



Tuesday, June 20, 2023

**STATEMENT OF MICHAEL CLARKE
NEW YORK CITY POLICE DEPARTMENT**

**BEFORE THE NEW YORK CITY COUNCIL
COMMITTEE ON PUBLIC SAFETY
COMMITTEE ON OVERSIGHT AND INVESTIGATIONS**

**COUNCIL CHAMBERS
JUNE 20, 2023**

Good morning Speaker Adams, Chair Hanks, Chair Brewer and members of the Council. I am Michael Clarke, Director of Legislative Affairs for the New York City Police Department (NYPD). I am joined here today by Kristine Ryan, the Deputy Commissioner of Management and Budget, John Breslin, the Commanding Officer of the Property Clerk Section and Neil Fenton, Executive Director of our Legal Bureau's Investigative Support Unit. On behalf of Police Commissioner Keechant L. Sewell, I am here to testify before your committees regarding the impact of the unfortunate fire at the Department's Erie Basin tow pound and evidence storage facility in Red Hook, Brooklyn.

On December 13, 2022, a three-alarm fire tore through the Department's Erie Basin evidence warehouse for many hours until it could be contained by the valiant efforts of the Fire Department. Unfortunately, the fire rendered the facility almost a complete loss. The warehouse at the Erie Basin facility at the time of the fire was primarily used to store items containing biological evidence from crimes. These items were stored in biological evidence containers, or BECs, which are cardboard or paper barrels that are the most effective way to store biological evidence storage as their materials and design are best equipped to limit moisture contamination. Storing biological evidence in plastic or metal containers can cause degradation of the biological samples. To be clear, all of the biological evidence which was stored at Erie Basin was collected and invoiced prior to Hurricane Sandy in 2012, and much of that evidence had already been significantly damaged by the floods. It is also important to note that evidence from sex assault evidence collection kits were not stored at Erie Basin.

At the time the evidence was collected, the District Attorneys, the NYPD and the Office of the Chief Medical Examiner (OCME) determined which pieces may have be relevant to any given investigation and items were tested using the state of the art procedures at the time. As a result, much of the evidence had already been tested and the results of those DNA tests were not destroyed in the fire.

Much has changed about our evidence collection and storage practices since Hurricane Sandy. All biological evidence that has been taken into custody since Sandy for long term storage is stored in a warehouse in Brooklyn, which is above the flood plain. Moreover, the evidence is stored on the sixth floor of this location, which is fully equipped with a modern fire suppression system. We have since modernized our evidence tracking system as well. Each item of evidence, when taken into custody, is assigned a unique electronic invoice number in the Department's FORMS system, which each officer accesses through Department

computers or Department-issued smart phones. This system allows evidence to be assiduously and easily tracked through every step of the process to ensure the chain of custody is documented at every turn, from the initial collection, to its movement between different storage and testing facilities, to ultimately its use in court.

As I stated earlier, all of the biological evidence stored at Erie Basin predated Hurricane Sandy in 2012, and unfortunately at that time the Department was still using a paper invoicing system. It is impractical to comb through the entire library of invoices to determine each item of evidence that was being stored at the Erie Basin warehouse. Additionally, given the age of the evidence, with at least ten and a half years having passed since even the newest evidence was invoiced and stored at Erie Basin, it would be expected that a significant number of the items would be associated with criminal cases which have been sealed pursuant to state law. Together with the fact that much of this evidence may also be connected to sexual assault cases, raises obvious privacy concerns. Much of this information simply legally cannot or should not be released to the public or to attorneys where there is no indication that they represent an individual with an interest in the case or piece of evidence.

The most effective, efficient and relevant path forward given the challenges posed by the fire, is for individuals or their attorneys who feel they may have an interest in a particular case or piece of evidence to make a request as to the status of that case or piece of evidence. That is why the NYPD has dedicated a team to liaise with the District Attorneys' offices in order to expedite the Department's response to any concerns and requests from those who feel their cases, open or closed, may have been affected by the fire. Requests by these individuals or their attorneys are fast-tracked. While this evidence is connected to older cases, and an invoice number may no longer be at hand to individuals, any small pieces of information such as a time frame or a name associated with the case, can be used to identify relevant invoices.

Thank you for the opportunity to testify about these important issues, and we look forward to answering any questions you may have.

DISTRICT ATTORNEY

COUNTY OF NEW YORK

ONE HOGAN PLACE

New York, N. Y. 10013



ALVIN L. BRAGG, JR.

DISTRICT ATTORNEY

**Testimony Before the New York City Council Committees on Oversight and Investigations
and Public Safety**

“Oversight – Examining the Impact of the NYPD Erie Basin Storage Facility Fire”

Thank you to Chairpersons Brewer and Hanks for the opportunity to submit this testimony providing the Manhattan District Attorney’s Office’s input on the issue of the impact of the NYPD Erie Basin storage facility fire. Our Office is grateful that the Council is focused on this issue that directly affects our practice and our ability to deliver justice to New Yorkers every day.

The fire at the NYPD Erie Basin warehouse destroyed nearly ten thousand barrels of evidence.¹ This fire comes after the 2012 flood at the NYPD Kingsland warehouse, which also destroyed many physical items.² Our understanding is that most of the destroyed evidence related to cases that are not currently open or active. However, the evidence did impact our work in two key ways: our work continuing to investigate cold cases as part of our Cold Case Unit, and our work investigating claims of actual innocence and other issues that undermine our confidence in convictions as part of our Post-Conviction Justice Unit (“PCJU”).

The work of PCJU is among the highest priorities for District Attorney Bragg. PCJU examines evidence for cases that are years, or even decades, old. There is no way of knowing whether, or how much, of the evidence destroyed in the Erie Basin fire could have exonerated innocent people convicted of crimes in Manhattan. Conversely, there is no way of knowing how much of this evidence might have confirmed the guilt of those who claim to be actually innocent. The inability to provide definitive answers in these cases directly undermines PCJU’s ability to fulfill its mission, and undermines public confidence in our justice system.

PCJU is particularly impacted by these disasters because it maintains an open and collaborative approach to defense requests for DNA testing, which means that we will seek more evidence for testing than ours or other offices have in the past. The New York criminal procedure law sets a high bar for defendants who seek DNA testing over a prosecutor’s objection. The law requires people seeking post-conviction DNA testing to demonstrate, in the case of a trial conviction, (1) the existence of an item items “secured in connection with the trial” containing DNA evidence,

¹ See Corey Kilgannon, *et al*, ‘Nightmare’ Warehouse Fire Erases Evidence in Many Unsolved Cases, The New York Times (Dec. 14, 2022), available at <https://www.nytimes.com/2022/12/14/nyregion/police-warehouse-fire-evidence.html>,

² See Jamie Schram, *Flood of evidence: NYPD cases soaked by Sandy*, New York Post, available at <https://nypost.com/2012/11/21/flood-of-evidence-nypd-cases-soaked-by-sandy/>.

and (2) a “reasonable probability that the verdict would have been more favorable” if new DNA testing is conducted.³ In a plea case, the standard is heightened to require the defendant show that the evidence would establish the person’s “actual innocence,” and also that DNA testing could not have reasonably been requested prior to the entry of the plea.⁴ The court, in its discretion, may order the prosecution to provide to the defense information concerning the physical location of DNA evidence. The factual and procedural bars to DNA testing can lead to results that are inconsistent with our shared justice-centered values. DANY’s PCJU strives to remove these negative consequences of the statutory strictness by entering collaborative reinvestigations with impacted individuals and their counsel as an alternative to litigation.⁵ In this collaborative process, the parties share information and plan a reinvestigation that is designed to be truth-seeking and non-adversarial. Instead, PCJU will consent to any reasonable request for DNA testing made by a convicted person who has raised a credible claim of innocence or wrongful conviction.⁶

The result of PCJU’s commitment to transparency, accountability and community collaboration is that DANY will necessarily seek more DNA testing than a prosecutor’s office ordinarily would. We are confident that this approach will exonerate innocent people, bring people who truly caused harm to justice, and build community confidence in the outcomes of reinvestigations. But we cannot meet these goals if, despite our best efforts to perform DNA testing, we cannot locate the evidence, or the evidence has been destroyed. That not one, but two, significant disasters happened in the span of ten years in NYPD evidence storage warehouses thwarts PCJU’s efforts in this regard. PCJU has already handled one case in which the Unit consented to DNA testing, only to learn it was destroyed in the Erie Basin warehouse fire.

Regarding our Cold Case Unit, which reviews and re-investigates hundreds of unsolved homicides, we are actively working on a 1994 homicide in which critical evidence was destroyed in the Erie Basin fire, including two knives recovered at the crime scene, a bloody footprint, a blood sample, and the victim’s clothing. We cannot know how this evidence might have been able to help solve this case and bring justice to the perpetrator and closure to the victim’s family. It goes without saying that the proper preservation of property recovered from homicide crime scenes is a key factor in solving these very difficult cases.

Our office is grateful for the assistance and partnership of the NYPD in our efforts to locate DNA evidence and other critically important pieces of evidence for testing and examination. We are continually impressed with the members of the Department who join in our commitment to truth seeking and transparency. We believe, however, that their efforts, like ours, would be far better served if the City provides resources and support for modernizing evidence tracking and storage, including creating shared computer databases and building and maintaining evidence storage

³ CPL 440.30(1-a)(a)(1).

⁴ CPL 440.30(1-a)(a)(2)

⁵ See “Post-Conviction Justice Unit,” available at <https://manhattanda.org/pcju/>.

⁶ See, e.g., Report of Fair and Just Prosecution, *Conviction Integrity and Review: Key Principles and Best Practices for Ensuring Justice and Accountability*, p. 2 available at <https://www.law.upenn.edu/live/files/10595-fjp-conviction-integrity-statement-of-principles> (“As part of a commitment to effective and robust conviction review, offices should approve, and not oppose, requests for DNA testing.”).

locations that treat every piece of evidence as the key to public safety and the ultimate truth – even if those two goals are not achieved until years or decades after a crime is committed.



Testimony of

Mariah A. Martinez
Trial Attorney
New York County Defender Services

Before the

New York City Council
Committee on Public Protection
Committee on Oversight and Investigations

Joint Oversight Hearing on the Impact of the NYPD Erie Basin Storage Facility Fire

June 20, 2023

My name is Mariah Martinez, and I am a Trial Attorney at New York County Defender Services, a public defense office that represents New Yorkers in thousands of cases in Manhattan’s Criminal and Supreme Courts every year. Thank you to Councilmember Hanks and Councilmember Brewer for holding this joint hearing about the New York City Police Department’s handling of the evidence stored at the Erie Basin Storage Facility, which caught fire on December 13, 2022.

This is an issue of great import to our office, as we believe the evidence in some of our clients’ cases – past and present – was stored in the Erie Basin facility. Since news of the fire broke nearly six months ago, we have been eager to determine the full scope of cases impacted. Moreover, the NYPD’s handling of the fire raises deep concerns within our office about the safety and protection of all evidence in the NYPD’s custody, not only at the Erie Basin warehouse, but at police precincts and in other evidence storage facilities as well.

We are grateful for the opportunity to share our experience and expertise with the committee today via this written testimony.

I. Background

On December 13, 2022, a fire broke out at the NYPD’s Erie Basin Evidence Center, a storage facility that warehoused physical and DNA evidence in thousands of New York City criminal cases.¹ Notably, the December fire was not the first natural disaster to affect the warehouse: Erie

¹ Corey Kilgannon, Hurubie Meko and Nate Schweber, ‘Nightmare’ Warehouse Fire Erases Evidence in Many Unsolved Cases, N.Y. TIMES, (Dec. 14, 2022), <https://www.nytimes.com/2022/12/14/nyregion/police-warehouse-fire-evidence.html>.

Basin Storage Facility also suffered extensive flooding and toxic exposure in the aftermath of Hurricane Sandy.² In fact, all the evidence not damaged from Hurricane Sandy was supposed to be transferred to an off-site facility over a decade ago.³ For reasons that remain a mystery, the evidence remained at the decrepit warehouse, which in addition to being physically damaged also apparently lacked a basic fire protection system. According to news reports, “everything inside was either lost or damaged.”⁴

The evidence located at the facility belonged to cases dating as far back as three decades.⁵ NYCDS presumes that evidence from at least some of its cases were stored at the Erie Basin facility. However, we are unable to identify how many of our current and past cases are impacted because the NYPD has refused to provide any detailed accounting of the scope of the fire’s damage.

The NYPD’s silence on the matter is alarming and suggests that even the custodian of these vital items is possibly unaware of the evidence in its possession. Indeed, as was reported in the aftermath of the fire, the NYPD never fully catalogued its evidence in closed cases.⁶ For the most well-funded law enforcement agency in the entire country, this is unacceptable.

II. NYPD Evidence Tracking Procedures

In 2012, the NYPD introduced a new evidence cataloguing and barcoding system, called [Property and Evidence Tracking System \(PETS\)](#), built by a for-profit company called Capgemini⁷ for \$25.5 million dollars⁸. The PETS system was designed to “efficiently identify, locate, track, and route property and evidence.”⁹ Notably, the PETS system, unlike its predecessors, relies on barcode technology that allows easy digital storage of information and tracking and establishes a web browser-accessible database.¹⁰

By all accounts, PETS was a long-overdue upgrade to the NYPD evidence tracking system. Prior to the PETS system rollout, the NYPD relied on “an entirely paper-based solution that had been in place, and largely unchanged, for over 100 years.”¹¹ Under the former system:

- All reporting had to be compiled manually by reviewing invoices and logs. Current numbers were then added or subtracted from the previous period’s results, to arrive at reportable information.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ Hurubie Meko and Nate Schweber, *Massive Fire Burns Down Part of an N.Y.P.D. Evidence Center in Brooklyn*, N.Y. TIMES (Dec. 13, 2022), <https://www.nytimes.com/2022/12/13/nyregion/nypd-brooklyn-fire-evidence-center.html>.

⁶ Kilgannon, Meko and Scheweber, *supra* note 1.

⁷ CAPGEMINI, *New York City Police Department Successfully Implements a Property and Evidence Tracking System*, (2014), https://www.capgemini.com/gb-en/wp-content/uploads/sites/3/2017/07/ss_nypd_0.pdf.

⁸ Sean Gallagher, *Judge Shocked to Learn NYPD’s Evidence Database Has No Backup*, ARS TECHNICA, (Oct. 18, 2017, 4:40 PM), <https://arstechnica.com/information-technology/2017/10/nypd-database-that-tracks-seized-evidence-and-cash-has-no-backup/>.

⁹ CapGemini, *supra* note 7.

¹⁰ *Id.*

¹¹ *Id.*

- Since property and evidence data was being managed and tracked manually on paper, valuable data was not easily accessible through any electronic means to be utilized in NYPD's fight against crime.¹²

While the introduction of the PETS system held much promise that our city's law enforcement agency would finally adopt a 21st century evidence tracking system, its rollout has been disappointing and, at times, alarming.

In recent years, it has been uncovered that the PETS system is not backed up anywhere, meaning that the data could be permanently lost relatively easily.¹³ In addition, the PETS system has been dogged by crashing issues to such an extent that in 2016, in response to a bill passed by this very committee requiring reporting on civil forfeitures,¹⁴ the NYPD stated "attempts to perform the types of searches envisioned in the bill will lead to system crashes."¹⁵

Moreover, it has become apparent in the aftermath of the Erie Basin fire that in the last decade since PETS became operational, the NYPD has not successfully uploaded and transferred its old cases to the PETS system. In December, experts speculated that "the extent of the fire's damage may never be known, because the Police Department never fully cataloged old cases using the bar-coding system it initiated in recent years."¹⁶

Unfortunately, the NYPD has not been forthcoming about the current state of their evidence storage and cataloguing procedures. However, in a civil proceeding shortly after the Hurricane Sandy damage in 2012,

Sgt. John Capozzi, who was assigned to the NYPD's Property Clerk Division, testified that evidence [at the Erie Basin warehouse] was stored in 55-gallon cardboard drums, stacked on top of one another on pallets. Each drum would contain items from multiple cases stuffed inside either cardboard boxes or paper bags.¹⁷

This 2012 report is alarming and gives us much cause for concern in relation to the most recent disaster.

¹² *Id.*

¹³ Gallagher, *supra* note 8.

¹⁴ 2017 N.Y. City Council Bill No. 2017/131, 318th Leg. Sess. (N.Y. 2017) (enacted).

¹⁵ Max Rivlin-Nadler, *NYPD: Revealing the Truth About the Millions We Seize Would 'Lead to Systems Crashes'*, THE VILLAGE VOICE (Sept. 16, 2016), <https://www.villagevoice.com/2016/09/16/nypd-revealing-the-truth-about-the-millions-we-seize-would-lead-to-systems-crashes/>; Sean Gallagher, *NYPD Can't Count Cash They've Seized Because It Would Crash Computers*, ARS TECHNICA (Sept. 18, 2016), <https://arstechnica.com/information-technology/2016/09/nypd-cant-count-cash-theyve-seized-because-it-would-crash-computers/>.

¹⁶ Kilgannon, Meko and Schweber, *supra* note 1.

¹⁷ Gwynne Hogan and Jake Offenhardt, *What's At Stake With Untold Loss of DNA Evidence in NYPD Warehouse Fire*, GOTHAMIST (Dec. 22, 2022), <https://gothamist.com/news/whats-at-stake-with-untold-loss-of-dna-evidence-in-nypd-warehouse-fire>.

III. Evidence Cataloguing Methods in Other Jurisdictions

In 2003, the Law Enforcement Information Technology Standards Council (LEITSC), a part of the Bureau of Justice Assistance, promulgated best practices and standards for law enforcement offices' evidence tracking systems.¹⁸ The report recommended that every agency maintain and operate a records management system that is single entry (*i.e.*, no duplicate data entry), submits data to external sources, contains a single database, and uses digitized and not handwritten notes.¹⁹ Notably, the report recommends that law enforcement offices not use “stand-alone” methods to catalogue evidence.²⁰

Two decades after these national guidelines were established, it appears our city's law enforcement agency still struggles to comport with the basic tenets of recommended evidence storage practices. It bears noting that the NYPD is the largest and most well-funded law enforcement agency in the entire country.²¹ Despite being far smaller and less resourced, many other police departments operate more modern, reliable and efficient property and evidence tracking systems. Below are examples of the types of evidence tracking systems that the NYPD could and should be using:

- [Providence, RI](#): uses a platform called Aegis™ Records System, which mandates that every piece of evidence that is processed is labeled as follows:
 1. Property tags and property forms shall include detailed descriptions of each item of property/evidence submitted.
 2. Numerical values pertaining to the number(s) of an Item(s) submitted shall be documented, and officers shall refrain from using ambiguous terms such as “numerous”, “several”, or “assorted”.
 3. Individual entries will be made on the property form for each item (*i.e.*, no “lumping together” of property in any entry).²²
- [Port of Seattle](#),²³ which maintains a unit of 100 offices operating in SeaTac, and [Prince George County](#) Police, a Virginia police department serving a population of 40,000 residents,²⁴ have both implemented digital evidence management systems called EvidenceonQ and DigitalonQ, respectively, two digital evidence management systems created by the company FileonQ. According to a blog post by the company, “Previous

¹⁸ See Law Enforcement Information Technology Standards Council (LEITSC), Standard Functional Specifications for Law Enforcement Records Management Systems (RMS), Bureau of Justice Assistance and the National Institute of Justice (2003),

https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/leitsc_law_enforcement_rms_systems.pdf.

¹⁹ *Id.* at 1.

²⁰ *Id.* at 17.

²¹ VERA, *A Look Inside the New York City Police Department Budget* (June 2020),

[https://www.vera.org/publications/a-look-inside-the-new-york-city-police-department-budget#:~:text=The%20New%20York%20City%20Police%20Department%20\(NYPD\)%20is%20by%20far,more%20than%20%2411%20billion%20annually](https://www.vera.org/publications/a-look-inside-the-new-york-city-police-department-budget#:~:text=The%20New%20York%20City%20Police%20Department%20(NYPD)%20is%20by%20far,more%20than%20%2411%20billion%20annually).

²² PROVIDENCE POLICE DEP'T, GEN. ORD. 420.01, PROPERTY AND EVIDENCE CONTROL (2018).

²³ FILEONQ, *Port of Seattle Police Implements EvidenceOnQ Evidence Management System From FileOnQ* (Jul. 28, 2022), <https://fileonq.com/port-of-seattle-police-implements-evidenceonq-an-evidence-management-system-from-fileonq/>.

²⁴ FILEONQ, *Prince George County PD (VA) Implements DigitalOnQ* (Apr. 18, 2023), <https://fileonq.com/prince-george-county-pd-implements-digitalonq/>.

manual processes have now been replaced by automation, including evidence processing, performing inventories, producing reports, and monitoring the lifecycle of evidence.”²⁵

IV. Conclusion

Immediately after the fire in December 2022, the NYPD held a press conference in which they promised “a careful accounting of what types of DNA evidence were lost in the smoldering warehouse.”²⁶ Nearly six months later, we have heard nothing.

The NYPD’s silence is alarming and reignites longstanding concerns of the defense bar and the public that the current police evidence cataloging system is, at best, woefully deficient, and at worst, negligent. Our entire criminal legal system rests on the basic ability of our law enforcement agency to collect, preserve, organize and safely store pieces of evidence in criminal cases. Thus, on a basic level, NYCDS demands to know the scope of the damage at the Erie Basin Storage Facility so that we may assess to what extent critical, possibly exonerating evidence in our clients’ cases is permanently destroyed. More broadly, we demand to learn to what extent the Erie Basin fire was due to the NYPD’s negligence. As explained above, this incident raises more serious concerns about the basic competence of the NYPD to safeguard vitally important evidence and property in its custody.

We thank the City Council for calling this oversight hearing and demanding the answers that the NYPD has thus far refused or been unable to provide. If you have any questions about my testimony, please email policy@nycds.org.

²⁵ FILEONQ, *Port of Seattle Police Implements EvidenceOnQ Evidence Management System From FileOnQ* (Jul. 28, 2022), <https://fileonq.com/port-of-seattle-police-implements-evidenceonq-an-evidence-management-system-from-fileonq/>.

²⁶ Hogan and Offenhartz, *supra* note 17.



June 5th, 2023

City Council Committee Hearing on Public Safety

Good morning, Chairperson Hanks and members of the Committee on Public Safety. My name is Tom Harris, and I am the President of the Times Square Alliance, the business improvement district that exists to make Times Square clean, safe, and desirable for all.



First, thank you to the Council for this legislation. Anything that will help address the proliferation of illegal weed stores in our city is appreciated. In five months, Times Square has gone from 2 illegal weed stores to 10. At least one has been robbed, there have been two homicides, and a person was shot in front of another. I am sure the citywide crime data would show that these illegal stores make our city less safe.

In addition to the violence, crime, and disorder surrounding these stores, many regularly sell their unregulated products to underage children.

While this bill is helpful, more is needed. The violence, potential health hazard, and inaction from Albany to effectively address the issue, should make this a top priority for the Council and the Administration. Multiple simultaneous actions from the Council are needed.

While this bill holds landlords accountable, more is needed to hold the illegal operators accountable. The Nuisance Abatement Laws were used successfully in the 1990s to eliminate criminal activity in establishments. In 2017, the City Council changed the Nuisance Abatement Law such that it is harder to issue a closure order when illegal activity is observed taking place within premises. I am urging the Council to reverse their action in 2017 for illegal weed stores where there is a presumption that allows judges to immediately issue a closure order when two incidents of the illegal activity occur at the same location. This is similar to the presumption for brothels and massage parlors. We also believe that the City Council, City Administration, and the community should lobby Albany to give the Office of Cannabis Management the same authority granted to the State Liquor Authority to shut down unlicensed liquor stores immediately – the same way they close unlicensed bars.

In order to effectively deal with this crisis, we need to take the handcuffs off law enforcement and put them on the criminals who repeatedly violate the law and make our neighborhoods and city unsafe.

Thank you for your time and consideration.

A handwritten signature in black ink, appearing to read "Tom Harris", with a horizontal line extending to the right.

Tom Harris
President
Times Square Alliance

Statement for Committees of Oversight and Public Safety

Good morning,

My name is Elizabeth Felber, and I am the head of Legal Aid Society's Wrongful Conviction Unit. While the Erie Basin fire was not an intentional act of sabotage, it follows a pattern of negligence by the NYPD when it comes to preserving property. The mass destruction of vouchered property from criminal cases has occurred now three times: in 1995, 2012 and 2022. NYPD has now ignored two letters we sent out seeking an accounting of what property was lost in the Erie Basin Fire. They have ignored us both times. Their lack of transparency speaks volumes. The unanswered questions about what steps, if any, they took to prevent this disaster, and what property was destroyed, are unfortunately not surprising given NYPD's repeated failure to produce vital evidence for cases where the Conviction Integrity Units request them to test for DNA.

Our unit has persuaded the several DA Conviction Integrity Units to test property for DNA in cases where clients have maintained their innocence. In each case NYPD has told the CIUs that the evidence was either lost or destroyed.

This has had very grave consequences for our clients.

- One client is in his 36th year of imprisonment, the CIU agreed to test evidence for DNA because many people have attested to the fact that someone else committed this murder. NYPD told the CIU that the evidence was destroyed.
- Another client served forty years while maintaining his innocence. The CIU agreed to test the murder weapon found at the scene. If his DNA is excluded, he will likely be exonerated. NYPD has told that CIU that the evidence cannot be located.

There needs to be transparency and an accounting for why it is so hard to locate evidence and why sufficient protocols were not in place before the Erie Basin fire destroyed so much evidence, and with it, our client's opportunity to exonerate themselves.



New York City Council Committees on Oversight & Investigations and Public Safety, Jointly

June 20, 2023
10:00 a.m.

Oversight – Examining the Impact of the NYPD Erie Basin Storage Facility Fire

Testimony of
The Legal Aid Society
Wrongful Conviction Unit
And
Center for Appellate Litigation

Presented by:

Christine Bella
Staff Attorney
Wrongful Conviction Unit
The Legal Aid Society
199 Water Street
New York, NY 10038
212-577-3349
clbella@legal-aid.org

Elizabeth Felber
Supervising Attorney
Wrongful Conviction Unit
The Legal Aid Society
199 Water Street
New York, NY 10038
212-298-3143
efelber@legal-aid.org

V. Marika Meis
Co-Director
Forensic Science Project
Center Appellate Litigation
120 Wall Street, 28th Fl
New York, NY 10005
212-577-2523, ext. 551
mmeis@cfal.org

New York City Council - Committees on Oversight & Investigations and Public Safety Joint Oversight Hearing - Chairs Gail Brewer of Oversight and Investigation Committee and Kamillah Hanks of Public Safety Committee

Tuesday, June 20, 2023, at 10:00 AM

Oversight – Examining the Impact of the *NYPD Erie Basin Storage Facility Fire*

We are members of The Legal Aid Society of New York (“LAS”) and the Center for Appellate Litigation (“CAL”). We represent thousands of New Yorkers in post-conviction proceedings, including direct appeals and collateral attacks on convictions for those who are wrongfully convicted and in fact innocent.

On December 13, 2022, a massive blaze erupted at a New York City Police Department (“NYPD”) storage facility in Red Hook, Brooklyn, destroying troves of evidence and extinguishing the hope for justice in untold cases. The ability of the wrongfully convicted and imprisoned people in New York City, some of whom have waited decades for technology to advance to the point where evidence in their cases could be tested/retested, to prove their innocence literally went up in smoke. Only a decade before, critical evidence was destroyed at the same facility after Superstorm Sandy flooded it with raw sewage and doused the hopes and dreams of those relying on forensic evidence for freedom.

In the days following the December 13, 2022 fire at Erie Basin, the Legal Aid Society requested that a list of evidence and names of the cases affected by the Erie Basin fire be made available and that the Mayor’s Office convene key stakeholders to begin a dialogue to ensure that the loss of such evidence will not be held against the accused or the wrongly convicted. Three months later, having received no acknowledgement or response from either NYPD or the Mayor’s Office, a follow-up letter from the Legal Aid Society, along with other organizations, was sent on March 28, 2023.

Since no one in either the NYPD or the Mayor’s Office responded to our letters, our only information has come from news outlets and from the NYPD in response to questions posed to them during the June 20th joint public hearing. What we learned at the hearing was a pattern of negligence with respect to properly preserving physical and biological evidence, and that the protocols for tracking evidence from

cases dating back before 2012 is still incredibly outdated, making it almost impossible to locate evidence. Nor was it surprising to learn that almost all the physical and biological evidence stored at Erie Basin had been destroyed by the fire.

We thank the City Council Committees on Oversight and Investigation and Public Safety for holding a public hearing on June 20, 2023, to address this critically important issue of what evidence was affected by the Erie Basin Fire, and more generally, to examine the NYPD's process for preserving, cataloging and organizing evidence from active, post-conviction and cold cases.

NYPD Testimony at the June 20, 2023 Hearing Revealed Almost Complete Destruction of Evidence at Erie Basin

Michael Clarke, Director of Legislative Affairs for the NYPD, testified that there was almost a complete loss of evidence stored at Erie Basin: biological evidence pertaining to cases that were older than 2012 and tracked only with paper logbooks. As a result, it was almost impossible to identify what evidence had been stored at Erie Basin when the fire broke out. The Erie Basin fire and the resultant loss of evidence in NYPD's possession is emblematic of a larger and longstanding problem.

NYPD Did Little to Improve Conditions at Erie Basin After Superstorm Sandy

Unfortunately, this Erie Basin fire is not the first time there has been such large-scale destruction of property in NYPD custody. In 2012, the very same storage facility was flooded during Superstorm Sandy resulting in the mass destruction of evidence from criminal prosecutions and cold cases. At the June 20th hearing before City Council, we learned that 5,000 barrels of evidence were destroyed during Sandy at Erie Basin (with another 1100 barrels destroyed at the Kingsland Ave facility). In 1995, another fire in a different Brooklyn NYPD facility destroyed property.¹

It remains unclear whether the fire at Erie Basin could have been avoided. At the hearing we also learned that in the eleven years since Super Storm Sandy destroyed 6,100 barrels of evidence at Erie Basin and at the Kingsland Avenue storage facility,

¹ See Storage and Accessibility of DNA Crime Scene Evidence in Criminal Investigations: Hearing on A. 11952 Before the Assembly. Standing Comm. on Codes, 2006 Leg., 229th Sess. (N.Y. 2006).

little, if anything, was done to rebuild and secure the Erie Basin facility. Erie Basin was still operating on backup generators since Sandy.

Kristine Ryan, Deputy Commissioner of Management and Budget for the NYPD, testified that the fire was likely an electrical fire, not caused by the generators. However, for whatever reason, the sprinkler system was not adequate to put out the fire. This testimony raises more questions: Why was the sprinkler system not sufficient to put out the fire? How old was it? Was the sprinkler system replaced after Sandy? Was it to code?

Police Testimony Reveals a Lack of Understanding About the Significance of Biological Evidence From Old Cases

Neil Fenton, the Director of NYPD Legal Bureau, testified that all evidence stored at Erie Basin had already been tested and used for court proceedings. Thus, he concluded that given the age of these cases, they would have been sealed pursuant to state law and could not be released to the public. This testimony does not comport with the criminal procedure law in New York State, however. The only cases that are currently sealed are those where there has been an acquittal, dismissal, a youthful offender adjudication, or the case was resolved with a non-criminal disposition. The biological evidence pertaining to cold cases, or convictions for homicide and rape, and other felony offenses – the ones that make up the majority of post-conviction litigation –, are never sealed.

No Protocols in Place to Address Defense Counsel's Queries

Mr. Neil Fenton further explained that NYPD communicates solely with the District Attorney offices to answer *their* questions about property from cold cases and any cases the District Attorney believed might have involved wrongful convictions. However, there was no testimony about NYPD's protocols to provide similar information to defense counsel seeking to exonerate their clients.

It is not good enough for NYPD to say “if DA's office calls us, then we will look and see if we have the evidence.” That is not transparency. The accused, the wrongfully convicted, and New Yorkers need to know. Individuals cannot wait for months or years to know if evidence in their case still exists. The accused, the

wrongfully convicted, and the public cannot remain in the dark about how much was destroyed by the latest catastrophic loss of critical evidence at the hands of NYPD.

NYPD's Digitized System Did Not Include Cases from Prior to 2012

Since 2012, NYPD digitized their evidence tracking system. Evidence is collected at a local precinct and assigned a unique voucher and bar code. All evidence is tracked using a Property Transfer Receipt (PTR) as it travels from the local precinct to laboratories for testing, borough facilities, or if it is a very large item, to a warehouse.

However, prior to 2012, all evidence was cataloged using a paper system and tracked through logbooks. When the digitized system was implemented, evidence collected before 2012 was never digitized. All of that stored property is still traced through an antiquated and much criticized paper system.

The problems that ensue from such an inefficient and outdated system are illustrated in *Newton v. City of New York*. In 2015, in the Newton case, the Second Circuit found that New York City had deprived Mr. Newton of his constitutional due process right to obtain evidence necessary for DNA testing as a direct result of the City's inadequate evidence management system.² Alan Newton, an African American man, was wrongfully convicted of assault, rape and robbery that took place in 1984. He served over twenty years in prison for crimes he did not commit. Mr. Newton's attorneys eventually were able to vacate his conviction and procure his freedom after the evidence that he had been seeking to retest for decades was finally located, but only after NYPD had repeatedly reported for years that evidence could not be located. Once located, the evidence was tested for DNA and Mr. Newton was excluded as a DNA contributor.

The Second Circuit court held that Mr. Newton had a liberty interest in demonstrating his innocence with newly available DNA evidence which included "reasonable procedures that [would] permit him to vindicate that liberty interest."³ Specifically, the Second Circuit found that the City's evidence management system was *inadequate* and its failures were systemic and "*reflected the department's*

² *Newton v. City of New York*, 779 F.3d 140, 142 (2d Cir. 2015).

³ *Id.*

practice or custom.”⁴ (Emphasis added). The court concluded, “[w]e are confident that the evidence management failures identified in this case have been or will soon be remedied with the help of modern technological advances and stronger recordkeeping practices.”⁵

Unfortunately, the inadequate system the federal court cited in *Newton* has never been fixed for those cases before 2012.

NYPD’s Inadequate Storage Problems Persist

Despite acknowledging the importance of proper storage for DNA evidence, Ms. Kristine Ryan admitted that some of their facilities did not have the proper HVAC system necessary to keep the evidence at the proper temperature to prevent degradation. She further testified that one of the storage facilities does not have the necessary fire suppression system needed to protect the evidence. While she mentioned that the department was looking into upgrading the system, she did not provide City Council with a specific time for when those critical upgrades would occur. She stated that it would take \$5 to \$10 million to upgrade those facilities to have proper fire and temperature controls.

NYPD representatives stated that they were in discussions with a consultant about the cost of digitizing the storage system of property collected prior to 2012. The Deputy Commissioner of Management and Budget did not know what their annual budget was for the preservation and storage of property but promised to get that information to City Council.

Although NYPD had funding in the amount of \$425 million in 2015 to build a state-of-the-art storage facility, that funding was cut in 2020. Ms. Kristine Ryan testified that conversations were ongoing to restore funding to build a state-of-the-art facility that would consolidate evidence storage in one place, but it is unclear when or whether funding will be available.

⁴ *Id.*

⁵ *Id.* at 159

The 12 NYPD Facilities Used for Evidence Storage Must be Adequate

In their testimony at this hearing, NYPD officials acknowledged the importance of proper storage of DNA evidence, as well as proper protocols to preserve evidence from being destroyed by floods and fires. Yet, NYPD still has storage facilities without proper temperature controls necessary for preserving DNA evidence, and not all facilities have proper fire suppression protocols.

NYPD must prioritize plans to upgrade their facilities. Every day that goes by without adequate temperature-control and fire suppression systems is another day that biological evidence becomes degraded and unusable. It is another day for another disaster to occur.

The wrongfully convicted, the accused, and New Yorkers cannot wait until a state-of-the-art facility is built nor is it necessary for that to happen before NYPD can take required steps now to properly track and preserve all evidence in their care. Such a facility may take years, if not decades, for funding to be secured and structure to be built, as the NYPD conceded that there currently is no funding available for its construction.

Proper tracking, preservation and storage of evidence must begin today. NYPD's failure to upgrade Erie Basin in the ten years since Superstorm Sandy demonstrates a pattern of downplaying the critical nature of evidence in the criminal justice system. It is unfathomable that, eleven years after critical evidence was contaminated in floodwater, Erie Basin continues to operate on a back-up generator with an inadequate sprinkler system. It was foreseeable that thousands of paper/cardboard barrels could spread any small fire wildly and uncontrollably. We therefore ask that city council assess the adequacy of all twelve NYPD facilities that currently house physical and biological evidence, and work with NYPD to expeditiously upgrade those facilities that are inadequate. While a state-of-the-art storage facility is ideal, but it is not a pre-requisite for NYPD to prioritize plans to upgrade its existing twelve facilities to ensure proper evidence preservation and storage today.

People Who Were Not as Fortunate as Alan Newton and Cannot Test Evidence That Has Been Lost or Destroyed by the 1995 and Erie Basin Fires and Sandy

Since the first DNA exoneration in 1989, preservation of biological evidence has proved critical in righting wrongful convictions. For those wrongfully convicted, biological evidence—over which the state exercises unfettered control—often presents the best, and at times, the only opportunity to prove their innocence. DNA technology has advanced tremendously in the past several decades and post-conviction forensic testing can mean the difference between incarceration and freedom, between deportation and remaining in this country, between living a life unencumbered by parole and being saddled with a criminal conviction or wrongfully registered as a sex offender.

The December 13, 2022 fire at Erie Basin extinguished the hopes of scores of people who were eagerly awaiting DNA testing to exonerate them. This loss of critical evidence has far-reaching consequences for New Yorkers. The Erie Basin fire destroyed untold volumes of critical biological evidence, that potentially affects thousands of New Yorkers whose legal cases are being appealed or are in the process of post-conviction litigation involving wrongful convictions.

Unfortunately, many other New Yorkers are deprived of the ability to test critical evidence because of NYPD’s outdated paper tracking system for pre-2012 cases. In case after case where there is either an agreement or a court order to test the critical evidence, the NYPD comes back with the same answer: the evidence cannot be located – it is lost or destroyed.

The New York state legislature codified the importance of testing evidence post-conviction in 1994, when it enacted Criminal Procedure Law (“CPL”) § 440.30 to allow for court-ordered testing of evidence.⁶

In addition to seeking the court’s permission in many instances, the Conviction Integrity Units of the City’s District Attorney offices (“CIU”) consent to DNA testing. Not surprisingly, and notwithstanding the District Attorneys’ consent, the NYPD seldom locates the evidence sought for testing.

⁶ NY C.P.L. § 440.30

In 2021, The Legal Aid Society's Wrongful Conviction Unit ("LAS WCU") received a federal grant, for the purposes of supporting our post-conviction work in general and to defray the costs of DNA testing, which are considerable if New York City Office of Chief Medical Examiner's Forensic Biology Department ("OCME") declines to test post-conviction evidence. Eager to put the funding to good use to assist our wrongfully convicted clients, our unit worked tirelessly to investigate cases that contained evidence that could prove probative or exonerating if tested for DNA.

In fact, four of the five District Attorney's offices agreed to test evidence in LAS WCU's cases. Yet, in each of those cases, the District Attorney's offices have been told by the NYPD that relevant evidence has been lost or destroyed⁷. For instance,

- One client was convicted in a 1989 rape case where the victim could not identify her rapist and the arrest was premised upon a very weak identification. In that case, the district attorney's office agreed to test the rape kit that had never before been tested for trial. However, to our great dismay, we learned that NYPD destroyed the rape kit, what would have been dispositive evidence, in 1996. It is unclear why that critical evidence was destroyed.
- In another case, we presented the CIU with affidavits from multiple people – including the sisters of the actual shooter – who attested that someone else committed the homicide. There were fingerprints obtained from the scene that would have freed the client, but NYPD informed that CIU office that the evidence was destroyed in Superstorm Sandy.⁸ That client is currently in his 36th year of imprisonment and remains imprisoned.
- Another client had already served 40 years before receiving clemency. At age 70, he is still trying to clear his name. There was physical evidence involved in the strangulation of the victim found at the scene. That evidence has the

⁷ We will not refer to our clients by name because we have signed agreements with different CIU offices not to speak publicly or with press about these cases while their units are reinvestigating them.

⁸ This representation is suspect given testimony at the June 20th hearing that the evidence stored in Erie Bain at the time of Superstorm Sandy in 2012 was for open cases. This client's case dated back to 1987.

ability to exonerate our client through DNA. There, NYPD advised the CIU attorney that the evidence cannot be located.

- We have another client who is currently in deportation proceedings as a result of this conviction that is now being investigated by a CIU. In that case, there is a recanting witness that discredits the only supposed eyewitness and an alibi that was never explored at trial. There is tangible physical evidence from the crime scene that was lost and was believed to have been stored at Erie Basin. DNA testing of that evidence could tip the balance for exoneration.
- Lastly, in a homicide case where our client has congestive heart failure and is currently serving a life sentence for a conviction from a cold case, the NYPD produced some evidence at trial, but did not produce the murder weapon. The CIU agreed to test the murder weapon post-conviction, but NYPD told the DA's office that the evidence could not be located *because the logbook - the source of locating pre-2012 evidence - had been lost.*

Additionally, in many instances the CIU attorneys have told us that evidence cannot be located because it was signed out to court decades ago by a police officer who has long retired, and the evidence was never returned to the property clerk as required. In such instances, our clients are left in limbo hoping that the evidence will turn up one day as it did for Alan Newton. The problems with readily locating evidence are not confined to post-conviction requests for DNA testing.

For instance, in both CAL and LAS, attorneys have litigated direct appeals where clients were deprived of the right to retest evidence as permitted under the law.

- CAL client, Peter Austin, proceeded to trial on burglary charges. The evidence in the case was not available at trial because it had been rendered unavailable due to Superstorm Sandy. During the *Austin* trial, it was discovered that the physical evidence that had been stored in the Kingsland facility had been rendered unavailable due to conditions caused sadly, by Sandy. Moreover, the facility could not be accessed because it had been flooded with water that was contaminated by a nearby Superfund location. Mr. Austin requested an adverse inference which the trial court denied. He was convicted. *People v. Austin*, 30 N.Y.3d 98, 103 (2017).

- LAS client, Lamont Gough, was convicted solely on the basis of DNA on a cigarette butt found at the scene. The cigarette butt was stored at Erie Basin and when Sandy struck, the evidence was contaminated, thereby depriving Mr. Gough of the ability to have the evidence tested himself, as he was entitled to under New York Law. His attorney also requested an adverse inference charge which the trial court also denied. He is currently serving twenty years in prison. *People v. Gough*, 209 A.D.3d 6667 (2d Dept. 2022).

In both cases, the failure to preserve evidence was excused as the result of a natural disaster. Even if the destruction was caused by an outlier storm, the underlying issues still existed. Had proper preservation protocols been put into place prior to Sandy, knowing that the building sat on the edge of the water? And once Sandy occurred, what measures, if any, were put into place to ensure the property returned to Erie Basin would be protected in the future? In both catastrophes the only constant was the prejudice to our clients and the lack of transparency for the wrongfully convicted, the accused and the general public.

CONCLUSION

As advocates for the accused and wrongfully convicted, we are troubled to learn of the loss of important physical and DNA evidence, and fear that the fire may have disastrous impact on our clients' past and present cases as well as NYPD's cold cases.

As we stated in our letters to the Mayor's Office, NYPD, and the District Attorney offices, we urged the Mayor's Office to convene key criminal justice stakeholders – including local public defender organizations and wrongful conviction providers – to develop concrete solutions to ensure that wrongfully convicted citizens have access to justice. Furthermore, we call upon the NYPD and prosecutors' offices to develop and publish a plan of action, in consultation with the City's conviction integrity units, to ensure that the accused and wrongfully convicted are not punished for the loss of this evidence.

In accordance with Criminal Procedure Law § 245.80(1)(b), we call upon prosecutors' offices to proactively identify potential remedies that are proportionate to the ways in which this evidence may have been helpful for the accused and wrongfully convicted.

We also call on the prosecutor's offices and NYPD to develop protocols to address defense counsel's queries about evidence.

Moreover, while a state-of-the-art evidence storage facility is an ideal, it is not a prerequisite for proper evidence tracking, storage and preservation under NYPD's care now. We strongly request that the NYPD review and revise as necessary protocols for tracking, preservation and storage of physical and biological evidence at its current 12 facilities. Plans to upgrade those facilities to ensure they are proper environments should be NYPD priorities. Moreover, we ask that the implementation of a robust evidence control and tracking system of all evidence in their care, including those evidence that predates 2012, be prioritized now.

As Kamillah Hanks stated in her opening remarks, a reliable and efficient system to safeguard evidence is "required to protect the rights of the accused, to ensure a fair and just criminal justice system for those accused of crime and those who have been victims of crime."

We sincerely thank the oversight and investigation committee and the public safety committee for calling a joint public hearing to elevate the urgent concern for clarity and transparency from the NYPD regarding the impact of the Erie Basin fire and NYPD's evidence tracking, preservation and storage practice in general.

**TESTIMONY OF
REBECCA BROWN, DIRECTOR OF POLICY, INNOCENCE PROJECT,
CYNTHIA E. JONES, PROFESSOR OF LAW,
AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW &
MARTIN TANKLEFF, ESQ., EXONEREE, ATTORNEY & JUSTICE ADVOCATE
BEFORE THE NEW YORK CITY COUNCIL
COMMITTEES ON OVERSIGHT & INVESTIGATIONS AND PUBLIC SAFETY
RE: NYPD WAREHOUSE FIRE AT THE ERIE BASIN FACILITY//
STORAGE AND ACCESSIBILITY OF DNA CRIME SCENE EVIDENCE**

Scott Fappiano, who was convicted of a rape in 1985 and consistently maintained his innocence throughout his incarceration, was exonerated by DNA testing in 2006. A week later, the Innocence Project provided testimony before the State Assembly Codes Committee on the pressing need for a uniform system to properly preserve biological evidence in New York State. There is still no law in New York State or in New York City that guides the preservation of biological evidence nor are there necessary codified remedies for a failure to do so.

In Scott's case, a wealth of samples had been collected from the crime scene—including cigarettes, a beer bottle, clothing worn during and after the attack, a towel, vaginal swabs, hairs, and fingernail clippings-- which could well have contained DNA from the perpetrator. DNA technology at the time could not produce a conclusive result that would identify the perpetrator of this heinous crime. Some exhibits containing biological evidence used at trial were returned to the DA's office; others were vouchered and sent either to the Pearson Place evidence storehouse or to the Brooklyn property bureau. In 1989, by consent of the parties, the DA's office sent two items of evidence—the rape kit and a pair of semen-stained sweatpants belonging to the victim—to Lifecodes, a now-defunct DNA laboratory which at the time performed rudimentary DNA analysis for the state.

Given the state of technology in 1989, although Lifecodes found semen to be present on the available evidence, they were unable to get a result. By 2002, state-of-the-art DNA testing enabled the potential for results to be achieved where testing in 1989 was unsuccessful and the Innocence Project embarked upon a search for the original exhibits. With cooperation from the DA's office, a search was conducted of DA storage areas, at Pearson Place, and at the Brooklyn property house. Nothing could be located. The original evidence vouchers did not contain any record of correspondence as to the evidence's location. There was no record detailing the destruction of any evidence, but it seemed that we had run out of options. In a last ditch effort, the Innocence Project reached out to Orchid Cellmark, a private DNA laboratory in Texas which had, after a series of mergers, taken over the Lifecodes lab. Orchid Cellmark had inherited dozens of boxes of test tubes containing DNA extracts from cases for which Lifecodes had previously attempted testing. Lo and behold, in August of 2005, two test tubes that corresponded with case number and item number to samples from the afore-mentioned sweatpants were located and subsequent testing excluded Mr. Fappiano. Unfortunately, there were a number of other Innocence Project cases for which Cellmark could not locate samples.

Had Scott Fappiano been dependent upon New York State to locate the evidence connected to his case, he would have remained in prison interminably. The existing records pertaining to his evidence seemed frozen in time. No notations existed that could trace the path of the evidence in his case. Miraculously, liquid DNA material from one item among over a dozen pieces of evidence had been preserved by a private laboratory, located more than a thousand miles from New York City. There were no records indicating that these other pieces of evidence had been destroyed, but they could not be located. It was by pure chance that the evidence was ever located.

Alan Newton, another exonerated man, was convicted in 1984 for a rape he did not commit. He maintained his innocence from the very beginning and throughout his sentence. He even refused to participate in programs that would have facilitated an early release on parole out of concern that it was an admission of guilt. Only DNA could prove his claim of innocence and so he sought DNA testing of the evidence used to convict him. Mr. Newton sought testing first in 1994, but his request was denied when NYPD officials from the Pearson Place evidence storehouse indicated that the rape kit could not be located. He sought testing again in 1998, but was informed that the evidence was presumed destroyed because the original voucher relating to the evidence was missing from his case file. Finally, in 2005, a Bronx Assistant District Attorney pursued that same evidence and asked that officials conduct a physical search of Pearson Place.

The rape kit was ultimately located in November of that year. DNA testing results proved that in fact Alan Newton was innocent of that horrible rape for which he was convicted. The DA's office joined in the Innocence Project's motion to vacate the conviction and grant Mr. Newton his freedom - a freedom that, but for the inability to find the evidence, should have happened, at the very least, twelve years earlier when Mr. Newton first requested that his evidence be located. That evidence also revealed that the true rapist had never been brought to justice.

And of course the recent fire at Erie Basin has prevented justice in an unknowable number of wrongful conviction and unsolved cases. Further, there is no law that provides guidance to the courts about how to respond when evidence custodians fail to safeguard evidence in their possession. New York still requires such direction.

Preventing the detection of the real perpetrators of rape, murder and the other serious crimes for which biological evidence is probative, is the other important aspect of preserved evidence. For while the issue gets significant attention in light of DNA exonerations, what is as important yet less recognized is the ability of preserved biological material to protect the public, and to bring justice to victims of crimes that could otherwise never be solved. A piece of clothing belonging to a rape victim that had been sitting in a DA file cabinet to was used to prove the guilt of Fletcher Anderson Worrell for a 32-year-old rape. That same rapist was linked to a series of additional rapes and other violent assaults after the one for which he eluded justice. If that evidence had been accessible, it could have been re-tested upon the advent of DNA technology, and the victim and the community could have been spared the pain that otherwise resulted.

The harm of failing to properly preserve and organize evidence thus obviously harms us in two important ways: It prevents us from detecting perpetrators of crime, and it further victimizes innocent people who have already suffered a wrongful conviction, and are then denied the opportunity to use the evidence that should have been preserved in order to prove that

innocence.

I want to thank the Oversight and Public Safety committees for looking into the issues of the preservation of evidence, and the accessibility of preserved evidence in New York City. For as these stories just begin to show, the accessibility of preserved evidence is critical to ensuring justice in our criminal justice system.

My testimony today will explain why the accessibility of preserved evidence has become such an important part of our criminal justice system, demonstrate how and why the current state of preserved evidence in New York City (and state) is inconsistent at best, and a travesty at worst, and propose the straightforward measures that New York City could undertake to remedy the problem, and thus greatly improve the administration of justice.

Technological advances make preserved evidence a critically important tool for justice

Modern DNA technology, coupled with today's comprehensive information and communications technology, has exponentially increased the power of preserved evidence, to levels unimaginable just a generation ago. As a result, evidence preservation practice that may have seemed adequate – if still a bit disconcerting – in the early 1980's is today an incredible waste of criminal justice potential. Our governments can be forgiven for their failure to anticipate the future power of preserved evidence, but there is no excuse for perpetuating this situation in light of preserved evidence's new power to provide justice in some of our most serious and violent cases.

Tapping this potential is as simple as properly preserving, storing, and organizing the criminal evidence that we gather. Preserving such evidence, while not mandated, is standard practice in New York State, so the task before us is simply to store and organize that evidence in a way that makes it readily accessible when we seek to use this newly valuable tool in our quests for justice.

If New York continues to fail to preserve evidence in a manner which allows its ready retrieval, we will needlessly deny justice to victims, the wrongfully convicted, and the public at large.

Identifying perpetrators of crime

Whereas a generation ago crime scene DNA was better described as "futuristic" than commonplace, the future is indeed upon us. DNA found at crime scenes can now, with a simple keystroke, be compared to DNA found at other crime scenes as well as the DNA of millions of individuals.

The Worrell case, which I referenced in my opening, is a fitting example of a failure to properly organize and track evidence. Had a suitable chain of custody been maintained in this case, cold case detectives would have been able to test this evidence years earlier, convict the real perpetrator, and likely prevent many of the other serious crimes that the perpetrator committed while the evidence remained dormant. Crimes such as these – where there were a range of crimes committed across multiple jurisdictions – often cannot be stopped when preserved evidence, because it cannot be found, or has degraded, cannot be entered into the investigative equation.

This is but one example of the countless others that we have tracked at the Innocence Project of the potential of accessible, preserved evidence to help law enforcement solve crimes and

protect the public.

Innocence Claims: A Tale of Two Cities

Preserved evidence can not only improve our efforts to detect and convict the guilty, but also provide justice to the innocents convicted of crimes they did not commit. According to the National Registry of Exonerations, to date, DNA has contributed to proving the innocence of fifty-four New Yorkers, who served an average of more than ten years in prison, all thanks to preserved evidence that was eventually retrieved.

Despite the difficulties we experienced in uncovering the evidence connected to the cases for which we were eventually able to prove innocence, they are the instances in which the system eventually succeeded. But preservation of and accessibility to crime scene evidence for the innocent in New York is best described as a tale of two cities: one in which innocence can be proven, and one in which looming questions of innocence will remain forever unanswered and lives are destroyed. For while I have described for you those NY success stories where obstacles have been overcome, you must also know about the many cases where the inability to locate and test the evidence leaves those with strong claims of innocence no ability to prove their innocence. Such is the case of Cordy Thomas.

Mr. Thomas was released from prison over 15 years ago after serving fourteen years on a rape conviction that he has consistently claimed he did not commit – and to which preserved evidence can provide us all the answer. The case against Mr. Thomas was based primarily upon the victim's identification of him, even though she claimed that her attacker was clean-shaven and testimony at trial indicated that Mr. Thomas wore a moustache at the time of the incident. While in prison, Mr. Thomas, like Mr. Newton, repeatedly sought the evidence associated with the crime for which he was convicted and refused to take part in a sex offender counseling program. Although this would have likely promised him an earlier release date, Mr. Thomas believed that participation would have been tantamount to a confession. Since his release, Mr. Thomas has been required to register as a sex offender and, because of this, has suffered from severe depression, has been unable to obtain steady employment, and was placed on disability. Unlike Mr. Newton, whose evidence, albeit belatedly, was eventually located, Mr. Thomas had repeatedly been told that the evidence associated with his case could not be found and numerous attempts to locate the evidence over an eight year period on the part of the Innocence Project were fruitless. We closed his case in 2004 because the evidence could not be located.

What you've heard today are just some of the stories relating to the wrongfully convicted and preserved evidence in New York. But there are many more. A preliminary analysis of the Innocence Project's closed cases from the last 10 years shows that fully 50% of these cases in New York City were closed because officials said evidence was lost or destroyed, while nationally more than one-quarter of closed cases were closed for this reason.

The Specific Problems with Preserved Evidence in New York State

Statewide

The methods of storing, organizing and retrieving preserved evidence vary by jurisdiction, as well as by type of entity charged with preserving evidence, throughout New York State. Our inability to locate evidence in New York has frustrated our efforts to prove innocence, causing

us to close countless cases from around New York State. We engage in a thorough review process before seeking DNA testing in any case, and these are cases that had cleared that process, and where our staff still believes that the evidence, if tested, would likely prove innocence. In addition to New York City, the Innocence Project has been forced to close cases throughout the state because evidence could not be located in Onondaga, Monroe, Suffolk and Columbia counties. When we have been able to prove innocence through our ability to locate testable biological evidence, it is the result of serendipity.

New York City

New York City represents such a large proportion of the stored evidence in the state. Evidence storage facilities like Erie Basin and Pearson Place therefore operate on a magnitude that illuminates the issues of concern. I wanted to share with you a number of issues identified by our staff attorneys relating to their experiences with Pearson Place. These examples neither paint the whole picture for New York City, nor do they touch upon problems we encounter throughout the state. Instead, they provide a flavor of the troubles experienced by individuals seeking to locate evidence:

- Lack of consistent information: A Pearson Place representative will tell an inquiring lawyer that the evidence being sought is being held in a borough facility, while a representative from that facility will direct the evidence seeker back to Pearson Place.
- Lack of standardized cataloguing system: There is no central repository for information about the location of evidence. Evidence custodians must check handwritten ledgers, multiple files, and an untold number of storage areas in order to locate evidence. Innocence Project staff attorneys have been told that there is no system in which records are updated after evidence is initially brought into the Pearson Place facility. Therefore, if evidence is moved in the intervening years following a trial, it is nearly impossible to locate.
- Antiquated organization system: Because all pieces of evidence are stored by either a voucher number or a borough storage number, as opposed to the name of the party and a case number, and most of these numbers were recorded either by hand or with a manual typewriter, if one digit was mis-transcribed or is illegible, it is almost certain that the property will not be found.
- Missing or Confusing Ledger Information: At times, a bin number is not specified in the ledger. In such cases, save for a physical search of all of the property, the evidence will not be located. As well, a single case may yield multiple ledger listings that correspond to numerous pieces of evidence located at various locations.
- Missing Records: Oftentimes, there is no record of destruction of evidence. Without proof of the destruction of evidence, our staff attorneys spend limitless hours petitioning for the testing evidence that is gone. In addition, there is no proof that the evidence was actually destroyed, leaving lingering innocence claims forever unanswered.
- Lack of Documented Inventory Policy: There is no documentation or explanation of policies, especially pertaining to old cases. It is unclear how far back in time the evidence has been preserved. For instance, when we sought evidence in Mr. Newton's case, NYPD officials represented that no rape kits predating 1987 were located in the Pearson Place facility, an assertion that was contradicted later by the detection of the 1985 rape kit associated with Mr. Newton's case.

One Innocence Project staff attorney likened the evidence searching process as a "low-tech

scavenger hunt through a paper and property haze.” As I mentioned earlier, this problem is not limited to NYC; the Innocence Project has closed cases for lack of evidence throughout the state. In these cases, lost or destroyed evidence spelled a dead end for justice. Sometimes cases that are close to closure are rekindled through the discovery of evidence, usually after needlessly lost years. Take the Terry Chalmers case. This Westchester man, whose innocence was later proven by DNA testing, languished in prison for more than seven years after his requests for DNA testing were denied since the evidence in his case could not be located. It was later discovered that the Westchester Department of Laboratories and Research had retained the rape kit and items of clothing which were used as evidence at trial and he successfully petitioned for DNA testing with the help of the Innocence Project. Had a centralized tracking system been present, Mr. Chalmers would not have lost nearly eight years of his life.

Recommended steps to properly store and organize preserved evidence in New York

This is not a new problem to NY, but this is an issue that continues to crop up because attempts to solve it have not been entirely fruitful. The NY legislature took a step in the right direction in 2004 when it added a provision to the post-conviction DNA access law that gave courts the power to order more thorough searches of NY State’s evidence rooms and direct hearings with evidence custodians in an attempt to locate more evidence. Unfortunately, because no statute exists that requires the preservation of evidence, and because of the state of disorganization of so much evidence, as well as the inability of evidence custodians to locate the evidence in the labyrinthine chambers of New York’s evidence rooms, the search for evidence is oftentimes a tragic and futile effort.

Even the most well-intentioned evidence custodian can only do as good a job as the system allows. And the current system must be corrected. Order can only be brought to chaos through the requirement that all “old” evidence be re-catalogued and inventoried and that a centralized entity be charged with the tracking system, so once it is re-catalogued, it can be easily retrieved. There also need to be a mandated inventory of the evidence stored in each facility.

Other jurisdictions, recognizing the crime-solving potential of old evidence for cold cases and observing the miscarriages of justice likely to occur when innocence claims cannot be addressed, have undertaken just such a process. For instance, police officials in Charlotte, NC, America’s 5th largest urban region, launched an initiative in 1995 to re-catalogue all of its evidence. In nine months, all of Charlotte’s evidence had been re-catalogued and placed in one 6,700 square foot storage space. The entire manpower cost was estimated at \$100,000. The pricetag for bar code printers and radio scanners, which allowed for a state-of-the-art searching tool, was \$40,258. Following the re-cataloguing of old evidence, Charlotte’s Police Department formed a Homicide Cold Case Unit. To date, the Cold Case Unit has cleared fifteen cases, charged fourteen persons with murder and is actively investigating a dozen reopened cases.

There are a number of steps that New York should take to effectively preserve, organize, and make accessible biological evidence:

Passage of a Citywide – and eventually a Statewide - Preservation Statute

The majority of states have passed statutes that obligate the government to properly collect and retain evidence that was collected during the original criminal investigation. Surprisingly,

New York, birthplace of the innocence movement and a leader in the uses of forensic technology, is not among those states. While, according to CPL § 440.30, the People must bear the burden of showing what evidence does exist and whether it is available in suitable quantities to make testing possible, there is no articulation of the required period of preservation. This leaves open a window of time between conviction and requests for postconviction testing that, in essence, allows evidence entities to destroy evidence.

The statutory scheme should also require the preservation of biological evidence connected to cases for those individuals who have been released from prison after serving their sentence. Like Cordy Thomas, these individuals face collateral consequences of conviction, such as mandated sex offender registration.

Biological evidence should be preserved in all cases where it may be probative, for as long as a sentence or collateral consequence of a wrongful conviction is in effect. Biological evidence should also be preserved in all cases where it is connected to an unsolved crime, so that it is readily available to law enforcement officers investigating old cases. Two of the authors, Rebecca Brown and Cynthia Jones, were members of the DOJ-funded and NIST-administered Technical Working Group (TWG) on the Preservation of Biological Evidence, which issued a set of recommendations guiding state statutes mandating the preservation of evidence. The TWG was comprised of membership from all corners of the criminal legal community, including academics, innocence and defense lawyers, sheriffs, police, biologists, SAN nurses, etc. Ultimately, our TWG recommended that the following provisions be included in legislation:

- Retention of biological evidence connected to adjudicated cases, regardless of whether an individual pleaded guilty, in the following 5 crime categories: Murder; Rape; Felony Assault; Kidnapping and Robbery;
- Retention of that evidence for at least the length of incarceration, although we recommend this be extended to the length of time under which a person would be subjected to the collateral consequences of a conviction, e.g. sex offender registration; parole; probation; etc.
- Retention of evidence in unsolved cases until the State of Limitations toll;
- Remedies “as appropriate” for a failure to preserve evidence

The remedy section is key since there is otherwise no recourse for potentially innocent petitioners who no longer have the benefit of evidence to test because it perished in the Erie Basin fire. Other natural disasters, including asbestos, have occurred in our evidence rooms so a provision such as this is critical over time.

Implementation of Best Practices

In addition to a city or state statute, implementation is paramount. There is no reason why a task force in New York City (or New York State) cannot be established to address the details of an evidence overhaul plan. While some aspects can be specifically addressed in the statute, several of the following significant details can be delegated to a to-be-formed task force, which, through a deliberative process, can implement a plan:

- A Centralized Entity to Administer Evidence System: Identify a central entity that would be charged with administering a re-cataloguing process, including the establishment of standards regarding the proper collection, retention and retrieval of biological evidence.

- An Accounting of Relevant Evidence Facilities: Identify all of the facilities (police agencies; courthouses; hospitals; laboratories; DA's Offices; etc.) where old evidence is currently stored.
- Inventory Evidence: Provide a brief description of the evidence located in each facility.
- Repackage Evidence: Repackage, as necessary, all relevant biological evidence that may be vulnerable to degradation.
- Organize and Catalogue Evidence by Case: Identify and inventory all voucher, borough property, and property receipt numbers associated with evidence, link all to the specific pieces of evidence to which they correspond, ensuring that all pieces of evidence associated with a particular case are grouped together, and identify a means through which that evidence can be readily located. This can be accomplished, as was done in Charlotte, through a bar coding system.
- Enter Evidence Into a Modern Database System: The central entity charged with administering the process will also oversee the creation of an integrated database that would establish chain of custody and allow easy access to old evidence.
- Clearly Articulated Policies and Procedures/Training: Finally, the administering entity will create training programs for law enforcement and other relevant employees that are charged with preserving and retrieving biological evidence.
- A system to track when biological evidence is analyzed and stored at a lab.

With today's technology, preserved evidence is nothing less than a goldmine of potential justice. Crimes can be solved, thus enhancing the public safety and serving the victims whose cases were never before solved; and the innocent and their families will no longer have to endure the terrible nightmare of a wrongful conviction, and their lives can begin to mend.

But as long as this important issue is largely ignored, victims, the wrongfully convicted, and the public at large are denied access to this incredible crime solving potential that is in our possession, yet beyond access.

The reliability of our criminal justice system cannot depend on the serendipitous discovery of evidence. New York has been a leader in the forensic uses of DNA technology and evidence. By establishing a reasonable evidence preservation policy that is both comprehensive and provides ready access to those in need, we can lead on this front as well. By doing so we will firmly establish New York at the forefront of tapping into the potential of preserved evidence – and more importantly, provide New Yorkers with the quality of justice that it would be unconscionable to deny.

**THE COUNCIL
THE CITY OF NEW YORK**

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____

in favor in opposition

Date: 6/20/23

(PLEASE PRINT)

Name: Elizabeth Felber

Address: 199 Water Street NY NY 1003

I represent: The Legal Aid Society

Address: _____

**THE COUNCIL
THE CITY OF NEW YORK**

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____

in favor in opposition

Date: 6/20/23

(PLEASE PRINT)

Name: Elizabeth Daniel Vasquez

Address: _____

I represent: Brooklyn Defender Services

Address: _____

**THE COUNCIL
THE CITY OF NEW YORK**

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____

in favor in opposition

Date: 6-20-23

(PLEASE PRINT)

Name: Sheila Howard

Address: Presidential drive

I represent: My son who has a 25 to Life

Address: Sen Louis Wronzone conviction

NO because they destroyed the
Please complete this card and return to the Sergeant-at-Arms Rec'd

**THE COUNCIL
THE CITY OF NEW YORK**

Appearance Card

[]

I intend to appear and speak on Int. No. _____ Res. No. _____

in favor in opposition

Date: 6/20

(PLEASE PRINT)

Name: Kristine E Ryan, Deputy Commissioner

Address: of Management and Budget @ NYPD

I represent: NYPD

Address: 1 Police Plaza

**THE COUNCIL
THE CITY OF NEW YORK**

Appearance Card

[]

I intend to appear and speak on Int. No. _____ Res. No. _____

in favor in opposition

Date: 6/20

(PLEASE PRINT)

Name: Neil Fenton, Executive Director

Address: of the Legal Bureau's Investigative

I represent: Support unit @ NYPD

Address: 1 Police Plaza

**THE COUNCIL
THE CITY OF NEW YORK**

Appearance Card

[]

I intend to appear and speak on Int. No. _____ Res. No. _____

in favor in opposition

Date: 6-20-23

(PLEASE PRINT)

Name: Captain John Breslin

Address: 1 Police Plaza

I represent: NYPD

Address: _____

**THE COUNCIL
THE CITY OF NEW YORK**

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____

in favor in opposition

Date: 6/20

(PLEASE PRINT)

Name: Michael Clarke, Director of Legislative

Address: Affairs for NYPD

I represent: NYPD @ 1 Police Plaza

Address: _____

**THE COUNCIL
THE CITY OF NEW YORK**

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____

in favor in opposition

Date: 6-20-2023

(PLEASE PRINT)

Name: Martin Tankleff Esq.

Address: Old Country Rd. Garden City NY 11530

I represent: Myself & Expenses

Address: _____

**THE COUNCIL
THE CITY OF NEW YORK**

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____

in favor in opposition

Date: 6/20/23

(PLEASE PRINT)

Name: Rebecca Brown

Address: 40 Worth St., Suite 705, NY, NY 10013

I represent: Innocence Project

Address: SAME

Please complete this card and return to the Sergeant-at-Arms