CAUGHT IN A *WEB[B]* OF DNA DISARRAY
AN EXAMINATION OF THE REMEDY OF POST-CONVICTION DNA ANALYSIS AND A CASE NOTE ON *PEOPLE V. WEBB*[*]

Mary Rhauline dG. Lambino[**]
Maria Angelica A. Paglicawan[***]

> *"Oh, you do not know what is seventeen months in prison! – seventeen ages rather, especially to a man who, like me, had arrived at the summit of his ambition – to a man, who, like me, was on the point of marrying a woman he adored, who saw an honorable career opened before him, and who loses all in an instant – who sees his prospects destroyed, and is ignorant of the fate of his affianced wife, and whether his aged father be still living! Seventeen months captivity to a sailor accustomed to the boundless ocean, is a worse punishment than human crime ever merited. Have pity on me, then, and ask for me, not intelligence, but a trial; not pardon, but a verdict – a trial, sir, I ask only for a trial; that, surely, cannot be denied to one who is accused!"*
>
> — ALEXANDRE DUMAS,
> THE COUNT OF MONTE CRISTO

People v. Webb,[1] known infamously as the Vizconde Massacre case, is arguably the most notorious case of rape with homicide in the Philippines. It involves the brutal rape and slay of a nineteen year-old woman and the stabbing to death of her mother and seven-year old sister in their home. The crime was allegedly perpetrated by her supposed jealous boyfriend, the son of a Senator, in conspiracy with seven of his friends. It

---

[*] *Cite as* Mary Rhauline Lambino & Maria Angelica Paglicawan, *Caught in a Web b of DNA Disarray: An Examination of the Remedy of Post-Conviction DNA Analysis and a Case Note on People v. Webb*, 86 PHIL. L. J. 700, (page cited) (2012).

[**] Vice Chair, PHILIPPINE LAW JOURNAL Vol. 84 (2009); J.D., *cum laude*, University of the Philippines College of Law (2012); B.S. Economics, *cum laude*, University of the Philippines (2005).

[***] Editor, PHILIPPINE LAW JOURNAL Vol. 85 (2010); J.D., University of the Philippines College of Law (2012); B.A. Public Administration, *magna cum laude*, University of the Philippines (2008).

[1] Lejano v. People, G.R. No. 176389, 638 SCRA 104, Dec. 14, 2010.

was also alleged that the conspirators were all high on cocaine that night the crime was committed.

Almost two decades after the incident, and eleven years after their conviction, all of the accused were acquitted by the Supreme Court, which found serious doubts on the credibility of the lone eyewitness who was "a police asset who proposed to her handlers [to] take the role of the witness to the Vizconde massacre."[2]

While the decision and the separate opinions of the Justices in the case center on the convoluted appreciation of testimonial evidence vis a vis alibi, *Webb* captures doctrinal interest in procedural law particularly as to the value of post-conviction DNA analysis as a remedy for the defense, granting "liberty interest in proving innocence"[3] of the convicted.

This paper examines the *Webb* decision in light of the Rules on DNA Evidence issued by the Supreme Court. It also aims to capture the policy and doctrine set by the Court regarding post-conviction tests *vis-à-vis* the issue of DNA evidence preservation throughout the lifetime of a criminal case.

It is divided into three main parts. Part I makes an analysis of the *Webb* decision, its main and separate opinions, under the lens of DNA post-conviction testing. Part II highlights the important provisions of the 2007 Rules on DNA Evidence and on how these provisions were applied in *Webb*. Lastly, Part III gives policy recommendations on how the use of DNA as evidence in post-conviction tests can be more effectively used in tilting the balance towards the ends of justice.

I.

A. Silencing the Silent Witness
The facts leading to the case and the majority opinion's discussion of the DNA issue

In *Webb,* semen was found in the rape victim's genital area. The principal accused whom the star witness purportedly identified as the perpetrator of the rape sought the DNA analysis of the semen specimen. This request was denied by the trial court for three reasons: (1) that the presence or absence of sperm is not a "primordial consideration" in rape

---

[2] *Id.* at 155.

[3] *Leading Case: 42 U.S.C. § 1983 – Postconviction Access to DNA Evidence* Skinner v. Switzer, 125 HARV. L. REV. 172, 321 (2011).

cases, (2) that DNA testing has "not yet been accorded official recognition" by the courts, as it was "believed" that there was no expert in the Philippines regarding this "relatively new science," and (3) there is no assurance that, six years into the case at the time of the order, the samples have not been contaminated or tampered with.[4] Such denial was merely raised as an error in the appellate court, and upon affirming the guilty verdict in 2005, it was only when the case was brought to the Supreme Court that a request for DNA analysis be conducted, and although granted by the Court in 2010, the semen samples were nowhere to be found.

Upon the failure to produce the samples, the principal accused filed an urgent motion to acquit because the failure of the State to preserve and produce such vital evidence denied him his right to due process, relying on the case of *Brady v. Maryland*[5] that "[t]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[6]

The main opinion in *Webb* curtly held that an acquittal on such ground was not warranted pointing out the "late stage" of the case and these two grounds:

First, the Court adopted the holding in the 1988 U.S. case, *Arizona v. Youngblood*,[7] which overturned *Brady*, that due process does not require the State to preserve semen specimen though may be useful to the accused, unless there is "bad faith" on the part of the State; and

Second, that when accused sought the testing, there was no precedent on the admissibility of DNA analysis in the country, "[c]onsequently, the idea of keeping the specimen secure . . . did not come up," noting that the accused's "lack of interest" to have the test done, even after the Court promulgated the rules on DNA analysis. In the words of the Court:

> [W]hen [the principal accused] raised the DNA issue, the rule governing DNA evidence did not yet exist, the country did not yet have the technology for conducting the test, and no

---

[4] People v. Webb, Order, RTC Branch 274, Parañaque City, Crim. Case No. 95-404 (Nov. 25, 1997) (*cited in* Patricia-Ann Progalidad, *Assimilating DNA into the Phil. Criminal Justice System: Exorcising the Ghost of the Innocent Convict*, 79 PHIL. L. J. 930, 950 (2004) and Lejano, 638 SCRA at 308 (Sereno, J., *concurring*)).

[5] 373 U.S. 83 (1963).

[6] Lejano, 638 SCRA at 282 (Villarama, J., *dissenting*) & 313 n. 29 (Sereno, J., *concurring*) (quoting *id.*).

[7] 488 U.S. 41 (1988).

> Philippine precedent had as yet recognized its admissibility as evidence. Consequently, the idea of keeping the specimen secure even after the trial court rejected the motion for DNA testing did not come up.
>
> . . .
>
> . [T]he State cannot be deemed put on reasonable notice that it would be required to produce the semen specimen at some future time.

B. *Youngblood* is for the old bloods

The rationale of the main opinion appears not only to be abrupt but also rather precarious for having made a perfunctory reliance in the holding in *Youngblood* without looking at the context of the case, promulgated 21 years before this decision in *Webb*. At the outset, it must be observed that the *Youngblood* was not adopted by a unanimous Court: out of the nine justices, only five concurred in the *ponencia* of Justice Rehnquist – a clearly divided Court.[8]

What is agonizing about the decision is that in reality, Youngblood was imprisoned for his ten and a half year-sentence, was called a sex offender of children (having been charged with sexual assault, kidnapping, and child molestation) from his conviction back in 1985, and was only exonerated 15 years after – due primarily because of eyewitness misidentification.[9]

1. Requirement of Bad Faith

A rather stark difference in the two cases is clearly apparent: in *Youngblood,* the semen sample was **not lost,** but was only not properly preserved such that it was degraded and rendered unfit for DNA analysis according to the technology available at the time. Science saves the day when in 2000, this "injustice"[10] was dealt with and the degraded evidence was tested using more advanced DNA technology yielding negative results against Larry Youngblood, who was released from charges. A year later, the DNA profile discovered from the test was matched to a certain Walter Cruise, who was thereafter convicted of the crime.[11]

---

[8] Lejano, 638 SCRA 105, 291 (Sereno, J., *concurring*).

[9] INNOCENCE PROJECT, KNOW THE CASES: LARRY YOUNGBLOOD, *available at* http://www.innocenceproject.org/Content/Larry_Youngblood.php (date last visited: Apr. 9, 2012).

[10] Lejano, 638 SCRA 105, 291 (Sereno, J., *concurring*)

[11] *Id.* at 314-15 (*citing* INNOCENCE PROJECT, *supra* note 9).

Assuming that the bad faith standard was adopted and contextualizing *Webb* in the circumstances of *Youngblood*, the question is: how could there not be bad faith when the semen sample was absolutely nowhere to be found?

However, much is also to be said about the requirement to prove bad faith as a grueling and vague requisite. Justice Blackmun in his dissent objected to the bad faith standard, reasoning that because of "the inherent difficulty in obtaining evidence to show a lack of good faith [and] the line between 'good faith' and 'bad faith' is anything but bright the majority's formulation may well create more questions than it answers,"[12] especially because it is the accused who has the burden of proving so.

The main opinion in *Webb* states that the State could not have been apprised of any need "to produce the semen specimen **at some future time.**"[13] However, the main case was still brought to the Supreme Court, and evidentiary issues can still be tackled by the High Court, as it has done many times in the past.[14]

Furthermore, one of the main reasons of the trial court for denying the motion was the lack of recognition of the "new science" by the Courts, or the then lack of "experts" in the country – an issue of technology that would be dealt with in the future.

The Court also points to the seeming "lack of interest" of the defense in using the semen sample and testing it for DNA because (a) it

---

[12] *Id.* at 313 (*citing* Youngblood, 488 U.S. 41 (1988) (Blackmun, J., *dissenting*)).

[13] Lejano, 638 SCRA 129. (emphasis supplied)

[14] While only questions of law may be entertained by the Supreme Court in a petition for review on certiorari, such rule is not ironclad and admits certain exceptions: (1) the conclusion is grounded on speculations, surmises or conjectures; (2) the inference is manifestly mistaken, absurd or impossible; (3) there is grave abuse of discretion; (4) the judgment is based on a misapprehension of facts; (5) the findings of fact are conflicting; (6) there is no citation of specific evidence on which the factual findings are based; (7) the finding of absence of facts is contradicted by the presence of evidence on record; (8) the findings of the Court of Appeals are contrary to those of the trial court; (9) the Court of Appeals manifestly overlooked certain relevant and undisputed facts that, if properly considered, would justify a different conclusion; (10) the findings of the Court of Appeals are beyond the issues of the case; and (11) such findings are contrary to the admissions of both parties. (Josefa v. Zhandong Trading Corp., G.R. No. 150903, 417 SCRA 269, Dec. 8, 2003; *see also* Larena v. Mapili, G.R. No. 146341, 408 SCRA 484, Aug. 7, 2003 (*citing* Gonzales v. Ct of Appeals, 358 Phil. 806, 821, Oct. 30, 1998; Polotan Sr. v. Ct of Appeals, 357 Phil. 250, 256-57, Sep. 25, 1998); *see further* Lacanilao v. Ct of Appeals, 330 Phil. 1074, 1079-80, Sep. 26, 1996).

did not bring the DNA issue on appeal, and (b) the Rules on DNA testing were meanwhile promulgated. This reasoning is alarming because:

First, there seems to be an implication that the defense slept on their rights, hence, estopped from availing of the remedy. Taking the reasoning a step further, the argument would insinuate that if the evidence existed, there would be an implicit prescriptive period when the defendant ought to avail of such remedy.

The fear of the trial court that there is a lack of assurance that the samples have not been contaminated or tampered with, considering it was already six years into the case at the time the DNA test was ordered, were "based on mere conjectures that ran against the presumption of regularity in the performance of official duty."[15]

Second, the facts of the *Webb* case show that the defense was of the belief that the samples were in the possession of the police. The following timeline is useful to determine the chain of custody of the semen sample:

- 1991: According to the testimony of Dr. Prospero Cabayanan, the National Bureau of Investigation Medico-Legal Chief, 1991 was the year that he first examined the semen samples.[16]

- 1995: Dr. Cabayanan also testified that he last saw the semen samples when it was photographed in 1995.[17]

- January 31, 1996: Chief State Prosecutor Jovencito Zuno marked in evidence the *photographs* of the three slides containing the semen specimen (not the semen specimen themselves).[18]

- January 31 to February 7, 1996: Testimony of Dr. Cabanayan in the trial court, also stating that as far as he knows between 1991 to 1995, the slides were kept in the NBI Pathology Laboratory.[19] In his testimony on February 6, 1996, when Dr. Cabanayan was asked to produce the slides during the previous hearing, which he promised to bring, he admitted that he "forgot all about it."[20]

---

[15] Lejano, 638 SCRA at 308 (Sereno, J., *concurring*) (*reiterating* the dissenting opinion of Justice Lucenito Tagle of the Court of Appeals).

[16] Lejano, 638 SCRA at 278 (Villarama, J., *dissenting*).

[17] *Id.*

[18] *Id.*

[19] *Id.* at 277-78.

[20] *Id.* at 280.

- April 23, 1997: NBI confirmed in a letter that the semen specimen was in its custody.[21]

- April 27, 2010: NBI in its Compliance and Manifestation stated that the semen specimens were submitted as evidence to the trial court. *However*, it is to be noted that in the same Compliance, NBI merely attached the Laboratory Report (stating positive result for the presence of human spermatozoa), the Autopsy Report (stating "Smear for presence of spermatozoa"), the Sworn Statement of Dr. Cabanayan with Certified True Copy of the envelope with a notation that *all photographs have been submitted as evidence* during the hearing dates.[22]

- May 21, 2010: Trial Court stated that there is no showing of actual receipt of the semen specimens.[23]

Third, it is important to determine who is the rightful custodian of the evidence among the following agents of the State: the NBI, the Prosecution, or the Courts. At the time, given that there were still no rules on DNA analysis, the most imperative point is that the State, regardless of its representation by whom among the aforementioned agents, had the duty to preserve the evidence.

2. Exculpatory value of DNA Evidence

Another point of the main opinion was the relevance of the semen sample to the case:

> It is true that [the eyewitness] identified [the principal accused] in her testimony as [the victim's] rapist and killer but serious questions had been raised about her credibility. At the very least, there exists a possibility that [the eyewitness] had lied. On the other hand, the semen specimen taken from [the victim] cannot possibly lie. If, on examination, the DNA of the subject specimen does not belong to [the principal accused], then he did not rape [the victim]. It is that simple. Thus, the Court would have been able to determine that [the eyewitness] committed perjury in saying that he did.[24]

---

[21] *Id.*
[22] *Id.* at 276-77.
[23] *Id.* at 277-78.
[24] *Id.* at 127-28.

The sole paragraph devoted to the discussion appears to be an oversimplification of the relevance of the DNA sample in relation to supposed positive identification of the witness by reducing it to merely that of an issue of the credibility of the witness. After this, the Court simply stated: "Still, [the principal accused] is not entitled to an acquittal for the failure of the State to produce the semen specimen at this late stage."

The dissent of Justice Villarama[25] provided for the rationale for such the holding of the main opinion in rejecting *Brady* and adopting *Youngblood*. To his mind, the source of the semen is "immaterial in determining the guilt" of the accused[26]:

> From the totality of the evidence presented . . [the principal accused] was positively identified as [the victim's] rapist.
>
> . . [T]he positive identification of [the principal accused] as the rapist satisfied the test of moral certainty, and the prosecution had equally established beyond reasonable doubt the fact of rape and the unlawful killing of [the three victims].[27]

Justice Villarama's opinion saw the subject semen sample as evidence which would not exculpate the principal accused if found negative, but merely corroborative, if found positive – because he was positively identified by the eyewitness:

> Even assuming that the DNA analysis of the semen specimen taken from [the victim's] body hours after her death excludes [the principal accused] as the source thereof, it will **not exonerate him from the crime charged.** [The eyewitness] did not testify that [the principal accused] had ejaculated or used a condom . . She testified that **she saw [him] rape [the victim]** and it was only him she had witnessed to have committed rape inside the Vizconde residence [on the date of the incident]. . . On the other hand, a positive result . . would merely serve as **corroborative evidence.**[28]

While true that the presence or absence of the DNA in a crime of rape by itself would not exonerate an accused, as in this case, the

---

[25] *Id.* at 200-91, where Villarama agreed with the majority on the holding on the issue of the DNA analysis, but dissented on the other issues, and voted to dismiss the appeal and uphold the conviction of the accused.

[26] *Id.* at 287.

[27] *Id.*

[28] *Id.* at 288.

discussion seemed to have lost sight of the issue on what duty is imposed upon the State to preserve evidence:

> [T]he accused's right to access to evidence necessitates in the correlative duty of the prosecution to produce and permit the inspection of the evidence, and not to suppress or alter it. **When the prosecution is called upon not to suppress or alter evidence in its possession that may benefit the accused, it is also necessarily obliged to preserve the said evidence.** To hold otherwise would be to render illusory the existence of such right.[29]

The Constitution provides that:

> **In all criminal prosecutions, the accused shall be presumed innocent until the contrary is proved,** and **shall enjoy the right to** be heard by himself and counsel, to be informed of the nature and cause of the accusation against him, to have a speedy, impartial, and public trial, to meet the witnesses face to face, and to have compulsory process to secure the attendance of witnesses and **the production of evidence in his behalf.**[30]

Thus, the Rules of Criminal Procedure reiterates these provisions providing for the right of the accused in all criminal prosecutions to be presumed innocent until proven otherwise beyond reasonable doubt[31] and the right to "compulsory process issued to secure the attendance of witnesses and production of other evidence in his behalf."[32] It specifically requires:

> **Production or inspection of material evidence in possession of prosecution.** – Upon motion of the accused **showing good cause and with notice to the parties, the court, in order to prevent surprise, suppression, or alteration, may order the prosecution to produce and permit the inspection** and copying or photographing of any written statement given by the complainant and other witnesses in any investigation of the offense conducted by the prosecution or other investigating officers, as well as any designated documents, papers, books, accounts, letters, photographs, **objects, or tangible things not otherwise privileged, which**

---

[29] *Id.* at 307 (Sereno, J., *concurring*).

[30] CONST. art. III, § 14 par. 2. (emphasis supplied) "No person shall be held to answer for a criminal offense without due process of law." CONST. art. III, § 14 par. 1.

[31] RULES OF COURT, Rule 115, § 1 par. a.

[32] RULES OF COURT, Rule 115, § 1 par. g.

> **constitute or contain evidence material to any matter involved in the case and which are in possession or under the control of the prosecution, police, or other law investigating agencies.**[33]

In *California v. Trombetta,*[34] the U.S. Supreme Court held:

> *Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense.*

> To meet this standard of constitutional materiality evidence must both possess an **exculpatory value** that was **apparent before the evidence was destroyed,** and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.[35]

The Rules of Court provides that "[e]vidence must have such a relation to the fact in issue as to induce belief in its existence or non-existence,"[36] hence, "determinable by the rules of logic and human experience."[37]

> The test of relevancy is the logical relation of the evidentiary fact to the fact in issue, i.e., whether the former tends to establish the probability or improbability of the latter. Whereas, materiality of evidence is determined by whether the fact it intends to prove is in issue or not.[38]

Evidence is relevant if "there is reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[39]

The holding of the Court and based on the Justice Villarama's dissent, therefore, is that the semen sample is irrelevant.[40] Thus, applying

---

[33] RULES OF COURT, Rule 116, § 10.

[34] 467 U.S. 479 (1984).

[35] Lejano, 638 SCRA at 283 n. 184 & 185 (Villarama, J., *dissenting)* (*quoting id.*). (second emphasis supplied)

[36] RULES OF COURT, Rule 128, § 4.

[37] FLORENZ REGALADO, REMEDIAL LAW COMPENDIUM (Evidence) 704 *(citing* John Reed, *Relevance and Materiality, in* REGALADO, at 1118).

[38] *Id.* at 702.

[39] Dabbs v. Vergari, 149 Misc. 2d 844, 570 N.Y.S. 2d 765 (Sup. Ct. Westchester Co. 1990).

[40] Lejano, 638 SCRA at 287 (Villarama, J., *dissenting),* used the term "immaterial" instead of irrelevant.

the analysis, there could not be any violation of the right to due process of the accused because of the loss of the subject evidence: "[The principal accused] must be able to demonstrate a reasonable probability that the DNA sample **would prove his innocence."**[41] The analysis was based on a statement quoted from a 2008 publication written by Ron Michaelis, Robert Flanders, and Paula Wulff:

> Postconviction test results are **not always exculpatory.** In addition, exculpatory test results will not necessarily free the convicted individual. If the evidence does exclude the petitioner, the court must weigh the significance of the exclusion in relation to all the other evidence. Not finding the petitioner's DNA does not automatically indicate the case should be overturned, however. **In a rape case, for example, the perpetrator may have worn a condom, or not ejaculated.** In some cases, the absence of evidence is not necessarily evidence of the defendant's absence or lack of involvement in the crime.[42]

The problem with this argument that a negative result would not exonerate the principal accused because the victim could have had sexual relations with another man prior to the incident is that it "would unrealistically raise the bar of evidence" for the defense, which is not the proper party to carry the burden of proof, simply because the accused shall be presumed innocent until the contrary is proved.[43]

That there was a conviction by the trial court does not change the presumption because the case was still on appeal to the Court of Appeals then to the Supreme Court. In the case of *In Re Conviction of Judge Angeles,*[44] it was held that since the conviction of crime by the trial court was on appeal, not having attained finality, the respondent in that cases still enjoyed the constitutional presumption of innocence:

> [T]he existence of a presumption indicating the guilt of the accused does not in itself destroy the constitutional presumption of innocence unless the inculpating presumption, together with all the evidence, or the lack of any evidence or explanation, proves the accused's guilt beyond a reasonable

---

[41] *Id.* at 284.

[42] *Id.* at 287 n. 189 (*quoting* RON MICHAELIS, ROBERT FLANDERS, JR. & PAULA WULFF, A LITIGATOR'S GUIDE TO DNA FROM THE LABORATORY TO THE COURTROOM 370 (2008)).

[43] Lejano, 638 SCRA at 308 (Sereno, J., *concurring*).

[44] A.M. No. 06-9-545-RTC, 543 SCRA 196, 216, Jan. 31, 2008 (*citing* People v. Galvez, G.R. No. 157221, 519 SCRA 521, Mar. 30, 2007, People v. Godoy, 250 SCRA 676, 726-27 [1995]).

> doubt. Until the accused's guilt is shown in this manner, the presumption of innocence continues.[45]

Another reasoning in line with this holding is that the semen sample itself was not formally offered by the prosecution, but only the photographs of the glass slide containing such because the purpose of the prosecution was only as "to proving that [the victim] was in fact raped and not that [the principal accused] was the source of the sperm/semen."[46]

Justice Sereno points out that the semen sample is relevant and material, since in this case, the principal accused's identity was the fact in issue. According to her, the defense can use the said evidence **not "to prove nor to disprove the commission of rape, but to pinpoint the identity of the assailant"**[47]

> In this case, semen with spermatozoa was in fact obtained, and **it did possess exculpatory potential** that might be beneficial to the accused. In *Tijing v. Court of Appeals*, we held that "courts should apply the results of science when competently obtained in aid of situations presented, since to reject said result is to deny progress." Hence, **it is the constitutional duty of the trial judge to afford all possible means to both the NBI and the counsel for accused, in order that such evidence may be scrutinized in open court.**[48]

Thus, the semen sample is material because it is used by the defense to determine the probability or improbability that the principal accused was not the assailant; and it is relevant because it has "exculpatory value," as required in the case of *Trombetta,* although by itself will not exonerate the accused.

In the case of *People v. Yatar,*[49] DNA technology is considered as a "uniquely effective means to link a suspect to a crime, or to exonerate a wrongly accused suspect, where biological evidence has been left. For purposes of criminal investigation, DNA identification is a fertile source of both inculpatory and exculpatory evidence."

---

[45] *Id. See* Mangubat v. Sandiganbayan, 227 Phil. 642, 646 (1986), where the Court held that "despite her convictions, '[respondent-accused] has still in her favor the constitutional presumption of innocence (and until) a promulgation of final conviction is made, this constitutional mandate prevails.'"

[46] Lejano, 638 SCRA at 289 (Villarama, J., *dissenting).*

[47] Lejano, 638 SCRA at 308 (Sereno, J., *concurring).*

[48] *Id.* at 309 (*quoting* Tijing v. Ct of Appeals, G.R. No. 125901, 354 SCRA 17, Mar. 8, 2001).

[49] G.R. No. 150224, 428 SCRA 504, May 19, 2004.

II. When the Silent Witness Speaks: *Re-examining the DNA Rules for Post-conviction Testing*

Although the scientific revolution of DNA as evidence started as early as the 1980s in the U.S., the Philippines through the Supreme Court, only formalized its Rules on DNA evidence[50] on October 15, 2007. Under the said Rule, DNA evidence is defined as "the totality of the DNA profiles, results and other genetic information directly generated from DNA testing of biological samples."

When DNA as evidence is material and pertinent to a particular case already pending in court, the party who wishes to use said evidence cannot just extract biological samples from a person and subject it to DNA testing. A court order issued upon motion of a party or *motu proprio* by the judge is required by the Rules to be secured first before DNA testing can be proceeded to.[51] When a DNA Testing Order is finally granted by the Court, said order is immediately executory and cannot be the subject of appeal. [52] As such any "petition for certiorari initiated therefrom shall not, in any way, stay the implementation thereof, unless a higher court issues an injunctive order."[53] However, the "grant of DNA testing application shall not be construed as an automatic admission into evidence of any component of the DNA evidence that may be obtained as a result thereof."[54]

---

[50] RULE ON DNA EVIDENCE, A.M. No. 06-11-5-SC (hereinafter "DNA RULES").

[51] Application for DNA Testing Order. – The appropriate court may, at any time, either motu proprio or on application of any person who has a legal interest in the matter in litigation, order a DNA testing. Such order shall issue after due hearing and notice to the parties upon a showing of the following:

A biological sample exists that is relevant to the case;

The biological sample: (i) was not previously subjected to the type of DNA testing now requested; or (ii) was previously subjected to DNA testing, but the results may require confirmation for good reasons;

The DNA testing uses a scientifically valid technique;

The DNA testing has the scientific potential to produce new information that is relevant to the proper resolution of the case; and

The existence of other factors, if any, which the court may consider as potentially affecting the accuracy of integrity of the DNA testing.

This Rule shall not preclude a DNA testing, without need of a prior court order, at the behest of any party, including law enforcement agencies, before a suit or proceeding is commenced.

DNA RULES, § 4.

[52] DNA RULES, § 5.

[53] DNA RULES, § 5.

[54] DNA RULES, § 5.

This requirement for a DNA Testing Order is not necessary when it comes to a DNA testing procured after a judgment of conviction in a criminal case had been rendered by the trial court. Under section 6 of the DNA Rules, "post-conviction DNA testing may be available, without need of prior court order, to the prosecution or any person convicted by final and executory judgment," provided that the following are present:

a. A biological sample,
b. That such sample is relevant to the case, and
c. The testing would probably result in the reversal or modification of the judgment of conviction.[55]

DNA evidence if properly preserved and tested not only in a highly scientific but also in a dependable manner, is given high probative value[56] and is taken as a very reliable[57] piece of evidence. As such, even after a judgment of conviction, acquittal can still be achieved, that is, if the

---

[55] DNA RULES, § 5.

[56] In assessing the probative value of the DNA evidence presented, the court shall consider the following:

The chain of custody, including how the biological samples were collected, how they were handled, and the possibility of contamination of the samples;

The DNA testing methodology, including the procedure followed in analyzing the samples, the advantages and disadvantages of the procedure, and compliance with the scientifically valid standards in conducting the tests;

The forensic DNA laboratory, including accreditation by any reputable standards-setting institution and the qualification of the analyst who conducted the tests. If the laboratory is not accredited, the relevant experience of the laboratory in forensic casework and credibility shall be properly established; and

The reliability of the testing result, as hereinafter provided.

The provisions of the Rules of Court concerning the appreciation of evidence shall apply suppletorily.

DNA RULES, § 7.

[57] In evaluating whether the DNA testing methodology is reliable, the court shall consider the following:

The falsifiability of the principles or methods used, that is, whether the theory or technique can be and has been tested;

The subjection to peer review and publication of the principles or methods;

The general acceptance of the principles or methods by the relevant scientific community;

The existence and maintenance of standards and controls to ensure the correctness of data generated;

The existence of an appropriate reference population database; and

The general degree of confidence attributed to mathematical calculations used in comparing DNA profiles and the significance and limitation of statistical calculations used in comparing DNA profiles.

DNA RULES, §8.

post-conviction DNA testing gives out results that are favorable to the convict.[58]

A. Preservation of Post-conviction DNA

The primary issue of contention in post-conviction DNA testing is the issue of evidence preservation. This is a critical issue considering that as of 2010, case disposal in the Philippines is as low as 33 percent for the Regional Trial Courts, 40 percent with the Court of Appeals and 55 percent for judicial matters in the Supreme Court.[59] Hence, together with increasing backlog, trials can last for years without decision.

Biological samples from where DNA can be obtained as evidence must be carefully handled, maintained and preserved, in order for it to be useful throughout the lifetime of a case, which under the Rules, includes the period, during which the convict serves his sentence in prison.[60] Under the DNA Rules, the preservation of DNA evidence is the responsibility of both the court where the case is pending and the appropriate government agency involved in handling DNA evidence for the case. Pertinent here is section 12 of the DNA Rules, which provides:

> The trial court shall preserve the DNA evidence in its totality, including all biological samples, DNA profiles and results or other genetic information obtained from DNA testing. For this purpose, the court may order the appropriate government agency to preserve the DNA evidence as follows:
>
> a. In criminal cases:
> i. for not less than the period of time that any person is under trial for an offense; or
> ii. in case the accused is serving sentence, until such time as the accused has served his sentence;
>
> b. In all other cases, until such time as the decision in the case where the DNA evidence was introduced has become final and executory.
>
> The court may allow the physical destruction of a biological sample before the expiration of the periods set forth above, provided that:
>
> a. A court order to that effect has been secured; or

---

[58] DNA RULES, § 10.

[59] SUPREME COURT, ANNUAL REPORT 40-41 (2010).

[60] DNA RULES, § 12.

b. The person from whom the DNA sample was obtained has consented in writing to the disposal of the DNA evidence.

Much responsibility lies in the hands of those given the task to handle biological samples from where DNA evidence can be obtained. The court, the law enforcement officers given the charge of obtaining biological samples and the laboratory scientists tasked in conducting the DNA tests, all play a significant part in the preservation of DNA evidence. Where there is insufficient direct evidence regarding the commission of a crime, DNA evidence can be the mute witness in sustaining a conviction or an acquittal of an accused.

In *Yatar*,[61] despite the non-existence of the DNA Rules then, the Court had given much import to the DNA evidence obtained from the semen sample acquired from the body of the rape victim in order to sustain conviction. In giving much reliance on the DNA, the Court applied a the principle enunciated in *Daubert v. Merrell Dow*,[62] **"that pertinent evidence based on scientifically valid principles could be used as long as it was relevant and reliable"[63]:**

> Admittedly, we are just beginning to integrate these advances in science and technology in the Philippine criminal justice system, so we must be cautious as we traverse these relatively uncharted waters. Fortunately, we can benefit from the wealth of persuasive jurisprudence that has developed in other jurisdictions.
>
> . . .
>
> **Applying the *Daubert* test to the case at bar, the DNA evidence obtained through PCR testing and utilizing STR analysis, and which was appreciated by the court a quo is relevant and reliable since it is reasonably based on scientifically valid principles of human genetics and molecular biology.[64]**

B. *Whose fault is it, anyway?*[65] Pointing the fingers to the accused for all DNA testing failure

---

[61] G.R. No. 150224, 428 SCRA 504, May 19, 2004.

[62] 509 U.S. 579 (1993).

[63] Yatar, 428 SCRA at 516 citing *id.*.

[64] *Id.* (emphasis supplied)

[65] "Apologies to Whose Line is it Anyway?" (BBC original airing Sept. 23, 1988 to July 2, 1998).

In the recent case of *Skinner v. Switzer*[66], the Texas Court of Criminal Appeals denied the accused's access to the DNA testing for not showing that he had no fault in the failure to test the evidence, hence, the accused "must now convince the federal district court that the statute as construed by the state courts rendered the statutory post-conviction relief procedures 'fundamentally inadequate to vindicate the substantive rights provided.'"[67]

In *Skinner,* the accused was convicted of murdering his girlfriend and her two adult sons. During trial, certain pieces of DNA and fingerprint evidence were tested and presented at trial – some implicating Skinner, and some did not. His defense counsel then declined testing of other physical evidence, fearing that the results would incriminate him.

In the U.S., the merit of a prisoner's request for the DNA testing is determined by what is provided in their State law. A narrow interpretation has often been made holding that statutes do not apply to specific groups of convicts or circumstances not otherwise stated in the law. The Illinois Supreme Court, for instance, denied DNA testing access to those prisoners who have pled guilty because the statute states that the prisoner must establish a *prima facie* case that "identity was the issue in the trial which resulted in his or her conviction."[68]

However, other State Supreme Courts have reversed such narrow interpretations. The Pennsylvania Supreme Court, for instance, overturned the holding that the DNA testing statute barred access to DNA testing by prisoners who had voluntarily confessed. The Tennessee Supreme Court also reversed the interpretation that only the comparison of "the petitioner's DNA to samples taken from biological specimens gathered at the time of the offense" was authorized, remarking on the two purposes of DNA testing statutes: (1) exonerating the innocent and (2) identifying the true perpetrators. Hence, holding such narrow holding as "incorrect because it overlooked the latter purpose" and "inappropriately limited the statute's reach."

The Supreme Court in *Skinner* ultimately held that DNA testing provided by state statute were not required to seek writs of habeas corpus, which provided for more restrictions, but could instead use 42 U.S.C. §

---

[66] 131 S. Ct. 1289 (2011).

[67] Leading Case, *supra* note 3 (*citing* Dist. Attorney's Office v. Osborne, 129 S. Ct. 2308, 2320 (2009)).

[68] "Analyses of successful DNA testing claims reveal the problematic nature of such an interpretation: of the first 265 prisoners to be exonerated by DNA evidence, 22 had pled guilty." *Id.*

1983.[69] The said section was the "proper vehicle" because "[s]uccess in his suit for DNA testing would not 'necessarily imply' the invalidity of his conviction" as the results could be exculpatory, inculpatory, or inconclusive."[70] Hence, the decision focused not on the accused's "ultimate goal" to be exculpated and released but only on his "immediate goal" of gaining access to untested physical evidence.

This is in stark contrast to the tenor of the Supreme Court in the 2004 decision of *De Villa v. Director of New Bilibid Prisons*,[71] which gives the impression that the Court sanctioned the accused for not being abreast with scientific revolutions in evidence such as DNA testing. It is important to note however that this decision came out three years before the DNA Rules were promulgated. Such Rules would now warrant acquittal should the DNA evidence dictate so.

In *De Villa*, a case resolved months after *Yatar*, the crime of rape resulted in the conception of a child by the victim. The Court was faced with the question of whether to uphold a post-conviction DNA test conducted on biological samples recovered from the accused, the alleged father, and the child borne out of the commission of the crime.[72] The Court resolved the issue by construing the DNA evidence recovered from the father and the subsequently born child as evidence. The conclusion however is that the case can no longer be reopened for new trial:

> [A]lthough the DNA evidence was **undoubtedly discovered after the trial,** we nonetheless find that it does not meet the criteria for "newly-discovered evidence" that would merit a new trial. Such evidence disproving paternity could have been discovered and produced at trial with the exercise of reasonable diligence.

---

[69] CIVIL ACTION FOR DEPRIVATION OF RIGHTS – Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

[70] Leading Case, *supra* note 3.

[71] G.R. No. 158802, 442 SCRA 706, Nov. 17, 2004.

[72] *Id.*

> . . . **[That accused] was "unaware" of the existence of DNA testing until the trial was concluded carries no weight with this Court. Lack of knowledge of the existence of DNA testing speaks of negligence, either on the part of [the accused] or [his] counsel. . . . [T]his negligence is binding upon [him].**
>
> [R]elief will not be granted to a party who seeks to be relieved from the effects of the judgment when the loss of the remedy at law was due to his own negligence, or to a mistaken mode of procedure.[73]

An observation can also be made of the contradiction in the reasoning of the Court between *Webb* and *De Villa.*

Webb, as earlier discussed, passed the blame to the principal accused when the semen obtained from the victim in 1991, which is also the biological sample pertinent for post-conviction DNA testing, had gone missing.

The Court in *De Villa* on the other hand faulted the accused for not being able to present the DNA evidence favorable to him early on during the trial stage. Despite the absence of the DNA Rules during that time, the Court ruled that the unawareness of the accused of the use of DNA as evidence is not an excuse for his late presentation. Said unawareness is tantamount to negligence on the part of the defense.

This is in contrast with *Webb,* wherein the Court excused itself and the law enforcement officers in charge of preserving the biological sample when the same had gone missing, rationalizing that during that time when the samples were taken, the DNA Rules were not yet existing. In these two inconsistent rulings, the Court seemingly pointed the finger at the accused, whether in disallowing DNA evidence or in not being able to use DNA evidence due to the loss of the biological samples.

The Court to justify its ratios on these two cases, narrowed on the existence or non-existence of the DNA Rules when these cases were decided. This is clearly not the proper direction if the Court is to set a precedent regarding the use of DNA evidence in post-conviction DNA tests.

III. Swearing in the DNA Witness

---

[73] *Id.*

Policy Recommendations for Post-Conviction DNA Testing

Two important policy issues must be considered: (1) preservation of DNA evidence and (2) compensation of the wrongfully convicted.

On the issue of ***preservation,*** despite of the existent DNA Rules on Evidence, the State should enact a policy either via statute or administrative rules and regulations for the obtaining and handling of biological samples i.e. use of gloves and other uncontaminated paraphernalia, and labeling of samples. This is to ensure that law enforcement officers and laboratory officers have adequate knowledge regarding the proper chain of custody to ensure the preservation of biological samples. Forensic experts or experienced individuals in the fields of science must be consulted and their inputs regarding such matter must be considered.

There should also be a central repository of biological samples where the same will be kept in order to be protected and preserved during the lifetime of the case where it is being used. This central repository which can be under the control and supervision of the Philippine National Police (PNP) or the National Bureau of Investigation (NBI) will be a library of some sorts of the biological samples, where they will be frozen and labeled in order for it to be available for future use, i.e. post-conviction DNA testing. In this way, these biological samples will be protected from any tampering and contamination which might affect its reliability and probative value as source of evidence. The creation of this central repository will also ensure that said biological samples will always be available should the need for testing them arise.

The problem with the current DNA Rules on preservation is that it is enacted by the judiciary in its rule-making power but addressed to the trial courts, empowering the latter to order government agencies, which falls under the executive branch.[74]

The legislature or the executive should consider requiring automatic preservation of all physical and biological evidence for unresolved cases, those with specific timeframes or those applicable to certain crimes, without need for a petition of the accused for preservation thereof.[75] After all, there is no post-conviction right to counsel, who could ensure that the prisoner would exhaust such remedies.

---

[74] DNA RULES, § 12.

[75] The following are suggested by the Innocence Project:

Taking the policy a step further, the preservation rule may consider vacating the conviction and granting a new trial to the accused. The DNA results may also be presumed as having exculpatory value[76] such that if there is destruction or negligence leading to the loss of DNA evidence, there will be sanctions for those found responsible for such loss.

On the issue of ***compensation,*** Congress should consider the social, monetary and emotional cost of the wrongful conviction of a person. The experience in the U.S. is that those who have been released for wrongful incarceration through post-conviction DNA testing have been imprisoned for twelve years on the average.

> The agony of prison life and the complete loss of freedom are only compounded by the feelings of what might have been, but for the wrongful conviction. Deprived for years of family and friends and the ability to establish oneself professionally, the nightmare does not end upon release. With no money, housing, transportation, health services or insurance, and a criminal

---

- The preservation of all items of physical evidence, regardless of whether an individual files a petition for post-conviction DNA testing
- The retention of crime scene evidence that is associated with unsolved cases
- The retention of all items of physical evidence secured in connection with a felony for the period of time that any person remains incarcerated, on probation or parole, involved in civil litigation in connection with the case, or subject to registration as a sex offender
- Sanctions for parties responsible for the improper destruction of evidence and provisions enabling courts to determine the appropriate remedy when evidence is improperly destroyed.

INNOCENCE PROJECT, *Preservation of Evidence available at* http://www.innocenceproject.org/Content/253PRINT.php (date last visited: Apr. 9, 2012).

[76] While not applicable to the Philippine jurisdiction, which does not adhere to the jury system:

Ideally, legislation requiring the preservation of evidence will include the following provisions:

- If biological evidence is destroyed, the Court may vacate the conviction, grant a new trial, and instruct the new jury that the physical evidence in the case, which could have been subjected to DNA testing, was destroyed in violation of the law.
- The Court will also instruct the jury that if it finds that the evidence was intentionally destroyed, it may presume that the results of the DNA testing would have been exculpatory.

Id.

> record that is rarely cleared despite innocence, the punishment lingers long after innocence has been proven.[77]

The wrongfully convicted ought to be given support for his immediate needs such as basis necessities like food and transportation. He or she shall also be provided assistance by the State to secure housing and livelihood, medical care, counseling, and legal services to acquire such benefits, expunge criminal records, and regain property and even custody of his children.[78]

In the United Kingdom, for instance, the legislative framework under the Criminal Justice Act of 1988 for compensation is grounded on the principle that there has been "miscarriage of justice" due to such wrongful conviction:

> [W]hen a person has been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned **on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice**, the Secretary of State shall pay compensation for the miscarriage of justice to the person who has suffered punishment as a result of such conviction.[79]

In the case of *R (Adams) v. Secretary of State for Justice*,[80] the members of the U.K. Supreme Court delved into a discussion of what a newly discovered fact meant: "a fact which was discovered by him or came to his notice after the relevant appeal proceedings had been finally determined or a fact the significance of which was not appreciated by the convicted person or his advisers during the trial or appeal proceedings."[81] Hence, the

---

[77] INNOCENCE PROJECT, *Compensating the Wrongly Convicted*, *available at* http://www.innocenceproject.org/Content/309PRINT.php (date last visited: Apr. 9, 2012).

[78] *Id.*

[79] U.K. Criminal Justice Act, § 133 (1988).

[80] [2011] UKSC 18, where the majority of the members of the U.K. Supreme Court held that a miscarriage of justice occurred whenever a new fact "so undermines the evidence against the defendant that no conviction could possibly be based upon it." This "formulation" fell under categories 1 and 2, but not under categories 3 and 4. *See* Craven, *infra* note 82. The Court also held that it is the Secretary of State's duty to decide in each individual case if the prisoner has suffered a "miscarriage of justice" as provided for in the U.K. Criminal Justice Act of 1988, § 133.

[81] *Id.* (*citing* Irish Crim. Proc. Act, § 9 (1993), adopted by Lord Phillips because "[m]any who are brought before the criminal courts are illiterate, ill-educated, suffering from one or another form of mental illness or of limited intellectual ability. A person who has been wrongly convicted should not be penalised should this be attributable to any of these matters.").

legislature and the judiciary may consider determining whether the post-conviction DNA test results would be newly discovered evidence that would make the case fall under the definition of a miscarriage of justice.[82]

Conclusion

There is the legal adage that "[i]t is better that ninety nine escape . . . than that one innocent man be condemned."[83] This dread of wrongful convictions can now be addressed through DNA testing and post-conviction remedies, given that they be properly recognized and correctly used by the State through its Courts and law enforcement agencies. In the U.S., 75 percent of post-conviction exonerations have been the result of wrongful identification, as in the case of *Webb.*[84] The experience of the United States also shows the value of the DNA post-conviction remedy. Since the first convict exculpated in 1989, 289 post-conviction DNA exonerations have been made and 139 of the cases have identified the real perpetrators.[85] The figure cited is very powerful especially in light of the thousands of convictions in the Philippines each year.[86]

Biological evidence contains DNA that may serve as the silent witness especially in criminal cases. Thirteen years after the promulgation of the DNA Rules, the Philippine legal system has yet to assimilate the

---

[82] *See* Edward Craven, *Case Comment: R (Adams) v. Secretary of State for Justice, available at* http://freelegalweb.org/8064/2011/05/case-comment-r-adams-v-secretary-of-state-for-justice-2011-uksc18/(date last visited Mar. 28, 2012), *discussing* the four categories were formulated by Lord Justice Dyson of the Court of Appeals as follows:

Category 1: Cases where fresh evidence shows that the defendant is innocent of the crime of which he has been convicted.

Category 2: Cases where fresh evidence is such that, had it been available at the time of the trial, no reasonable jury could have properly convicted the defendant.

Category 3: Cases where fresh evidence renders the conviction unsafe in that, had that evidence been available at the time of the trial, a reasonable jury might or might not have convicted the defendant.

Category 4: Cases where something has gone seriously wrong in the investigation of the offence or the conduct of the trial, resulting in the conviction of someone who should not have been convicted.

[83] THOMAS STARKIE, EVIDENCE 751 (1824).

[84] The case of *Webb* may not fall squarely into this because of the allegedly positive identification of the witness who claims to know and was accompanying the alleged culprits during the incident. However, eyewitness misidentification is still a leading cause and must not be discounted.

[85] INNOCENCE PROJECT, *Facts on Post-Conviction DNA Exonerations*, http://www.innocenceproject.org/Content/351PRINT.php (date last visited: Apr. 9, 2012).

[86] According to the SUPREME COURT, ANNUAL REPORT 40 (2010), there are 125,378 decided cases per year (without identifying the type of case, i.e., if criminal, civil, special proceeding, or administrative).

scientific reliability and consistency of DNA testing versus the inherently fallacious and unreliable eyewitness identification.

It can be concluded that until policies on preservation and compensation are fomented either by Congress, the Executive or the Judiciary, decisions on post conviction DNA testing would be bleak and would rely heavily on U.S. jurisprudence and experience, as what can be seen in *Webb*.

Hence, due to the lack of clear policy, at least for the DNA issue, the majority opinion and separate opinions were more of an appreciation of the facts, without truly establishing doctrine on what standards would apply should post-conviction DNA testing could not be availed of due to loss or destruction of the evidence, or if existing, if the procedures were correctly followed by the imprisoned petitioner.

DNA is not just a scientific fad or a mere product of the technological revolution the world is in today. As the storehouse of a person's unique genetic make-up, this diagonal helix, though invisible to the naked eye, is able to speak a thousand words, perhaps even more truthful and trustworthy than any statement that might come out of a person's lips. The significance of DNA as evidence can no longer be understated because this silent witness, if only able to speak and amplify its soft yet earnest voice, can cause the conviction or acquittal of a person.

-o0o-