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Many Resist DNA Testing for Inmates

■ Prison: Although 64 wrongly convicted men in U.S. have been freed, states are reluctant to bestow right. Pending legislation could change that.

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Even as President Clinton joins the growing call for DNA testing of inmates—and despite the 64 wrongly convicted U.S. prisoners freed after testing—only two states give inmates such a right, and many prosecutors actively resist it.

Last week, Clinton, who supports capital punishment, said he is "favorably disposed" toward legislation recently introduced by Sen. Patrick J. Leahy (D-Vt.) that would make it easier for inmates to obtain DNA tests that they believe could prove their innocence.

A similar bill proposed by state Senate President Pro Tem John Burton (D-San Francisco) is before the California Legislature, and measures are being drafted in Arizona, Mississippi, Missouri, Oklahoma, Louisiana, South Dakota, Tennessee and Washington.

In the meantime, obtaining a DNA test for an inmate, outside of New York and Illinois, often "is like a war," said lawyer Barry Scheck, co-founder of the Innocence Project at New York's Cardozo Law School, which has led the way in using DNA tests to overturn wrongful convictions.

For example, Clyde Charles walked out of Louisiana's Angola prison just before Christmas, having been exonerated of a rape conviction as a result of DNA tests conducted 18 years after he was sentenced to life without parole. But Charles, whose conviction rested primarily on identification by the victim, had to fight a nine-year battle to get the biological evidence tested. A district attorney agreed to the tests only after Scheck and Innocence Project co-founder Peter Neufeld filed a federal civil rights suit challenging Louisiana's refusal to permit the tests.

The suit asserted that refusing to grant Charles access to evidence that could prove his innocence violated his constitutional right to due process of law. In particular, the suit alleged that, under the landmark 1963 Supreme Court decision in Brady vs. Maryland, the prosecution was obliged to disclose anything that might bear on Charles' guilt or innocence.

It also contended that continuing to incarcerate Charles for a crime he did not commit violated the Constitution's prohibition against cruel and unusual punishment when a "truly persuasive showing of actual innocence can be made"—and that this could be done with DNA testing.

"The quest for truth does not terminate with a defendant's conviction," the attorneys said.

The Innocence Project recently filed similar lawsuits in Baton Rouge, La., and Orlando, Fla. Plans are underway to file others in several states—including Massachusetts, Michigan, Missouri and Pennsylvania—where prosecutors are resisting testing.

These legal challenges come at a time when two conflicting forces are intersecting. On the one hand, the demonstrated potency of DNA evidence—which can include semen, blood or even fingernail scrapings—is growing in importance not only to defense lawyers but also to prosecutors, who have used it to help secure hundreds of convictions around the country.

On the other hand, the availability of DNA evidence has precipitated thorny legal issues because post-conviction testing requests do not fit neatly into court rules or U.S. legal doctrine, which has made it increasingly difficult in recent years for inmates to challenge convictions.

In September, the National Commission on the Future of DNA Evidence, appointed by Atty. Gen. Janet Reno, said the wave of DNA-based exonerations over the last decade, including five in Canada, had weakened "the strong presumption that verdicts are correct." That presumption has been one of the underpinnings of restrictions on inmates obtaining post-conviction relief.

The commission recommended that in situations "where DNA can establish actual innocence," prosecutors should agree "to the pursuit of truth" rather than invoking laws that prohibit introduction of new evidence because of the passage of time.

The panel also urged judges to waive statutory time limits for consideration of newly discovered evidence in such situations.

Additionally, the commission recommended that prosecutors and defense lawyers try to work cooperatively in situations where DNA may help determine innocence, although it may not be absolutely conclusive. Defense lawyers also were urged not to file DNA-based appeals in situations where it is clear that testing would be of no value in determining innocence.

DNA Tests Expose System's 'Fallibility'

Leahy's bill, which is expected to face hearings later this year, is an attempt to put those recommendations into federal law. "Perhaps more than any other development, improvements in DNA testing have exposed the fallibility of the legal system," said Leahy, a former prosecutor.

His measure would prohibit the government from destroying biological evidence from a crime scene without 90 days notice, during which time an inmate could request DNA testing.

That is important, Scheck said, because in many parts of the country, evidence is not retained long enough. He said that in 70% of the cases in which inmates have asked the Innocence Project for help, it turned out that the biological evidence had been destroyed.

Another impediment to using DNA is that most states have time limits on when newly discovered evidence can be introduced.

Some judges have cited such laws in refusing to permit post-conviction

testing, but others have ruled that the statutes should not be a bar to getting at the truth.

New York courts first confronted the issue in 1990 in the case of Charles Dabbs, who was convicted of rape in 1984—before DNA testing was available and before New York enacted its post-conviction testing law.

Dabbs sought tests of semen and other bodily secretions recovered from the victim's panties, a gauze pad and rape test slides. His conviction was based largely on identification by the victim, who testified that she had not had sexual relations for at least 24 hours before the attack.

Prosecutors resisted testing on the grounds that there was no statutory right and that the results were speculative. They also argued that if the judge granted the motion, it would set a precedent that would lead other convicted sex offenders to demand DNA testing.

The court disagreed. Judge Nicholas Colabella ruled that a defendant has a right to be informed of exculpatory information known to the state—and that the state has a duty to preserve the material.

"To deny [Dabbs] the opportunity to prove his innocence with such evidence simply to ensure the finality of convictions is untenable," the judge said. "Mistaken identification probably accounts for more miscarriages of justice than any other single factor."

The testing was done, and Dabbs was exonerated.

Courts in Indiana, New Jersey and Pennsylvania have issued similar rulings. But courts in other states, including Florida, have ruled against testing.

Even in Illinois—which has a statute permitting post-conviction testing and has had 14 DNA-based exonerations, more than any other state—judges have differed on the showing a defendant has to make to qualify for testing.

California, unlike most states, has no law limiting when newly discovered evidence can be introduced. In theory, that makes it easier for an inmate to get DNA testing. But the path is not always swift.

In recent years, men convicted of sexual assaults in Los Angeles, Orange, Riverside and San Diego counties have been freed as a result of DNA tests.

Kevin Green was convicted of sexually assaulting his wife in 1980, before DNA testing was available. He served 17 years before another prisoner told police that he was the perpetrator. As soon as Gerald Parker confessed, the Orange County district attorney's office initiated DNA testing of evidence, which showed Green could not have been the rapist. He was freed.

But in other cases, it has taken inmates a long time to get testing.

For example, San Diego defense lawyer Carmela Simoncini launched efforts to get DNA testing for Frederick Daye in 1990, after she learned that another inmate convicted of the same rape and kidnapping had signed a sworn affidavit stating that Daye was not his accomplice.

After a lengthy legal battle, Simoncini finally convinced a judge to permit the DNA testing that cleared Daye in 1994.

And in a case just resolved in Riverside, it took three years after a Cardozo student working for the Innocence Project discovered that relevant biological evidence had been preserved to get a judge to release it for testing.

DNA tests done for the defense late last year showed that Herman Atkins—who got a 45-year sentence in a 1986 rape case—could not have been guilty. FBI testing confirmed forensic scientist Edward Blake's results and, on Thursday, the Riverside district attorney's office asked a judge to set aside the conviction and order Atkins' release.

Neufeld said that Atkins could have gotten out of prison three years earlier if prosecutors had agreed to testing when the student learned the evidence was available.

Riverside to Adopt New DNA Policies

Riverside Dist. Atty. Grover Trask said his office would adopt new policies, in line with the DNA commission recommendations, a change that should facilitate prompter testing.

Neufeld also stressed that Atkins and Charles, both black men convicted of raping white women, are typical of the Innocence Project's clients. Nationally, he said, only 11% of rapes are cross-racial—but almost half of the individuals the project has helped free were convicted in cross-racial rape cases that involved mistaken identification.

Assistant Dist. Atty. Norman Gahn of Milwaukee, who serves on the DNA commission with Scheck, said he and many other prosecutors feel that if DNA can be used to convict someone "and send him away for life," then prosecutors should be open to its use to prove innocence.

However, both Gahn and George "Woody" Clarke, a deputy district attorney in San Diego who also is on the DNA commission, expressed reservations about enacting a statute that mandates post-conviction DNA testing according to set criteria. They said they feel it is important that judges retain the discretion to bar testing based on the circumstances in a particular case.

Other prosecutors have expressed concern that permitting DNA tests years after a conviction is upheld on appeal raises the specter that no verdict will ever be final.

But Scheck and Neufeld maintain that obtaining conclusive scientific results to establish innocence or guilt should trump other concerns.

"Finality is a doctrine that can be explained in two words when it comes to innocence tests: 'willful ignorance,' " Scheck and Neufeld declare in their recently published book, "Actual Innocence."

Myrna Raeder, a professor at Southwestern Law School in Los Angeles who closely follows cases involving the use of DNA, offered a similar assessment.

"When you have a tool like DNA that can render definitive proof of innocence," invoking finality as the most important goal "is a smoke screen," Raeder said. Consequently, it would be wise to enact legislation with clear criteria for testing eligibility so that the decision about who gets a test "is not left solely to the whim of a prosecutor or judge."

Photo:
Barry Scheck, center, pictured with two clients whose convictions were overturned by using DNA tests, has filed similar suits in Baton Rouge, La., and Orlando, Fla., on behalf of Innocence Project.

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(A2), DNA TESTING—Co-author Barry Scheck, left, Jim Dwyer and Peter Neufeld argue that Dna tests can overturn wrongful convictions. Yet only two states give inmates such a right. A1

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Descriptors
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