

SIXTH CIRCUIT JUDICIAL CONFERENCE

DNA FORENSICS AND CRIMINAL LAW

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1. Technical developments.
 - a. mtDNA.
 1. *People v. Holtzer*, 660 N.W.2d 405 (Mich. Ct. App. 2003) – admissible as generally accepted in scientific community.
 2. *State v. Scott*, 33 S.W.2d 746 (Tenn. 2000) – admissible under Tenn. Code §24-7-118(b).
2. Right to defense expert re DNA evidence.
 - a. *Leonard v. People*, 256 F. Supp. 2d 723 (W.D. Mich. 2003) – attorney’s failure to seek defense expert violated defendant’s 6th Amendment right to effective counsel.

-- the Mark Twain case
 - b. *People v. Tanner*, 671 N.W.2d 728 (Mich. 2003) – no right to defense expert where evidence excludes defendant and defendant fails to give “any specific reason why this expert assistance was necessary.”

-- Court of Appeals had argued that expert necessary to enable defendant to develop and argue the point that the DNA evidence exculpated her.

-- Dissent: “The majority ... sets an impossible goal for defense counsel. If counsel fully understands the prosecution’s evidence, there would be no need for an expert to explain it. If, as here, counsel is not expert in certain scientific matters, the majority seems to require counsel to petition for funds for an expert using an expert’s grasp of the subject matter.”

-- See, e.g., *People v. Turner*, No. 245376, 2003 Mich. App. LEXIS 3008 (Mich. Ct. App. Nov. 25, 2003) – “defendant sought appointment of a DNA expert to help him determine whether the prosecutor’s DNA expert’s testimony at trial ‘comported with the required scientific protocols.’ Again, however, defendant has not identified any specific concerns about the DNA expert’s testimony. Thus, there is no basis for us to conclude that the trial court’s decision was an abuse of discretion.”

- c. *People v. Harris*, No. 232192, 2003 Mich. App. LEXIS 27 (Mich. Ct. App. Jan. 7, 2003) – Not ineffective assistance of counsel to fail to request DNA expert when prosecution expert testifies on cross-examination that DNA evidence neither excludes nor positively identifies defendant; or to fail to request statistical analysis of DNA evidence, since 2 eyewitnesses identified defendant as perpetrator.
- d. *People v. Brewer*, No. 239368, 2003 Mich. App. LEXIS 1481 (Mich Ct. App. June 19, 2003) – Not ineffective assistance of counsel to fail to request DNA expert where “no reasonable probability that [it] would have resulted in a different outcome at trail.”

3. Right to post-conviction DNA testing.

- a. Innocence Project -- 143 exonerated (as of April 16, 2004).
- b. State legislation:
 - 1. Kentucky Rev. Sta. Ann. Ch. 422 – capital cases, identity an issue at trial, preponderance of evidence that DNA testing or retesting possible and exonerative
 - 2. Michigan Comp. Laws §770.16 – imprisoned felons, identity an issue at trial, no prior DNA testing or new technology, DNA evidence material, inculpatory result placed in database.
 - 3. Ohio Rev. Code Ann. §§2305.02 and 2743.48 – imprisoned felons, identity at issue, no guilt or no-contest plea, no DNA test at trial (and DNA testing not generally accepted or available) or test result not definitive.

4. Tenn. Code Ann. §§40-30-401 through 413 – specified offenses and others at judge’s discretion, no prior DNA test or kind of testing now requested.
 - a. Turner v. State, No. E2002-02895-CCA-R3-PC, 2004 Tenn. Crim. App. LEXIS 299 (Tenn. Crim. App. April 1, 2004) – no right to retest DNA in rape case where prior test had inculpated petitioner and he had confessed.
 - b. Shuttle v. State, No. E2003-00131-CCA-R3-PC, 2004 Tenn. Crim. App. LEXIS 80 (Tenn. Crim. App. Feb.3, 2004) – reverses denial of post-conviction DNA test despite confession (and thus identity not at issue at trial) when petitioner initially told counsel that crime was committed by third party. (Note: Tenn. Law does not require identity to have been issue.)
- c. Federal legislation: H.R. 3214 “Advancing Justice Through DNA Technology Act”
 1. Authorizes \$151 million per year for 5 years to reduce DNA test backlog.
 - a. Formula for grants to states.
 - b. Funds can be spent on private, for-profit laboratory testing.
 2. Tolls statute of limitations until perpetrator’s DNA identified.
 3. Makes it a crime not only for unauthorized disclosure of DNA information but also unauthorized “obtaining” and “use”.
 4. Post-conviction DNA testing:
 - a. Requires court to order testing if –
 - i. inmate in federal system attests to innocence;
 - ii. evidence was secured in relation to offense;
 - iii. evidence not previously subjected to DNA testing, or inmate is requesting use of new method that is substantially more probative;
 - iv. evidence in government custody and properly maintained;
 - v. proposed testing reasonable in scope and method;

- vi. inmate identifies defense theory consistent with affirmative defense at trial and that would establish inmate's innocence;
 - vii. applicant convicted following trial in which perpetrator's identify was in issue;
 - viii. proposed test would produce new material evidence to support defense theory and raise a reasonable probability that inmate did not commit offense;
 - ix. inmate agrees to provide DNA sample for comparison;
 - x. request is not intended to delay execution of sentence or administration of justice.
- b. Inmate must pay costs of testing unless indigent.
 - c. If DNA test inculpatates inmate –
 - i. Government may move court to determine if assertion of innocence was false and, if so, hold inmate in contempt (subject to additional consecutive sentence of at least 3 years).
 - ii. Inmate must pay costs of testing.
 - iii. Director of Prisons may deny good conduct credit.
 - iv. Parole Commission may deny parole.

4. Ex parte search warrant OK for post-presentment blood sample – State v. Blye, No. E2001-01227-SC-R11-CD, 2004 Tenn. LEXIS 131 (Tenn. Feb. 25, 2004).

5. Forced DNA testing of inmates and parolees:

- a. State. V. Steele, 802 N.E.2d 1127 (Ohio Ct. App. 2003) – upholds Ohio Rev. Code §2901.07 against Fourth Amendment challenge on grounds of “special needs” and “reasonableness” rationales.
- b. U.S. v. Kincade, 345 F.3d 1095 (9th Cir. 2003), *rehearing en banc granted*, 354 F.3d 1000 (9th Cir. 2004) – violates Fourth Amendment: “It is undoubtedly true that, were we to maintain DNA files on all persons living in this country, we would even more effectively further the public interest in having efficient and orderly criminal prosecutions, just as we would were we willing to sacrifice *all* of our interests in privacy and personal liberty. We chose, however, not to follow that course when we adopted the *Fourth Amendment*” (345 F.3d at 1103).

1. “Special needs” exception to need for individualized suspicion does not apply because sample is for law enforcement purposes.
 - i. Rejects government’s argument that purpose of sampling inmates and parolees is to “fill a gap in the CODIS database”: “The purpose of these searches is no more to put samples into CODIS than is the purpose of finger-printing to place cards into index files” (345 F.3d at 1112).
 - ii. Relies on *City of Indianapolis v. Edmund*, 531 U.S. 32 (2000)(suspicionless highway searches for illegal drugs violate Fourth Amendment) and *Ferguson v. City of Charleston*, 532 U.S. 67 (2001)(testing pregnant women for drug use and informing police of second positive result violates Fourth Amendment).

2. Dissent: Forced testing is constitutional based on “totality of the circumstances” reasonableness standard.
 - i. *Edmund* and *Ferguson* only apply to special needs standard, not to totality-of-circumstances standard.

6. Dragnets?

- a. Voluntary compliance does not raise Fourth Amendment issue even if individual unaware of option to refuse (see *Schneekloth v. Bustamante*, 412 U.S. 218 (1973)(knowledge of right to refuse search of car does not invalidate consent).
- b. If individual refuses, can he or she be compelled?
- c. Would refusal, along with other evidence, create reasonable suspicion or probable cause?

-- In re Non-Testimonial Identification Order Directed to R.H., 762 A.2d 1239 (Vt. 2000)(upholding order to obtain saliva for DNA testing from suspect in rape-murder of 9 year-old because suspect lived in area and had history of sexual attacks on women, including one using comparable method of attack).