Postconviction DNA Testing: Recommendations to the Judiciary from the National Commission on the Future of DNA Evidence

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The ability of DNA testing to precisely identify the perpetrator has revolutionized the criminal justice system for the past decade. An unforeseen consequence of DNA testing is that closed criminal cases are being re-opened because postconviction DNA testing is occurring and exonerating defendants wrongfully convicted and already serving a sentence for their crimes.

The American criminal justice system has a dilemma. On one hand, the criminal justice system is a search for the truth. On the other hand, the finality of judgments, especially after the appeals process is exhausted, is sacrosanct. Yet, postconviction DNA testing has shown that juries have been wrong in sexual assault and homicide cases where they relied upon either mistaken eyewitness identification or poor forensic work and convicted innocent defendants. As of July 2000, 68 wrongly convicted defendants have been exonerated by DNA testing. It is not known how significant a problem this is, but pretrial forensic DNA testing in the FBI laboratory has excluded the primary suspect in 25% of the cases since 1989. Also, 8 of the 87 people taken off of death row since the reinstitution of the death penalty in 1976 have been exonerated through postconviction DNA testing.

A well-publicized postconviction DNA case is that of Gary Dotson of Chicago, Illinois. In July 1979, Dotson was convicted of aggravated kidnapping and rape and sentenced to not less than 25 years and not more than 50 years. The evidence against him at trial included both eyewitness testimony and traditional forensic methods, two types of evidence most likely to be falsified by DNA evidence. The victim had identified Dotson from both a police mug book and in a police lineup. The traditional forensic methods used were blood group typing and pubic hair comparison; methods that do not discriminate as well as DNA evidence. In March 1985 the victim recanted her testimony, but the original judged denied Dotson's motion for a new trial because the victim's recantation was not as believable as her original testimony. Twice Dotson was granted parole by the governor and each time parole was revoked due to bad behavior. When Dotson was back in prison in 1988, his attorney had DNA tests, which were not available at the time of the original trial, conducted on the victim's underwear. The test results showed that the semen on the victim's underwear could not have come from Dotson, but could have come from the victim's boyfriend. Dotson's conviction was overturned in 1989 after he had served a total of eight years in prison.

The pro bono Innocence Project at Benjamin Cardozo Law School in New York City is the group best known for exonerating prisoners with postconviction DNA testing. As of July 2000, the Innocence Project has exonerated 38 prisoners,

some of them on death row. Professor Barry Scheck and defense attorney Peter Neufeld founded the project in 1992 using law students to investigate the innocence claims. Their pioneer work in exonerating wrongfully convicted persons served as the impetus to a National Institute of Justice report detailing the case studies of 28 men who were exonerated with postconviction DNA testing. This report, Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial, has served to bring postconviction DNA testing issues to the forefront.

Postconviction DNA Testing State Statutes

This tension between a search for the truth and the finality of judgments is evident in how different states handle these requests for postconviction DNA testing. The majority of states have not been proactive in considering the issues raised by postconviction DNA testing even though 33 states have statutes of limitation of six months or less for introducing new evidence. In most states, a convicted prisoner has no right to obtain tests the might prove his innocence. Only New York and Illinois have statutes that allow for postconviction DNA testing regardless of the statute of limitation on newly discovered evidence or the ability of the convicted to pay for the testing. These laws allow a prisoner to obtain DNA testing if the results might prove their innocence on evidence that was gathered at the time of trial, but DNA testing was not available.

Statutory postconviction DNA testing in Illinois is a two-part process. First, the statute establishes a right to a post-trial petition for DNA (or fingerprint) testing of evidence collected before trial but not tested due to unavailability of the test. If the court grants the motion and the test results are favorable, the next step is a petition for a new trial based on this new evidence. At this point, the court considers the DNA evidence as it would any other request for a new trial based on newly discovered evidence; would the verdict have been different if the test results had been introduced at trial? Illinois has a Capital Litigation Trust Fund that both sides can use to hire scientific evidence.

In most states the authority to grant postconviction DNA testing is at the discretion of the prosecutor, the courts, or the governor because of statutes of limitation barring new evidence. For example, in Virginia, new evidence must be presented within 21 days of conviction, and the only possibility of postconviction relief (via executive pardon) is at the discretion of the governor. The concern here, and in other states that place the authority of postconviction DNA testing or exoneration in the hands of an elected official, is that political considerations might determine whether the testing is done or whether an exculpatory results lead to exoneration.

It is not surprising that the two states with the most postconviction DNA exonerations are the states with a postconviction DNA testing statute. Illinois has 14 DNA exonerations and New York has seven DNA exonerations. Other states

that have postconviction DNA exonerations are Alabama, California, Connecticut, Georgia, Indiana, Kansas, Maryland, Massachusetts, Missouri, New Jersey, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Texas, Virginia, West Virginia, and Wisconsin.

Report of the Postconviction Working Group of the National Commission on the Future of DNA Evidence

Attorney General Janet Reno established the National Commission on the Future of DNA Evidence in 1998 in response to the National Institute of Justice report, Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial. Her goal was "to identify ways to maximize the value of DNA in our criminal justice system." The Commission's Postconviction Issues Working Group took on the task of formulating recommendations for handling requests for postconviction DNA testing. The Chair of the Working Group is the Honorable Ronald Reinstein, the Associate Presiding Judge of the Superior Court in Maricopa County (metro Phoenix), Arizona. The Working Group members include prosecutors, a public defender, a defense attorney, law school professors, a victim's spokesperson, a private DNA laboratory director, and representatives from the U.S. Department of Justice.

The Working Group's 1999 report, Postconviction DNA Testing: Recommendations for Handling Requests, addresses the tension between truth and finality of judgments by offering an analytical framework that "applies DNA technology to the appeals process while recognizing the value of finality in the criminal justice system." This framework categorizes postconviction DNA testing requests into five categories depending on how probative the DNA evidence will be. The report individually tailors its recommendations to the five stakeholders in the postconviction relief process; prosecutors, defense counsel, judges, victim assistance advocates, and laboratory personnel.

Recommendations for the Judiciary

The recommendations for the judiciary recognize that although the courts routinely receive postconviction relief requests, postconviction DNA requests are different. At the time of the request for DNA testing, the defendant does not yet have the "newly discovered evidence" that would overturn the conviction and even if he did, his motion for a new trial would probably be time barred.

The court must make the initial decision if DNA testing would be relevant to the outcome of the case upon receiving the postconviction request for DNA testing. For example, DNA testing would not be relevant in a sexual assault case where the contested fact at trail was consent rather than identity of the perpetrator. The court must make a summary judgment determination and deny the request if the court believes that DNA testing would not be relevant to the outcome of the case. If DNA testing might overturn the conviction, the court's role changes to that of a

referral source. At this point, the court must notify the other stakeholders; the prosecutor, the public defender, the state criminal defense attorneys' association, local court-appointed attorneys, or a national resource center such as the Innocence Project, of the request. It is not recommended that the court notify the victim or the victim's family, but rather leave that decision to the prosecutor and victim assistance office.

The Work Group recommends that information gathered about a case should be evaluated in terms of five broad categories, as follows:

- Category 1 involves cases in which biological evidence was collected and still exists. If the evidence is subjected to DNA testing or retesting, favorable results will exonerate the petitioner.
- Category 2 involves cases in which biological evidence was collected and still exists. If the evidence is subjected to DNA testing or retesting, favorable results would be helpful to the petitioner's claim of innocence, but reasonable persons might disagree as to whether the results exonerate him. This category also includes cases where, for policy and/or economic reasons, there might be disagreement as to whether DNA testing should be permitted at all or, for indigent inmates, at State expense. The decision on whether this is a case for testing or retesting may have to be made by a judicial officer.
- Category 3 involves cases in which biological evidence was collected and still exists. However, if the evidence is subjected to DNA testing or retesting, favorable results will be inconclusive.
- Category 4 involves cases in which biological evidence was never collected, or cannot be found despite all efforts, or was destroyed, or was preserved in such a way that it cannot be tested. In such cases, postconviction relief on the basis of DNA testing is not possible.
- Category 5 involves cases in which a request for DNA testing is frivolous.

The Work Group recommends that the court participate in the screening process by aiding in discovery and helping the parties locate and obtain access to the stored evidence. This might include issuing orders for parties to gain access to preserved evidence and to prohibit investigating agencies from destroying evidence. Other ways the court can aid in the proceedings is to issue orders prohibiting parties to have no contact with the press and compelling third parties to provide DNA samples for elimination testing.

The court will probably only be involved in Category 1 and Category 2 cases where there is biological evidence and the DNA testing or retesting of this evidence might lead to a different outcome in the case. The Work Group recommends in these cases that the judicial officer arrange for an informal conference between the prosecutor, the defense counsel, and a crime laboratory representative. The court should use the conference to both foster a spirit of cooperation between the parties and to lay the foundation for the testing.

Decisions need to be made during the informal conference on the following matters:

- chain of custody during the testing process,
- type of DNA analysis to be conducted,
- the laboratory that will conduct the testing,
- the cost of testing and who will pay for it,
- the amount of sample available for testing and replicate testing,
- the testing protocol if there is not enough sample for replicate testing,
- and whether it will be necessary to retest the victim or take samples from the victim's relatives or third parties.

When there is no agreement as to any of these issues, the court will need to enter orders for the final determination.

The Work Group recommends that if the results of DNA testing are favorable to the defendant and no alternative explanations exist, several outcomes could occur depending upon whether there is concurrence between the prosecution and defense and whether the postconviction relief is time barred. The ideal situation is where the prosecution and defense jointly request that the judgment be vacated and there is no time bar. In this ideal situation, the court should grant the request. Where there is concurrence between the prosecution and defense, but the relief is time barred, the Work Group recommends that the court should attach its findings and recommendations to an application for clemency or pardon from the governor. There is also the possibility in some states of the parties stipulating to a waiver of the time bar or the court may be able to order the defendant's release from custody pending the executive decision.

When there is no concurrence between the prosecution and defense, the court should exercise its discretion in the interests of justice and hold an evidentiary hearing to determine the probative value of the DNA evidence. If the finding of the evidentiary hearing is there is a reasonable probability of a change in the verdict due to the DNA exculpatory evidence, a new trial should be set and the possibility of defendant release should be considered.

Further responsibilities of the judiciary are:

- to ensure that the victim is treated with sensitivity during the process so as to reduce any additional harm if the petition for postconviction relief is granted and
- to promptly dismiss the petition for postconviction relief if the results of the DNA testing further inculpate the defendant.

The Future of Postconviction DNA Testing

Some criminologists believe that postconviction DNA testing may be a passing phenomenon. At some point in the future as DNA technology improves and becomes the standard in homicide and sexual assault cases, there will be no back log of prisoners that were wrongly convicted because the biological evidence was not tested properly. It appears that the legislators who wrote the New York law belong to this camp because New York's law allows postconviction testing only for convictions occurring before January 1, 1996.

Others argue that there always will be new DNA technologies to analyze old evidence. Just as DNA PCR testing was a monumental improvement over the earlier DNA RFLP testing because PCR testing gave reliable results on degraded DNA and on much smaller amounts of DNA, a better technology always may be around the corner. This is an important philosophical split because which scenario is believed will affect policy and legal decisions on the storage and preservation of postconviction DNA evidence. Once DNA evidence is destroyed, there can be no postconviction DNA testing.

Sources

National Institute of Justice 810 Seventh Street N.W. Seventh Floor Washington, DC 20531 202-307-2942 www.ojp.usdoj.gov/nij/dna/

Innocence Project Benjamin N. Cardozo School of Law 55 Fifth Avenue New York, NY 10003 212-790-0200 www.yu.edu/cardozo/law/innocent.html