Prof. Damir Primorac, Ph.D.[1]

REOPENING OF CRIMINAL PROCEEDINGS AND SUBSEQUENT DNA ANALYSIS FOR REVIEWING AND CORRECTING JUDICIAL ERRORS AND EXONERATING INNOCENT PERSONS

1.02 Review Article
UDK 343.157.3:[343.982.323:577.212(497.5)
UDK 343.154:[343.982.323:577.212(497.5)

Abstract

It is indisputable that in all forms of human conduct there is the possibility of error, including in criminal proceedings, where a convicted person may be unjustly convicted for a criminal offense they did not commit. Of course, given the speed of today's technological development, such errors in criminal proceedings are becoming fewer and fewer. Nevertheless, it is always necessary to ensure high-quality methods related to the review and correction of such errors. One of these methods is certainly DNA analysis, which is of exceptional importance in criminal proceedings for identifying the perpetrator of a criminal offense, that is, for correcting "wrong" judicial decisions. It is precisely the development of technology related to DNA analysis that has led, in certain cases, to a different factual situation being established through subsequent DNA analysis than the one established during the earlier conduct of proceedings—on the basis of which unjustly convicted persons were acquitted in a new proceeding. Therefore, DNA technology has enabled us, through the analysis of collected traces from the crime scene and other places where traces of the criminal offense are located, and by comparing those traces with biological samples taken from individuals, to unequivocally determine the actual perpetrator of the criminal offense. In the Republic of Croatia, the possibility of correcting judicial errors in such cases is provided by the Criminal Procedure Act through an extraordinary legal remedy – the renewal of criminal proceedings – by presenting new facts or submitting new evidence that, either on their own or in connection with previous evidence, are suitable to cause the acquittal of the person who

[1] Titular full professor at the University Department of Forensic Sciences, University of Split; Full professor at the Faculty of Law, University of Mostar; Attorney at the law firm "Primorac i partneri" d.o.o. Email: damir.primorac@primorac-partners.com

was previously convicted. That is why it is extremely important, along with this sophisticated DNA technology and the legal institute of criminal proceeding renewal, to properly store the collected DNA sample so that it can later be used for the needs of criminal proceedings for the purpose of reviewing and correcting errors of the judicial system. Equally important is the database of data collected by molecular-genetic analysis (DNA profiles), which is maintained in digital form in the CODIS system, and which data can, under prescribed conditions, be submitted to foreign police bodies and certain international organizations for the purpose of fighting crime, especially crime with international characteristics. In addition, it is important to emphasize the great significance of the fact that from 2020 to 2024, a research project was conducted in the Republic of Croatia – the "Innocence Project" – which, following the example of similar projects worldwide, undoubtedly made a major contribution to building criteria and creating preconditions for correcting errors in the judiciary when it comes to unjustly convicted persons.

Key words: renewal of criminal proceedings, unjustly convicted persons, correction of errors, DNA analysis, exoneration of the person.

1. Introduction

We are witnesses to how today, all around the world, with the help of deoxyribonucleic acid (hereinafter: DNA), a large number of criminal cases are being solved, that is, perpetrators of criminal offenses are being identified. DNA represents a very long molecule that carries the records of hereditary traits of every organism.[2] Therefore, DNA is the carrier of genetic information in such a way that it determines our basic characteristics such as skin color, height, eye color, and so on. The discovery of the molecular structure of DNA is one of the greatest discoveries of the 20th century, and scientists Francis Crick and James Watson participated in it. They published their discovery in 1953, which led to the development of molecular genetics, and for this, they received the Nobel Prize in 1962.[3] Around thirty years after their discovery, more precisely in 1984, British geneticist Alec Jeffreys demonstrated that certain regions of DNA contain repeating sequences that differ from person to person, and this very insight was of decisive

[2] Primorac, D.: Primjena analize DNA u hrvatskome kaznenopravnom sustavu, u: Analiza DNA u sudskoj medicini i pravosuđu, Primorac Dragan i Marijanović Damir (eds.), Medicinska naklada, 2008. godina, str. 110.
[3] Marijanović, D; Primorac, D. et al. Forenzička genetika – teorija i aplikacija, Lelo, 2103. godina, str. 67.

importance in a criminal case that was resolved using DNA analysis. Namely, after the murders of Lynda Mann and Dawn Ashworth in 1983 and 1986, the police organized DNA testing of more than 5,000 men and, thanks to that, found the killer. It is important to emphasize here that DNA analysis for the purposes of that case was, for the first time, officially recognized within a court proceeding.[4]

DNA analysis, as the most reliable method in forensic medicine, represents a molecular-genetic procedure aimed at analyzing the fundamental genetic material or sample (e.g., blood, hair, semen, bone, etc.).[5] It is a matter of "scientific evidence," which is one of the most effective and highest-quality tools in the fight against crime. The goal of this scientific evidence is to uncover the truth in order to ensure that no innocent person is convicted, and that the perpetrator of the criminal offense is held accountable for what they have done.[6] Of course, as with other types of evidence, the emphasis with this form of evidence is primarily on assisting judicial authorities, so that ultimately the court, by evaluating each piece of evidence individually and in connection with the other evidence, can reach a conclusion as to whether a particular fact has been proven.[7]

Forensic science represents a set of scientific principles and technical methods applied in the investigation of criminal offenses, with the aim of proving that a criminal offense has been committed and identifying its perpetrator.[8] Therefore, the fundamental role of forensic sciences is to assist judicial authorities in establishing certain facts for the correct application of the law.[9]

---

[4] The Recommendation No. R (92) 1 of the Committee of Ministers of the Council of Europe to Member States concerning the use of analysis of deoxyribonucleic acid (DNA) within the framework of the criminal justice system, adopted on 10 February 1992 at the 470th meeting of the Ministers' Deputies, holds exceptional significance for the application of DNA analysis in criminal justice systems.
(Council of Europe: Recommendation No. R (92) 1Of The Committee of Ministers to Member States on The Use of analysis of deoxyribonucleic Acid (DNA) within The framework of the Criminal Justice System (1992) (Adopted by the Committee of Ministers on 10 February 1992 at the 470th meeting of the Ministers' Deputies) – pristupljeno 27. srpnja 2024. godine.

[5] Primorac, D.: Primjena analize DNA u hrvatskome kaznenopravnom sustavu, u: Analiza DNA u sudskoj medicini i pravosuđu, Primorac Dragan i Marijanović Damir (eds.), *op. cit, str. 110.*

[6] Article 1, paragraph 1 of the Criminal Procedure Act (*Narodne novine* Nos. 152/08, 76/09, 80/11, 91/12, 143/12, 56/13, 145/13, 152/14, 70/17, 126/19, 130/20, 80/22, and 36/24 – hereinafter: ZKP) reads: *This Act lays down the rules intended to ensure that no innocent person is convicted and that the perpetrator of a criminal offense is punished or subjected to another measure under the conditions prescribed by law and on the basis of a lawfully conducted procedure before a competent court.*

[7] Fazlić, A.; Marjanović, D.: *Primjena DNK analize u bosanskohercegovačkom pravosudnom sistemu: prednosti i nedostaci u odnosu na postojeću praksu u Europi*, Časopis za kriminalistiku, kriminologiju i sigurnosne studije, br. 3–4, Sarajevo, 2012, p. 145.

[8] Modly, D.; Šuperina, M.; Korajić, N.: Rječnik kriminalistike, Strukovna udruga kriminalista, Zagreb 2008. godina, str. 164-165.

[9] Mršić, G.; Modly, D.; Popović, M.: Forenzika – Istraživanje mjesta događaja II, Hrvatska sveučilišna naklada, Zagreb, 2015. godina, str. 563.

From this, it is clear that forensic science (commonly referred to today in colloquial terms as "forensics") and law are often closely intertwined, and that their interaction is of exceptional importance for the resolution of a criminal case.[10] We can say that forensic science begins at the crime scene and, in the service of law, ends in the courtroom.[11]

In the Republic of Croatia (hereinafter: RC), DNA analysis was first applied in 1993 in Zagreb (at the Department of Forensic Medicine and Criminalistics, Faculty of Medicine, University of Zagreb) and in Split (at the Department of Pathology, Forensic Medicine and Cytology, Clinical Hospital Centre Split) for the purpose of identifying victims of the Homeland War. The introduction of DNA analysis at the Centre for Forensic Examinations, Research and Expert Analyses "Ivan Vučetić" (hereinafter: the Centre) began in 1996. The Centre is a unique forensic institution in Croatia, operating as an independent organizational unit of the Ministry of the Interior. It conducts forensic examinations, research, and expert analyses independently and exclusively at the request of the State Attorney's Office, the courts, and the police, as well as on the basis of agreements or within the framework of cooperation with other institutions.[12] In its work, the Centre utilizes modern technology and a wide range of diverse methods for the forensic processing of physical traces and their transformation into material evidence.

However, no matter how impressive the advancement of knowledge and technology may be today—regardless of the field of research—we must always bear in mind that errors, manipulation, and similar issues can still occur.[13] The rapid pace of today's advancement in knowledge and technology almost always brings something new and of higher quality than what came before. Therefore, it is entirely justified—particularly in well-founded situations—to re-examine previous results and strive to improve them. In this context, we are aware that no legal system is immune to errors, including those that may occur during the course of criminal

[10] For more on DNA as courtroom evidence, see: Becker W. S.; Derenčinović, D.; Primorac, D.: *DNA as Evidence in the Courtroom*, in: *Forensic DNA Applications – An Interdisciplinary Perspective*, Second edition, Primorac, D. and Schanfield, S. M. (eds.), CRC Press, Taylor & Francis Group, Boca Raton, 2023, pp. 433–449.
[11] *Ibid, str. 18.*
[12] 70 godina Centra za forenzična ispitivanja, istraživanja i vještačenja „Ivan Vučetić"**,** Zagreb, 2023. godina, str. 26, dostupno na: https://forenzika.gov.hr/UserDocsImages/dokumenti/2023/MONOGRAFIJA_Ivan_Vucetic.pdf, pristupljeno: 24. srpnja 2024. godine.
[13] Cole, S. A.; Thompson, W. C.: Forensic Science and Wrongful Convictions, u: Wrongful Convictions & Miscarriages of Justice, Huff, R. C. i Kilias, M. (eds.), Routledge, Taylor & Francis Group, New York, 2013. godina, str. 111-112.

proceedings—whether at the stage of preliminary inquiry, investigation, or trial.[14] In order to correct such errors in justified cases, a robust legal framework is necessary—one that allows for a professional and comprehensive review of final court decisions, with the aim of rectifying mistakes and potentially exonerating innocent individuals.[15] In the following section of this paper, the focus will be on examining whether the Republic of Croatia has an adequate legislative framework that would allow for the reopening of criminal proceedings in such cases. Particular emphasis will be placed on the possibility of conducting subsequent expert analysis—specifically DNA testing—at the request of a convicted person, after the final conviction has been rendered.[16]

2. Revision of the Criminal Procedure

The Criminal Procedure Act (ZKP) provides for three extraordinary legal remedies: the reopening of criminal proceedings, the request for the protection of legality, and the request for extraordinary review of a final judgment. A request for the reopening of proceedings and a request for the protection of legality may be filed against both final judgments and decisions, whereas a request for extraordinary review of a final judgment may only be submitted against final court judgments. Extraordinary legal remedies are characterized by their exceptional nature—they may be used only in specific circumstances clearly prescribed by law. This is because the finality of a judgment is based on the presumption of truth, legality, and conclusiveness, and as such, it must be enforced.[17] Therefore, an extraordinary legal remedy is the only legal instrument that enables the re-examination of a final court decision in criminal proceedings and the correction of any potential errors made during the earlier stages of the procedure.[18]

Within the scope of extraordinary legal remedies, this paper focuses specifically on the so-called *true reopening* of criminal proceedings—namely, those proceedings that may be reopened

[14] Drenški Lasan, V.: Obnova kaznenog postupka *de lege lata* i analiza odluka Ustavnog suda RH donesenih u povodu ustavnih tužbi nakon obnove kaznenih postupaka na osnovi konačne presude Europskog suda za ljudska prava, Hrvatski ljetopis za kazneno pravo i praksu, br. 2, Zagreb, 2018. godina, str. 170.
[15] Giannelli, P. C:. Wrongful Convictions and Forensic Science: The Need to Regulate Crim Labs, , UNC School of Law, North Carolina Law Review, 2007. godina, str. 208-219.
[16] Derenčinović, D.; Roksandić Vidlička, S.; Dragičević Prtenjača, M.:"Projekt nedužnosti" i naknadna DNK vještačenja u Republici Hrvatskoj – moguća stvarnost ili nedostižna želja, Zbornik radova Pravnog fakulteta u Zagrebu, br. 3-4, 2017. godina, str.376-377.
[17] Pavišić, B.: Komentar Zakona o kaznenom postupku, 4. izdanje, Žagar, Rijeka, 2003. godina, str. 504.
[18] Primorac, D.; Stipanović, I.; Pilić, M.: Kazneno procesno pravo, Press SUM i Alfa, Mostar, 2021. godina, str. 251.

in favor of the convicted person.[19] The reopening of criminal proceedings is characterized as a non-suspensive and non-devolutive legal remedy. It is non-suspensive because it does not postpone the enforcement of the final judgment, and non-devolutive because the decision on the request is made by the same court that rendered the final judgment.[20] There are three main conditions that must be met in order to initiate the reopening of criminal proceedings: the existence of a final court judgment.[21] A request submitted by an authorized person and the existence of legal grounds for reopening the proceedings as prescribed by the Criminal Procedure Act (ZKP). A request for the reopening of criminal proceedings may be submitted by the parties and the defense counsel, and after the death of the convicted person, by the state attorney, as well as the convicted person's spouse or common-law partner, direct-line relative, legal representative, adoptive parent, adopted child, sibling, or guardian.[22] It follows from this that a request for the reopening of proceedings may be submitted by the state attorney, not only to the detriment of the convicted person, but also in their favor.

Article 501, paragraph 1 of the Criminal Procedure Act (ZKP) stipulates that proceedings concluded with a final judgment may be reopened in favor of the convicted person, regardless of whether they are present, if:

1. it is proven that the judgment was based on a forged document, recording, or false testimony by a witness, expert, or interpreter,

2. it is proven that the judgment resulted from a criminal offense committed by the state attorney, judge, lay judge, investigator, or another person who participated in the evidentiary proceedings,

3. new facts are presented or new evidence is submitted which, either on their own or in connection with previously presented evidence, are suitable to lead to the acquittal of the convicted person or their conviction under a more lenient criminal law,

---

[19] Unlike a true reopening of proceedings, a so-called *false* reopening does not deal with factual or legal issues (i.e., it is not a classic retrial) but concerns only the final sentence imposed: Vasiljević, T; Grubač, M.: Komentar Zakona o krivičnom postupku, Savremena administracija, Beograd, 1987. godina, str. 706.

[20] Primorac, D.; Stipanović, I.; Pilić, M.: *op. cit,* str. 252.

[21] Garačić, A.; Novosel, D.: Zakon o kaznenom postupku u sudskoj praksi, Knjiga II, Rijeka, 2018. godine, str. 613. i Drenški Lasan, V.: *op. cit,* str. 177: „Although the legislator refers to a final judgment, the reopening of criminal proceedings in favor of the convicted person is also possible if the proceedings were concluded by a final decision and if that decision resolved the substance of the matter related to the commission of the criminal offense (such as in proceedings involving juveniles or young adults).

[22] Article 504(1) in conjunction with Article 464(2) of the Criminal Procedure Act (ZKP).

4. the person has been convicted more than once for the same offense, or if several individuals have been convicted for the same offense that could have been committed by only one of them or by some of them,

5. in the case of a conviction for a continued criminal offense or for another criminal offense that, under the law, encompasses multiple similar acts, new facts are presented or new evidence is submitted showing that the convicted person did not commit one of the acts covered by the conviction, and the existence of such facts could significantly affect the sentencing.

In the context of reopening proceedings and the application of DNA analysis or subsequent expert examination (after the final conviction), the focus will be on the reopening of criminal proceedings as referred to in Article 501, paragraph 3 of the Criminal Procedure Act (ZKP). This provision concerns the presentation of new facts or the submission of new evidence which, either on their own or in connection with previously presented evidence, are suitable to lead to the acquittal of the convicted person or their conviction under a more lenient criminal law.

Although the legal provision refers to the presentation of "new facts" or the submission of "new evidence" in the plural form, it is sufficient for only one new fact (accompanied by evidence intended to prove it) or only one new piece of evidence (with an explanation of the fact it aims to prove) to be submitted—provided that the court can be convinced that the legal grounds for reopening the criminal proceedings have been met.[23] It is important to highlight that requests for the reopening of criminal proceedings are most commonly submitted on these very grounds.[24]

When discussing new facts or evidence in the context of the reopening of criminal proceedings, it is important to emphasize the following types of facts/evidence:

- *noviter relata* – These are facts (or evidence) that the court becomes aware of for the first time at the moment the request for the reopening of criminal proceedings is submitted. However, they do not necessarily have to be “new” in the sense that the party only discovered them after the conclusion of the criminal proceedings.[25]

[23] Pavišić, B.: *op. cit,* str. 508.
[24] Garačić, A.: Prava i neprava obnova kaznenog postupka, Hrvatska pravna revija, Zagreb, 2005. godina, str. 112. Dostupno i na: https://www.vsrh.hr/CustomPages/Static/HRV/Files/AGaracic_Prava-i-neprava-obnova-postupka_2005.pdf, pristupljeno: 25. srpnja 2024. godine.
[25] Zlatarić, B.; Damaška, M.: Rječnik krivičnog prava i postupka, Informator, Zagreb, 1966. godina, str. 191.

- *noviter reperta* – These are facts (or evidence) that are new not only in the sense that they are being submitted to the court for the first time, but also in the sense that, at the time the earlier criminal proceedings were concluded, they were not known even to the party invoking them in the request for the reopening of the proceedings.[26]
- Therefore, for a request to reopen criminal proceedings to be accepted, the facts or evidence in question must, objectively speaking, be *noviter relata* (newly presented) or *noviter reperta* (newly discovered). In other words, what matters is not when the court became aware of the facts or evidence, but whether they are truly new.
- Otherwise, if the facts or evidence had already been presented during the earlier criminal proceedings (prior to the final judgment), but the court failed to consider them, or if they were, for instance, only raised in the appeal and not addressed by the appellate court, then they do not qualify as new facts or new evidence.[27]

Just as in criminal proceedings the burden of proving guilt lies with the prosecution, in the case of reopening criminal proceedings, the burden falls on the applicant to demonstrate that their request is well-founded. However, the evidence presented does not need to meet the high threshold of establishing a strong probability, as is required for a conviction during the trial. Instead, it is sufficient to make it plausible that something previously established by a final judgment may have occurred differently.[28]

If the request for the reopening of criminal proceedings does not present new facts or submit new evidence which, either on their own or in connection with previously presented evidence, are suitable to lead to the acquittal of the convicted person or their conviction under a more lenient criminal law (*noviter relata* or *noviter reperta*), but instead relies on facts and evidence that were already presented during the earlier criminal proceedings, the court will dismiss the applicant's request.[29] The court will proceed in the same manner if the applicant, in their

[26] *Ibid,* str. 191.
[27] Garačić, A.: Zakon o kaznenom postupku – pravni lijekovi u sudskoj praksi, II. Izmijenjeno i dopunjeno izdanje, Libertin naklada, Zagreb, 2022. godina, str. 78.
[28] *Ibid,* str. 78.
[29] According to the Supreme Court of the Republic of Croatia (VSRH) decision No. I Kž 600/2020-4 of 9 November 2020:
"…In his request for the reopening of criminal proceedings submitted on 3 August 2020, the convicted person proposed, as new evidence within the meaning of Article 501(1)(3) of the Criminal Procedure Act (ZKP/08), the conducting of a partial reconstruction of the event by a ballistics expert. This evidence had not been presented during

request, cites facts and evidence that had already been presented in a previous request for the reopening of criminal proceedings which was dismissed by a final court decision.[30]

---

the first-instance proceedings, and according to the findings and opinion of expert V. N. from C. 'I. V.', such reconstruction was necessary to determine the precise positions of the participants in the incriminated event, the total number, direction, and sequence of shots fired, as well as which of the damages and traces documented in the crime scene report and fixed through photographic evidence occurred as a result of a direct projectile hit or a ricochet. All of this was aimed at establishing that the injury to F. K. did not occur due to the willful or even negligent conduct of the convicted person, and particularly not as a result of shots fired at M. M. The convicted person maintained this position also in his appeal.

However, contrary to these appellate claims, the first-instance court correctly rejected the request for the reopening of proceedings, as the proposed evidence did not qualify, either on its own or in connection with previously presented evidence, as likely to result in the acquittal of the convicted person or in a conviction under a more lenient law.

Namely, at the hearing held on 10 September 2015, the defense proposed a partial reconstruction based on the same reasoning as in the request for reopening. That evidentiary proposal was rejected, and the reasons for rejection were stated in the first-instance judgment. An appeal was filed against the rejection of this evidentiary proposal, and the appellate court also provided reasons for its dismissal in its decision. Therefore, it is clear that this is not new evidence but rather a re-proposal of evidence that had already been submitted and was lawfully rejected by final decision, without any new circumstances being identified that would warrant a different outcome—namely, the acquittal or a more lenient sentence for the convicted person.

See also the Supreme Court decision No. I Kž-238/2003 of 29 April 2003:

"…Pursuant to Article 409(1) of the Criminal Procedure Act, the court may reject a request for the reopening of proceedings by decision only if, based on the request and the file of the previous proceedings, it establishes that the request was submitted by an unauthorized person, or that the legal requirements for reopening are not met, or that the facts and evidence on which the request is based had already been presented in a previous request for reopening, or that these facts are not suitable for allowing the reopening of proceedings.

If the court does not dismiss the request based on its contents alone, it shall forward the case file to the opposing party, who has the right to respond within 8 days, and is obliged, either through the investigating judge or on its own, to investigate the facts cited by the applicant and to collect evidence.

In this particular case, the court forwarded the entire case file to the County State Attorney's Office for opinion, which was submitted on 12 January 1996 with a recommendation that the request for reopening be dismissed as unfounded. Therefore, the court was not authorized to reject the request for reopening by decision after that point. Instead, it was obliged to act in accordance with Article 409(2) of the Criminal Procedure Act and conduct an investigation into the claims made by the applicant.

For this very reason, the appeal of P.Š. was upheld, the contested decision was overturned, and the case was returned to the first-instance court for reconsideration. In doing so, the court is required to proceed in accordance with Article 409(2) ZKP and subsequently assess whether the request for the reopening of proceedings is well-founded. If it is not, the request shall be dismissed as unfounded…"

See also the decision of the County Court in Zagreb No. Kž-826/2020 of 30 November 2020

[30] Article 506, paragraph 1 of the Criminal Procedure Act (ZKP). See also the Supreme Court decision No. I Kž-164/01-5 of 8 May 2001:

"…Since the convicted person based the request for the reopening of criminal proceedings dated 12 January 2001 on the same circumstances that had already been presented in the previous request for reopening dated 14 December 1999, which was dismissed by a final decision (see pp. 498 and 509 of the case file), the first-instance court acted correctly in dismissing the repeated request for reopening pursuant to Article 409(1) of the Criminal Procedure Act.

Namely, as in the request of 14 December 1999, the convicted person again proposes that a co-perpetrator, I-accused M.P., be heard, asserting that M.P. would confirm that he, II-accused N.G., did not participate in the commission of the criminal offense.

Furthermore, the proposal of II-accused N.G. to hear as witnesses representatives of the company in Germany where he himself had worked is considered inadmissible evidence, since from the circumstances of the case—and from N.G.'s own claims—it is clear that the proposed witness has no knowledge of the incriminating event and would only testify to the personality of the convicted person.

3. Reopening of Criminal Proceedings in the Context of Subsequent DNA Analysis

One of the key questions in this paper, relating to the reopening of criminal proceedings in the context of subsequent DNA analysis, concerns whether the regulations governing this matter are adequately defined. The relevant legal provisions include the following:

- Law on Criminal Procedure,
- The Guidelines on the Manner of Collecting Biological Material Samples and Conducting Molecular-Genetic Analysis (hereinafter referred to as *Ordinance I*),[31]
- The Ordinance on the Organization and Manner of Managing Automated Data Collections for the Identification of Suspects (hereinafter referred to as *Ordinance II*),[32]
- The Ordinance on the Handling of Found and Seized Items (hereinafter referred to as *Ordinance III*),[33]
- Sudski poslovnik[34] i
- Poslovnik državnog odvjetništva.[35]

Article 202, paragraph 2, point 32 of the Criminal Procedure Act (ZKP) (Definitions of Legal Terms) provides that molecular-genetic analysis, for the purposes of this Act, is a procedure used for the analysis of DNA, which constitutes the fundamental genetic material of humans and other living organisms.

Chapter XVIII of the Criminal Procedure Act (ZKP) regulates Evidentiary Actions, within which the section on Expert Examination is governed (Articles 308–328). The ZKP stipulates that expert examination is ordered by a written warrant issued by the authority conducting the

In light of all the above, and as the convicted person simply reiterates the same claims made in the earlier request for reopening, the appellate court decided, pursuant to Article 398(3) of the Criminal Procedure Act, as stated in the operative part of this decision."

[31] Pravilnik o načinu uzimanja uzoraka biološkog materijala i provođenja molekularno-genetske analize (Narodne novine br. 120/2014).

[32] Pravilnik o ustrojstvu i načinu vođenja zbirki s automatskom obradom podataka o utvrđivanju istovjetnosti osumnjičenika (Narodne novine br. 147/2020).

[33] Pravilnik o postupanju s pronađenim i oduzetim predmetima (Narodne novine br. 58/2012).

[34] Sudski poslovnik (Narodne novine br. 37/14, 49/14, 08/15, 35/15, 123/15, 45/16, 29/17, 33/17, 34/17, 57/17, 101/18, 119/18, 81/19, 128/19, 39/20, 47/20, 138/20, 147/20, 70/21, 99/21, 145/21, 23/22, 12/23,122/23 i 55/24).

[35] Poslovnik državnog odvjetništva (Narodne novine br. 128/2019).

proceedings—that is, either the State Attorney's Office or the court.[36] Regarding the collection of biological material samples (hereinafter: sample), the Criminal Procedure Act (ZKP) prescribes several different scenarios depending on whether the sample is collected from the crime scene or another location containing traces of the criminal offense, from the defendant, the victim, or another person. Accordingly:

- If the sample is collected from the crime scene or another location containing traces of the criminal offense, the sample is taken by the authority conducting the search, temporary seizure of objects, crime scene investigation, or other evidentiary action prior to the commencement of proceedings (i.e., the police, the State Attorney's Office, or the court).
- If the sample is collected from the defendant, the sampling is ordered by the State Attorney's Office.

  – If the sample is collected from the victim or another person, the sample is taken with their consent by the authority conducting the inquiry or proceedings (police, State Attorney's Office, or court). If there is no consent, the sample may be collected upon the court's order at the request of the State Attorney's Office.

Therefore, while the police, State Attorney's Office, or the court may order the collection of samples (depending on the specific case), molecular-genetic analysis of those samples may only be ordered by the State Attorney's Office or the court, and such analysis may only be entrusted to a court-appointed expert.

The reopening of criminal proceedings is regulated by Articles 497–509 of the ZKP. This part of the paper will focus on the so-called "true" reopening of proceedings (as discussed earlier), which refers to cases concluded with a final judgment where new facts are presented or new evidence is submitted which, either on their own or in conjunction with previous evidence, are suitable to result in the acquittal of the convicted person or their conviction under a more lenient law.

Ordinance I, among other provisions, stipulates that samples remaining after molecular-genetic analysis—collected from the defendant, victim, or another person (such as blood obtained by finger prick onto a filter card, epithelial cells from the oral cavity collected using a cotton swab

[36] Čl. 309. st. 1. ZKP.

or other appropriate tools, available samples from a deceased person, or tissue samples from a paraffin block)—must be immediately destroyed in accordance with professional standards. However, if the biological material samples are of unknown origin (disputed traces), they must be returned to the authority that submitted them.[37]

Ordinance III, in Article 5, paragraphs 1 and 2, provides that the competent State Attorney or the President of the competent court shall designate the building and room in which all *corpora delicti* are to be stored. Exceptions include items which, under the Rules of Procedure of the State Attorney's Office or the Court Rules of Procedure, are to be stored in the court's treasury or which are unsuitable for storage in the State Attorney's Office or the court.

Thus, according to Article 295, paragraph 2 of the Court Rules of Procedure, if a seized item—due to its volume or specific nature—is not suitable for storage in the court or in a safe, it shall be stored with another legal or natural person that has adequate storage facilities. Similarly, Article 145, paragraph 1 of the Rules of Procedure of the State Attorney's Office stipulates that seized items which cannot be stored in the State Attorney's Office, such as explosives, weapons, ammunition, artworks, etc., are to be entrusted to competent state authorities or to institutions or companies that specialize in the storage and handling of such items.

Generally, items temporarily seized and held by the State Attorney's Office are submitted to the court together with the indictment and a delivery receipt, which is then archived in the prosecutorial file. The employee responsible for dispatching the file is obliged to attach the temporarily seized items (*corpora delicti*) as per the decision in the file. If, for any reason, the items are not held by the State Attorney's Office, the court is to be notified in writing as to their location.

Considering all of the above, and in the context of the reopening of proceedings and subsequent DNA analysis, it is necessary to further examine two critical issues: a) the proper storage of seized items (in the State Attorney's Office or the court) that contain biological traces; b) the possibility of conducting subsequent DNA analysis on seized items following a final conviction, initiated at the request of the convicted person.

As evident from the preceding discussion, one of the main challenges in conducting subsequent DNA analysis lies in the adequate preservation of seized items that may contain biological traces. While the Criminal Procedure Act clearly regulates the retention period for data

[37] Čl. 2. i 6. Pravilnika I.

obtained through molecular-genetic analysis, the same level of clarity is not always ensured for the physical evidence itself.[38], Although Ordinance II regulates the contents of the DNA data collection, including what information is stored, where the collection is maintained, and the procedures for entering, updating, and deleting data obtained through molecular-genetic analysis, none of the regulations provide a sufficiently clear and precise framework for the storage of biological traces, nor do they determine the duration for which such traces must be preserved.

For example, Article 6 of Ordinance I states that only biological material samples of unknown origin (so-called disputed traces), which remain after molecular-genetic analysis, are to be returned to the authority that submitted them (i.e., the State Attorney's Office or the court). However, as previously emphasized, neither Ordinance III, the Court Rules of Procedure, nor the Rules of Procedure of the State Attorney's Office specify exactly where items containing biological traces should be stored or for how long they should be preserved.

Therefore, in addition to the critical importance of locating and securing traces of the criminal offense, the proper packaging and storage of such traces should not be overlooked, particularly when it comes to preserving DNA evidence and ensuring its viability for future analysis.[39] It is always necessary to keep in mind that these are seized items (*corpora delicti*), such as clothing, weapons, tools, and similar objects bearing biological traces, which—in the event of a reopening of criminal proceedings—may be of exceptional importance for the further course of the proceedings.[40] In my opinion, the provisions of Ordinance III, the Court Rules of Procedure, and the Rules of Procedure of the State Attorney's Office relating to the storage of seized items containing biological traces are too general and insufficiently detailed. These provisions should be amended or supplemented, particularly in the part concerning the specific location where such items must be stored (e.g., in a dedicated room with appropriate temperature, lighting, and similar conditions), the materials in which they should be kept (e.g., paper bags, etc.), and other relevant requirements.[41] Otherwise, as long as such matters are not precisely regulated, there remains a risk

[38] Čl. 327.a ZKP. Vidjeti o tome presudu Europskog suda za ljudska prava S. i Marper protiv Ujedinjenog Kraljevstva br. 30562/04 i 30566/04 od 04. prosinca 2008. godine, presudu Europskog suda za ljudska prava Trajkovski i Chipovski protiv Sjeverne Makedonije br. 53205/13 i 63320/13 od 13. lipnja 2020. godine te presudu Suda Europske unije br. C-118/22 od 30. siječnja 2024. godine.

[39] Lee C., Henry; Palmbach M., Timothy; Primorac, D.; Anđelinović, Š:. Prikupljanje i očuvanje materijalnih tragova, u: Forenzična analiza DNA – Interdisciplinarni pristup, Primorac D. i Schanfield, M. (eds.), Školska knjiga, Zagreb, 2016. godina, str. 256.

[40] Vodinelić, V.; Aleksić, Ž.: Kriminalistika, Informator, Zagreb, 1990. godina, str. 539-540.

[41] Šatrak, M.; Hoblaj, S; Stemberg, V.; Cuculić, V.: Biološki tragovi na mjestu događaja, Medicina fluminesis, Hrvatski liječnički zbor, br. 2, Rijeka, 2018. godina, str. 137.

that seized items bearing biological traces may lose their essential properties and become unusable for further expert analysis.[42]

In the following section of this paper, an example from case law will be presented that highlights certain oversights by the police and judicial authorities during the earlier proceedings—particularly regarding the handling of a seized item and whether it was submitted for expert analysis to determine the presence of biological traces.[43] The defendant was charged with stabbing the victim in the left thigh with a knife—an injury that was classified by a forensic medical expert as grievous bodily harm. A criminal proceeding was initiated against the defendant for causing grievous bodily injury. The defendant denied stabbing the victim, claiming that the injury occurred during a scuffle and fall onto a surface scattered with sharp objects—such as kindling, glass shards, broken bottles, and similar debris. The victim, however, insisted that the stab wound had been inflicted with a knife by the defendant.

During the pre-trial phase (prior to the filing of the indictment), a knife was seized from the defendant, but no crime scene investigation was conducted, nor was the knife submitted for forensic analysis to determine whether biological traces were present. In the meantime, the knife was kept in a file at the misdemeanour court, since a parallel misdemeanour proceeding had been initiated against the defendant for disturbing the public order and peace.

From the moment the knife was seized until the first hearing in the criminal trial, five years had passed. It was only during the hearing stage that the court requested the knife be submitted and ordered a forensic medical examination to determine whether micro-traces of blood were present on the knife, and if so, to conduct DNA profiling and compare the results with the victim's DNA.

The forensic examination revealed that, after analyzing the genetic loci of the swabs taken from the knife, no results were obtained indicating the presence of blood micro-traces. The court expert clarified during the hearing that a knife penetrating tissue must leave blood traces on its surface, but it is possible for such traces not to be preserved if the knife was not promptly analyzed, if it had been mechanically cleaned prior to seizure, or if it was not stored under appropriate

[42] Primorac, D.: Primjena analize DNA u hrvatskome kaznenopravnom sustavu, u: Analiza DNA u sudskoj medicini i pravosuđu, *op. cit.,* str. 78-79.
[43] *Ibid.,* str. 126-127.

conditions to protect blood micro-traces from degradation, bacteria, or other chemical and biological agents.

Beyond the evident problem of ensuring proper storage of items bearing biological traces, another critical issue that must be considered is the availability of such items to the convicted person for subsequent DNA analysis. As previously mentioned, seized items, once the judgment becomes final, are stored in designated court premises (or, in certain cases, entrusted to another legal or natural person possessing suitable storage facilities).

Furthermore, according to Article 6 of Ordinance I, the *Ivan Vučetić Centre for Forensic Examinations, Research and Expert Analysis* is required to return only biological material samples of unknown origin (i.e., disputed traces) remaining after molecular-genetic analysis to the authority that submitted them (the State Attorney's Office or the court). All other samples—those collected from the defendant, victim, other individuals, samples from a deceased person, or tissue from paraffin blocks—are to be immediately destroyed in accordance with professional standards after the analysis.

On the other hand, if a convicted person believes they have been wrongfully convicted, the only way to attempt to prove that is by submitting a request for the reopening of criminal proceedings, which must clearly specify the legal grounds on which the request is based and the evidence supporting the facts upon which the request relies. In other words, the submitted request must clearly demonstrate the causal link between the facts and the evidence cited. If the request lacks this information, the court will instruct the applicant to amend it within a set time frame, and failure to comply will result in the request being dismissed.[44]

When it comes to a request for the reopening of criminal proceedings in which the convicted person claims to have been wrongfully convicted, and in which the preparation of a DNA analysis report and expert opinion is requested based on the facts and evidence presented, a legitimate question arises: how seriously will the court consider such a request if it is not accompanied by a new DNA analysis that supports the convicted person's claims? In other words, how can one convince the court that it is necessary to conduct a DNA analysis report and opinion in order to verify the credibility of the allegations made in the request?

On the other hand, another question that arises is: how can the convicted person, before submitting the request, even obtain a DNA analysis report from a court expert for their own

[44] Art. 505. para. 2 inrl. čl. 506. st. 1. ZKP:

purposes, especially given that they do not have access to the seized item that may contain biological traces and is stored at the court?

Given that the threshold for accepting new evidence in requests for reopening proceedings is relatively high in Croatian judicial practice, it is worth considering whether the only viable path available to the convicted person—prior to deciding whether to formally submit a request for reopening—is to first approach the competent State Attorney's Office with a submission outlining the new facts or evidence (provided that the convicted person possesses them), or at least indicating leads and circumstances that could, with greater or lesser probability, justify the request. Unlike the court, which adjudicates a formal request for reopening, the criteria guiding the actions of the State Attorney's Office are generally more flexible. For example, the State Attorney can initiate a preliminary inquiry (*izvidi*) to verify the convicted person's claims and, if justified, propose that the court order a new DNA analysis. Following this, the State Attorney's Office may then assess whether the submission was founded.

If the preliminary inquiry confirms the claims raised by the convicted person, it becomes reasonable to submit a formal request for the reopening of criminal proceedings—either by the convicted person or by the State Attorney acting on their behalf.[45] After all, the role of the State Attorney is to gather information concerning both the guilt and the innocence of the defendant with equal diligence.[46]

As previously emphasized, the burden of proof in proceedings for reopening lies with the applicant, just as the burden of proof before the final judgment lies with the prosecution. Therefore, it is not sufficient for the convicted person to merely mention a piece of evidence in the request; rather, they must make it plausible through that evidence that something previously established by a final judgment occurred differently.[47] In the context of subsequent DNA analysis, all relevant decisions rest solely with the court, which rules on the request for the reopening of criminal proceedings—but only if the convicted person manages to convince the court that the facts and evidence presented in the request justify the preparation of a new expert report and opinion.

[45] A request for the reopening of criminal proceedings may be submitted by the parties and the defense counsel, and after the death of the convicted person, by the State Attorney, as well as the convicted person's spouse or common-law partner, direct-line relative, legal representative, adoptive parent, adopted child, sibling, or defense counsel—pursuant to Article 504, paragraph 1 in conjunction with Article 464, paragraph 2 of the Criminal Procedure Act (ZKP).
[46] Art. 9. para. 2. ZKP.
[47] Garačić, A.: Zakon o kaznenom postupku – pravni lijekovi u sudskoj praksi, *op. cit.,* str. 78.

Therefore, under the current legal framework in the Republic of Croatia, it is evident that the possibility for a convicted person to request a subsequent DNA analysis is significantly hindered, and with it, the opportunity to prove that they were wrongfully convicted. By contrast, the situation is far more straightforward when it comes to requests for the reopening of proceedings that do not involve a proposal for DNA analysis, but rather pertain to other types of cases in which expert reports and opinions are already available and submitted with the request. These may include reports by court experts in traffic and technical matters, finance, psychiatry, ballistics, and similar fields. All these experts can, at the request of the convicted person, prepare their expert opinions based on the documentation in the case file, interviews with the convicted person, and other available materials—which is not the case with DNA analysis. Such reports can then be attached directly to the request for the reopening of proceedings.[48] Of course, it must be emphasized here

[48] A key ground of appeal raised by the defendant was that the contested judgment "is based exclusively on evidence obtained during the previous proceedings," specifically arguing that a 3D forensic reconstruction, which could have determined the height of the perpetrator, was not conducted. The appeal referred to a comparative biometric expert analysis and 3D forensic reconstruction prepared by expert witness V. M., which served as the basis for the request to reopen the proceedings. According to the case file, the defendant was convicted by a final judgment for the offense of robbery committed on 27 June 2013 at the K. store in O. The defendant later filed a request for the reopening of the proceedings under Article 501(1)(3) of the Criminal Procedure Act (ZKP/08), based on the Record of Comparative Biometric Expert Analysis and 3D Forensic Reconstruction conducted, at the defense's request, by V. M., a permanent court expert in ballistics, mechanoscopy, chemical-physical examinations, and forensic 3D reconstruction. According to the expert's findings, the 3D reconstruction method established a 6–11 cm height difference between the defendant and the unidentified perpetrator (NN), thereby excluding the possibility that the defendant could be the perpetrator. Additionally, based on differences in the structure of the left forearm and eyebrows, the expert further concluded that the defendant could not be the same person as the NN perpetrator.
The result of this 3D forensic reconstruction was recognized as new evidence, with the finding that "the expert's conclusions on the height difference constitute new facts capable of leading to the defendant's acquittal in the reopened proceedings, as they cast doubt on the identification of the defendant as the perpetrator of the offense" (see final decision of the County Court in Osijek, No. Kv I-37/2018, dated 27 December 2018). In the reopened proceedings, the first-instance court rightly ordered the Centre for Forensic Examination (CKV) to conduct a biometric expert analysis and 3D forensic reconstruction to compare the height of the perpetrator with that of the defendant, I. P. However, once CKV replied that it does not conduct 3D forensic reconstructions, the first-instance court disregarded the importance of this type of analysis, relying instead on the testimonies of witnesses A. Š. and T. G., who identified the defendant as the perpetrator in the courtroom and during a lineup conducted five days after the offense. These forms of evidence (witness testimony and identification records) had already been used in the previous trial and were the basis for the original conviction. In other words, despite the fact that the final conviction was called into question by the results of the 3D forensic method, the first-instance court initially ordered the same analysis, but later abandoned it solely because CKV does not provide that service. The clarification offered by CKV expert M. M. at the hearing is also relevant, noting that the facial biometric analysis could not confirm the identity of the defendant as the perpetrator with certainty. The expert explained that similarities can exist between two individuals due to general facial features, and therefore assigned a lower level of probability to the identification—stating that it cannot be ruled out that the defendant is the person seen in the video recordings. Moreover, the expert clarified that CKV only conducts facial biometric analysis, not analyses of other body parts, and that 3D reconstructions of the crime scene can be used to calculate the suspect's height and conduct other biometric assessments, such as body stature and individual physical characteristics. Given these circumstances, the defendant was right in arguing that the factual situation remained incomplete and thus wrongly established due to the failure to conduct the 3D forensic reconstruction. Importantly, the fact that CKV does not perform this type of analysis is not a valid reason for the court to forgo it entirely. The court

that such expert reports and opinions do not have the status of formal evidence, but rather serve as *supporting facts* that may indicate the existence of potential new evidence. These expert witnesses, having been engaged privately by the convicted person (and not by the court or the State Attorney's Office, as prescribed by Article 309(1) of the Criminal Procedure Act), do not constitute formal new evidence, but rather new facts that the court will take into account when deciding on the request.

Moreover, the task of the court in assessing a convicted person's request for the reopening of criminal proceedings is not to reassess the facts already determined in the final criminal judgment, but rather to determine whether the convicted person has presented new facts or submitted new evidence which, either independently or in connection with previously submitted evidence, are suitable to result in the person's acquittal or conviction under a more lenient criminal law. Therefore, for the reopening of criminal proceedings to be allowed, the new facts and evidence must meet a certain threshold of quality—that is, they must be of such substance and relevance that they could affect the factual findings established by the final judgment.[49]

Pravilnik II, koji uređuje ustrojstvo i način vođenja zbirki s automatskom obradom podataka o utvrđivanju istovjetnosti osumnjičenika, od iznimnog je značaja u Republici Hrvatskoj jer je sukladno njemu, uz Zbirku papilarnih linija i signaletičkih fotografija, ustrojena i Zbirka podataka prikupljenih molekularno-genetskom analizom (u daljnjem tekstu: Zbirka MGA).[50] The MGA Database was established in 2000, and since then, the Centre for Forensic Examinations, Research and Expert Analysis "Ivan Vučetić" has successfully cooperated with countries across Europe and the world in the international exchange of DNA profiles.[51] It is maintained within the digital system CODIS (Combined DNA Index System), which forms part of the Information

should have entrusted the task to another court expert with the necessary expertise. If there is a limited pool of available experts, there is no legal barrier to allowing the court to assign the same expert—initially engaged by the defense for the reopening request—to carry out the expert analysis. In the renewed proceedings, the first-instance court must re-examine the previously presented evidence and supplement the evidentiary procedure as directed in this ruling. In addition to conducting the 3D forensic reconstruction, the court must also consider, in light of the limited scope of facial biometric analysis performed by CKV, whether supplementary biometric analysis of other body parts (e.g., the forearm) should be conducted. All of this must be done in accordance with Articles 317 and 318 of the Criminal Procedure Act (ZKP/08). After completing the evidentiary procedure and reassessing the evidence, the first-instance court must render a new, lawfully based judgment, which must be properly and fully reasoned, particularly in relation to establishing the identity of the perpetrator. See Supreme Court of the Republic of Croatia (VSRH), decision No. I Kž 97/2021-4 of 12 May 2022.

[49] Vasiljević, T.; Grubač, M.: *op. cit.,* str. 718.

[50] ČL: 2. Pravilnika II.

[51] See more: https://forenzika.gov.hr/UserDocsImages/104, pristupljeno: 30. srpnja 2024. godine.

System of the Ministry of the Interior of the Republic of Croatia. The authority to enter, update, and delete data contained in the MGA Database lies with the Centre for Forensic Examinations, Research and Expert Analysis "Ivan Vučetić", which operates as an independent organizational unit of the Ministry of the Interior.[52] Namely, with the acceptance of DNA analysis as a means of evidence and the resulting DNA profiles as admissible proof, it became necessary to consolidate all such results in a single location—in one database—in order to enhance the fight against crime, particularly transnational crime.[53] As well as more efficient[54] To that end, Article 10, paragraph 1 of Ordinance II stipulates that the data stored in the MGA Database may be provided to foreign police authorities and certain international organizations, upon their request, provided that the country to which the personal data is being transferred has an appropriate and proper system for the protection of personal data, or ensures an adequate level of data protection.

To that end, Article 10, paragraph 1 of Ordinance II stipulates that the data stored in the MGA Database may be provided to foreign police authorities and certain international organizations, upon their request, provided that the country to which the personal data is being transferred has an appropriate and proper system for the protection of personal data, or ensures an adequate level of data protection.[55], as well as on the basis of international agreements.[56] An

[52] The MGA Database contains (Article 4 of Ordinance II): data obtained through molecular-genetic analysis from suspects, along with other personal data (such as name, surname, date of birth, personal identification number), data obtained through molecular-genetic analysis of samples collected from the crime scene or another location where traces of the criminal offense are found and which are not linked to a specific individual, the type of sample, a unique reference number under which the data is recorded in the database, the case number under which the molecular-genetic analysis was conducted, and information about the authority that ordered the analysis.

[53] For more on the importance of DNA analysis and the CODIS digital system in combating organized crime, see: Jovanović, J: *DNK analiza i Codis u istraživanju organizovanog kriminala u Crnoj Gori*, Časopis za kriminalistiku, kriminologiju i sigurnosne studije, No. 2, Sarajevo, 2021, pp. 1–19.

[54] See also: Aspen, C.: *DNA baze podataka*, in *Forenzična analiza DNA – Interdisciplinarni pristup*, Primorac D. and Schanfield, M. (eds.), op. cit., pp. 557–569; and Ledić, A.; Makar, A.; Obleščuk, I.: *DNA Databases*, in: *Forensic DNA Applications – An Interdisciplinary Perspective*, Second edition, Primorac D. and Schanfield S. M. (eds.), CRC Press, Taylor & Francis Group, Boca Raton, 2023, pp. 433–449.

[55] When it comes to the delivery and exchange of DNA analysis results between European Union member states, several legal instruments play a crucial role. These include the Council Framework Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime; Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, repealing Council Framework Decision 2008/977/JHA; the Council Implementing Decision (EU) 2018/1035 of 16 July 2018 on the launch of automated DNA data exchange in Croatia; the Act on the Implementation of the General Data Protection Regulation (*Narodne novine* No. 42/2018); and the Act on the Protection of Natural Persons with regard to the Processing and Exchange of Personal Data for the Purposes of Prevention, Investigation, Detection or Prosecution of Criminal Offences or Execution of Criminal Sanctions (*Narodne novine* No. 68/18).

[56] For effective police and judicial cooperation between states in criminal matters, particularly in the fight against cross-border crime and terrorism, the following instruments play a crucial role:

important contribution to this issue will undoubtedly be provided by the recently completed research project – *"The Innocence Project in Croatia"*, conducted between 2020 and 2024, which involved numerous experts from Croatia and abroad (in the fields of law, medicine, molecular biology, chemistry, and others). The results of the project contain valuable recommendations and conclusions.[57]

4. Conclusion

The application of DNA analysis in today's world is of great significance—not only in identifying perpetrators of criminal offenses, but equally in correcting so-called wrongful convictions in cases where individuals have been convicted of crimes they did not commit. In this context, it must always be borne in mind that the aim of any criminal proceeding is to ensure that no innocent person is convicted, while also ensuring that the perpetrator of a criminal offense receives an appropriate sanction. DNA analysis, as a form of evidence in criminal proceedings, can be of substantial assistance in achieving this goal. The strength of this scientific evidence" lies in its foundation in modern science and technology, which makes it both reliable and well-grounded. This paper focuses on the reopening of criminal proceedings in the context of subsequent DNA analysis, examining the legal framework regulating this area and offering proposals to improve the development of this critically important issue. Based on the analysis conducted, the conclusion is that despite the existence of certain legal provisions, the process of exonerating wrongfully convicted individuals in Croatia remains complex and faces numerous obstacles. The mere existence of a legal framework, if it is not sufficiently clear or well-defined,

– the Convention between the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, and the Republic of Austria on the stepping up of cross-border cooperation, particularly in combating terrorism, cross-border crime, and illegal migration, signed in Prüm, Germany, on 27 May 2005 (commonly known as the Prüm Convention). It is important to emphasize that this Convention specifically provides for the exchange of DNA profiles and fingerprint data between signatory states; – the Council Framework Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime; – the Council Framework Decision 2008/616/JHA, which implements Decision 2008/615/JHA on the intensification of cross-border cooperation, particularly for the purpose of fighting terrorism and cross-border crime; – the Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the EU member states; – and the Act on the Simplification of Data Exchange between the Authorities of EU Member States Responsible for Law Enforcement (*Narodne novine* No. 56/2015).

[57] The book of abstracts from the completed research project – *"The Innocence Project in Croatia"* – was published in the Book of Abstracts, available at: https://croinop.pravo.unizg.hr/wp-content/uploads/2024/02/Projekt-neduznosti-u-Hrvatskoj-3.pdf, accessed: 30 July 2024.

does not in itself resolve the problem or guarantee that an individual has an accessible and effective route to exercise their rights. Through the analysis of the current legal framework, the author identifies specific legal shortcomings and proposes amendments to the relevant provisions—particularly those related to the storage of seized items containing biological traces kept in courts and state attorney's offices. The current legal arrangement poses a risk that biological traces may degrade or become unusable for new forensic analyses. As evidence of this risk, the author presents an example from case law illustrating such a scenario.

The paper also draws attention to another important issue: the availability of seized items with biological traces to the convicted person, especially in the context of preparing and submitting a request to reopen the criminal proceedings. Considering that the burden of proof lies with the applicant/convicted person, and that the request must already include evidence supporting the claims, a legitimate question arises: how can a convicted person, without having obtained a prior expert report and opinion on DNA analysis, adequately persuade the court of the merits of their request? It is clear that such a report and opinion, prepared for the convicted person, does not constitute formal evidence but rather a supporting fact, which the court must examine. Nonetheless, it provides at least a foundation that can help the convicted person decide whether to submit a request for reopening, and can also assist the court in assessing the submitted request. The author believes that by amending and supplementing the relevant legal provisions, and in combination with the existing legal mechanisms, a more accessible and effective path can be created for reviewing final judgments in criminal proceedings and correcting potential errors that may have led to a wrongful conviction. This effort will undoubtedly be strengthened by the results of the recently completed research project *"The Innocence Project in Croatia"*, which contains valuable recommendations and conclusions, and involved the participation of numerous experts from Croatia and abroad (in fields such as law, medicine, molecular biology, chemistry, and others).

Literature

Books, Articles, and other publications

Aspen, C.: DNA baze podataka, u Forenzična analiza DNA – Interdisciplinarni pristup, Primorac D. i Schanfield, M. (eds.), Školska knjiga, Zagreb, 2016. godina.

Cole, S. A.; Thompson, W. C:. Forensic Science and Wrongful Convictions, u: Wrongful Convictions & Miscarriages of Justice, Huff, R. C. i Kilias, M. (eds.), Routledge, Taylor & Francis Group, New York, 2013. godina.

Becker W., S.; Derenčinović, D.; Primorac, D.: DNA as Evidence in the Courtroom, u: Forensic DNA Applications – An Interdisciplinary Perspective, Second edition, Primorac Dragan i Schanfield S. M. (eds.), CRC Press, Taylor & Francis Group, Boca Raton, 2023. godina.

Derenčinović, D.; Roksandić Vidlička, S.; Dragičević Prtenjača, M.: "Projekt nedužnosti" i naknadna DNK vještačenja u Republici Hrvatskoj – moguća stvarnost ili nedostižna želja, Zbornik radova Pravnog fakulteta u Zagrebu, br. 3-4, 2017. godina.

Drenški Lasan, V.: Obnova kaznenog postupka *de lege lata* i analiza odluka Ustavnog suda RH donesenih u povodu ustavnih tužbi nakon obnove kaznenih postupaka na osnovi konačne presude Europskog suda za ljudska prava, Hrvatski ljetopis za kazneno pravo i praksu, br. 2, Zagreb, 2018. godina.

Fazlić, A.; Marjanović, D: Primjena DNK analize u bosanskohercegovačkom pravosudnom sistemu: prednosti i nedostaci u odnosu na postojeću praksu u Europi, Časopis za kriminalistiku, kriminologiju i sigurnosne studije, br. 3-4, Sarajevo, 2012. godina.

Garačić, A.: Prava i neprava obnova kaznenog postupka, Hrvatska pravna revija, Zagreb, 2005. godina, str. 112. Dostupno i na: https://www.vsrh.hr/CustomPages/Static/HRV/Files/AGaracic_Prava-i-neprava-obnova-postupka_2005.pdf, pristupljeno: 25. srpnja 2024. godine.

Garačić, A.: Zakon o kaznenom postupku – pravni lijekovi u sudskoj praksi, II. Izmijenjeno i dopunjeno izdanje, Libertin naklada, Zagreb, 2022. godina.

Giannelli, P. C.: Wrongful Convictions and Forensic Science: The Need to Regulate Crim Labs, , UNC School of Law, North Carolina Law Review, 2007. godina.

Jovanović, J.: DNK analiza i Codis u istraživanju organizovanog kriminala u Crnoj Gori, Časopis za kriminalistiku, kriminologiju i sigurnosne studije, br. 2, Sarajevo, 2021. godina.

Knjiga sažetaka „Projekt nedužnosti u Hrvatskoj“ – dostupna na: https://croinop.pravo.unizg.hr/wp-content/uploads/2024/02/Projekt-neduznosti-u-Hrvatskoj-3.pdf, pristupljeno: 30. srpnja 2024. godine.

Lee C., Henry; Palmbach M., Timothy; Primorac, D.; Anđelinović, Š.: Prikupljanje i očuvanje materijalnih tragova, u: Forenzična analiza DNA – Interdisciplinarni pristup, Primorac D. i Schanfield, M. (eds.), Školska knjiga, Zagreb, 2016. godina.

Ledić, A.; Makar, A; Obleščuk, I.: DNA Databases, u: Forensic DNA Applications – An Interdisciplinary Perspective, Second edition, Primorac Dragan i Schanfield S. M. (eds.), CRC Press, Taylor & Francis Group, Boca Raton, 2023. godina.

Marijanović, D.; Primorac, D.: et al. Forenzička genetika – teorija i aplikacija, Lelo, 2103. godina.

Modly, D.; Šuperina, M.; Korajić, N.: Rječnik kriminalistike, Strukovna udruga kriminalista, Zagreb 2008. godina.

Mršić, G.; Modly, D.; Popović, M.: Forenzika – Istraživanje mjesta događaja II, Hrvatska sveučilišna naklada, Zagreb, 2015. godina.

Pavišić, B.: Komentar Zakona o kaznenom postupku, 4. izdanje, Žagar, Rijeka, 2003. godina.

Primorac, D.: Primjena analize DNA u hrvatskome kaznenopravnom sustavu, u: Analiza DNA u sudskoj medicini i pravosuđu, Primorac Dragan i Marijanović Damir (eds.), Medicinska naklada, 2008. godina.

Primorac, D.; Primorac, D.; Butorac, S. S.; Adamović, M.: Analiza DNA u sudskoj medicini i njezina primjena u hrvatskome kaznenopravnom sustavu, Hrvatski ljetopis za kazneno pravo i praksu, br. 1, Zagreb, 2009. godina.

Primorac, D.; Stipanović, I.; Pilić, M.: Kazneno procesno pravo, Press SUM i Alfa, Mostar, 2021. godina.

Šatrak, M.; Hoblaj, S.; Stemberg, V.; Cuculić, V.: Biološki tragovi na mjestu događaja, Medicina fluminesis, Hrvatski liječnički zbor, br. 2, Rijeka, 2018. godina.

Vasiljević, T.; Grubač, M.: Komentar Zakona o krivičnom postupku, Savremena administracija, Beograd, 1987. godina.

Vodinelić, V.; Aleksić, Ž.: Kriminalistika, Informator, Zagreb, 1990. godina.

Zlatarić, B.; Damaška, M.: Rječnik krivičnog prava i postupka, Informator, Zagreb, 1966. godina.

Laws, Convictions and Other Sources

Convention between the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the Republic of Austria on the stepping up of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal migration was signed by the contracting parties in Prüm (Germany) on 27 May 2005. (Prüm Convention). English version of the Treaty, Council Document 10900/05, 7 July 2005. (available on: http://www.statewatch.org/news/2005/aug/Prum-Convention.pdf).

Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime.

Council Decision 2008/616/JHA of 23 June 2008 on the implementation of Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime.

Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union.

Council Implementing Decision (EU) 2018/1035 of 16 July 2018 on the launch of automated data exchange with regard to DNA data in Croatia.

Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA.

Poslovnik državnog odvjetništva (Narodne novine br. 128/2019).

Pravilnik o načinu uzimanja uzoraka biološkog materijala i provođenja molekularno-genetske analize (Narodne novine br. 120/2014).

Pravilnik o ustrojstvu i načinu vođenja zbirki s automatskom obradom podataka o utvrđivanju istovjetnosti osumnjičenika (Narodne novine br. 147/2020).

Preporuka br. R (92) 1 Odbora ministara Vijeća Europe državama članicama o korištenju analize deoksiribonukleinske kiseline (DNK) u okviru kaznenopravnog sustava od 10. veljače 1992. godine donesenoj na 470 sjednici zamjenika ministara (Council of Europe: Recommendation No.

R (92) 1Of The Committee of Ministers to Member States on The Use of analysis of deoxyribonucleic Acid (DNA) within The framework of the Criminal Justice System (1992) (Adopted by the Committee of Ministers on 10 February 1992 at the 470th meeting of the Ministers' Deputies) - https://www.ejprarediseases.org/wp-content/uploads/2021/10/Rec923E-on-genetic-testing_1992.pdf, pristupljeno 27. srpnja 2024. godine.
Sudski poslovnik (Narodne novine br. 37/14, 49/14, 08/15, 35/15, 123/15, 45/16, 29/17, 33/17, 34/17, 57/17, 101/18, 119/18, 81/19, 128/19, 39/20, 47/20, 138/20, 147/20, 70/21, 99/21, 145/21, 23/22, 12/23,122/23 i 55/24).
Zakona o kaznenom postupku (Narodne novine br. 152/08, 76/09, 80/11, 91/12, 143/12, 56/13, 145/13, 152/14, 70/17, 126/19, 130/20, 80/22 i 36/24).
Zakon o pojednostavljenju razmjene podataka između tijela država članica Europske unije nadležnih za provedbu zakona (Narodne novine br. 56/2015).
Zakon o provedbi Opće uredbe o zaštiti podataka (Narodne novine br. 42/2018).
Zakon o zaštiti fizičkih osoba u vezi s obradom i razmjenom osobnih podataka u svrhe sprječavanja, istraživanja, otkrivanja ili progona kaznenih djela ili izvršavanja kaznenih sankcija (Narodne novine br. 68/18).

Sudska praksa

Presuda suda Europske unije br. C-118/22 od 30. siječnja 2024. godine.
Presuda Europskog suda za ljudska prava S. i Marper protiv Ujedinjenog Kraljevstva br. 30562/04 i 30566/04 od 04. prosinca 2008. godine.
Presuda Europskog suda za ljudska prava Trajkovski i Chipovski protiv Sjeverne Makedonije br. 53205/13 i 63320/13 od 13. lipnja 2020. godine.
Rješenje VSRH br. I Kž-164/01-5 od 08. svibnja 2001. godine.
Rješenje VSRH br. I Kž-238/2003 od 29. travnja 2003. godine.
Rješenje VSRH br. I Kž 222/2004-9 od 23. veljače 2005. godine.
Rješenje VSRH br. I Kž 212/2019-4 od 11. rujna 2019. godine.
Rješenje VSRH br. I Kž 600/2020-4 od 09. studenoga 2020. godine.
Rješenje Županijskog suda u Zagrebu br. Kž-826/2020 od 30. studenoga 2020. godine.
Rješenje VSRH br. I Kž 97/2021-4 od 12. svibnja 2022. godine.

Web Sources

70 godina Centra za forenzična ispitivanja, istraživanja i vještačenja „Ivan Vučetić“, Zagreb, 2023. godina, dostupno na: https://forenzika.gov.hr/UserDocsImages/dokumenti/2023/MONOGRAFIJA_Ivan_Vucetic.pdf, pristupljeno: 24. srpnja 2024. godine.

Проф. д-р Дамир Приморац[58]

ПОВТОРНО ОТВОРАЊЕ НА КРИВИЧНАТА ПОСТАПКА И ПОСЛЕДОВАТЕЛНА ДНК-АНАЛИЗА ЗА ПРЕИСПИТУВАЊЕ И КОРИГИРАЊЕ НА СУДСКИТЕ ГРЕШКИ И ОСЛОБОДУВАЊЕ НА НЕВИНО ОСУДЕНИ ЛИЦА

Резиме

Неоспорно е дека постои можност за грешка во сите облици на човечко дејствување, вклучително и во кривичната постапка, каде обвинетото лице може неправедно да биде осудено за дело што не го сторило. Секако, со оглед на брзиот развој на денешната технологија, ваквите грешки во кривичната постапка сè повеќе се намалуваат. Сепак, секогаш е неопходно да постојат ефикасни механизми за нивна ревизија и исправка. Еден од тие механизми е ДНК анализата, која има исклучително значење во кривичната постапка – како за идентификација на сторителот на кривичното дело, така и за корекција на „погрешни“ судски одлуки. Напредокот на технологијата за ДНК анализа доведе до случаи во кои понатамошната ДНК анализа утврдила поинаква фактичка состојба од онаа утврдена во првичната постапка, што резултирало со ослободување на неправедно осудени лица во нова постапка. На тој начин, ДНК технологијата ни овозможи дефинитивно да го идентификуваме вистинскиот сторител на кривичното дело преку анализа на траги собрани од местото на настанот и други локации каде се најдени криминалистички траги, и нивно споредување со биолошки примероци земени од одредени лица. Во Република Хрватска, можноста за исправка на судските грешки во вакви случаи е предвидена во Законот за кривичната постапка преку вонреден правен лек – обновување на кривичната постапка – со изнесување на нови факти или поднесување нови докази кои, сами или во врска со претходните докази, можат да доведат до ослободување на претходно осуденото лице.

[58] Насловен редовен професор на Универзитетскиот оддел за форензички науки, Универзитет во Сплит; Редовен професор на Правниот факултет при Универзитетот во Мостар; Адвокат во адвокатското друштво „Приморац и партнери“ д.о.о. Е-пошта: damir.primorac@primorac-partners.com.

Затоа, клучно е, покрај оваа софистицирана ДНК технологија и правниот институт за обновување на кривичната постапка, правилно да се складираат собраните ДНК примероци за да можат подоцна да се користат во постапки за ревизија и исправка на судски грешки. Подеднакво важна е и Базата на податоци добиени преку молекуларно-генетска анализа (ДНК профили), која се одржува во дигитален облик во системот CODIS. Овие податоци, под пропишани услови, можат да се споделуваат со странски полициски тела и одредени меѓународни организации за борба против криминал, особено оној со меѓународен елемент. Дополнително, значајно е да се истакне дека во периодот од 2020 до 2024 година во Република Хрватска се спроведе истражувачкиот проект „Innocence Project“. Овој проект, моделиран според слични иницијативи ширум светот, несомнено даде значителен придонес во воспоставување критериуми и создавање услови за исправка на судски грешки во случаи на неправедно осудени лица.

Клучни зборови: обновување на кривична постапка, неправедно осудени лица, исправка на грешки, ДНК анализа, ослободување на лица.