



MEMORANDUM TO ALL FEDERAL PROSECUTORS

FROM: Eric H. Holder, Jr.
Attorney General

SUBJECT: Guidance Regarding Use of DNA Waivers in Plea Agreements

DNA evidence has assumed a prominent and powerful place in our criminal justice system. This should come as no surprise: Like the development of fingerprint and photographic identification before it, the development of DNA analysis marked a momentous breakthrough in law enforcement identification technology. DNA evidence has rightly commanded the attention of law enforcement agents, prosecutors, defendants, judges, and juries alike. It has been used in thousands of cases to link the guilty to their crimes and, in other instances, to protect the innocent from mistaken suspicion, accusations, and conviction for crimes they did not commit. Simply put, DNA evidence has helped ensure that justice is done.

Because DNA identification is such a powerful tool, it should be used whenever possible. In a companion memorandum issued today, I emphasize the importance of the requirement to collect DNA samples from federal arrestees and defendants, and provide guidance concerning issues that have arisen in the implementation of this requirement. *See* DNA Sample Collection from Federal Arrestees and Defendants, also issued on this date.

That memorandum recognizes the value of obtaining DNA identification information at the earliest feasible point in the criminal justice process. This memorandum, by contrast, recognizes the value of using DNA identification evidence throughout the criminal justice process. Both memoranda share the same goal: to make the best use of the most precise identification techniques at our disposal, to meet the ends of justice.

Thus, the Department should not, as a matter of general policy, seek to foreclose the possibility of postconviction DNA testing under the Innocence Protection Act ("IPA"), 18 U.S.C. § 3600, as part of plea agreements with defendants. The purpose of this memorandum is to require that, going forward, waivers of DNA testing pursuant to the Innocence Protection Act (IPA) be sought or accepted by federal prosecutors only under exceptional circumstances. This revises guidance issued in 2004 directing prosecutors to seek waivers of IPA rights to post-conviction DNA testing. Below is a discussion of the IPA's grants and limitations, a description of existing guidance, and an exposition of the manner in which prosecutors must proceed in the future.

I. THE INNOCENCE PROTECTION ACT

Congress enacted the IPA in recognition of the critical importance of DNA evidence. The Act provides convicted individuals under a sentence of imprisonment or death with access to DNA testing. Access to testing is not unlimited: the statute makes testing available only upon an assertion, under penalty of perjury, of actual innocence, and only where the proposed testing could produce new material evidence that would raise a reasonable probability that the individual did not commit the offense. 18 U.S.C. § 3600(a)(1) and (a)(8).

The statute imposes a number of other limitations as well. For example, an individual may not obtain testing of evidence that was tested previously (unless he is seeking testing using a new method or technology that is substantially more probative than the prior testing technology), and the evidence to be tested must have been retained by the government under conditions adequate to ensure the evidence's integrity. 18 U.S.C. § 3600(3) and (4). Moreover, individuals must apply for testing in a "timely fashion," with a rebuttable presumption against timeliness for any application that is not filed within 36 months of conviction. 18 U.S.C. § 3600(a)(10).

The statute accordingly incorporates safeguards against misuse while preserving access for those who may be actually innocent of the offense for which they were convicted. The availability of this remedy enhances the integrity of our criminal justice system by ensuring that the scientific advances in DNA identification methods can be used to detect and correct miscarriages of justice.

II. THE DEPARTMENT'S 2004 POLICY

Existing Department policy requires federal prosecutors to obtain, in many circumstances, a waiver of a defendant's rights to DNA testing pursuant to the Innocence Protection Act. Specifically, the policy mandates securing a waiver "whenever possible from a defendant who may be sentenced to imprisonment, when the defendant is pleading guilty and there is evidence in the case that may be amenable to DNA testing." New DNA Testing and Evidence Retention Provisions under the Innocence Protection Act, at 2, under cover memorandum of November 10, 2004, from Deputy Attorney General James B. Comey. Attached to the policy memorandum were a model written waiver for defendants pleading guilty and a model colloquy for use by the court for the acceptance of guilty pleas.

The policy, however, has been implemented inconsistently across various districts. Some districts use a standard plea agreement that contains an IPA waiver provision. Many districts, on the other hand, make use of waiver provisions only rarely, if at all.

III. NEW POLICY

Existing policy is too rigid to accommodate the facts presented by individual cases – particularly in light of the huge range of federal criminal cases the Department handles across the country – and does not promote careful consideration of whether a waiver is appropriate to the case at hand. For this reason and those articulated in the sections above, the policy will change in the following manner.

Waivers of DNA testing pursuant to the IPA should only be sought or accepted under exceptional circumstances and always with supervisory approval. Each United States Attorney's Office should implement a protocol for supervisory approval of any decision to seek or accept a waiver, and each office should develop a model written waiver and oral colloquy for use in all cases in which a waiver is executed. Any waiver sought must be accompanied by an offer to test the evidence subject to such a waiver. Finally, federal prosecutors should never ask a defendant to waive the right to pursue an IPA claim based on the availability of a new testing method pursuant to 18 U.S.C. § 3600(a)(3)(B).

This memorandum supersedes any prior contrary guidance. This memorandum is set forth solely for the purpose of internal Department of Justice guidance. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable by law by any party in any matter, civil or criminal, and does not place any limitation on otherwise lawful investigative and litigative prerogatives of the Department of Justice.