entering in Boston almost entirely on eye-witness testimony. He was sentenced to twenty-six to forty-five years in prison. After serving almost ten years in prison he was exonerated by DNA testing. Or consider the case of Anthony Powell, who served twelve years of a 12-20 year sentence in a Massachusetts state prison after being erroneously convicted for kidnapping and rape by eye-witness testimony. He was exonerated by DNA testing.

The Council for Responsible Genetics believes there must be a statutory remedy for these mistakes that gives an innocent individual-although convicted-a chance to prove his innocence and regain his liberty. While the scope of rights of a defendant may be limited post-conviction, fundamental fairness dictates that if the state of Massachusetts has the evidence that would establish guilt or innocence of an individual, it is incumbent upon it to seek the truth. As the Ninth Circuit Court of Appeals noted in describing the need for access to post-conviction DNA testing in *Osborne v. District Attorney's Office*: "Although finality is undoubtedly an important consideration, it is not such an immovable force as to override the due process interests at stake." In fact such testing has in many cases led to new lines of investigation and even additional new evidence.

It is insufficient to rely on the discretion of prosecutors and judges to ensure that appropriate post-conviction DNA testing takes place. To be sure, a host of individual prosecutor's and entire district attorney' offices themselves have shown a concern for justice by attempting to remedy the problem of wrongful convictions. Nevertheless conduct of prosecutors can have a negative impact on the outcome of post-conviction innocence claims. They can oppose DNA testing altogether or simply stall in turning over the DNA evidence sought by the defense, which is almost invariably in the possession of law enforcement. In 50% of cases that have led to exoneration by DNA tests, prosecutors failed to initially consent to DNA tests. Some have even continued to fight claims of innocence even after DNA testing has exculpated the defendant. The zeal with which DNA

testing is readily adopted to seek convictions is rarely matched post-conviction. Our criminal justice system cannot be allowed to place obstacles in the way of post-conviction DNA testing that could determine whether the wrong people have been convicted and punished for crimes they did not commit.

Prosecutors themselves have long recognized the need for a statutory solution. In 1998 then Attorney General Janet Reno established the National Commission on the Future of DNA Evidence in response to an even earlier report from the National Institutes of Justice entitled *Convicted by Juries, Exonerated by Science: Case studies in the Use of DNA Evidence to Establish Innocence After Trial* which provided a stinging indictment of current methods for handling such claims. In 1999 the Commission issued multiple recommendations to encourage post-conviction DNA testing. As Scott Burns, Executive Director of the National District Attorney's Association has subsequently stated "If there's any question at all and if there's any way that a forensic test would be helpful. I think the vast majority of prosecutors and of Americans, I think we ought to do the test."

Indeed Massachusetts own Congressman Bill Delahunt, himself a Norfolk County district attorney for more than twenty years, spent five years of his political career championing the successful passage on Capitol Hill of the Innocence Protection Act that, among other things, grants any federal inmate the right to petition a federal court for DNA testing to support a claim of innocence. As Congressman Delahunt noted:

"The search for truth is a fallible process and mistakes happen. Think of the human costs when an innocent person is executed or spends long years in jail. Imagine the scars when a victim waits years to know the identity of their assailant. We are not talking about hypothetical scenarios. We are talking about real people, ordinary Americans facing the most extreme miscarriages of justice. I think this is something of profound consequence. This is about protecting innocent people and ensuring that those who are culpable of capital crimes are held responsible."

It is clear that a strong statutory solution is required. Such a law must:

- 1) Preserve and account for biological evidence of a crime and ensure proper standards are employed for accuracy of testing.
- 2) Eliminate procedural bars and develop reasonable standards to permit undergoing such testing.
- 3) Prevent unnecessary and counter-productive expansion of DNA databases.
- 4) Allow such testing in cases where DNA can establish innocence.

For these reasons, the Council for Responsible Genetics urges the Joint Committee on the Judiciary to move quickly to pass a strong and comprehensive law providing for post-conviction DNA testing. The right to liberty, to defend one's innocence and prevent continued unjust incarceration is paramount. Massachusetts must once again regain its role as a national leader in addressing the social and ethical implications of new technologies and biotechnologies in particular. The Council for Responsible Genetics offers its expertise and assistance and welcomes the opportunity to work with this Committee and the legislature as a whole to find a just solution to this glaring injustice.