2012 DNA EXPANSION

Current Law:

- Currently, DNA samples are taken from anyone convicted of a Penal Law felony or one of 36 Penal Law misdemeanors.

- As a result of existing law, convicted offenders have been linked to crime scene evidence and convictions have been secured in 2,721 cases – including 189 homicides, 593 sexual assaults and 1,353 burglaries. (Unless otherwise noted all data is as of December 2011)

- Another 27 individuals who were wrongly convicted of crimes in New York State have been exonerated; that's approximately10 percent of the nation's 271 DNA exonerations. Additionally, DNA has helped exclude and clear countless mistakenly identified suspects, often in the earliest stages of a criminal investigation.

- The current law only permits DNA to be collected from 48 percent of the offenders convicted of a Penal Law crime.

- Databank Statistics (as of Jan. 9, 2012):

    - New York's Databank contains more than 400,000 offender profiles and
    - Nearly 38,000 crime scene samples.

How we got here:

- New York's DNA Databank began limited operations in 1996 and contained DNA profiles from individuals convicted of only homicide and certain sex-related offenses.

- No genetic material is stored in the Databank; those samples are converted into a unique series of numbers that are stored in the Databank at the New York State Police Forensic Investigation Center in Albany.

- The Legislature expanded the DNA Databank in 1999, 2004 and 2006 to include additional crimes. (NOTE: in 2010, the Penal Law crime of Strangulation took effect, creating three new crimes: two felonies and one misdemeanor; by virtue of the law that created it, the misdemeanor strangulation crime was DNA eligible).

- Each expansion was overwhelmingly approved in each house of the Legislature:

    - 1999: Assembly 142 to 2; Senate 58 to1.
    - 2004: Assembly 147 to 0, Senate 60 to 0.
    - 2006: Assembly 132 to 6; Senate 56 to 2.

Governor's Proposed Expansion:

- The Governor's proposal would add about 180 Penal Law misdemeanors and approximately 200-250 felonies in other state laws, including the Vehicle and Traffic; Tax and Finance; and Agriculture and Markets Law, to name a few.

- It details which agency would be responsible for collection of samples: Probation Departments if the offender is sentenced to Probation or the Sheriff's Office if the sentence does not include either Probation or term of imprisonment.

    - It does not prohibit any other agency – such as the courts, parole or police – from taking samples if they are notified by DCJS that an offender owes a sample as a result of a DNA-eligible conviction.

- The law would take effect Aug. 1, 2012; it is ***not*** retroactive to offenders under sentence.

- This expansion is being proposed because we know that people who commit serious crimes have committed lower-level misdemeanors in the past:

    - For example, there have been 965 hits on offenders convicted of petit larceny; their DNA was taken as a result of the 2006 expansion.

        - Those matches have assisted law enforcement in their investigation of: 51 homicides; 222 sexual assaults; 117 robberies; and 407 burglaries.

    - And other low-level crimes – that are currently not DNA eligible – such as unauthorized use of a vehicle, possession of stolen property, theft of services; and misdemeanor drug offenses, are precursors to violent crime:

        - 27 percent of individuals convicted of unauthorized use of a vehicle are subsequently arrested for a Violent Felony Offense within five years of that misdemeanor conviction.

        - 21 percent of individuals convicted of theft of services are arrested for a VFO within five years of that misdemeanor conviction.

        - 16 percent of individuals convicted of misdemeanor drug possession are arrested for a VFO within five years of that misdemeanor conviction.

- Approximately 89 percent of the 3,547 offenders linked to a sexual assault through DNA were in the Databank for a non-sex crime, such as petit larceny or trespassing.

- On average, offenders linked to crimes through the DNA Databank had three prior non-qualifying convictions before they were finally convicted of an offense that required a DNA sample to be taken.

- An examination of 9,180 Databank hits revealed that in 27% (2,485) of the hit events, the crime solved by the hit occurred prior to the offender's DNA qualifying conviction. Had DNA been collected at the offender's first non-qualifying PL conviction, these crimes would have been solved an average of 5.2 years earlier.

    - Included in the 2,485 crimes that would have been solved sooner had DNA been collected on all Penal Law misdemeanor convictions are:

        - 47 counts of homicide,
        - 125 counts of rape/sexual assault,
        - 237 counts of aggravated assault
        - 320 counts of robbery
        - 386 counts of burglary, and
        - 1,370 other offenses.

    - While the analysis above could not specifically quantify the number of crimes that would have been prevented if DNA had been collected from currently non-qualifying offenses, it is indisputable that solving 2,485 crimes an average of 5.2 years earlier would prevented scores of future/additional crimes.

- Expanding the DNA Databank will help bring justice to victims of color.

    - In 2010, 86.7 percent of the victims of non-domestic homicide were black or Hispanic (623/718).

    - Holding their attackers accountable will make their communities – and the whole of New York – safer.

- The more samples there are in the Databank, the more likely it will be that those who are wrongly convicted and imprisoned will be able to prove that they are innocent. Case example:

    - For three decades, Erie County was terrorized by a criminal known as the "Bike Path Rapist." This man was believed responsible for numerous rapes, as well as the murders of three women. In 1984, Anthony Capozzi was convicted of two of these rapes based on eyewitness identification and he was sentenced to 25 years in prison. While Mr. Capozzi was in prison, additional rapes and murders took place. Joan Diver was murdered on a local bike path in 2006 and a task force was formed to investigate the crime. Investigators paid special attention to the similarities to prior rapes and murders, including the two for which Capozzi was imprisoned. The investigation led the task force to suspect Altemio Sanchez. Ultimately, Mr. Sanchez's DNA was collected from a water glass in a restaurant and, after testing, was found to match the DNA profile from a drop of sweat found in Joan Diver's car. All of the evidence in police custody from Mr. Capozzi's trial had been destroyed after his appeal was denied; however, forensic DNA tests of the clinical slides still maintained at the hospital of the two victims

for which Capozzi was still serving his sentence matched the DNA profile of Altemio Sanchez. In 2007, after serving 22 years in prison, Anthony Capozzi was exonerated and set free based on the new DNA evidence. In August 2007, Altemio Sanchez pleaded guilty to the murder of three women.

Misconceptions:

The Innocence's Project's website details the following reasons as to why DNA databanks should be limited:

1. **Innocence Project Claim: We don't know how secure DNA databases are. If hackers or lab employees ever compromised the privacy of this information, the incredibly sensitive and personal biological information contained within DNA test results could end up in the wrong hands.**

- **FACT:** No genetic material – or sensitive and personal biological information – is stored in the New York State Databank.
    - DNA samples are converted into a unique series of numbers – or profiles – and those profiles only reveal if an individual is male or female. They cannot be used to identify anything about a person's appearance, such as their race; their health – if they have a disease like cancer, sickle-cell anemia or Parkinson's – or their behavior. The Databank does not include any names; they are maintained at DCJS.
    - New York State has never had an incident where the DNA Databank has been compromised.
    - It is a felony, punishable by up to four years in prison to intentionally disclose a DNA record, tamper with a DNA sample, or use test results other than those authorized by law.

2. **Innocence Project Claim: To collect and store DNA samples from broader populations – such as all people arrested or people convicted of misdemeanors – puts enormous strain on underfunded and understaffed DNA labs across the country. When labs are overburdened, mistakes are made.**

- **FACT:** Right now, the New York State Police Forensic Investigation Center – which is the lab that processes all DNA samples provided by convicted offenders – has the capacity to process 10,000 samples a month.
    - The lab currently processes 3,500 samples a month. The lab is not overburdened; there is no backlog.
    - The Governor's proposed expansion would bring that monthly number up to 7,000.

- That means that the lab will be nowhere near capacity with this expansion. And, this expansion will not create a backlog in convicted offender samples.

- Simply stated: New York has the capacity, staff and resources in place to handle this expansion

3. Innocence Project Claim: Forensic labs should be focused on working on crimes and not testing samples from vast numbers of innocent people.

- **FACT:** The Governor's proposed expansion only applies to convicted criminals. Individuals convicted of Penal Law misdemeanors and felonies under other state laws, such as Vehicle and Traffic, Agriculture and Markets, Tax and Finance, and Alcoholic Beverage Control, would be required to provide a DNA sample as a result of his proposal.

    - This expansion is being proposed because we have data that shows people who commit low-level misdemeanors have committed violent felonies in their past.

        - Case example:

            - A woman was found dead, lying in a creek underneath a footbridge in Hempstead on June 14, 1989. An autopsy revealed the presence of semen and in 2002, after technological advances in testing; a laboratory was able to extract a male DNA profile that was entered into the Databank. In June 2009 – 20 years after the woman's body was found – Joey T. Bethea was arrested on a petit larceny charge in Chenango County. Subsequent to his arrest, Bethea submitted a DNA sample, owed on a criminal trespass conviction, which became a DNA-eligible offense in 2006. That sample matched the profile from the 1989 murder and an investigation revealed that, in 1989, Bethea lived and worked near where the body was found. In his statement to police, Bethea denied knowing the woman but was unable to explain how his DNA ended up at the scene. A confirmatory DNA sample taken from Bethea matched the DNA from the crime scene. Bethea was convicted by a jury of second-degree murder in November 2010, and is now serving a sentence of 25 years to life in prison.

    - Those who have committed lower-level misdemeanors in the past that are currently not DNA eligible – such as unauthorized use of a vehicle, possession of stolen property, theft of services; and misdemeanor drug offenses – often escalate to violent crime.

        - 27 percent of individuals convicted of unauthorized use of a vehicle are subsequently arrested for a Violent Felony Offense within five years of that misdemeanor conviction.

- 21 percent of individuals convicted of theft of services are arrested for a VFO within five years of that misdemeanor conviction.

- 16 percent of individuals convicted of misdemeanor drug possession are arrested for a VFO within five years of that misdemeanor conviction. Case example:

    - In January 2000, an elderly woman was raped in her home and the perpetrator's DNA was left at the scene. Two months later, a woman was raped and murdered in her home and in January 2004, a man was found in his home, beaten and shot to death. DNA at each scene matched the same unknown assailant. In March 2005, Raymon McGill was convicted of an attempted robbery charge that required him to provide a DNA sample, which linked him to the three unsolved crimes. Prior to the attempted robbery charge, McGill was convicted of two minor crimes, neither of which required submission of his DNA. Had McGill's DNA been collected as a result of a petit larceny conviction in 1999 the January 2000 rape could have been quickly solved, and the 2000 and 2004 murders likely would have been prevented. The misdemeanor drug possession charge – of which McGill was convicted three months before he killed his second victim in January 2004 – is still not a DNA eligible offense. It would be under the Governor's proposed expansion. McGill is serving a prison sentence of 40 years to life.

4. **Innocence Project Claim: Sometimes crime scene samples produce only partial results that match a larger percentage of the population. If hundreds of innocent people match a partial sample, crucial law enforcement resources are spent investigating innocent suspects and the possibility of charging and convicting an innocent person is greatly increased.**

- **FACT:** New York State imposes strict oversight standards regarding partial DNA matches, which are set forth in detailed rules and regulations (9 NYCRR Part 6192) that were promulgated by the Commission on Forensic Science after two years of study and input by nationally renowned DNA experts, that govern when – and if – information about a partial DNA match can be released to law enforcement. Before promulgation, this matter was discussed in open CFS and DNA Subcommittee meetings.

    - These regulations address situations where a routine search of the DNA Databank results in an inadvertent near hit that could greatly limit the pool of potential by using statistical formulas to narrow the suspects provided.

    - Before these regulations existed, a lab <u>was prohibited</u> from sharing that information with law enforcement. And that could mean that a lab had information key to stopping a serial rapist, or exonerating an innocent individual, but could do nothing

with it. This not – ***and the regulations do not permit*** – "familial searching," or singling out particular families and actively searching the Databank to try to match their DNA profiles to someone.

- These regulations address situations where a routine search of the DNA Databank results in an inadvertent near hit that could greatly limit the pool of potential suspects by indicating if a perpetrator is a potential blood relative of the individual whose DNA sample is on file. Since promulgation of the policy in 2010, there have been less than 20 names released to law enforcement under this policy.

- Critics often use the phrases "partial match" and "familial searching" interchangeably. They are completely different and one should not be confused with the other.

- A DNA match – whether full or partial – is a lead. In some cases – it may be the first lead in a case that has been unsolved for decades. In others, it may confirm what law enforcement already knows from other evidence: that a particular individual is responsible for a crime.

- Regardless, it is simply evidence that must be vetted and corroborated, one piece of the entire puzzle that prosecutors must assemble to prove an individual's guilt beyond a reasonable doubt. Even the Innocence Project states that DNA evidence isn't the be-all, end-all in proving guilt or innocence: To quote the organization's website: "In other cases, DNA test results alone are not enough to free our clients, but can help exonerate people when coupled with other evidence of innocence."

Other Arguments

- When discussions about expanding the DNA Databank have come up in the past, opponents continually challenge the accuracy of labs, lab personnel and testing, but they cannot, when pressed, point to a specific example of where a DNA lab wrongly implicated someone in a New York State crime.

- In NYS, there is a Commission on Forensic Science and DNA Subcommittee. The CFS is empowered to develop minimum standards and a program of accreditation for all public forensic laboratories in New York State. Accreditation of a forensic DNA laboratory is granted through the DNA Subcommittee (Executive Law §995-b[13]). The Subcommittee issues binding recommendations on accreditation of labs and also advises the CFS on any matter related to the implementation of scientific controls and quality assurance procedures for the performance of forensic DNA analysis. Such oversight of the DNA laboratories ensures fairness and reliability in the testing process and maintains the highest standards and quality assurance in testing and analysis.

- The Office of Forensic Services monitors forensic laboratories' compliance with accreditation standards established by the accrediting bodies and the CFS. The laboratories must demonstrate compliance with the standards of the American Society of Crime

Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB) and the Quality Assurance Standards for Forensic DNA Testing Laboratories required by the Federal Bureau of Investigation (FBI). Labs also must comply with the New York State Rules and Regulations pertaining to public forensic laboratory accreditation (9 NYCRR 6190 et seq).

- In the 17-year of the history of the NYS Databank, which currently houses over 400,000 offender profiles, there have NOT been any errors associated with sample switching or contamination.

- New York State has never had an incident where the DNA Databank has been compromised and the State has safeguards in place to ensure the integrity of the testing process.

- There are eight DNA labs in the state and New York is one of only five states in the nation that mandates accreditation of its labs (TX, OK, MO (as of 12/21/12) and NB (DNA labs only). There have been no allegations of systemic issues regarding improper DNA processing or erroneous release of information.

- DNA labs must meet the Quality Assurance Standards of the FBI and comply with all NDIS guidelines. In addition, the State Police Lab, which maintains the DNA Databank, must meet the FBI's **"**Quality Assurance Standards for Convicted Offender DNA Databasing Laboratories."

- Any tampering with a DNA sample or non-law enforcement use of the Databank is a felony punishable by up to four years in prison.

- In general, when accuracy of lab personnel and testing are challenged, the issue is not DNA. Indeed, according to the National Academy of Science report (Strengthening Forensic Science in the United States: A Path Forward [Feb. 2009], pages 5-3 to 5-5), "DNA typing is now universally recognized as the standard against which many other forensic individualization techniques are judged. DNA enjoys this preeminent position because of its reliability and the fact that, absent fraud or an error in labeling or handling, the probabilities of a false positive are quantifiable and often miniscule."

- They further state that "DNA analysis also has been subjected to more scrutiny than any other forensic science discipline, with rigorous experimentation and validation performed prior to its use in forensic investigations. As a result of these characteristics, the probative power of DNA is high * * * [The power of other forensic disciplines] likely can be improved by strengthening the methods' scientific foundations and practice, as has occurred with forensic DNA analysis.

- When there are claims of DNA lab error (like in the Thompson article) the errors are instances in which samples from different cases became cross contaminated. Due to the extremely sensitive nature of today's DNA technology, contamination can occur; however these instances occur rarely and are often detected through in-house quality assurance measures prior to the results being released. The examples pointed out are extremely small number compared to the number of DNA tests that are performed every year in the US.

- Also, external, blind proficiency testing (PT) does not prevent errors such as cross contamination. PT testing is used to determine if the laboratory is obtaining correct results and interpreting data properly; it in no way prevents errors from occurring.

- Moreover, it should be noted that these infrequent instances occur in forensic casework laboratories and NOT in databasing laboratories such as the NYS Databank. In addition, quality assurance measures in place in the State Police laboratory require that prior to release of an offender's name, a second sample is analyzed independently to ensure the reliability of the result. As noted, in the history of the Databank, there have not been any errors associated with sample switching or contamination.

- Accidental contamination of an evidentiary sample with DNA from a suspect's reference sample is not relevant in the context of the DNA Databank. Databank samples are handled in separate laboratories from evidentiary samples.