

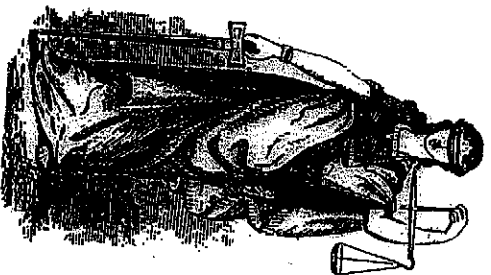
CONTINUING LEGAL EDUCATION

Spring 2012

May 17, 2012

**BEYOND THE “ALL CRIMES” EXPANSION:
THE IMPACT AND MEANING OF THE NEW DNA LEGISLATION**

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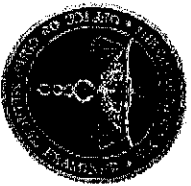


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Request for Testimony / Case Conferences

As a general practice, the Office of Chief Medical Examiner does not require a personal appearance subpoena in order to secure the court appearance of any OCME employee.

A criminalist may testify in all manner of proceedings (Grand Jury, criminal or civil trials, depositions) without the need for an attorney to send a personal appearance subpoena.

It is always encouraged that all attorneys contact the criminalist directly and sufficiently in advance of grand jury or trial, to coordinate scheduling of testimony.

OCME **requires** that all attorneys who intend to call a criminalist as a witness at trial have a pre-trial meeting here at the OCME DNA Laboratory Building with the assigned analyst.

In general, if an attorney wishes to speak with the assigned criminalist concerning reported case-specific DNA results, the attorney is welcome to meet with the criminalist here at the OCME DNA Laboratory Building.

Protective Orders

An attorney may agree to or request that the collection and comparison of a defendant's DNA sample be afforded two 'protections': that the defendant's known DNA profile be strictly compared to specific case evidence, and further, that the defendant's known DNA profile not be entered into the local NYC DNA databank.

The OCME **requires a Court Order** stating such.

A telephone call informing the criminalist of a Court's directive or copy of court transcript or letter from a prosecutor or defense attorney is not sufficient.

The OCME Legal Department reviews and 'approves' all Protective Orders.

The following simple language is suggested for Protective Orders:

The Office of Chief Medical Examiner, Department of Forensic Biology is directly to strictly compare the known DNA profile of [insert name of defendant] to case evidence which is assigned Forensic Biology Laboratory number [insert FB#].

The Office of Chief Medical Examiner, Department of Forensic Biology is further directed to refrain from entering the known DNA profile of [insert name of defendant] into the local OCME DNA databank

A few other points to keep in mind:

The only type of DNA profile which the New York City Office of Chief Medical Examiner uploads to the State DNA databank is a forensic (meaning derived from a crime scene), unknown DNA profile.

The New York City Office of Chief Medical Examiner **never** uploads a known DNA profile (i.e., belonging to a suspect or defendant or victim or eyewitness, etc.) to the State DNA databank.

The New York City Office of Chief Medical Examiner has **NO** access to the New York State DNA databank.

The New York City Office of Chief Medical Examiner has no ability to 'see' the offender DNA profiles which are maintained in the State DNA databank, nor does the OCME have the ability to access or 'pull down' offender DNA profiles which are maintained in the State DNA databank.

The only parties who have 'access' to the State DNA Databank are the Forensic Investigation Center of the New York State Police and Office of Forensic Services, New York State Division of Criminal Justice Services.

OCME's twice-monthly upload of forensic, unknown crime scene DNA profiles must never be confused as having access to the State DNA databank.

Two types of profiles are maintained within the New York State DNA databank: (i) the known profiles of all defendants who have been convicted of a designated offense and (ii) all forensic, unknown crime scene DNA profiles detected within all of New York State (the unknown profiles detected from crime scenes in New York City, Rochester, Watertown, Binghamton, Naples, Lake Placid, etc, etc.)

No Court need ever direct the OCME not to enter a defendant's known profile into the State DNA databank since the OCME never uploads a defendant's DNA profile to the State DNA databank. As conviction of a designated offense is the fundamental requirement before one's known profile may be entered into the State databank.

Attorney Request to be Present for Testing

An attorney and/or their technical expert may request to be present for evidence viewing, evidence examination and/or DNA testing. The Department of Forensic Biology permits an attorney and/or technical expert to be present within a Forensic Biology laboratory to observe the entire process or selected portions of DNA analysis (e.g., an attorney may request to be present only for evidence examination or an expert may solely ask to observe the swabbing of items of crime scene evidence).

All requests from attorneys to be present for testing must be brought to the attention of the OCME Legal Department.

The attorney must submit a written request to the OCME Legal Department at least one week in advance of the proposed observation date.

If evidence or exemplar examination has already commenced prior to receipt of the attorney's written request, Forensic Biology testing will NOT cease unless a Court Order directs the Department of Forensic Biology to do so.

The attorney's written request must include the following identifying information:

- a. the case caption (i.e., People v. John Smith, Indictment #1234/12)
- b. the name of the presiding Judge;
- c. the name of the attorney and/or expert who wishes to observe;
- d. the items of evidence [and NYPD voucher number if known] which the attorney or expert believes were submitted to the OCME for DNA analysis.

In accordance with Department of Forensic Biology protocol, no one is permitted to enter a DNA laboratory without first submitting a DNA sample. Therefore, the attorney and/or expert must complete and sign an OCME VISITOR DNA SAMPLE CONSENT FORM and provide a DNA sample to the Department of Forensic Biology prior to entering the laboratory.

A criminalist within the Department of Forensic Biology Exemplar Group will collect an oral swab from the attorney and/or expert.

A record of the DNA profile(s) generated will be placed into LabTypes.

The OCME will only permit an attorney or expert(s) to be present for observation during normal business hours: Monday to Friday, 9 am to 5 pm.

The attorney and/or expert will be escorted by an OCME Department of Forensic Biology criminalist at all times.

The attorney and/or expert must gown up to OCME specification prior to entering a laboratory. An attorney or expert who does not follow the OCME gowning specifications will not be permitted to enter the laboratory.

The attorney and/or expert may bring paper and pen into the laboratory.

The attorney and/or expert are prohibited from bringing cameras, cell phones or tape recording devices into the laboratory.

The attorney and/or expert are prohibited from photocopying any OCME documents.

The attorney and/or expert may not remove anything from the OCME Department of Forensic Biology laboratories or facility.

The attorney and/or expert will not be given a tour of the OCME DNA Facility.

This is not an occasion or opportunity for the attorney and/or expert to question or quiz a criminalist about the testing process or technology or equipment utilized. If an attorney and/or expert wish to speak with the assigned criminalist in advance of trial concerning case-specific DNA testing and results, the attorney and/or expert may return to the OCME DNA Building at a later designated time to speak with the criminalist in person.

Request for evidence to be sent to a laboratory for testing

An attorney may request that case or exemplar evidence be sent to a laboratory for testing.

All requests for evidence to be sent to a laboratory for testing must be brought to the attention of the OCME Legal Department.

The Department of Forensic Biology may only forward case evidence or exemplars to a laboratory accredited by the New York State Department of Health (unless a Court Order dictates otherwise).

A list of the private laboratories accredited by New York State Department of Health can be found at <http://www.wadsworth.org/labert/clip/Category/PermitLinks/Category/Listing.htm> under the section 'Forensic Identity.'

The Technical Leader of the Department of Forensic Biology can also provide a list to any attorney of the private laboratories accredited by NYS DOH.

First it must be determined if OCMF is still possesses the case evidence which the attorney wishes to send to another laboratory. If case evidence has been returned to the custody of the New York Police Department, then the attorney must make all arrangements directly with the NYPD.

If the Department of Forensic Biology still possesses the case evidence, the OCMF requires a Court Order to effectuate transfer to another laboratory.

The Court Order must include the following identifying information:

1. the case caption (i.e., People v. John Smith, Indictment #1234/12)the name and address of the selected laboratory;
2. acknowledgement that the selected laboratory is accredited by the New York State Department of Health;
3. a listing of the precise evidence which the OCMF Department of Forensic Biology is directed to forward for testing.
4. A statement that the laboratory shall return to the OCMF Department of Forensic Biology evidence 'leftover' subsequent to its testing.

The Court Order should be sent to the OCMF Legal Department for review.

It is suggested that the assigned criminalist and/or supervisor speak with the attorney to come to a specific understanding as to 'how much' of each item of evidence will be sent by OCMF to the laboratory to enable testing.

The OCMF will not assume the cost of mailing evidence to the laboratory named in the Court Order. The selected laboratory must forward the Department of Forensic Biology a prepaid mailing label and any shipping material which the laboratory deems necessary.

The assigned criminalist and/or her/his supervisor will locate the requested evidence and will be responsible for sending to the laboratory named in the Court Order.

Expungement Requests

An attorney may request that a suspect or defendant's known DNA profile be expunged from the local OCMF DNA databank.

Any attorney inquiring as to expungement of a DNA profile **must** be referred to the OCMF Legal Department.

The OCMF Legal Department will advise the attorney that they may wish to ask for the following:

1. the defendant's known numeric DNA profile be expunged from OCMF's local DNA database
2. the swabs collected from the defendant be destroyed
3. the associated DNA extracts be destroyed
4. the associated Forensic Biology S file be destroyed

The OCMF **requires a Court Order**. A letter of request is not sufficient.

Post Conviction DNA testing

The Office of Chief Medical Examiner will perform post-conviction DNA testing upon Court Order or the written assent of the District Attorney's Office.

A defense attorney or defendant's written request for post-conviction testing is not sufficient.

The Court Order or written assent of the District Attorney's Office **must** be sent to the OCMF Legal Department.

Any attorney involved in Post Conviction DNA testing is welcome to come to the OCMF DNA building to speak with the assigned case criminalist to discuss case-specific testing.

Amends Criminal Procedure Law §440.30, §240.40 & §440.10
Amends Executive Law §995 & §995-c

S 1. Subdivision 1 of section 440.30 of the Criminal Procedure Law is amended to read as follows:

1. (A) A motion to vacate a judgment pursuant to section 440.10 of this Article and a motion to set aside a sentence pursuant to section 440.20 of this Article must be made in writing and upon reasonable notice to the people. Upon the motion, a defendant who is in a position adequately to raise more than one ground should raise every such ground upon which he or she intends to challenge the judgment or sentence. If the motion is based upon the existence or occurrence of facts, the motion papers must contain sworn allegations thereof, whether by the defendant or by another person or persons. Such sworn allegations may be based upon personal knowledge of the affiant or upon information and belief, provided that in the latter event the affiant must state the sources of such information and the grounds of such belief. The defendant may further submit documentary evidence or information supporting or tending to support the allegations of the moving papers. The people may file with the court, and in such case must serve a copy thereof upon the defendant or his or her counsel, if any, an answer denying or admitting any or all of the allegations of the motion papers, and may further submit documentary evidence or information refuting or tending to refute such allegations. After all papers of both parties have been filed, and after all documentary evidence or information, if any, has been submitted, the court must consider the same for the purpose of ascertaining whether the motion is determinable without a hearing to resolve questions of fact.

(B) In conjunction with the filing or consideration of a motion to vacate a judgment pursuant to section 440.10 of this article by a defendant convicted after a trial, in cases where the court has ordered an evidentiary hearing upon such motion, the court may order that the people produce or make available for inspection property, as defined in subdivision three of section 240.10 of this part, in its possession, custody, or control that was secured in connection with the investigation or prosecution of the defendant upon credible allegations by the defendant and a finding by the court that such property, if obtained, would be probative to the determination of 'All Crimes' DNA legislation 3.12.12

defendant's actual innocence, and that the request is reasonable. The court shall deny or limit such a request upon a finding that such a request, if granted, would threaten the integrity or chain of custody of property or the integrity of the processes or functions of a laboratory conducting dna testing, pose a risk of harm, intimidation, embarrassment, reprisal, or other substantially negative consequences to any person, undermine the proper functions of law enforcement including the confidentiality of informants, or on the basis of any other factor identified by the court in the interests of justice or public safety. The court shall further ensure that any property produced pursuant to this paragraph is subject to a protective order, where appropriate. The court shall deny any request made pursuant to this paragraph where:

(i) (1) the defendant's motion pursuant to section 440.10 of this article does not seek to demonstrate his or her actual innocence of the offense or offenses of which he or she was convicted that are the subject of the motion, or (2) the defendant has not presented credible allegations and the court has not found that such property, if obtained, would be probative to the determination of the defendant's actual innocence and that the request is reasonable;

(ii) the defendant has made his or her motion after five years from the date of the judgment of conviction; provided, however, that this limitation period shall be tolled for five years if the defendant is in custody in connection with the conviction that is the subject of his or her motion, and provided further that, notwithstanding such limitation periods, the court may consider the motion if the defendant has shown:

(a) that he or she has been pursuing his or her rights diligently and that some extraordinary circumstance prevented the timely filing of the motion;

(b) that the facts upon which the motion is predicated were unknown to the defendant or his or her attorney and could not have been ascertained by the exercise of due diligence prior to the expiration of the statute of limitations; or

(c) considering all circumstances of the case including but not limited to evidence of the defendant's guilt, the impact of granting or denying such motion upon public confidence in the criminal justice system, or upon the safety or welfare of the community, and the defendant's diligence in seeking to obtain the requested property or related relief, the interests of justice would be served by considering the motion;

(iii) the defendant is challenging a judgment convicting him or her of an offense that is not a felony defined in section 10.00 of the penal law; or

(iv) upon a finding by the court that the property requested in this motion would be available through other means through reasonable efforts by the defendant to obtain such property.

S 2. Subdivision 1-a of section 440.30 of the Criminal Procedure Law, as amended by chapter 138 of the laws of 2004, is amended to read as follows:

1-a. (a) (1) Where 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 deoxyribonucleic acid ("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.

(2) where the defendant's motion for forensic DNA testing of specified evidence is made following a plea of guilty and entry of judgment there on convicting him or her of:

(a) a homicide offense defined in article one hundred twenty-five of the penal law, any felony sex offense defined in article one hundred thirty of the penal law, a violent felony offense as defined in paragraph (a) of subdivision one of section 70.02 of the penal law, or

(b) any other felony offense to which he or she pled guilty after being charged in an indictment or information in superior court with one or more of the offenses listed in clause (a) of this subparagraph, then the court shall grant such a motion upon its determination that evidence containing dna was secured in connection with the investigation or prosecution of the defendant, and if a DNA test had been conducted on such evidence and the results had been known to the parties prior to the entry of the defendant's plea and judgment thereon, there exists a substantial probability that the evidence would have established the defendant's actual innocence of the offense or offenses that are the subject of the defendant's motion; provided, however, that:

(i) the court shall consider whether the defendant had the opportunity to request such testing prior to entering a guilty plea, and, where it finds that the defendant had such opportunity and unjustifiably failed to do so, the court may deny such motion; and

(ii) a court shall deny the defendant's motion for forensic DNA testing where the defendant has made his or her motion more than five years after entry of the judgment of conviction; except that the limitation period may be tolled if the defendant has shown:

(a) that he or she has been pursuing his or her rights diligently and that some extraordinary circumstance prevented the timely filing of the motion for forensic DNA testing;

(b) that the facts upon which the motion is predicated were unknown to the defendant or his or her attorney and could not have been ascertained by the exercise of due diligence prior to the expiration of this statute of limitations; or

(c) considering all circumstances of the case including but not limited to evidence of the defendant's guilt, the impact of granting or denying such motion upon public confidence in the criminal justice system, or upon the safety or welfare of the community, and the defendant's

diligence in seeking to obtain the requested property or related relief, the interests of justice would be served by tolling such limitation period.

(B) In conjunction with the filing of a motion under this subdivision, the court may direct the people to provide the defendant with information in the possession of the people concerning the current physical location of the specified evidence and if the specified evidence no longer exists or the physical location of the specified evidence is unknown, a representation to that effect and information and documentary evidence in the possession of the people concerning the last known physical location of such specified evidence. If there is a finding by the court that the specified evidence no longer exists or the physical location of such specified evidence is unknown, such information in and of itself shall not be a factor from which any inference unfavorable to the people may be drawn by the court in deciding a motion under this section. The court, on motion of the defendant, may also issue a subpoena duces tecum directing a public or private hospital, laboratory or other entity to produce such specified evidence in its possession and/or information and documentary evidence in its possession concerning the location and status of such specified evidence.

(C) in response to a motion under this paragraph, upon notice to the parties and to the entity required to perform the search the court may order an entity that has access to the Combined DNA Index System ("CODIS") or its successor system to compare a DNA profile obtained from probative biological material gathered in connection with the investigation or prosecution of the defendant against DNA databanks by keyboard searches, or a similar method that does not involve uploading, upon a court's determination that (1) *such profile complies with federal bureau of investigation or state requirements, whichever are applicable and as such requirements are applied to law enforcement agencies seeking such a comparison, and that the data meet State DNA Index System and/or National DNA Index System criteria* as such criteria are applied to law enforcement agencies seeking such a comparison and (2) if such comparison had been conducted, and if the results had been admitted in the trial resulting in the judgment, a reasonable probability exists 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

⁴All Crimes' DNA legislation 3.12.12

available to the defendant prior to the plea, a reasonable probability exists that the conviction would not have resulted. For purposes of this subdivision, a "keyboard search" shall mean a search of a DNA profile against the databank in which the profile that is searched is not uploaded or maintained in the databank.

S 3. Subdivision 1 of section 240.40 of the Criminal Procedure Law, as amended by chapter 558 of the laws of 1982, the opening paragraph as amended by chapter 317 of the laws of 1983, is amended to read as follows:

1. Upon motion of a defendant against whom an indictment, superior court information, prosecutor's information, information, or simplified information charging a misdemeanor is pending, the court in which such accusatory instrument is pending:

- (a) must order discovery as to any material not disclosed upon a demand pursuant to section 240.20, if it finds that the prosecutor's refusal to disclose such material is not justified;

- (b) must, unless it is satisfied that the people have shown good cause why such an order should not be issued, order discovery or any other order authorized by subdivision one of section 240.70 as to any material not disclosed upon demand pursuant to section 240.20 where the prosecutor has failed to serve a timely written refusal pursuant to section 240.35;

- (c) may order discovery with respect to any other property, which the people intend to introduce at the trial, upon a showing by the defendant that discovery with respect to such property is material to the preparation of his or her defense, and that the request is reasonable; and

- (d) where property in the people's possession, custody, or control that consists of a deoxyribonucleic acid ("DNA") profile obtained from probative biological material gathered in connection with the investigation or prosecution of the defendant and the defendant establishes that such profile complies with Federal Bureau of Investigation or state

requirements, whichever are applicable and as such requirements are applied to law enforcement agencies seeking a keyboard search or similar comparison, and that the data meets State DNA Index System or National DNA Index System criteria as such criteria are applied to law enforcement agencies seeking such a keyboard search or similar comparison, the court may order an entity that has access to the Combined DNA Index System or its successor system to compare such DNA profile against 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, upon a showing by the defendant that such a comparison is material to the presentation of his or her defense and that the request is reasonable. For purposes of this paragraph, a "keyboard search" shall mean a search of a DNA profile against the databank in which the profile that is searched is not uploaded to or maintained in the databank. Upon granting the motion pursuant to paragraph (c) of this subdivision, the court shall, upon motion of the people showing such to be material to the preparation of their case and that the request is reasonable, condition its order of discovery by further directing discovery by the people of property, of the same kind or character as that authorized to be inspected by the defendant, which he or she intends to introduce at the trial.

S 4. Subdivision 1 of section 440.10 of the Criminal Procedure Law is amended by adding a new paragraph (g-1) to read as follows:

(g-1) forensic DNA testing of evidence performed since the entry of a judgment, (1) in the case of a defendant convicted after a guilty plea, the court has determined that the defendant has demonstrated a substantial probability that the defendant was actually innocent of the offense of which he or she was convicted, or (2) in the case of a defendant convicted after a trial, the court has determined that there exists a reasonable probability that the verdict would have been more favorable to the defendant.

S 5. Subdivision 7 of section 995 of the Executive Law, as amended by chapter 2 of the laws of 2006, paragraph (a) as separately amended by chapter 320 of the laws of 2006 and paragraph (f) as amended by chapter 405 of the laws of 2010, is amended to read as follows:

Any felony defined in any chapter of the laws of the state or any misdemeanor defined in the penal law except that where the person is convicted under section 221.10 of the penal law, only a person convicted under subdivision two of such section, or a person convicted under subdivision one of such section who stands previously convicted of any crime as defined in subdivision six of section 10.00 of the penal law.

S 6. Subdivision 3 of section 995-c of the Executive Law, as amended by chapter 576 of the laws of 2004, is amended to read as follows:

3. (a) Any designated offender subsequent to conviction and sentencing for a crime specified in subdivision seven of section nine hundred ninety-five of this article shall be required to provide a sample appropriate for DNA testing to determine identification characteristics specific to such person and to be included in a state DNA identification index pursuant to this article.

(b) (i) in the case of a designated offender who is sentenced to a term of imprisonment, such sample shall be collected by the public servant to whose custody the designated offender has been committed.

(ii) in the case of a designated offender who is sentenced to a term of probation, including a sentence of probation imposed in conjunction with a sentence of imprisonment when a sample has not already been taken, such sample shall be collected by the probation department supervising the designated offender.

(iii) in the case of a designated offender whose sentence does not include either a term of imprisonment or a term of probation, outside of the City of New York, the court shall order that

the designated offender report to an office of the sheriff of that county, and when the designated offender does so, such sample shall be collected by the sheriff's office or a court officer. Within the City of New York, the court shall order that the sample be collected by a court officer.

(iv) nothing in this paragraph shall prohibit the collection of a DNA sample from a designated offender by any court official, state or local correction official or employee, probation officer, parole officer, police officer, peace officer, other law enforcement official, or designated personnel of the division of criminal justice services who has been notified by the division of criminal justice services that such designated offender has not provided a DNA sample. Upon notification by the division of criminal justice services that a designated offender has not provided a DNA sample, such court official, state or local correction official or employee, probation officer, parole officer, police officer, peace officer or other law enforcement official, or designated personnel of the division of criminal justice services shall collect the DNA sample.

S 7. Nothing in this act shall be construed to create or impose an affirmative obligation upon laboratories, police departments, district attorneys, or any other law enforcement agencies or personnel to retain or preserve property that may contain DNA if such obligation did not exist prior to the effective date of this act, provided, however, that nothing in this act shall be construed to affect or remove any such obligation if it did exist prior to the effective date of this act.

S 8. The actual costs incurred in connection with DNA testing or keyboard searches performed pursuant to subdivision 1-a of section 440.30 of the criminal procedure law shall be borne by the defendant requesting such testing or searches, provided, however that the court, taking into account the defendant's financial resources, as well as any of the defendant's financial obligations, shall make a determination whether or not the payment of such cost would impose a hardship upon the defendant, and in such case, the state shall bear such costs.

S 9. This act shall take effect October 1, 2012; provided, however, that the amendments to subdivision 7 of section 995 of the executive law made by section five of this act shall apply to conviction of designated offenses, and subparagraph two of paragraph (a) of subdivision 1-a of Section 440.30 of the criminal procedure law as added by section two of this act shall apply to a guilty plea entered, on or after such effective date.