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Justice Dept. to Review Bush Policy on DNA Test Waivers

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Attorney General Eric H. Holder Jr. has ordered a review of a little-known Bush administration policy requiring some defendants to waive their right to DNA testing even though that right is guaranteed in a landmark federal law, officials said.

The practice of using DNA waivers began several years ago as a response to the Innocence Protection Act of 2004, which allowed federal inmates to seek post-conviction DNA tests to prove their innocence. More than 240 wrongly convicted people have been exonerated by such tests, including 17 on death row.

The waivers are filed only in guilty pleas and bar defendants from ever requesting DNA testing, even if new evidence emerges. Prosecutors who use them, including some of the nation's most prominent U.S. attorneys, say people who have admitted guilt should not be able to file frivolous petitions for testing. They say the wave of DNA exonerations has little impact in federal court because all those found to be innocent were state prisoners, and the waivers apply only to federal charges. DNA evidence is used far more frequently in state courts.

But DNA experts say that's about to change because more sophisticated testing will soon bring biological evidence into federal courtrooms for a wider variety of crimes. Defense lawyers who have worked on DNA appeals strongly oppose the waivers, saying that innocent people sometimes plead guilty -- mainly to get lighter sentences -- and that denying them the ability to prove their innocence violates a fundamental right. One quarter of the 243 people exonerated by DNA had falsely confessed to crimes they didn't commit, and 16 of them pleaded guilty.

"It's a mean-spirited policy. Truth, ascertained by science, should trump the finality of a conviction," said Peter Neufeld, co-director of the New York-based Innocence Project. He said the waivers are effectively "gutting the impact" of the 2004 law because 97 percent of federal convictions result from guilty pleas.

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Interviews and documents show that language allowing for DNA waivers was inserted into the law at the behest of Republican senators and that the Bush Justice Department lobbied against the measure even with the waiver provision. Soon after the law passed with bipartisan support, the department sent a secret memo to the nation's 94 U.S. attorney's offices urging them to use the waivers, several federal officials familiar with the memo said.

Holder, a former U.S. attorney in the District, has called for expanded DNA testing in federal courts. After inquiries by The Washington Post, his spokesman, Matthew Miller, said Holder "has ordered that the department review its DNA waiver policy."

"The attorney general believes that DNA testing is a crucial law enforcement tool both in solving crimes and exonerating the innocent," Miller said, adding that if new evidence arises after conviction, "prosecutors have an obligation to act."

The waivers run counter to the national movement toward post-conviction DNA testingas the forensic tool has revolutionized criminal justice. Nearly all 50 states have passed laws giving inmates the right to seek testing in state courts, and most allow for petitions after guilty pleas.

Oregon prosecutor Joshua Marquis, who sits on the executive committee of the National District Attorneys Association, said he's never heard of DNA waivers in state court and that the organization opposes the concept. "I think it's important to always leave the door open for actual proof of innocence," he said.

In federal court, the waivers are part of the standard plea agreement filed by prosecutors in the District, Alexandria and Manhattan, which are among the nation's highest-profile U.S. attorney's offices. Waivers are used in some or all pleas by at least 16 other offices, including such large ones as Chicago and Los Angeles and such smaller ones as Arkansas and West Virginia. Prosecutors in Maryland rarely use the waivers.

"It saves us a lot of spurious litigation down the pike," said G.F. Peterman III, acting U.S. attorney in the Middle District of Georgia. "All they have to do is say I'm not guilty, go to trial and they've waived nothing. It's their

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decision."

Defense attorneys disagree, saying prosecutors give defendants the choice of signing the waiver or not getting the benefits of a plea agreement, which usually include a lighter sentence.

"It's a horrendous provision, and I can never get them to take it out," said Christopher Amolsch, a lawyer whose client recently waived DNA testing rights in a cigarette smuggling case in U.S. District Court in Alexandria. Other lawyers said they don't usually fight the waivers, considering it a losing battle.

The U.S. attorney's office in Alexandria declined to comment.

At least 24 U.S. attorneys don't use the waivers. It could not be determined how many inmates have been affected by the policy, because the remaining 50 U.S. attorney's offices did not respond to inquiries or declined to comment. It is also unclear how many federal prisoners have filed petitions seeking post-conviction DNA testing since 2004. Justice Department officials said the number is small but have also said they expect more petitions over time.

At the heart of the debate is the question of how often the innocent plead guilty. Michael Volkov, a former federal prosecutor who as counsel to Sen. Orrin G. Hatch (R-Utah) pushed to insert waiver language into the 2004 law, said he thinks it is "extremely rare."

But experts who have studied DNA exonerations say it is more common. "The idea that people who plead guilty are always guilty is false," said Brandon Garrett, a University of Virginia law professor. He said the waivers "send a terrible message: that federal prosecutors take a dim view of truth telling."

Arthur Lee Whitfield, for example, was convicted in 1982 of raping a woman in Norfolk and was about to go on trial in a second rape. Facing a possible life term, he pleaded guilty for a lighter sentence. He was exonerated of both crimes by DNA in 2004 after more than 22 years in prison.

"I figured I can put my life on the line and take a chance, or I can take the plea and have a shot at coming home to my family,"

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Whitfield said in a recent interview. "You never know what you'd do until you're put in that situation."

Justice Department officials who favor DNA waivers say the 2004 federal law wouldn't have affected such defendants because their cases were in state courts. Violent crimes in which suspects are more likely to leave their DNA have traditionally been prosecuted locally.

But federal prosecutors have been tackling more violent crimes in recent years, especially involving gangs or drugs. And experts say the arrival in the next few years of more sophisticated DNA testing will allow DNA to be used in more federal cases both to convict and to exonerate.

For example, DNA tests can't discern whether DNA came from blood, semen or other tissues; they show only that a DNA profile is present. When that changes, said Dan Krane, a biological sciences professor at Wright State University, defendants might be able to show that they never touched key pieces of evidence in drug, gun, forgery and other cases.

These types of scientific advances were among the reasons that Sen. Patrick J. Leahy (D-Vt.) originally proposed the Innocence Protection Act in 2000. The waiver provision emerged from intensive negotiations with Republican senators, who insisted on it as one price for their support, congressional sources said.

The language inserted into the final bill says federal judges can order post-conviction DNA testing if the inmate did not "knowingly and voluntarily waive the right to request DNA testing of that evidence in a court proceeding." The law also says the government can destroy biological evidence if there is a DNA waiver.

With the waiver provision in the law, the Justice Department in April 2004 sent a 22-page letter to the Senate Judiciary Committee that said allowing any defendant who pleaded guilty to seek DNA testing would amount to "an unjustified attack on the integrity of guilty pleas which . . . are the means by which most cases are resolved."

"The purpose [of post-conviction DNA testing] is not to enable killers, rapists and other criminals to re-open old wounds of

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crime victims and their survivors years and decades after the normal conclusion of criminal proceedings," the letter said.