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Feb. 13, 2019

## RE: Memo of Support for Discovery Reform

### S. 1715/A.1431

This is a memo of support from The Jeffrey Deskovic Foundation for Justice in support of the Senate Bill 1715 and Assembly Bill 1431. The Jeffrey Deskovic Foundation for Justice is a non-profit 501 C(3) organization whose purpose is to exonerate the wrongfully convicted in both DNA and Non-DNA cases, as well as preventing wrongful convictions by seeking changes in the law aimed at addressing the systemic deficiencies that lead to wrongful conviction. In the furtherance of that goal, The Foundation raises awareness about those deficiencies as well as surrounding issues involving wrongful conviction as well as false accusations.

I, Jeffrey Deskovic, the Founder and Executive Director of The Foundation, served 16 years in prison- from age 17-32- for a murder and rape which I did not commit, despite a pre-trial DNA exclusion prior to being exonerated by further DNA testing via the DNA Databank, which not only exonerated me but also identified the actual perpetrator. Our memo of support is based upon our expertise in the field in combination with my personal experience. Therefore, a quick review of credentials is in order, as I believe this will assist in assessing the memo of support.

I have delivered more than 140 presentations across the country on wrongful conviction; authored more than 200 articles on the topic, including being published in nine different publications. I am certified in the State of New Jersey as an instructor in police academies, and am brought in twice a year for the ethics portion of the training that soon to be graduating classes of police officers receive as well as wrongful conviction/false accusation prevention best practices and measures. I have served as a CLE instructor for Judges on four different occasions where I addressed various topics around wrongful conviction, such as "How Has Proceduralism Gotten In The Way Of Substantive Justice" and "Catching and Correcting Wrongful Convictions in the Normal Course of the Appellate Process." I have also addressed other professional associations, such as the Best Practices Committee of the New York State District Attorneys Association, the Northeastern Association of Forensic Scientists, and at several Forensic Science panel discussions at Fordham University. I have twice adjunct co-taught a wrongful conviction college course at the Rockland Community College, and the Masters Degree I received from the John Jay College of Criminal Justice included a thesis written on wrongful conviction causes and reforms needed to address them. I have given hundreds of print, radio, and television interviews including some as a commentator. I am projected to graduate with a law degree this May at the Elisabeth Haub School of Law at Pace University. I started The Foundation using \$1.5

million dollars of my own money which I received a part of the compensation in connection with my wrongful imprisonment. In it' 6 years of existence, the Foundation has exonerate two people- William Lopez (23 ½ yrs) and William Haughey (8yrs and 4 months), freed 5 other people through other legal means, and has nearly a dozen other cases it is working on, including Andrew Krivak- the co-defendant of exoneree Anthony DiPippo, who was recently awarded an evidentiary hearing. We expect Mr. Krivak to be exonerated shortly. In recognition of my advocacy work, I have received the "2018 Distinguished Alumn Award" from the John Jay College of Criminal Justice; the "Humanitarian of the Year" award by the New Rochelle Chamber of Commerce; the "New Yorker of the Week" award by the television channel New York 1; the "Sobie Pasternack Award" which is given to the law student who has contributed the most to civil rights; and the "Public Sector Servant of Justice" award by the coalition group It Can Happen To You which I am an advisory board member of in connection with my role in assisting the coalition in it's six year effort in spearheading the passage of the Commission On Prosecutor Conduct which was signed into law this past May.

In terms of personal experience, a major cause of my wrongful conviction was prosecutorial misconduct, exasperated by inadequate discovery procedures. As a plaintiff in a 1983 civil rights lawsuit that I brought after I was exonerated, I had greater discovery rights than what I did when I was a defendant originally defending myself against the false charges. I learned many things about my case during discovery than I knew previously; information that would have been critical for my lawyer to know which could have led to my acquittal rather than being wrongfully convicted and spending 16 years in prison. For example, Medical Examiner Dr. Louis Roh had been complained of in neighboring jurisdictions by authorities who were concerned that he was giving false testimony to help defendants get away with crimes; there was a memo in which the then prosecutor memorialized that he instructed Peekskill Detectives McIntyre and Levine not to arrest me until after the DNA Test results came in from the FBI lab because there was inadequate evidence-instructions that were ignored by the police. Those test results excluded me. Had my defense lawyer had that report, it would have been potent evidence to use on cross-examination against the detectives and would have helped to show that was why they engaged polygraphist Daniel Stephens, a then Putnam County Sheriff Investigator to engage in a procedure known as "GTC" (Get The Confession) in coercing a false confession out of me which ultimately resulted in my wrongful conviction and imprisonment despite that pre-trial DNA exclusion. Note that I proved my allegation against Stephens when I obtained a civil judgment against him in my lawsuit. There were other police reports and memo's that had been withheld from the defense as well.

Prosecutor George Bolen took advantage of the inadequate discovery laws in withholding that information: had the discovery reform in this bill been in place there would have been less opportunity and time to withhold any information, and if it turned out that anything was withheld the person who did so would be accountable due to the oath that the bill provides for. Speaking of Stephens, he is also one of the main bad actors in the Andrew Krivak case referenced above. Inadequate discovery procedure affected Andrew also:



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police reports were withheld from the defense. He currently has served 23 years wrongfully.

In the William Lopez exoneration, federal Judge Garaufis noted in his lengthy opinion granting Habeas Relief that there was a “deceitful prosecutor” in that the prosecutor misrepresented to the court that an informant had not received a deal in exchange for testimony, yet coincidentally she was released from custody a week after William was convicted. New York State wound up having to pay \$4.2 million dollars in compensation while another \$8.3 million dollars was paid by the city via the Civil Rights Lawsuit filed. I would be remiss if I did not mention that Mr. Lopez passed away after a mere 1 ½ years of freedom, his life virtually stolen from him by prosecutorial misconduct aided by inadequate discovery procedures.

There is no uniform practice in terms of when information is turned over: it varies from office to office and sometimes even from prosecutor to prosecutor. This bill would make discovery uniform.

The absence of adequate discovery sets the stage for wrongful conviction; prosecutors withhold information, often turning documents over just before a witness takes the stand- an inadequate amount of time to review the material and prepare for cross examination. The defense and the prosecution having access to the same information lends itself to just outcomes in cases; not trial by ambush.

Many innocent people plead guilty because they do not know what the evidence is against them and therefore that their attorney is not adequately prepared, and they fear the dramatically different penalty they will face if wrongfully convicted- a prospect that seems likely in view in view of inadequate discovery.

Absence of adequate discovery is contrary to the United State Constitution’s Sixth Amendment Right To Confrontation; how can one confront their accuser if evidence, witness statements, etc. are withheld to the very end when it is too late to make adequate use of them?

The unfairness extends beyond wrongful convictions: many defendant’s in NY are denied their Constitutional Rights as well as their rights under the NY Constitution by inadequate discovery. I repeat the argument I made above. A defense lawyer being given witness statements just before a witness takes the stand deprives them of adequate preparation and hence a fair trial.

Additionally, prosecutors often make “exploding offers” of a plea bargain- an offer that is “just for today” that a defendant must decide if he or she is taking without knowing what the evidence is against them. Many plead guilty while never learning what the evidence is

against them and therefore, by definition, without adequate advice from counsel since counsel does not know what the evidence is either.

Passing this bill will not only make the justice system more just, fair, accurate, but also more efficient. Defense lawyers, knowing the evidence against their client, will be able to immediately focus on getting the best possible plea bargain for their client thus resulting in cases being disposed of faster and conserving judicial resources rather than going through unnecessary motion practice and the many delays which causes cases to go on for many months and even sometimes years. In short, it will reduce the court backlog. That will lead to faster justice for crime victims as well, which will mean that they can begin the healing process quicker inasmuch as the court case and attendant court appearances, uncertainty etc. will be over in open and shut cases that currently are unnecessarily dragged out.

In terms of the argument prosecutors use against discovery reform-trying to utilize fear as a way of blocking this common sense reform- that discovery reform will result in witness intimidation and killing of witnesses, that is a complete fallacy: New Jersey has automatic discovery and bodies are not floating up and down the Hudson River. If the facts of a case warrant it, a prosecutor can apply to the court for a protective order in which the defendant would be unable to learn the name and address of witnesses though the defense attorney would have access to them thus enabling legitimate pre-trial investigation while accomplishing the goal of witness safety. That mechanism works in New Jersey.

After the Commission On Prosecutor Conduct, I dare say that discovery reform is the single biggest reform that could be done towards making the justice system more accurate and therefore I pray that the legislature will pass this bill. Please make my suffering and the suffering of others who have either been falsely accused or wrongfully convicted count for something.

Best,

Jeff Deskovic, M.A., projected JD Class of 2019

Founder/Executive Director

The Jeffrey Deskovic Foundation for Justice