



New York State Justice Task Force

Recommendations Regarding Post-Conviction Access to DNA Testing and Databank Comparisons

Introduction

The New York State Justice Task Force was convened on May 1, 2009 by Chief Judge Jonathan 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 prevent them in the future, while also remaining mindful of the need to maintain public safety.

Recognizing the growing importance of DNA evidence in exonerating the wrongfully convicted and bringing the guilty to justice, in 1994, New York was the first state to enact a law providing defendants with access to post-conviction DNA testing.¹ The State Legislature also authorized the creation of a DNA Databank to provide law enforcement a means by which to compare DNA

¹ New York Criminal Procedure Law 440.30(1-a)(a) provides:

[w]here the defendant's motion requests the performance of a forensic DNA test on specified evidence, and upon the court's determination that any evidence containing DNA was secured in connection with the trial resulting in the judgment, the court shall grant the application for forensic DNA testing of such evidence upon its determination that if a DNA test had been conducted on such evidence, and if the results had been admitted in the trial resulting in the judgment, there exists a reasonable probability that the verdict would have been more favorable to the defendant.

evidence retrieved from local crime scenes with DNA evidence from convicted offenders and unsolved crime scenes stored in national, state and local databanks.²

In appreciation of the fact that since 1994, there have been significant developments in DNA technology, 48 additional post-conviction laws implemented nationwide and 266 wrongfully convicted individuals exonerated by DNA,³ the Justice Task Force chose to re-examine the New York law regarding post-conviction access to DNA testing to ensure its adequacy. As part of this process, the Forensics Subcommittee of the Task Force (the “Subcommittee”) reviewed the current legislative framework for pre- and post-conviction DNA testing in New York, as well as a host of possible reforms. The Subcommittee also considered potential reforms that would allow a petitioner to seek access to local, state and national DNA databanks, both pre- and post-conviction, in order to conduct DNA comparisons between crime scene evidence and evidence stored in such databanks. The Subcommittee’s examination of these issues was informed by a variety of sources: it heard from numerous speakers ranging from laboratory directors to law enforcement representatives; it reviewed reports, memoranda and various statistics regarding the existing law, proposed legislation in New York State, statutes adopted in other states, as well as proposals for reform from the Innocence Project, the New York State Bar Association and others; and it examined cases involving exonerations resulting from post-conviction DNA testing and databank comparisons.

After many months of examination by the Subcommittee, the full Task Force began its consideration of the various possible reforms presented by the Subcommittee. The Task Force engaged in extensive discussion and robust debate on many of these issues, considering not only the benefits of each proposal but also the practical implications each would have on the criminal justice system as a whole. The Subcommittee members’ diverse backgrounds and relevant experiences provided unique and necessary perspectives on these issues.

² The NYS DNA Databank became operational in August 1999, with 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”): local (LDIS), state (SDIS) and national (NDIS). The Federal Bureau of Investigation (FBI) serves as the NDIS connection and links New York State with other participating states. This tiered approach allows individual state and local agencies to operate their respective DNA databases according to applicable state law and local policy. See New York State Division of Criminal Justice Services, The NYS DNA Databank and CODIS, <http://www.criminaljustice.state.ny.us/forensic/dnabrochure.htm>.

³ According to the Innocence Project, there have been 280 post-conviction DNA exonerations in United States history to date. See Innocence Project, Facts on Post-Conviction DNA Exonerations, <http://www.innocenceproject.org/know/>.

Recommendations⁴

Access to Post-Conviction DNA Testing After Guilty Pleas

One of the more controversial issues the Task Force addressed was whether to grant access to post-conviction DNA testing to those defendants who had pleaded guilty pre-trial. Under existing New York law, petitioners are not entitled to access to DNA testing following a guilty plea.⁵

The Task Force reviewed a number of nationwide cases involving defendants who had pleaded guilty to crimes they did not commit and for which they were ultimately exonerated. Task Force members were united in their wholehearted belief that where an innocent person has been wrongly convicted, every effort should be made to exonerate that person so that justice prevails. The question thus presented was whether the law need explicitly provide for post-plea access to DNA testing or whether the ability to obtain such testing post-plea should remain in the hands of District Attorneys' offices. In light of the need for finality in the criminal justice system (for victims, among others), the sanctity of the legal process by which a defendant pleads guilty before a judge, and concerns about defendants who would attempt to "game" the system by failing to seek testing until after a plea when it may be harder for a prosecutor to prove his or her case, this was a complicated question, particularly given the sheer number of defendants that plead guilty every year.⁶

Ultimately, the Task Force recognized the need to provide a formal mechanism to exonerate the innocent post-plea, while also acknowledging the importance of preserving the integrity of the plea process, maintaining a level of finality in the system and attempting to prevent frivolous petitions from guilty

⁴ The twenty-two voting members of the Task Force strived to reach consensus wherever possible; however, not all recommendations were made unanimously.

⁵ See CPL 440.30(1-a)(a), providing, in relevant part, that:

[t]he court shall grant the application for forensic DNA testing of such evidence upon its determination that if a DNA test had been conducted on such evidence, and if the results had been admitted in the trial resulting in the judgment, there exists a reasonable probability that the verdict would have been more favorable to the defendant. (Emphasis added.)

See also People v. Byrdsong, 33 A.D.3d 175, 180 (N.Y. App. Div. 2d Dep't 2006), lv denied 7 N.Y.3d 900 (2006); People v. Allen, 47 A.D.3d 543, 543 (N.Y. App. Div. 1st Dep't 2008).

⁶ In 2010, 473,555 Penal Law arrests reached final disposition. Of those only 3,380 were disposed of after a trial; 277,028 were disposed by guilty pleas. (193,147 were disposed by a non-conviction disposition other than an acquittal [dismissed, decline to prosecute, no true bill, etc.]).

defendants seeking to take advantage of the system. Accordingly, the Task Force recommends the creation of a new provision in New York’s post-conviction DNA testing statute that would permit defendants who pleaded guilty to seek post-conviction DNA testing, but only in limited circumstances. As outlined further below, the Task Force recommends that a more stringent standard for access to testing apply in the post-plea context, and that other limitations, such as a statute of limitations, a limitation on the category of offenses and a consideration of prior opportunity for testing, apply as well.⁷

In particular, the Task Force recommends the creation of a provision governing post-plea access to DNA testing, with the following parameters:

I. Standard

A provision permitting post-conviction DNA testing after a guilty plea should utilize a more stringent standard than the current “reasonable probability” standard contained in New York Criminal Procedure Law 440.30(1-a)(a). Specifically, the Task Force recommends that a court be required to find that there exists a “substantial probability that the DNA evidence would have established that the defendant is actually innocent” before granting post-conviction DNA testing to those individuals who pleaded guilty.

II. Statute of Limitations

The Task Force also recommends that any provision permitting post-conviction DNA testing after a guilty plea should include a five-year statute of limitations. The Task Force, however, further recommends that equitable tolling of the statute of limitations be permitted if the petitioner shows: (1) that he/she has been pursuing his/her rights diligently and that some extraordinary circumstance prevented the timely filing of the post-conviction motion for DNA testing; (2) that the facts on which the motion is predicated were unknown to the defendant or his/her attorney and could not have been ascertained by the exercise of due diligence prior to the expiration of the statute of limitations; or (3) in the interest of justice.

III. Category of Offenses

The Task Force also recommends that access to post-conviction DNA testing after a guilty plea should be limited to certain designated offenses only; specifically homicide, sexual assault, violent felonies as defined by the New York Penal Law 70.02 and burglary in the third degree. It further recommends that those defendants who were charged in an indictment or information in superior

⁷ The Task Force also recommends that, in conjunction with expanding access to post-conviction DNA testing after a guilty plea, statistics should be maintained on the number of petitions filed requesting such testing.

court with one of the designated offenses listed above, but pleaded guilty to and were convicted of another felony, should also have access to post-conviction DNA testing.

IV. Prior Opportunity for Testing

Lastly, the Task Force recommends including a provision that permits a court to consider whether the petitioner had a prior opportunity to move for DNA testing before granting post-conviction DNA testing in the guilty plea context. The relevant statutory language could read as follows: “In deciding whether to grant a motion for such testing, the court may consider whether the defendant had the opportunity to move for such testing prior to entering a guilty plea, but unjustifiably failed to do so.”

Access to Post-Conviction Retesting of DNA Evidence Based on New Technology

In light of developments in DNA technology such as Y-STR testing that is capable of producing more conclusive exculpatory results, the Task Force further recommends amending the post-conviction DNA testing statute to add explicit language regarding retesting of DNA evidence based on new technology. In particular, the Task Force recommends that the statute include a standard similar to the one established in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) (or whatever the applicable standard is in New York for the admissibility of scientific evidence if the *Frye* standard were to change) for determining the reliability of new testing technology. The relevant statutory language could read as follows:

To determine whether the request for DNA forensic testing should be granted, the court shall consider the availability of newly developed tests and advances in technology that are generally accepted as reliable in the relevant scientific community (or other accepted legal standard for the admissibility of scientific evidence in New York State) and are capable of obtaining exculpatory DNA test results that were not previously obtained.

Authority of Courts to Order Databank Comparisons of DNA Profiles Post-Conviction

In light of exonerations that have resulted from comparisons of crime scene evidence to DNA evidence contained in local, state or national databanks that identified true perpetrators, the Task Force also recommends amending the post-conviction DNA testing statute to authorize courts to order post-conviction comparisons of DNA profiles using local, state or federal databanks. In so doing, the Task Force was sensitive to respect existing local, state and national requirements and criteria for databank searches. The Task Force recommends that such comparisons be made available to petitioners who were convicted

following a trial, as well as those who pleaded guilty. The relevant statutory language could read as follows:

In response to a post-conviction motion by a defendant, a court may order an entity that has access to the Combined DNA Index System (“CODIS”) to compare a DNA profile obtained from probative biological material from crime scene evidence against the DNA databanks by “keyboard searches” (or a similar method that does not involve uploading) upon notice to both parties and the entity required to perform the search, and upon a court’s determination that if such comparison had been conducted on such biological material, and if the results had been admitted in the trial resulting in the judgment, there exists a reasonable probability that the verdict would have been more favorable to the defendant, or in a case involving a plea of guilty, if the results had been available to the defendant prior to the plea, there exists a reasonable probability that the conviction would not have resulted.⁸ Defendant must also demonstrate that the DNA profile complies with FBI or state requirements, whichever is applicable, and the data meets SDIS and/or NDIS criteria.

Authority of Courts to Order Databank Comparisons of DNA Profiles Pre-Judgment

Similarly in the pre-trial context, the Task Force recommends amending New York’s pre-trial discovery statute, Criminal Procedure Law 240.40, to authorize courts to order comparisons of DNA profiles pre-judgment if a defendant satisfies the existing materiality and reasonableness requirements in the statute.

The relevant statutory language could read as follows:

In response to a motion by a defendant against whom an indictment, superior court information, prosecutor’s information, or simplified information charging a misdemeanor is pending, a court may order an entity that has access to the Combined DNA Index System (“CODIS”) to compare a DNA profile obtained from probative biological material from crime scene evidence against the DNA databanks by “keyboard searches” (or a similar method that does not involve uploading) upon notice to both parties and the entity required to perform the search, and upon a showing by the defendant that such a comparison is material to the preparation of his or her defense and that the request is reasonable. Defendant must also

⁸ For purposes of post-conviction DNA databank comparisons (as opposed to access to testing) the “reasonable probability” standard contained above should apply both to defendants who were convicted following a trial and defendants who pleaded guilty.

demonstrate that the DNA profile complies with FBI or state requirements, whichever are applicable, and the data meets SDIS and/or NDIS criteria.

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