

Cooley's Challenge

Innocence Project teams students with lawyers to free the wrongfully convicted

By Naseem Stecker

A decision is made. The verdict pronounced. The convicted person responds in disbelief and pain. "I'm innocent, I'm innocent," he screams, as he is dragged out of the courtroom. Justice may have been served. The prosecution and the jurors acted in good faith—but there's still a nagging doubt. "What if he really was innocent?"

Since the late 1980s, the use of DNA testing, a sophisticated method of genetic fingerprinting that can identify individuals with great precision, is showing us that there are many instances in which innocent people have been sent to prison.

The exact number of such people in prison is unknown. However, a National Institute of Justice report on innocence says that of the approximately 10,000 sexual assault cases referred to the FBI in the last decade, 26 percent of the primary suspects were exonerated due to DNA testing. Since 1992, 85 people in the United States have been freed from prison after post-conviction DNA testing. Ten of these DNA exonerations involved people who had been sentenced to death.

As part of a growing national movement, the Thomas M. Cooley Law School in Lansing started an Innocence Project this spring to free the wrongfully accused now languishing in Michigan prisons. A new law on DNA testing, which gives Michigan felons a five-year window—until January 2006—to make a belated case for any DNA testing, gives teeth to the Cooley project. Even before the official start-up date, hundreds of inquiries

had been coming into the office of Professor Norman Fell, executive director of the Innocence Project at Cooley Law School.

"With the resources that we have, we are going to try to identify those people who have been wrongfully convicted, offer them representation, and seek their release through the use of DNA testing to prove that they could not have been the ones who committed the crime," Fell said.

According to Fell, the nation's prisons and jails hold inmates who could not afford DNA testing at the time of their conviction. Others were locked up before the testing reached its present degree of sophistication. In yet other cases, a combination of police and prosecutorial misconduct combined with ineffective assistance of counsel resulted in convictions.

The Cooley Innocence Project does not have a political or ideological agenda, Fell explained. "It's not conservative or liberal, it's not pro prosecution or pro defense. It's about right and wrong. It is about correcting an imperfection in our system of justice. To allow an innocent person to languish in prison for a crime he did not commit is unconscionable. We now have scientific means by which guilt or innocence may be established to a certainty. We have the means to correct a wrong. There can be no reasonable justification for not doing so."

The Cooley program, which will team students and lawyers, is modeled after the Innocence Project founded by Barry Scheck and Peter Neufeld at Cardozo Law School in

New York. The Innocence Project there is responsible for the release of 50 wrongly convicted prisoners through the use of DNA testing. Scheck, a DNA expert and one of the defense lawyers in the O.J. Simpson case, visited Lansing in March for a lecture.

"DNA testing has given us an opportunity, a great burning moment to take a look at the system and see what factors contribute to wrongful convictions and what we can do to prevent it," Scheck said. "Every time an

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founded by

innocent person is wrongfully arrested, convicted, sentenced, or, God forbid, executed, the real perpetrator is out there committing more crimes. The project which this law school is now beginning is definitely something that is for American values. This is a public safety imperative. Everybody wants the law to get the right person."

Scheck also said that while DNA testing is obviously a great tool for exonerating people, it's not a panacea to cure the ills of the justice system. He advocates changes such as more funding and resources for laboratories, overburdened police, and prosecutors, as well as setting up ethics review boards as a form of record keeping for judges and prosecutors. "You've got a lot of work to do here in Michigan," he added.



Left to right: Norman Fell, Barry Scheck, F. Martin Tieber, and Frank Reynolds

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Scheck's Innocence Project at Cardozo Law School has been looking into a Calhoun County case that is making legal history in Michigan. Two men closely associated with Cooley's Innocence Project, F. Martin Tieber, who is responsible for bringing the project to Michigan, and Frank Reynolds, vice-chairman of the project, are currently handling the Michael Hicks case in Calhoun County. Battle Creek attorney Patrick M. O'Connell assisted Reynolds in handling the trial court work leading to the favorable order on behalf of the Cooley Innocence Project.

Convicted for a 1993 rape, Hicks is one of the first in the state to get his case revisited under the new DNA testing law. The

judge in the case, Allen Garbrecht, has ordered evidence released for testing that could prove Hicks's claim that he didn't commit a brutal rape in 1993. The prosecutor John Hallacy appealed the ruling. In late April, the court of appeals denied the prosecutor's appeal. Hallacy said he was not going to appeal to the Michigan Supreme Court. The appeals court ruling clears the way for testing in a California laboratory that will be examining a critical piece of evidence—a pillowcase—to determine if the semen stains on it are Hicks's. If they are not, the next step for his lawyers will be to argue for a new trial.

Like Reynolds and Tieber, over 160 Michigan attorneys have volunteered to take these cases on a pro bono basis. Tieber, who

is the long-time director of the Lansing Office of the Michigan State Appellate Defender, developed the attorney panel concept that is unique to Cooley's Innocence Project.

"Most of these Innocence Projects like the ones at Wisconsin, Cardozo, and several others around the country actually have litigators who are professors on salary to the schools. They actually go into court and do the cases. That's not going to be the structure of our project. We are going to build the cases in the law school, research them, and develop them so that they are going to be taken to court by one of these participating attorney panels... these are the best practitioners in the state," Tieber said.

Tieber also played a key role in helping to hammer out legislation proposed by Michigan prosecutors and sponsored by Republican State Senator Bill Schuette. The bill, which became law in January, does not include those who pleaded guilty. Tieber described it as a "solid bill" but expressed some concerns about the issue of false confessions. "[False confessions] occur more frequently than many would believe in terms of people confessing to crimes they didn't commit and pleading guilty to crimes they didn't commit for whatever particular reason," Tieber said.

"The Ochoa case down in Texas is a prime example that occurred very recently, where it was shown through DNA evidence that Chris Ochoa did not commit a very heinous murder that he'd pled guilty to. I think that the same things can occur here. Mandatory non-parole life imprisonment is a very, very severe penalty. There are those who will plead guilty to avoid that—even though they might not have done the crime—if they feel that there's no possibility that they're going to be shown innocent because the proofs are just not there. Later on down the road, DNA evidence or other scientific evidence can come along to the point where we can then establish those folks did not commit the crime. I think it's terrible not to be able to bring those cases when you can prove innocence. I testified on that in front of the legislature both in the house and the senate but they didn't support including the guilty plea."

Jeffrey Sauter, president of the Prosecuting Attorneys Association of Michigan, says

that a defendant has responsibility for the plea that they enter in court and that there are safeguards in place to prevent a coerced plea. "To take a guilty plea, our court rules require that the judge individually advise the defendant of the due process protections built into our system of justice. The defendant must acknowledge and waive each right separately. . . . In our state, the guilty plea can only be accepted after the defendant says, in his or her own words, under oath, why they are guilty of the crime. Accordingly, we should not have any innocent people pleading guilty in Michigan," Sauter said.

He points out that an innocent person, who pleads guilty, commits perjury and a fraud upon the court. "The justice system is fair, not perfect, and it cannot protect those who do not avail themselves of their rights until too late. Nor should it protect those who lie to the court to obtain a benefit of a

ously," Sauter said. He adds that re-opening settled cases should only be done with due regard for the impact on the community, victims, and their families. Only cases with a serious question of innocence should be re-opened for testing.

In response, Tieber said that "advice from the judge and a formalistic factual basis requirement will not stop a defendant—many of whom are undereducated or mentally deficient, who have been cowed by threats of non-parolable life imprisonment by police and prosecutors—from pleading guilty to something he or she did not do, to avoid such a penalty. . . . If we can prove that someone is innocent of the crime for which they have been imprisoned, justice demands their release. There is no basis for the statement that the state lacks resources to test those convicted at trial who request such testing. Mr. Sauter's comment that suggests only "in-

someone believes that their guilty plea is inappropriate because of mental impairment, ineffective assistance of counsel, coercion, duress, mistaken facts, mistake of law, or any of the other reasons that would warrant the setting aside of the guilty plea, those issues exist whether or not DNA or biological samples exist and those issues certainly should have been raised."

As the details get worked out and debated, students at Cooley will be working directly on the Innocence Project as one of the school's clinical programs. They will sift through the files and evidence, screen cases, and prepare written case evaluations. The students will also be helping participating attorneys assigned to the cases. Although the Innocence Project will focus on cases that require DNA and other hard scientific evidence, it will not be strictly limited to this type of case.

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plea, only later to complain after receiving the benefits of their bargain."

Sauter also says that the state lacks the resources to test the cases of all those prisoners convicted at trial who could demand a test. "A primary goal of the legislation was to create a procedure to screen prisoners who falsely demand testing from the innocent person who deserves it. DNA testing is only helpful in cases where the identity of the perpetrator was an issue," Sauter adds that there is no ability to screen allegedly fraudulent guilty plea cases precisely because the defendant chose to enter a plea of guilt. There is no record of the strength of the evidence or possible defenses in that case.

"Seventy-four percent of Michigan's prisoners, a population of approximately 37,000, pleaded guilty. Even if the State Police had the personnel trained to do that many tests, it would be a huge expense. . . . The estimated cost of this testing must be taken seri-

ous persons" deserve to be tested flies in the face of the true goal of the legislation—to promote determination of guilt or innocence through advanced scientific testing."

Tieber also said that everyone involved in the Cooley Law School Innocence Project shares a deep concern for victims and their families. "Victims, however, deserve accurate convictions. A crime victim is twice victimized if an innocent person is convicted and the real perpetrator remains at large."

Ingham County prosecutor Stuart J. Dunnings said that prosecutors "try to do things right the first time, but if that doesn't work, we are always open to trying to right the wrong." According to Dunnings, a "majority of prosecutors are of the opinion that if a person comes into court and takes an oath and if it's a guilty plea, then, that's the end of it. I don't happen to share that view, but I also agree that guilty pleas should not be subject to this bill. My reason is that if

"The success of this project to a large part depends on the willingness of the public to assist us," said Fell. "While Cooley Law School has donated space and support staff to help the project get up and running, without continued sources of funding, we're not going to be very effective. DNA testing costs money. Most of these prisoners are indigents," Fell said.

Cooley Law School will be appealing to private foundations and looking for grant and fellowship money to support the Innocence Project, but individual donations are also being sought. To help financially, send your tax-deductible contributions to Cooley Law School Innocence Project, Cooley Center Building, 300 S. Capitol Avenue, Lansing, MI 48933. ♦

Naseem Stecker is a staff writer for the Michigan Bar Journal.