



**BROOKLYN  
DEFENDER  
SERVICES**

**TESTIMONY OF:**

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***BROOKLYN DEFENDER SERVICES***

*Written with Andrea Nieves, Senior Policy Attorney*

**Presented before**

**The New York City Council Committees on Health and Public Safety**

**Oversight Hearing – Examining Forensic Science Practices**

**in the NYPD Crime Lab and OCME**

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**Introduction**

My name is Guy Raimondi and I am a supervising attorney in the criminal defense practice for Brooklyn Defender Services. BDS provides multi-disciplinary and client-centered criminal, family, and immigration defense, as well as civil legal services, social work support and advocacy, in nearly 40,000 cases in Brooklyn every year. I thank the City Council Committee on Health and Public Safety and Chairs Corey Johnson and Vanessa Gibson for the opportunity to testify today about forensic science practices in the NYPD Crime Lab and the Office of the Chief Medical Examiner.

Brooklyn Defender Services joins with the comments presented today by our colleagues at the Legal Aid Society, Bronx Defenders, and the Innocence Project. They all raise crucial points about the importance of accuracy and reliability in forensic testing in criminal cases. They also offer diverse suggestions about how to improve forensic oversight in our city. We urge the Council to consider all of their recommendations. I will focus my

comments today on the importance of transparency in lab protocols and early disclosure of forensic evidence to defense teams and will provide specific recommendations for reform.

## **Recommendations**

### ***1. The City should require the NYPD to list all of their laboratory protocols on the internet to be available to the public, as they required the OCME to do in 2013.***

There has been a move towards more transparency in crime lab protocols in response to widespread scandals that have led to thousands of convictions being overturned across the country.<sup>1</sup> To be considered reliable, scientific study must be replicable. Scientists must be able to show how they arrived at their conclusions and those conclusions should be able to be replicated by others. Crime labs across the country have thus begun to post their protocols, validation studies, technical manuals and directives on their website. In 2013, the City Council passed legislation requiring OCME to post this information, which is now publicly available on their website.<sup>2</sup> Two examples from other states include the Indiana State Police Laboratory Division<sup>3</sup> and the North Carolina State Crime Lab.<sup>4</sup>

Unlike other jurisdictions, New York City's police crime lab does not post their laboratory protocols on their website. Notably, the NYPD crime lab does not even have a page on the NYPD website that the public can access to learn about the lab, much less access critical protocols, test methods, quality assurance manuals and other relevant information. This information is critical to the analysis and assessment of all forensic testing that will be used in criminal cases.

At a minimum, the Council should require the NYPD crime lab to maintain a website and post on the websites all of the critical information required of OCME. Local Law 86-2013 should serve as the Committee's model in drafting transparency legislation to apply to the NYPD crime lab.

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<sup>1</sup> "Scandals have plagued state crime labs in North Carolina, California, Virginia, Illinois, Maryland, West Virginia and Mississippi; the city crime labs in Houston, Cleveland, Chicago, Omaha, Oklahoma City, Washington and San Francisco; the county lab in Nassau County, New York; and even at the FBI and Army crime labs." Radley Balko, *Private Crime Labs Could Prevent Errors, Analyst Bias: Report*, HUFFINGTON POST, June 14, 2011, available at [https://www.huffingtonpost.com/2011/06/14/the-case-for-private-crime-labs\\_n\\_876963.html](https://www.huffingtonpost.com/2011/06/14/the-case-for-private-crime-labs_n_876963.html).

<sup>2</sup> New York City Office of the Chief Medical Examiner website, available at <http://www1.nyc.gov/site/ocme/services/technical-manuals.page> (last viewed Dec. 13, 2017).

<sup>3</sup> Indiana State Police Laboratory Division website, available at <https://www.in.gov/isp/labs/index.htm> (last viewed Dec. 13, 2017).

<sup>4</sup> North Carolina Department of Justice – State Crime Lab website, available at <http://www.ncdoj.gov/About-DOJ/Crime-Lab/ISO-Procedures.aspx> (last viewed Dec. 13, 2017).

**2. The City should require the NYPD and OCME to turn over all of the evidence that relates to testing in a criminal case early and automatically to defendants and their attorneys.**

**The Need for Discovery Reform in New York State**

In order for people charged with crimes to present a full and fair defense in their case, they need complete and quick disclosure of all of the evidence. This is particularly so in cases involving forensic evidence which “often [has] decisive power in the judicial system.”<sup>5</sup>

Defense attorneys play a crucial role in holding police, forensic experts and prosecutors accountable and exposing systemic injustice. Yet we cannot fulfill our responsibilities in this role as a check on other court actors if we do not have access to the evidence.

Unlike most of the rest of the country, New York’s criminal procedure laws do not require early disclosure of the case evidence to the defense. This lack of information is unfair and results in wrongful convictions.<sup>6</sup> It also has a pernicious effect on the process of plea bargaining. Without any information on the case, it is hard for people accused of crimes to trust their attorney during plea negotiations. It is hard for the defense attorney to assess the advisability of a plea offer without the police reports. Without the information defense attorneys need in order to defend our clients’ innocence or negotiate the plea bargain we believe is fair and appropriate, we are unable to move the process forward. Instead the case ends up in a standstill for months.

This means that even forensic evidence, often the key evidence in the prosecution’s case, may be withheld from the defendant for months. In our experience, while it is now routine in Brooklyn for final reports or analyses to be turned over, we still may have to litigate, obtain subpoenas or at least engage in a prolonged back and forth, to obtain other critical forensic evidence in the case.

The City Council can help to ensure that people accused of crimes in New York City have all of the evidence they need to defend themselves, especially in cases involving forensic evidence. *The Council should join with defenders and grassroots groups to call upon the State legislature and the Governor to pass comprehensive discovery reform in all criminal cases during the 2018 legislative session. Current discovery practices harm court-involved City residents and their families and are costly to taxpayers who must cover the costs of extended and unnecessary incarceration on Rikers due to discovery delays. The Council’s leadership on this issue could go a long way in bringing about statewide reform.*

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<sup>5</sup> Itiel D. Dror, *Cognitive neuroscience in forensic science: Understanding and utilizing the human element*, 370 PHILOS. TRANS. R. SOC. LONDON B. BIOL. SCI. 1674 (2015).

<sup>6</sup> See, e.g., Brandon L. Garrett, *Actual Innocence and Wrongful Convictions*, in REFORMING CRIMINAL JUSTICE, VOL 3: PRETRIAL AND TRIAL PROCESSES, pp. 193-210, available at [http://academyforjustice.org/wp-content/uploads/2017/10/9\\_Reforming-Criminal-Justice\\_Vol\\_3\\_Actual-Innocence-and-Wrongful-Convictions.pdf](http://academyforjustice.org/wp-content/uploads/2017/10/9_Reforming-Criminal-Justice_Vol_3_Actual-Innocence-and-Wrongful-Convictions.pdf).

## **Particular Areas of Concern**

### ***OCME – Electronic Raw Data***

A defendant cannot effectively challenge DNA evidence without access to the electronic raw data because the data is subject to interpretation by both the software program which processes it and the analyst who constructs the DNA profile. Yet in our experience, OCME will only turn over this information in response to a court-ordered subpoena. Judges respond inconsistently to defense requests for a subpoena, leading to variability across judges and jurisdictions.

Justice demands that where DNA is at issue in the case, the defendant and his or her expert should have early and automatic access not only to the electronic raw data, but all of the underlying data related to the DNA in his or her case, including a complete record of all bench notes.

New York City, like the rest of the state, falls far behind the rest of this country in with respect to prompt and thorough disclosure of this critical evidence, and it is time for reform. *The City Council should require the OCME to provide this information to the District Attorney prosecuting the cases along with the analysis and all of the other necessary evidence early and automatically in the case.*

### ***OCME – Results of Employee Proficiency Exams and Disciplinary Records***

As the City well knows, a single analyst can do significant harm to the reputation of a crime lab if they engage in illegal, improper, incompetent or simply careless behavior.<sup>7</sup> It is critical that defense counsel have access to the results of employee proficiency exams and disciplinary records to ensure that there is neither a rogue employee nor a pattern and practice of oversight that may lead to inaccurate results. The OCME Department of Forensic Biology does publish on its website the department wide results of proficiency exams. However, defendants and their lawyers know nothing as to whether the proficiency exams are sufficiently challenging and whether the samples used reflect the complex mixtures seen in real world casework. A 2013 audit of the OCME Department of Forensic Biology by the New York State Office of the Inspector General disclosed that there exists a multi-level employee disciplinary scheme to deal with OCME criminalist malfeasance but the defense community knows little of the process and does not receive any documentation regarding prior mistakes made by the criminalist.<sup>8</sup> *The City Council should require the OCME to provide this information to both District Attorneys and to the defense.*

### ***NYPD Crime Lab - Testing of Controlled Substances in Misdemeanor Cases***

<sup>7</sup> See, e.g., Joseph Goldstein, *New York examines over 800 rape cases for possible mishandling of evidence*, N.Y. TIMES, Jan. 10, 2013, available at <http://www.nytimes.com/2013/01/11/nyregion/new-york-reviewing-over-800-rape-cases-for-possible-mishandling-of-dna-evidence.html>.

<sup>8</sup> State of New York, Office of the Inspector General, *Investigation into the New York City Office of Chief Medical Examiner: Department of Forensic Biology* (Dec. 2013), available at <https://www.ig.ny.gov/sites/default/files/pdfs/OCMEFinalReport.pdf>.

Lab testing of controlled substances in misdemeanor cases is of particular concern because of a Court of Appeals case that, in effect, leaves innocent people incarcerated at Rikers for months without the testing of the evidence in their cases. Criminal Procedure Law Section 170.70 mandates that an incarcerated defendant be held in jail no more than five days absent the converting of the misdemeanor complaint to an information. Prior to the decision in *People v. Kalin*, the prosecutor, in order to convert, was required to obtain a laboratory report demonstrating that the item recovered was, in fact, a controlled substance. However, under *Kalin*, prosecutors can satisfy both the conversion requirement and, consequently, their obligation under CPL 170.70, with an assertion by the recovering police officer that based upon their training and experience and familiarity with packaging they believe the item to be the particular controlled substance.<sup>9</sup> The testing by the police lab is then often pushed off months down the road, perhaps until right before trial. And upon testing, if it determined that the item is, in fact, not a controlled substance, the defendant charged with a misdemeanor can have spent a considerable amount of time incarcerated for something that was not a crime. The irony is that our clients charged with felony possession or sale of a controlled substance are actually provided with more protections against wrongful imprisonment. *Kalin* does not abrogate the prosecutor's obligation, pursuant to Criminal Procedure Law Section 180.80, to present a laboratory report to a grand jury within six days of the moment of an incarcerated defendant's arrest. Therefore, in felony cases where the defendant is incarcerated and where the prosecutor must obtain an indictment within six days, we see cases dismissed when the laboratory report comes back as no controlled substance. These safeguards do not exist for our misdemeanor clients. We have seen clients sit on Rikers Island for some period of time, or who have to return to court multiple times with a charge hanging over their head, who are later proven innocent of misdemeanor drug possession once the recovered item is tested. More commonly, even if a person asserts their innocence, they take a plea to get off Rikers before the lab report even comes back. *This is unconscionable, but by requiring the crime lab to test evidence quickly and turn over the evidence to the defense, we could avoid unnecessary incarceration and court proceedings.*

### ***3. The City should act to make the city's crime lab independent of the NYPD to avoid bias***

For decades, scholars have written of the “inbred bias of crime laboratories affiliated with law enforcement agencies’ – as have courts, legislators, prosecutors, investigators, and reporters.”<sup>10</sup> 2009 represented a sea change. In that year, the National Academy of Sciences' Report, *Strengthening Forensic Science in the United States: A Path Forward*, challenged the law enforcement paradigm for forensic laboratories,

<sup>9</sup> *People v. Kalin*, 2009 NY Slip Op 2446 (N.Y. 2009).

<sup>10</sup> Paul C. Giannelli, *Independent Crime Laboratories: The Problem of Motivational and Cognitive Bias* (2010), CASE WESTERN SCHOOL OF LAW FACULTY PUBLICATIONS, PAPER 603, available at [https://learn.saylor.org/pluginfile.php/33515/mod\\_resource/content/3/BUS403-2.6.3-IndependentCrimeLaboratoriesTheProblemofMotivationalandCognitiveBias-pdf..pdf](https://learn.saylor.org/pluginfile.php/33515/mod_resource/content/3/BUS403-2.6.3-IndependentCrimeLaboratoriesTheProblemofMotivationalandCognitiveBias-pdf..pdf).

recommending that forensic service providers be administratively or financially independent of law enforcement-based parent agencies.<sup>11</sup>

Since then (and in reaction to ongoing scandals involving crime lab errors or misconduct), both Washington D.C. and Houston have created independent forensic agencies. Two other states, Virginia and Rhode Island, already had independent forensic labs.<sup>12</sup>

New York City should join with these other jurisdictions and make the city's crime lab independent of the NYPD. This would instill public trust in the crime lab, limit the role of motivational and cognitive bias in testing, and put New York at the forefront of reform. We need not wait for another scandal to serve as the impetus for reform: the Council should act now to make our crime lab independent of the NYPD.

### **Questions?**

If you have any questions, please feel free to reach out to Guy Raimondi, Supervising Attorney, [g.raidondi@bds.org](mailto:g.raidondi@bds.org), & Andrea Nieves, BDS Policy Team, 718-254-0700 ext. 387 or [anieves@bds.org](mailto:anieves@bds.org).

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<sup>11</sup> National Research Council of the National Academies, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009).

<sup>12</sup> Max M. Houck, *What does independence mean for a forensic laboratory?*, EVIDENCE TECHNOLOGY MAGAZINE, available at [http://www.evidencemagazine.com/index.php?option=com\\_content&task=view&id=1385](http://www.evidencemagazine.com/index.php?option=com_content&task=view&id=1385).