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Short of the Goal  
New York's Legislation to Compel HIV Testing  
from Accused Sex Offenders

By

Joseph E. Fahey<sup>1</sup>

This past November legislation came into effect which, at first blush, appeared to provide more relief for victims of sex offenses who live with the dread that they might also have been infected with Human Immunodeficiency Virus (HIV). Section 210.16 of the Criminal Procedure Law<sup>2</sup> was enacted<sup>3</sup> and it provided that upon the filing of either an indictment or superior court information, which charged an offense under Article 130 of the Penal Law<sup>4</sup> involving "sexual intercourse, oral sexual conduct or anal sexual conduct" as defined in Section 130.00 of the Penal Law the court could order the defendant to undergo HIV testing. This legislation is designed to augment the same relief offered by Section 390.15 of the Criminal Procedure Law<sup>5</sup> enacted four years previously.<sup>6</sup> That law provided for the same testing but only after conviction<sup>7</sup> for an offense pursuant to Article 130 in which the same conduct occurred. Indeed, a comparison of the two sections reveals that the procedures for obtaining the testing are identical. Both provide for the application to be filed by the victim or, where necessary, the victim's legal representative. Both provide that the victim must have been offered counseling by a public health officer and advised of the limitations of the information obtained from an HIV test; current scientific assessments of the risk of HIV from the exposure the victim experienced; and the need for the victim to undergo HIV testing to definitively determine his or her status. Both allow the court to

order a hearing, only if necessary to determine if the applicant is the victim of the offense. Both contain elaborate confidentiality protections for the parties concerned, and which exclude the results of such testing from any related proceedings.

Since testing pursuant to Section 390.15 occurs only after a conviction, there is no requirement that the victim demonstrate a particularized need for the testing.

Under Section 210.16 the victim must demonstrate that the testing would have a medical or psychological benefit to the victim. A medical benefit is found where “...(i) a decision is pending about beginning, continuing or discontinuing a medical intervention for the victim and(ii) the result of an HIV test of the defendant could affect that decision, and could provide relevant information beyond that which could be provided by an HIV test of the victim.”<sup>8</sup> This section also allows for a hearing in the event a follow-up test is sought, but limits the victim to a single follow-up test.

While the new legislation offers the victim an opportunity to obtain HIV testing earlier in the proceedings, and the opportunity to obtain follow-up testing, it contains a number of time limits upon the availability of this testing which seem to limit the effectiveness of the legislation and raises a number of interesting questions.

Pursuant to Section 390.15 the victim could seek this relief only if the defendant was convicted of a felony or the misdemeanor of Sexual Misconduct.<sup>9</sup> An application for such testing must have been filed within ten days after entry of the conviction but could be extended, for good cause, if prior to the sentence being imposed.

Under Section 290.16, the request for such testing must be filed with the court prior to or within forty-eight hours after the filing of an indictment or superior court information charging

an offense pursuant to Article 130 containing the types of conduct previously mentioned, but the court could permit such a request to be filed later in the proceedings. More importantly however under this section a request for such testing will be entertained *only if it is made within six months from the date of the offense.*<sup>10</sup> Why this enactment limits the relief being granted only within six months of the date of the commission of the offense remains an unanswered question. Indeed the limitation appears to further victimize those who were sexually assaulted years earlier, and even those whose cases have been under investigation for a protracted period of time. It could even victimize those whose prosecution has been delayed by ongoing or protracted plea negotiations, resulting in the delay of a superior court disposition. While the section does allow the filing of a request for the testing prior to the filing of an indictment or superior court information, this limitation requires a prosecutor engaged in such plea discussions to be extra vigilant, lest the right of the victim to such testing be lost. Moreover the six month limitation appears to fly in the face of more recent DNA advances.

A review of recent cases demonstrates that the use of DNA technology has resulted in law enforcement agencies solving many “cold” cases. In *People v. Grogan*, 28 A.D. 3d [Second Department (2006)], the Appellate Division affirmed a conviction for Rape in the First Degree where the defendant was indicted eight years after the rape occurred, as the result of his being identified through DNA matching. Likewise in *People v. Lloyd*, 23 A.D. 3d 296 [First Department (2005)] the court affirmed a 2004 conviction for Sodomy in the First Degree, Sexual Abuse in the First Degree and Endangering the Welfare of a Child based upon a 1996 incident. In *People v. Harrison*, 22 A.D. 3d 236 (2005) it again rejected a defendant’s argument that his speedy trial rights were violated where he was identified by the use of DNA comparisons years after the crimes occurred. In all of these cases the courts held that the five year statute of

limitations was tolled, where authorities had exhausted all reasonable investigative measures and the defendant's identity and whereabouts were unknown, until the DNA technology identifying the perpetrators was perfected. Indeed in *People v. Lloyd*, the court noted that this case was one of "16,000 cold cases" awaiting DNA comparison. Perhaps the best discussion of what the advance of DNA technology means for the criminal justice system occurred in *People v. Martinez*, 52 A.D. 3d (2008). There the First Department affirmed a defendant's 2006 conviction for Attempted Rape in the first Degree for an attack that occurred in 1996. Judge Acosta in the Court's opinion noted that in 2001 a particularized DNA sample was indicted as "John Doe" by a New York County grand jury. In 2004 the defendant was identified and the indictment was amended to reflect his name. In affirming the propriety of this practice, Judge Acosta observed; "That the indictment did not refer to the defendant by name is of no moment inasmuch as it identified him by his unique DNA markers." (52 A.D. 3d 68, 71)

Amplifying this reasoning, he went on to declare;

"Nothing in CPL 200.50 requires that an individual charged in an indictment be referred to in any particular manner, and we conclude that a 'John Doe' indictment accompanied by a specific DNA profile is sufficient to give a defendant notice of the charges against him

Indeed given the advances in science, the practice of indicting DNA is starting to take a foothold in this country's justice system ( *see* Scott Akehurst-Moore, *An Appropriate Balance ?-a Survey and Critique of State and federal DNA indictment and Tolling Statutes*, 6 high tech L. 213[2006]). Some states have employed non-statutory DNA indictments but in addition to the federal legislation (18 USC3282) there are four states utilizing statutory DNA indictments. The non-statutory states include Wisconsin, (*see, State v. Dabney*, 264 Wis, 2d 843, 854, 663 N.W. 2d 366, 372, [Ct. Of App. 2003]. Petition dismissed. 266 Wis 2d 63, 671 N.W. 2d 850 [2003]) and Massachusetts (*see* Suzanne Smalley, *Newest Suspect in Rapes: The DNA 'John Doe' Indicted to Keep Cases Open*, *The Boston Globe*, June 20, 2004, p.1 ([ noting use of DNA indictment after legislature failed to abolish statute of limitations for rape]). Examples of legislative implementation of DNA indictments include Ark. Code Ann. Section 5-1-109(b)(1)(B),(i)-(j); Del. Code Ann. Tit. 11 section 3107(a); Mich Comp. Laws Section 767.24(2)(b); N.H. Rev Stat. Ann. Section 592-A:7(II); and 18 USC Section 3282). States in which a genetic material has been indicted (*see, Moyer & Answay, Biotechnology*

*and the Bar: A Response to the Growing Divide Between Science and the Legal Environment* 22 Berkeley Tech L J 671, 688 [2007] include California, Texas, Wisconsin, North Dakota, Pennsylvania, Oklahoma, New York, Utah, Missouri, and Kansas (id at 689 n.95).” (52 A.D. 3d at 72)

The Judge went on to approve the practice in the instant case, writing;

Absent a constitutional or statutory prohibition a DNA indictment is an appropriate method to prosecute perpetrators of some of the most heinous criminal acts. Indeed, the prevalence of DNA databanks today as a criminal justice tool supports the conclusion that a defendant can be properly identified by a DNA profile, especially in light of the accuracy of this identification. The chance that a positive DNA match does not belong to the same person may be less than one in 500 million (*see Moyer & Amway, supra*, 22 Berkeley Tech L.J. at 684 n. 64). therefore, in the instant case, given the nature of the crime, the notice of the charges received by the defendant was reasonable under all the circumstances” (*People v. Palmer*, 7 A.D. 3d 472, 788 N.Y.S. 2d 144[2004], *lv. Denied*, 3 N.Y. 3d 710, 785 N.Y.S. 2d 38, 818 N.E. 2d 680 [2004]).

Clearly we are at the dawn of a new age with the increasing application of DNA technology to criminal investigations. If even a fraction of the 16,000 cold cases cited in *Lloyd supra* result in identification and prosecution of rapists and sex offenders, there will be several thousand victims who will have closure from their ordeal. Don't these victims also deserve to have some piece of mind about whether they were infected with the HIV virus as part of that closure ? If the answer is yes, as surely it should be, then this legislation needs to be amended further.

<sup>1</sup>The author is a Judge in the New York State Court System presiding in Onondaga County Court. He received his J.D. from Syracuse University College of Law in 1975 and an LLM in Criminal Law from University of Buffalo Law School in 2003. He is an Adjunct Professor of Law at Syracuse University College of Law.

<sup>2</sup>McKinney's (2007).

<sup>3</sup>L. 2007, c. 639, effective November 1, 2007.

<sup>4</sup>McKinney's (2004 ).

<sup>5</sup>McKinney's (2005 ).

<sup>6</sup>L.2003,c.264, Section 44, effective November 1, 2003.

<sup>7</sup>Conviction under this section also encompassed one who was adjudicated and sentenced as a Youthful Offender pursuant to Section 720.10 of the Criminal Procedure Law.

<sup>8</sup>Criminal Procedure Law Section 210.16(1).

<sup>9</sup>Section 130.20 of the Penal Law.

<sup>10</sup>Emphasis added.