



New York State Justice Task Force

Recommendations Regarding Forensics and Expansion of the New York State DNA Databank

Introduction

The New York State Justice Task Force was convened on May 1, 2009, by Chief Judge Lippman of the New York Court of Appeals. Its mission is to eradicate the systemic and individual harms caused by wrongful convictions, and to promote public safety by examining the causes of wrongful convictions and recommending reforms to safeguard against any such convictions in the future. Because it is a permanent task force, it is charged not only with the task of implementing reforms but monitoring their effectiveness as well. The Justice Task Force is chaired by Janet DiFiore, Westchester County District Attorney, and the Honorable Theodore T. Jones, Associate Judge, New York Court of Appeals. Task Force members include prosecutors, defense attorneys, judges, police chiefs, legal scholars, legislative representatives, executive branch officials, forensic experts and victims' advocates. The differing institutional perspectives of Task Force members allow for thorough consideration of the complex challenges presented by the occurrence of wrongful convictions and the evaluation of recommendations to decrease the incidence of wrongful convictions in the future, while remaining mindful of the need to maintain public safety.

Recognizing the importance of forensic science to the criminal justice system, and to the identification and prevention of wrongful convictions in particular, the Task Force created the Forensics Subcommittee in the late summer of 2009. In addition to numerous members of the Task Force and their representatives, a number of professionals with relevant experience, including forensic laboratory directors, law enforcement personnel, defense attorneys and representatives from the Innocence Project, were asked to serve on the Forensics Subcommittee as advisory group members. Thus constituted, the Forensics Subcommittee set about identifying issues related to forensic science that might have a role in contributing to or identifying wrongful convictions, or that might present a means of preventing such convictions in the future. By fall 2009, the Subcommittee had identified a wide array of forensic issues that it felt merited further study, including, but not limited to, accreditation of laboratories and certification of scientific expert witnesses; collection, preservation and retention of evidence; defendants' pre-trial and post-conviction access to DNA and other evidence; and possible expansion of the New York State DNA Databank (DNA Databank).

In furtherance of this pursuit, the Task Force, both in conjunction with and through its Forensics Subcommittee, reviewed numerous national and local studies, articles and reports on forensic science, including the National Academy of Sciences' Report entitled *Strengthening Forensic Science in the United States: A Path Forward*. It also heard from over a dozen speakers on many of these and other more discrete issues, including from several speakers on the legislative and regulatory frameworks that govern oversight and accreditation of forensic laboratories performing DNA analysis. Finally, it conducted several in-person tours of State forensic laboratories, began to examine the possibility of standardizing forensic lab reports, and discussed relevant wrongful conviction cases.

While continuing its work on other topics, the Task Force made top priorities of reviewing the regulation of forensic laboratories, the laws regarding access to DNA evidence and the possible expansion of the DNA Databank. Among other things, the Task Force and Forensics Subcommittee examined the framework established under section 995 of Article 49-B of the Executive Law for the governance of the DNA Databank, and the New York State Accreditation Program for Forensic Laboratories codified at 9 NYCRR 6190. Our first recommendation in this area, as stated below, was ultimately that participants in the criminal justice system receive training on forensic sciences, including DNA and related issues. The next recommendation the Task Force is prepared to make is on the expansion of the DNA Databank.

Training

There is little question that forensic science has become an increasingly common aspect of criminal investigations, and promises only to become more so with time. Judges and practitioners are now routinely required to assess, evaluate, and critique information that is extremely technical, highly nuanced, and undoubtedly consequential. The challenges that come with navigating such content are substantial as well as diverse.

As a result, several members of the Task Force, including both practitioners and members of the judiciary, have noted that it would be beneficial to provide greater resources and training on critical issues of forensic science. In particular, it was suggested that education on various topics would improve the quality and efficiency of decisions involving forensic evidence and testimony. With this in mind, the Justice Task Force has made the below recommendation regarding the availability of forensic science resources for practitioners and judges. Consistent with this recommendation, the Co-Chairs and Task Force Counsel are now in the process of assisting the Judicial Institute in planning an initial training on the science of DNA for New York State judges February 3, 2011.

Overview of the NYS DNA Databank

In 1994, the State Legislature authorized the creation of the DNA Databank for the purpose of providing law enforcement officials with a means to identify the perpetrators of crimes based on DNA evidence retrieved from a crime scene. The statutory provisions

establishing the Databank are found in Article 49-B of the Executive Law, specifically section 995-c. Sections 995-a and 995-b established the Commission on Forensic Science (Commission) and the DNA Subcommittee, and required promulgation of accreditation standards for public forensic labs in the State of New York and regulation of the Databank. The Office of Forensic Services (OFS) within the Division of Criminal Justice Services (DCJS) was created to help carry out the broader goals of the Commission and the DNA Subcommittee, including taking on principal responsibility for administrative oversight of the DNA Databank. Pursuant to their responsibility to oversee the State's public laboratories, the Commission has promulgated regulations, codified at 9 NYCRR 6190, requiring all public laboratories conducting forensic DNA analysis to meet rigorous quality and performance standards established by the American Society of Crime Laboratory Directors Laboratory Accreditation Board (ASCLAD/LAB).

The DNA Databank is a computerized collection of DNA "profiles" derived from various sources, including convicted offenders required by the Executive Law to provide a sample; crime scenes; missing persons or the relatives of missing persons; and offenders who voluntarily provide a sample in connection with a plea bargain, participation in a temporary release program, or release on parole or probation. These profiles are maintained in the convicted offender, forensic, missing and unidentified persons, and subject indices, respectively. The DNA Databank is maintained at the New York State Police Forensic Investigation Center (FIC) in Albany.

The Databank began limited operations in 1996, when individuals convicted of certain designated offenses—at the time, homicide and select sex-related crimes—were required to submit a sample for inclusion. It became fully operational in August 1999 and yielded the first "hit" linking an offender with DNA evidence from a crime scene in February 2000. The Databank is part of a national system called the Combined DNA Index System (CODIS), a searchable software program with three hierarchical tiers of the DNA Index System (DIS)—national (NDIS), state (SDIS) and local (LDIS). The Federal Bureau of Investigation (FBI) serves as the NDIS connection and links New York State with other participating states. This tiered approach allows authorized individual state and local agencies to operate their respective DNA databases according to applicable state law and local policy.

In New York State there are eight LDIS DNA laboratories. The State Police Forensic Investigation Center (FIC) in Albany serves as a LDIS site for forensic casework performed at the FIC and as the SDIS laboratory for New York State. All LDIS laboratories maintain a Forensic Index, which is comprised of DNA profiles from crime scene evidence submitted by the law enforcement agencies they serve. These profiles are routinely compared in order to identify and link criminal incidents that may involve the same perpetrator. The SDIS Database at the State Police FIC contains forensic DNA profiles uploaded by each of the LDIS laboratories. The SDIS enables inter-comparisons of crime scene evidence DNA profiles among the participating LDIS laboratories in New York State and across the country, and also allows for the routine comparison of crime scene profiles against the convicted offender and subject indices.

Since the Databank's inception, the State Legislature has expanded the list of designated offenses three times—in 1999, 2004 and 2006.¹ Under current law, anyone convicted of and sentenced for a Penal Law felony or one of 35 specified misdemeanor offenses must provide a DNA sample for inclusion in the Databank. As a result, DNA samples are collected from offenders for 46 percent of New York Penal Law convictions, with the State Police processing approximately 54,000 designated offender samples per year. According to DCJS, as of December 31, 2010, the DNA Databank contained 381,783 DNA profiles and 34,548 crime scene samples.

Decision to Recommend Expansion of the DNA Databank

In evaluating whether to recommend expansion of the DNA Databank and the scope of any such recommendation, the Task Force was informed by a range of sources: it heard from numerous speakers representing law enforcement, academia and public interest groups; reviewed news and academic articles, and several pieces of pending legislation; examined an analysis of crimes currently eligible and ineligible for inclusion in the DNA Databank, a summary of other states' laws on collecting DNA samples, as well as cost, processing volume and other statistics provided by DCJS; and considered position papers, memoranda and other materials submitted to the Task Force.

Among other things, the Task Force was provided information indicating that as of October 31, 2010, the Databank had aided 11,039 investigations.² It also heard about the benefits that the State has gained from the 2006 DNA Databank expansion. According to DCJS, through October 2010, persons convicted of crimes that were added as qualifying offenses in 2006 have provided DNA samples that matched to samples collected in 2,456 cases.³ In addition, members heard about specific incidents in which the provision of a DNA sample either exonerated individuals or could have prevented additional crimes from occurring. This and other evidence highlighted how further expansion of the DNA Databank has the potential to prevent and remedy wrongful convictions by directing criminal investigations toward the actual perpetrators, preventing “tunnel vision” and increasing the opportunity of wrongfully convicted individuals to prove their innocence through Databank hits that implicate others.

The Forensics Subcommittee and Task Force met on several occasions to discuss the issue of possible DNA Databank expansion. Due to the diverse perspectives represented, these meetings garnered robust debate and dialogue, not only about the merits of and/or concerns regarding expansion but also about whether any recommendation regarding

¹ Qualifying offenses are listed in section 995(7) of the Executive Law.

² According to DCJS, the Databank can aid an investigation in two circumstances: first, by linking crime scenes together (a case to case match), and second, by linking a crime scene sample to a suspected perpetrator (a forensic to offender match). As of December 31, 2010, the DNA Databank had aided 11,382 investigations.

³ According to DCJS, as of December 31, 2010, samples contained in the DNA Databank had matched to samples collected in 2,532 cases for offenses added in 2006.

expansion should be part of a larger set of proposals also under the ongoing consideration of the Task Force. While mindful of these concerns, based on a thorough examination of the issue, the Task Force voted to expand the DNA Databank in the manner described below, concluding that such an expansion would help prevent and remedy wrongful convictions, as well as improve public safety, and that it could be accomplished on a discrete basis prior to the study necessary to make further recommendations on other related issues.

Recommendations

Training

The Justice Task Force recommends that robust training be provided for practitioners and members of the state judiciary on various issues related to forensic science, including the science of DNA.

DNA Databank

The Justice Task Force recommends that the New York State DNA Databank be expanded as follows:

I. Penal Law Crimes

The universe of individuals from whom DNA samples are collected should be expanded to include those convicted of any Penal Law crime (i.e., all Penal Law misdemeanors, as well as felonies).

II. Non-Penal Law Crimes

The universe of individuals from whom DNA samples are collected should be expanded to include those convicted of any non-Penal Law felony.⁴

Conclusion

In an effort to identify and remedy any wrongful convictions in New York State and to prevent them from occurring in the future, as well as to further the goal of public safety, the Justice Task Force supports the foregoing commitment to training for practitioners and judges as well as the foregoing expansion of the New York State DNA Databank.

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⁴ Although the Justice Task Force is not presently recommending that the universe of individuals from whom DNA samples are collected be expanded to include those convicted of any non-Penal Law misdemeanor, the Forensics Subcommittee intends to continue to examine whether there are any specific non-Penal Law misdemeanors worthy of further discussion.