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Committee on Criminal Justice Senator James E. "Jim" King, Jr., President

CRITICAL ISSUES IN THE USE OF DNA EVIDENCE IN PROSECUTION AND DEFENSE PROCEEDINGS

SUMMARY

The use of DNA evidence in criminal cases has been in the spotlight throughout the country in recent years. Florida has taken the lead in making postconviction DNA testing available to inmates and participation in the nationwide DNA database system, which has vast crime-solving potential.

Since the 2001 Legislature made postconviction DNA testing available to inmates, approximately 16 people have requested testing. Developing case law has clarified when postconviction DNA testing is permitted. Testing is denied, for instance, when there is no reasonable probability that the defendant would be exonerated if DNA evidence were tested. When DNA evidence found at the scene fails to match the defendant's DNA, that does not demonstrate that the defendant was not present or participating with a co-defendant. These rulings have defined, to some extent, the availability of postconviction testing.

Due to the volume of samples received by the Florida Department of Law Enforcement Offender Database, and due in part to a shift in the method of sample analysis, a significant backlog exists. A need to prioritize the analysis of forensic samples has created a backlog of unanalyzed rape kits in Florida and throughout the country. Finding ways to reduce these backlogs is critical.

Because DNA in smaller quantities and more degraded conditions can now be analyzed after longer periods of time, it is becoming possible to solve crimes using DNA from unconventional sources like cigarette butts. The national network of DNA databases containing the DNA profiles of convicted offenders has also made it possible to solve cases in which the perpetrator might have otherwise remained unknown. For these reasons, many states have expanded the statutes of limitation on commencing prosecution of a broad range of crimes. Staff recommends Florida legislators consider amending our statutes of limitation in a similar fashion.

BACKGROUND

Postconviction DNA Testing

The topic of the use of DNA (deoxyribonucleic acid) evidence in the criminal justice arena is a broad one.

In recent years legislation has been enacted in many states, including Florida, that provides a mechanism by which people who have been convicted of crimes can more easily challenge those convictions through the use of existing DNA evidence. This legislation is likely a by-product of two phenomenons: 1) more confidence in the reliability and accuracy of DNA testing and analysis, and 2) public outcry over several high-profile cases in which the convictions were questioned and the defendants ultimately exonerated, at least partly due to DNA evidence which cast doubt on their guilt.

During the 2001 Legislative Session, ss. 925.11 and 943.3251, F.S., were enacted. Section 925.11, F.S., provides that a person who has been found guilty at trial of committing a criminal offense has the right to seek testing of physical evidence collected at the time of the crime which may contain DNA evidence that would exonerate him or her, or mitigate the sentence that he or she received.

To seek testing, a defendant must file a sworn petition containing the following:

- A statement of the facts relied upon, including a description of the physical evidence which contains DNA and, if known, the present location or the last known location of the evidence and how it was originally obtained;
- A statement that the evidence was either not previously tested for DNA, or, if tested, that the results of the previous test(s) was inconclusive, and

that subsequent scientific developments in DNA testing would likely produce a definitive result;
- A statement that the defendant is innocent and how the DNA evidence will exonerate the defendant; and
- A statement that identification of the defendant is a genuinely disputed issue.

Under the provisions of s. 925.11, F.S., the trial court will review the petition and determine if the facts are sufficient to support its filing. In ruling on the motion, the court must find whether:
- The physical evidence that may contain DNA still exists;
- The results of DNA testing of that evidence would be admissible at trial and whether there is reliable proof that the evidence has not been materially altered and would be admissible at a future hearing; and
- There is a reasonable probability that the defendant would have been acquitted or would have received a lesser sentence.

Section 925.11, F.S., requires governmental entities to hold physical evidence for the time frame within which a postconviction DNA petition could be filed and for 60 days after the execution of the sentence in a death penalty case.

The Florida Department of Law Enforcement or its designee is directed to carry out any testing ordered by the court in s. 943.3251, F.S. The Florida Department of Law Enforcement reports that approximately 16 people have requested that the FDLE lab conduct postconviction DNA testing under the provisions of the statute since it became effective October 1, 2001.

Application of the Postconviction DNA Testing Statute
Since the enactment of the postconviction DNA testing statutes and procedural rule, there have been cases which have challenged the trial court's ruling on the defendant's initial petition seeking the testing. In two such cases the appellate court upheld the trial court's ruling that the petition was insufficient because there was no reasonable probability that the defendant would be exonerated if the DNA evidence were tested or re-tested.

In making these rulings the trial court and the appellate court weighed the facts of the case and the potential effect on the outcome had the defendant not been the source of the DNA evidence.

For instance, in *Galloway v. State,* 802 So.2d 1173 (Fla. 1st DCA 2001), the defendant (appellant) was convicted, along with two co-defendants, of two counts of robbery and one count of sexual battery. In upholding the trial court's denial of the petition for DNA testing, the appellate court stated: "Appellant merely alleged in his motion that his DNA would not match DNA evidence found at the scene of the crimes and on the body of the victim of the sexual battery. Even if DNA testing of this evidence produced such a result, it would not exonerate appellant. *Such evidence would not demonstrate that appellant was not present at the scene of the crime and participating with his co-defendants in the commission of the crimes when they occurred. The fact that only appellant's co-defendants may have deposited DNA at the crime scene or on the body of the victim does not mean that appellant was not there.*" (*Id. at 1175*, emphasis added.)

In *Hartline v. Florida,* 806 So.2d 595 (Fla. 5th DCA 2002), the appellate court similarly noted: "Upon review of the attached portions of the trial transcript, we agree with the court below that there is no reasonable probability of acquittal if the DNA evidence was reexamined. Hartline's identity was not in question and based on the sexual activity with the child victim *which he admitted performing*, the victim's testimony, and acts an eyewitness described, even exculpatory DNA results would not have been given any weight by the jury." (*Id. at 595-596,* emphasis added.)

A different result was reached by the appellate court in *Zollman v. State,* 820 So.2d 1059 (Fla. 2nd DCA 2002), as the trial court's ruling which denied the defendant's petition was reversed on appeal and sent back to the trial court for further proceedings. As with *Galloway* and *Hartline*, the court extensively analyzed the facts of the underlying case as presented in the defendant's petition.

In *Zollman* the defendant was convicted of kidnapping, sexual battery and robbery which occurred in 1978. The victim apparently described her assailant as having blond hair and gray eyes. At trial she identified the defendant, who had brown hair and dark brown eyes, as the man who had attacked her. In addition to the victim's identification, the State presented evidence of the defendant's partial fingerprint on the outside of the victim's car, and one hair that was "consistent with" the defendant's hair inside the car. Zollman sought DNA testing of the rape kit, victim's clothes and cigarette butts collected from the scene of the sexual battery, pursuant to s. 925.11, F.S. His petition alleged that his only defense at trial was misidentification.

The trial court ruled that because the victim had identified Zollman at trial, and because of the existence of the partial fingerprint on her car, DNA testing would not exonerate him. In reversing the trial court, the appellate court found that the defendant had sufficiently alleged that identity was a genuinely disputed issue and that DNA testing would either exonerate him or mitigate his sentence, as required by the statute and the procedural rule.

Significantly, the court stated: "the fact that the victim identified Zollman as her assailant at trial *does not mean that identity was not genuinely disputed at trial for purposes of postconviction DNA testing*." The court found the identification to be the "only significant evidence tying Zollman to the crimes," thereby discounting the partial fingerprint and hair evidence. (*Id.* at 1062, emphasis added.) The court further found that DNA testing of the rape kit would bear directly on Zollman's guilt or innocence since the victim testified that the assailant had ejaculated into her, and that there was only one assailant. Because of the findings made by the appellate court, the trial court was directed to order the State to respond to Zollman's petition and to indicate whether the items sought to be tested still exist. *Id.* at 1063.

Postconviction DNA Testing Requests

The State Attorney in the 17th Judicial Circuit, the Broward County Sheriff, and the local chiefs of police agreed in May 2001, to review for genetic evidence every case in which a defendant is on Florida's Death Row as a result of a conviction in that circuit. This initiative was launched before the new postconviction DNA testing legislation became effective. Of the potential 29 inmates, only 3 have requested the DNA testing. Eight inmates objected to the test being done in their cases.

FDLE reports that approximately 16 postconviction DNA tests have been conducted in their labs, pursuant to court orders issued under s. 925.11, F.S.

DNA Database

Florida is also in the forefront of legislation regarding the use of DNA as a crime fighting tool. In 1989, the Legislature created a state DNA data bank to accumulate and analyze DNA from known criminals to compare to DNA evidence collected from crime scenes to help solve crimes. Section 943.325, F.S., establishes a timetable for expanding the DNA data bank to include any person convicted for:

- robbery as of July 1, 2002;
- manslaughter or kidnapping as of July 1, 2003;
- violent felony offense as of July 1, 2004; and
- any person convicted for any felony offense.

The Florida Department of Law Enforcement is responsible for receiving, processing, and storing the samples collected, as well as providing the specimen collection kits. FDLE, along with the statewide criminal laboratory analysis system, is further directed to "establish, implement, and maintain a statewide automated personal identification system capable of, but not limited to, classifying, matching, and storing analyses of DNA and other biological molecules." s. 943.325(8), F.S.

Since the inception of the database, the testing method used by FDLE changed from the restriction fragment length polymorphism method (RFLP) to the short tandem repeat method (STR). RFLP analysis required a fairly large quantity of DNA and may have been unsuccessful at yielding a result where the sample was degraded by environmental factors. With the STR method of analysis, much smaller quantities of DNA are needed for analysis. STR's are based on repeated sequences dispersed throughout the chromosomes. It evaluates specific regions, or "loci." The variable nature of the STR regions intensifies the discrimination between one DNA profile and another. Studies indicate that the likelihood that any two individuals (not identical twins) will have the same 13-loci DNA profile can be as high as 1 in 1 billion or greater. This method of analysis is becoming the laboratory standard all around the country. *The Future of Forensic DNA Testing, Predictions of the Research and Development Working Group,* National Institute of Justice, November 2000; *Using DNA to Solve Cold Cases,* Special Report, National Institute of Justice, July 2002.

The FBI has selected 13 loci to serve as a standard battery of "core loci" and laboratories are developing the capability to process these loci. This allows for comparisons and cooperation between laboratories, as does the Combined DNA Index System (CODIS) which is administered by the FBI. The FBI provides the computer software and training to facilitate the use of CODIS. In the four years CODIS has been in existence it has expanded to include 130 federal, state, and local laboratory participants. (FDLE News Release, June 25, 2002)

METHODOLOGY

Staff engaged in legal research of case law, other states' statutes, reviewed articles published by the

National Institute of Justice and others, conducted an informal survey of prosecutors, and interviewed laboratory personnel and supervisors at the Florida Department of Law Enforcement during a site visit to the database and forensic science laboratories in Tallahassee.

FINDINGS

The use of DNA evidence in criminal cases has been in the spotlight throughout the country in recent years. We can identify several trends which bear further examination:

- Because testing methods have improved, it is now possible to solve "cold" cases, years later, by testing evidence collected at the crime scene which may contain DNA.
- The national network of DNA databases containing the DNA profiles of convicted offenders has made it possible to solve cases in which the perpetrator might have otherwise remained unknown.
- Due in large part to this evolving science, Statutes of Limitation, which close the window of opportunity for filing criminal charges against a suspect, are being amended around the country to provide for prosecution to commence at later dates where DNA evidence identifies the perpetrator.
- The human element in the collection, preservation, testing and analysis of DNA evidence, as well as decisions regarding what level of reliance on the evidence is appropriate has become increasingly important as the scientific element becomes more widely accepted by the general population.

The FDLE DNA Database and its Crime-Solving Potential

As of October 2002, FDLE had collected a total of 154,662 samples for the DNA database of convicted offenders. Six years ago when the analysis method was changed from RFLP to STR, 62,347 samples had to be re-analyzed utilizing STR. The result was an instant "backlog" of samples to be analyzed. FDLE considers a sample to be backlogged if it has been at the laboratory for 111 days or more and has yet to be analyzed. The number of backlogged STR samples yet to be entered into the offender database as of October 2002, was 10,875.

The National Institute of Justice awarded FDLE a $1.1 million grant recently to assist in decreasing the backlog. With this money, equipment will be purchased to automate the extraction of DNA from samples submitted, as well as a genetic analyzer which can analyze 16 samples in 24 hours (versus the one sample which can be analyzed now). Between the purchase of the new equipment and out-sourcing some of the workload, it is expected that the backlog will soon diminish.

During the second quarter of 2002, FDLE reported a statewide rate of receiving a DNA sample from only 42 percent of the qualifying offenders. Of the 3,944 qualifying offenders from which a sample should have been received, 1,662 were actually received during the second quarter.

From a practical standpoint, the collection of samples is fairly routine in cases where the offender is sentenced to incarceration within the Department of Corrections, as all inmates are processed through medical and receiving facilities. Although s. 943.325(3), F.S., requires that "if the person is not incarcerated following such conviction, the person may not be released from the custody of the court or released pursuant to a bond or surety until the blood specimens or other approved biological specimens required by this section have been taken," it appears that the sample collection becomes a less routine matter under these circumstances. FDLE reports that in some cases the sample is actually collected in court, in others it is collected at a later date by the probation office. It is suggested that incorporating the saliva swab sample collection into the fingerprinting procedure that is done in the courtroom upon conviction, would improve the compliance rate dramatically.

FDLE is processing samples now which come from a saliva swab, as opposed to an actual sample of blood which was used in the past. This swab makes it easier to gather the samples because the procedure is not as invasive and the same skills are not required of the sample collector.

Clearing out convicted offender sample backlogs, as well as a high compliance rate for submission of offender samples to the lab, is important from an investigatory standpoint. It stands to reason that the more information contained in both the forensic and offender DNA databases, the more powerful tools they can be for investigation purposes. This tool can help to identify the perpetrator of a crime as well as eliminate suspects, or aid in the exoneration of a defendant who was wrongfully convicted.

National DNA Database System

As mentioned in the Background section, the FBI administers the Combined DNA Index System (CODIS) which allows federal, state and local crime

labs to exchange and compare DNA profiles electronically. There are three tiers within the CODIS system – National (NDIS), State (SDIS) and Local (LDIS). The databases include DNA profiles from convicted offenders, unsolved crime scene evidence, and missing persons. *Using DNA to Solve Cold Cases*, Special Report, National Institute of Justice, July 2002.

CODIS can provide investigative leads in crimes where biological evidence is recovered from the scene using two indexes: the forensic and offender indexes. The forensic index contains DNA profiles from crime scene evidence while the offender index contains DNA profiles from the convicted offender databases of the participating states. Only six states do not participate in the National DNA Index System. As of September 2002, NDIS contained a total of 1,194,486 DNA profiles – 40,361 forensic profiles and 1,154,125 offender profiles. (Source: http://www.fbi.gov/hq/lab/codis/national.htm, last visited December 5, 2002.)

Florida has aided more investigations using the NDIS than any other participating state. As of June 2002, Florida had aided in 890 investigations through the profiles contained in the NDIS. (FDLE News Release, June 25, 2002) According to the FBI, Florida had contributed 135,667 offender profiles and 3,975 forensic samples as of September 2002. (Source: http://www.fbi.gov/hq/lab/codis/national.htm, last visited December 5, 2002.)

The following are just two examples of how the CODIS/NDIS can be used to solve crimes:

- *Forensic database"hit"*- "In 1999 Leon Dundas was killed in a drug deal. Investigators remembered Dundas refusing to give a blood sample in connection with a rape investigation in 1998. They were able to obtain Dundas' blood sample through the medical examiner's office and forwarded it to the DNA lab at the Florida Department of Law Enforcement. Dundas' DNA profile was compared with the national forensic index and a match was made between Dundas and DNA evidence from a rape victim in Washington, D.C. The FBI then entered DNA evidence from additional unsolved rapes committed in Washington. Dundas' DNA matched seven additional rapes in Washington and three more in Jacksonville, Florida. Police in Washington said that without DNA, they never would have identified Dundas, who had no prior recorded history of violent crime." *Using DNA to Solve Cold Cases*, Special Report, National Institute of Justice, July 2002.
- *Offender database "hit"* – "In 1995, an unidentified woman's body was found on an off-ramp along an interstate in Des Moines, Iowa. After identifying the victim, police began looking at truck drivers as suspects, due to the location of the body. The Iowa Department of Public Safety sent biological evidence left at the crime scene to the FBI laboratory for DNA analysis. The FBI lab analyzed the evidence and developed a DNA profile of the perpetrator. The profile was uploaded to CODIS, where NDIS matched it to the Florida offender. At the time of the hit, the offender was incarcerated in a Florida prison for a sexual assault conviction in early 1999. After identifying the offender, police discovered that he possessed a commercial trucking license." (Source: http://www.fbi.gov/hq/lab/codis/national.htm last visited December 5, 2002.)

Rape Kit Backlog

Since the advent of DNA databases which contain the profiles of offenders from all over the country, analyzing evidence contained in what is commonly called "rape kits" – the serological and trace evidence gathered from victims of sex crimes – is critical. In cases where there was no known suspect, or particularly in dated cases which occurred before DNA testing became more routine, the evidence contained in these kits could now be analyzed and the DNA checked against the database to potentially obtain the identity of a suspect.

It has been reported, however, that as of October 1999, at least 180,000 rape kits across the country remain unprocessed because there are no known suspects in those cases. The reason the kits are unprocessed is a matter of priorities. In a forensic laboratory, the cases scheduled for trial take precedence over those in which there is not even a suspect. In most jurisdictions, the biological evidence in cases in which there is no suspect are not being routinely analyzed or placed in the DNA database. DNA evidence from crime scenes is usually used to prosecute a known suspect rather than to investigate unsolved cases. *Using DNA to Solve Cold Cases*, Special Report, National Institute of Justice, July 2002.

Recent Congressional Action

In September 2002, the U.S. Senate passed the DNA Sexual Assault Justice Act of 2002 (S. 2513). On October 7, 2002, the Act was referred to the House Subcommittee on Crime, Terrorism, and Homeland Security. The legislation would increase funding for state laboratories to process backlogged rape kits, require the U.S. Attorney General to survey every law

enforcement agency in the country to assess the extent of the backlog and provide federal grants to local law enforcement agencies to help reduce the backlog. The Act would also provide additional funding to the FBI for the purpose of upgrading the CODIS computer system. *S. 2513, 107th Congress*, Introduced May 14, 2002; *Criminal Justice Newsletter*, Vol. 32, No. 17.

Part of the Act authorizes the issuance of "John Doe" indictments for federal sexual assault crimes. In a report issued by the U.S. Senate Committee on the Judiciary it is explained that it is the intent of the bill to provide that when law enforcement does not know the name of the perpetrator but does know his DNA profile, it may seek an indictment that identifies him by that profile. So long as the indictment is returned within the existing federal statute of limitation – five years – the prosecution may commence at any time without regard to the limitation. *Report 107-334, U.S. Senate Committee on the Judiciary, November 4, 2002*.

None of the Florida prosecutors who responded to an informal survey on the question have sought "John Doe" arrest warrants or indictments, however they have been successfully used by prosecutors in at least eight other states. According to the U.S. Senate Report, state courts in Wisconsin and California have upheld the warrants. *Report 107-334, U.S. Senate Committee on the Judiciary, November 4, 2002*.

DNA's Unique Effect on Statutes of Limitation

We should not overlook the potential for solving crimes that are outside the crimes we assume DNA evidence can be gathered from – usually murder and sex crimes involving blood and semen. Blood from a broken window at the scene of a burglary, saliva from a discarded cigarette butt or beer bottle, or even skin cells rubbed off on a rope used as a restraint can yield DNA evidence. It is possible now to connect a suspect with a crime that occurred many years ago, using DNA evidence gathered from places not routinely thought of in the past.

For example, in January 2002, a former University of Washington linebacker was sentenced to 3 ½ years in prison for his part in an armed robbery. He was reported to be connected to the crime through DNA evidence on a glove smeared with the blood of the victim and the football player.

In Michigan, DNA lifted from cigarette butts led to a murder conviction in a 1973 case. The twenty year old victim had disappeared from a shopping mall, was raped and shot in the head. Her frozen body was discovered in a forest two months later. A gun was found in a river in 1974 and the victim's wallet was found nearby two years later. Police re-examined the "cold" case in the mid-1990's, focusing on the gun. One of the gun's owner's told police he suspected a man named Wingeart had stolen the gun. Using DNA extracted from cigarette butts taken from Wingeart's trash, investigators matched his DNA to semen taken from the victim's body nearly 29 years previously.

Florida's Statutes of Limitation

Section 775.15, F.S., sets forth time limitations for commencing criminal prosecutions, commonly known as "statutes of limitation."

There were no statutes of limitation at common law. *State v. McCloud*, 67 So.2d 242 (Fla. 1953). It is purely a statutory creation. In *State v. Hickman*, the court borrows a section from 22 C.J.S., Criminal Law s. 223 to explain that:

> "Statutes of Limitation are construed as being acts of grace, and as a surrendering by the sovereign of its right to prosecute or of its right to prosecute at its discretion, and they are considered as equivalent to acts of amnesty. Such statutes are founded on the liberal theory that prosecutions should not be allowed to ferment endlessly in the files of the government to explode only after witnesses and proofs necessary to the protection of accused have by sheer lapse of time passed beyond availability. They serve, not only to bar prosecutions on aged and untrustworthy evidence, but also to cut off prosecution for crimes a reasonable time after completion, when no further danger to society is contemplated from the criminal activity." *State v. Hickman*, 189 So.2d 254, 262 (Fla. 2nd DCA 1966).

Section 775.15(4), F.S., provides that time for prosecution of a criminal case starts to run on the day after the offense is committed. An offense is deemed to have been committed either when every element of the offense has occurred, or, if the legislative purpose to prohibit a continuing course of conduct plainly appears, at the time when the course of conduct or the defendant's duplicity therein is terminated.

Section 775.15, F.S., controls the time limitations for initiating a criminal prosecution for any felony offense in the following manner:

- For a capital felony, a life felony, or a felony resulting in death, there is no time limitation.

- For a first or second degree felony violation of s. 794.011, F.S., which includes several different sexual battery offenses, if reported to a law enforcement agency within 72 hours after commission of the crime, there is no time limitation.
- For any felony that resulted in injury to a person when the felony arises from the use of a "destructive device," there is a ten-year limitation.
- For a first degree felony, there is a four-year limitation.
- For any other felony, there is a three-year limitation.

These general time limitation periods are extended for prosecutions involving securities transaction violations, insurance fraud, and Medicaid provider fraud under ch. 517, s. 409.920, F.S., s. 440.105, F.S., and s. 817.234, F.S. (five years); prosecutions involving environmental control felony violations under ch. 403 (five years); prosecutions involving felony elderly person or disabled adult abuse under s. 825.102, F.S. (four years); and prosecutions involving certain sexual offenses committed against children under 18 years of age (applicable time limitation does not begin to run until the crime is reported or until the child turns 18, whichever occurs first).

Other States – Recent Expansion of Statutes of Limitation

In the past several years statutes of limitation around the country have been expanded for cases which involve the identification of the perpetrator through DNA evidence. There are a few distinct ways in which the expansion has occurred:

- Georgia provides for prosecution of certain offenses (armed robbery, kidnapping, sex crimes) to commence at any time when DNA evidence is used to establish the identity of the accused, so long as a sufficient portion of the evidence is preserved and available for testing by the accused. *Code of Georgia, 17-3-1*. Minnesota has a similar law. s *628.26, Minnesota Statutes*.
- Kansas provides for the commencement of prosecution of certain sex crimes within one year from the date on which the identity of the suspect is conclusively established by DNA testing. *s.21-3106, Kansas Statutes.*
- New Jersey law provides that the "time starts to run on the day after the offense is committed, except that when a prosecution is supported by physical evidence that identifies the actor by means of DNA testing or fingerprint analysis, time does not start to run until the State is in possession of both the physical evidence and the DNA or fingerprint evidence necessary to establish the identification of the actor by means of comparison to the physical evidence." *s. 2C:1-6, New Jersey Statutes*.
- Texas has no limitation on the commencement of sexual assault prosecutions where DNA results do not match "the victim or any other person whose identity is readily ascertained." *Tx. Crim.Pro. Art. 12.01*.
- Delaware provides that if the statute of limitation for any crime has expired, a prosecution may nonetheless commence within 10 years after the crime is committed if "based upon forensic DNA testing." *11 Del.C. s. 205*.

Potential for Exoneration Exists

The potential for finding DNA in evidence gathered many years in the past is astounding. FDLE reports collecting DNA from evidence in a case as old as 36 years. It should be noted that when one man is exonerated, another suspect should be implicated in the crime. In certain cases, the true perpetrator may escape prosecution if the Statute of Limitation has expired.

In 1996, the U.S. Department of Justice published a study entitled *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence after Trial* which reports the details of 28 cases from all over the country that resulted in exculpation based on DNA evidence. Most of the cases occurred in the mid-1980's, when DNA technology was not readily accessible. In each of the cases the defendant was serving a sentence of incarceration. While in prison, the defendants consented to a comparison of DNA derived from evidence in the cases against them to their own DNA. In each case the results showed that there was no match and the defendants were ultimately set free. *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence after Trial*, U.S. Department of Justice, June 1996.

The Innocence Project, a legal clinic at the Benjamin N. Cardozo School of Law, handles cases where postconviction DNA evidence can yield conclusive proof of innocence, according to the website. The Project reports that 111 people have been exonerated by postconviction DNA evidence testing. (Source: http://www.innocenceproject.org, last visited December 12, 2002.)

Among those cases reported by the Innocence Project are two Florida cases – Jerry Frank Townsend and Frank Lee Smith. The Smith case had been based in large part on what later became questionable

eyewitness testimony. The victim in that case had been sexually battered and killed. The DNA evidence from the sexual battery did not match Smith in postconviction testing. By the time the testing was completed, Smith had died of cancer in prison. Townsend has been released from prison. Postconviction DNA testing in both cases ultimately implicated another man.

The Human Element in Handling DNA Evidence and Interpreting Results

Law enforcement, prosecutors, criminal defendants and jurors seem to have great confidence in the strictly scientific aspects of DNA evidence. The prosecutors who responded to our informal survey indicate that throughout Florida, juries seem to understand and accept DNA evidence presented at trial at least to the degree that they are willing to rely on it when reaching verdicts. In fact, one prosecutor reported that he believes juries actually *expect* DNA evidence now.

The focus has shifted to the *interpretation* of the findings – just what can be inferred from DNA evidence being found in, or being absent from, a particular location?

For instance, in a rape/murder where semen is found in the victim's body, does excluding a suspect as the source of the DNA evidence related to the rape automatically exclude him as a suspect in the murder as well? The theory that two people rather than one perpetrated the crimes is not outside the realm of possibility. This is where the interpretation or meaning of DNA evidence becomes critical. The handling of evidence gathered at the crime scene, the analysis of that evidence in the laboratory, the weight the evidence is given in the assessment of a charging decision by a prosecutor or a decision by a court in a postconviction motion hearing are all factors that involve science to a lesser degree than common sense.

Challenging DNA evidence, from a defense perspective, seems to be focusing more on the human element and less on the science per se. In other words, was there contamination at the crime scene or in the lab? Was evidence left behind that should have been gathered and preserved? Can the credibility of the lab technician be called into question?

In several of the cases reported by the 1996 Department of Justice study, perjured testimony of a serologist with the West Virginia State Police laboratory was in large part responsible for the wrongful convictions. *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence after Trial,* U.S. Department of Justice, June 1996. An investigation ensued which uncovered a "long history of falsifying evidence in criminal prosecutions" by the serologist. *In re: Investigation of the West Virginia State Police Crime Laboratory, Serology Division*, 438 S.E.2d 501 (1993).

The Florida Department of Law Enforcement operates a lab that is accredited by the American Society of Crime Laboratory Directors. The FBI administers a program followed by FDLE that involves external proficiency tests and other quality controls are adhered to internally. FDLE reports that all DNA data is re-analyzed by a second analyst and then an administrative review is conducted. The proficiency tests and internal quality control measures are designed to weed out technologists and analysts who are not performing at the required level.

As the cases discussed in the Background section above illustrate, there are usually three possibilities with DNA test results, at least where there is sufficient existing material from which to conduct tests. Those possibilities are: 1) the evidence originated with the victim; 2) the evidence originated with the defendant; or 3) the evidence came from someone else. It is the analysis of the crime, the circumstances, and the myriad possibilities with regard to the third (the evidence came from someone else) that is crucial at all stages of a criminal case, from thorough investigation to going forward with a prosecution to ordering and interpreting the meaning of postconviction DNA testing.

RECOMMENDATIONS

Staff recommends amending the Statutes of Limitation in cases where DNA evidence can be used to identify the perpetrator.

It is also important to keep up with developing technology, employ trustworthy lab technicians and analysts, and work toward clearing out backlogs in both offender database profiles and forensic database submissions, as well as keeping the offender database as current as possible as it expands to include more felony crimes in the future. To that end, staff suggests continued emphasis in funding those goals.