DNA Expansion Proposal Considered by State Assembly Had Provisions Inconsistent With Justice

Part 1

by Jeffrey Deskovic

Introduction

I had heard that there was going to be a hearing on strengthening the state DNA Database, and also that there was some sort of compromise in the works that would limit 440.10 motions to one year following conviction. Such motions are intended to bring to the Court information that was unavailable at the time of trial and conviction, which, if known, would likely have influenced the verdict. I was concerned about the one-year limit, and the limitations that it would place on other people who are currently wrongfully convicted and who are attempting to establish their innocence. I therefore decided to attend the hearing before the Assembly Codes Committee, in order to both observe what was going on, and participate in the hearing by testifying from my own personal experience about the deficiencies and cracks in the system whereby the Innocent can be wrongfully convicted and have to overcome tremendous obstacles and difficulties undoing such convictions.

I often view myself as speaking on behalf of those whom I metaphorically left behind, but who remain in prison wrongfully, unable to speak for themselves. I viewed this opportunity as an extension of that principle.

There were a variety of different proposed changes in the way the code of criminal procedure works that were under consideration, as well as a variety of other related matters that the Assembly invited commentary on.

As part of Governor Spitzer's proposal to expand the DNA Databank, those convicted of nonviolent misdemeanor crimes would be required to submit a DNA sample. I felt that this was a welcome change which could only increase the chances of freeing the wrongfully convicted. The reason is that when someone who is wrongfully convicted requests a DNA test to compare DNA found at a crime scene with the databank, the larger the pool to compare against, the better the chances of a match, and thereby simultaneously demonstrating the innocence of the wrongfully accused, and the guilt of the real perpetrator.

When I was in prison, and was dreaming about having the DNA in my case compared against the databank, hoping for a match, I realized just how much of a long shot it might be that the person who really committed the crime would have their sample in the Databank. I therefore wanted my lawyer to push to have the DNA not merely compared to those who were in New York's databank, but also to those in the databanks of other states, as well as the federal databank. My reasoning was that I wish to cast as large a net as possible to maximize my chances. The strengthening of the DNA databank by increasing the samples available is a natural extension of this rationale. Additionally, strengthening the database can prevent wrongful convictions by increasing the chances that the real perpetrator will be arrested originally.

Surprisingly, the expansion of the databank was not welcomed by all. Robert Newman, testifying on behalf of The Legal Aid Society Of New York City, although stating that including profiles from all persons convicted of crimes "would enhance to some degree the crime-solving capacity of law enforcement," then continued, "However, we feel that in practice, this additional expansion of the Databank, following so quickly upon last year's substantial expansion, would divert resources away from other crime-prevention efforts that promise more substantial benefits."

My response was that anything, anything at all, which can aid in the proving of innocence as well as the prevention of a wrongful conviction, must be done. If it only saves one life, I think that, in and of itself, is well worth it. What price can we place on a man or woman's freedom? To hold otherwise would be, in effect, to say to someone who is wrongfully convicted, "You must stay in prison, unable to prove your innocence, because we are unwilling to spend the money needed to include samples from those convicted of misdemeanors, which could prove your innocence, because we don't think it is worth it financially. But you understand, right?'

Also in opposition to expansion of the DNA Database was Professor Harvey Levine, of Queens College Graduate Center. His objection was two-fold: Firstly, that the nonviolent misdemeanors, most often consisting of smoking marijuana, represented crime at its lowest levels; and, secondly that African-Americans and Latinos were more likely to be arrested for non violent misdemeanors and therefore it would be mostly their DNA which would be collected, and that therefore it's a racist outcome.

As I see it, Levine's arguments fail. Those who break the law and start out with low-level crimes often go on to bigger and more serious ones. Marijuana is known as a gateway drug which can lead its users to more serious drugs, such as crack and heroin, which may then cause them to commit more serious crimes in order to support their habit. Use of the more serious drugs may cause them to commit crimes while in an altered state of mind. Steven Cunningham, for example, the perpetrator of the crime I served 16 years wrongfully for, was, in fact, a known crack user who said that he was high at the time he killed the victim. Therefore, the idea that all those who commit low level crimes are harmless and, by implication, that their samples are worthless is simply not true. Additionally, the implementation of the collection of DNA from all of those who are convicted of nonviolent misdemeanors, is not racist because it calls for the taking of the samples from anybody, regardless of race or ethnicity.

Robert Perry, representing the New York Civil Liberties Union, was also against the expansion of the DNA Databank. He argued that because human beings collect and analyze the samples, and because humans are fallible, the databank should not be expanded. If the crime lab does not use correct safety protocols to ensure that cross-contamination does not occur, or if mislabeling of the sample happens, this can lead to errors and false positives. He noted a couple of cases where issues such as contamination and mislabeling led to wrongful convictions, and felt therefore that if even more samples were obtained this would increase the error rate. There are a variety of responses to this. While I agree that scientific protocols must be observed in order to obtain accurate results, this is true of any science. The occurrence, and correction I might add, through additional DNA Tests down the line which corrected the wrongful convictions, does not disprove the general theory. It merely shows that a safety feature could be built in requiring confirmatory tests by different labs in order to ensure the accuracy of results when DNA is used to prosecute defendants, just as third and sometimes fourth tests are utilized before anybody is released based on a negative showing. Additionally, although there have been a few rare instances of false positives, there has never been a case of a false negative, nor has there ever been a case in which defense witnesses testify to an exclusion while the prosecution testified to a match. In those couple of cases of wrongful convictions based on initial inaccurate readings, when the error was discovered, the accurate readout was confirmed by experts for the prosecution so that there was agreement by both sides.

To not expand the DNA Databank because of a few rare false positives is to also say that DNA should never be used at all, which would have had the result of not obtaining the 2002 exonerations that have been achieved nationwide, including the approximately 30% of cases wherein DNA has not only shown innocence but has also shown the guilt of the correct party, often accompanied by admissions of guilt by the accused. Further, if the idea to not use technology because there is a human element to it and therefore it is not perfect were applied across the board, there would be no invention or advancement ever used in any aspect of life.

Peter Neufeld, co-founder of The Innocence Project, which nationwide has helped clear 2002 wrongfully convicted people through DNA, stated, "Anytime lawmakers are weighing bills on DNA and the criminal justice system, the bottom line question is whether the reforms can prevent wrongful convictions, help people prove their innocence more quickly, and improve public safety. Legislation introduced in the Assembly meets that test far better than the Senate proposal does. These are serious problems that demand serious action, and New York's criminal justice system will best be served by the Assembly reforms."

Shortcomings Of The Bill

Unfortunately, there were other provisions in the bill which were very objectionable. For example, there was a one-year time limit provision, modified to three years by the time of the day of the hearing, in which defendants would be able to file a post-conviction motion known as a 440.10, after which they would be time-barred. This rule was to apply to all non-DNA or newly discovered evidence claims. This rule is inconsistent with justice, truth, guilt and innocence. Everybody who spoke was against this rule. Consider the following:

- In cases wherein there is misconduct by a prosecutor, a defendant would only have one year to bring this issue forward;
- When it is discovered that a previous attorney knew about evidence but either did no investigation or else failed to bring this to the court's attention, such evidence would not be considered newly discovered because the prior attorney knew about it or the defendant knew about it, and therefore if the one or three years had passed, it would be too late.
- A defendant who discovers, more than a year after conviction, that the police or the prosecutor withheld evidence that by law they were supposed to disclose to the defense (Brady material), they would no longer be able to raise the issue.
- Sometimes The Court of Appeals adopts a new rule and decides that justice requires that it be applied retroactively to cases already in the system. A defendant who has already exhausted his appeals or has progressed beyond the state level, would no longer be able to raise the issue in court, thereby denying him the benefit of the new rule.

With regard to the proposed time limit, I addressed several points before the Committee. I spoke of how being time barred could lead to injustice, recounting how then-Westchester District Attorney Jeanine Pirro had urged the federal court to time bar me because my legal paperwork arrived 4 days too late, and how the court's adopting of this position led to my continued incarceration. I pointed out that it should make no difference how much time it has taken a defendant with scarce resources and little, if any, legal representation to uncover that the prosecutor has illegally held back information which, by law, she should have turned over to the Defense. I then cited the case of Anthony DiSimone, who had 52 boxes of exhibits and 376 pages of statements from various witnesses indicating that another man committed the crime other than he, would not have had a legal leg to stand on, since this was uncovered years later. I mentioned that the proposed rule was an example of putting procedure over fairness, truth, justice, guilt and innocence. Professor Bennett Gershman, of Pace University Law School, highly regarded former prosecutor, and author of the book ***Prosecutorial Misconduct***, which is generally regarded as the definitive work on the subject, and frequent media commentator, speaking from his heart and with passion flowing from his voice, expressed how the inclusion of this time-limiting provision in a bill designed to strengthen DNA testing and access was undoubtedly the result of a compromise reached by the Governor with some prosecutors. Jonathan Gradess, of the group New York State Defenders Association, which provides research information to public defenders who request it, when asked by the Assembly if such a time limit proposal has any place in a DNA expansion bill, replied that it did not.

An additional problem with the bill as proposed was that it would limit defendants to the filing of only one 440.10, and that any additional motions filed would automatically have to be denied by courts without even looking at the merits of the issue. This would create several pitfalls inconsistent with justice. First off, defendants have no right to a lawyer when filing a 440.10, therefore a lot of them have been prepared without benefit of a lawyer to argue and prepare them correctly. Defendants who have no means and are incarcerated, having no lawyer, often resort to filing petitions on their own, out of desperation. Often these petitions are not argued correctly. If that same defendant then somehow manages to obtain a lawyer at a later date, that lawyer would be barred from filing a properly argued 440.10. In addition, if a lawyer provided inadequate representation on a 440.10, this would kill the opportunity for a subsequent lawyer to file a new motion. Lastly, as Prof. Hellerstein, the director of The Second Look Program, which works to clear those wrongfully convicted who do not have a DNA issue, pointed out, the provision would make no distinction between frivolous and non-frivolous 440.10 motions. In other words, it would not matter how compelling the new facts or legal arguments in the second motion were, they would not even be looked at or considered by the court. Assemblyman Lentol, who chaired the hearing, chimed in, speaking to the absurdity of the rule, stated that the message being sent to those of scant legal and financial resources, if such a rule was adopted, was "You have one year, so hurry up." ■