Justice Undeterred: A Call for Massachusetts Legislation on Post-Conviction DNA Access

[Petitioner] can obtain relief only if that determination was contrary to, or an unreasonable application of, “clearly established Federal law, as determined by the Supreme Court of the United States.” It most assuredly was not. This Court has never held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is “actually” innocent.1

I. INTRODUCTION

The development of DNA technology and its subsequent use in the criminal justice system has changed criminal procedure in American law.2 DNA evidence serves as a powerful identification tool for the prosecution and the defense, both during and after trial.3 A number of groups, such as the Innocence Project, have also used DNA testing to free wrongfully convicted persons.4 Prosecutors and victims’ rights groups, however, point out that allowing more post-conviction DNA tests could clog the appellate courts and erode the finality of decisions.5

The Supreme Court recently addressed the availability of post-conviction DNA testing for prisoners in *District Attorney’s Office v. Osborne*. Reversing a decision of the Ninth Circuit Court of Appeals, the Supreme Court held the United States Constitution does not afford prisoners access to post-conviction DNA testing. In its reasoning, the Court stressed that a jury had already convicted the appellant after a fair and impartial trial, and Alaskan courts provide adequate access to post-conviction DNA testing. In addition, the Court reasoned the judiciary should not preempt the state legislatures’ standards for post-conviction DNA access.

Most states have already followed the Supreme Court’s suggestion in *Osborne* and enacted statutes regulating post-conviction motions for DNA testing. Massachusetts is one of two states that still have no such law.

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7. See *Osborne, 129 S. Ct. at 2319-20* (discussing due process rights of prisoners). The Court reversed the Ninth Circuit, which granted access to DNA by reasoning that the disclosure requirements in *Brady v. Maryland*, 373 U.S. 83 (1963), also applied to post-conviction procedures. *See Osborne v. Dist. Attorney’s Office, 521 F.3d 1118, 1128 (9th Cir. 2008)* (relying on circuit precedent to apply *Brady* disclosure standards to include both pre- and post-trial motions); *see also Brady, 373 U.S. at 87.* In *Brady*, the Supreme Court held that due process requires prosecutors to disclose material evidence to the defense upon request. *See Brady, 373 U.S. at 87.* *See generally, Brian T. Kohn, Article, Brady Behind Bars: The Prosecutor’s Disclosure Obligations Regarding DNA in the Post-Conviction Arena, 1 Cardozo Pub. L. Pol’y & Ethics J. 35 (2003)* (outlining legal principles *Brady* established).

8. See *Osborne, 129 S. Ct. at 2320-21* (holding Alaska’s post-conviction requirements meet procedural due process afforded in U.S. Constitution). The Court also noted that “[a] criminal defendant proved guilty after a fair trial does not have the same liberty interests as a free man.” *Id. at 2320.*

9. *Id. at 2322* (discussing state responses to challenges DNA creates for criminal justice systems). The Court noted that many states already have a statute dealing with post-conviction DNA testing and articulated concern that declaring DNA access a constitutional right could interfere with such statutes. *Id.*


Massachusetts legislature has previously been unsuccessful in its attempts to pass a DNA access statute. Currently, prisoners in Massachusetts must rely on Rule 30 of the Massachusetts Rules of Criminal Procedure, a general post-conviction discovery motion that applies to nearly all post-trial appeals. While Massachusetts courts have attempted to establish standards for post-conviction DNA access, the lack of legislative action on the issue still leaves questions regarding time limitations, the prima facie burden for evidence preservation and production, and general practicality issues.

This Note argues that the Massachusetts legislature should enact a post-conviction Model (providing model legislation for post-conviction access). This Note will specifically examine how New York and Maine have written, amended, and implemented post-conviction DNA access statutes. See generally ME. REV. STAT tit. 15, §§ 2136-2138 (2006); N.Y. CRIM. PROC. LAW § 440.30 (McKinney 2009).


Although a post-conviction DNA statute in Massachusetts has received support both from politicians and prosecutors, one theory is that such a popular bill will become a “Christmas tree,” with individual legislators attempting to capitalize on its popularity by adding irrelevant and controversial provisions or pork projects that would otherwise be difficult to pass. See Rachel Steinback, Comment, The Fight for Post-Conviction DNA Testing is Not Yet Over: An Analysis of the Eight Remaining “Holdout States” and Suggestions for Strategies to Bring Vital Relief to the Wrongfully Convicted, 98 J. CRIM. L. & CRIMINOLOGY 329, 348-49 (2007) (discussing potential reasons for bill’s nonpassage).


conviction DNA access statute by focusing on various approaches of other state courts and legislatures in recognizing a statutory right to post-conviction DNA testing. The goal of this Note is not to assess the constitutional and due process rights of access to DNA evidence, but instead to provide effective and pragmatic policy reasons for a Massachusetts statute. Part II.A provides an overview of federal legislation and case law on post-conviction DNA access. Part II.B discusses how Massachusetts prisoners currently appeal for post-conviction DNA testing. Part II.C studies Massachusetts case law, which has interpreted and applied Rule 30, specifically in motions for post-conviction DNA access. Part II.D focuses on the statutory and case law approaches of the state of New York. Part II.E discusses the statutory requirements needed for post-conviction DNA access under Maine law, as well as Maine’s recently amended DNA access statute. Finally, Part III suggests the approach the Massachusetts legislature should take in developing a post-conviction DNA statute, incorporating successful aspects of federal, Maine, and New York legislation on post-conviction DNA access.

II. HISTORY

With advancements in DNA identification technology came new requests for post-conviction access in both state and federal courts. New York was one of the first states to pass specific post-conviction DNA access legislation. Maine also passed legislation for DNA access, and recently amended its post-conviction statute to make it easier to gain access to DNA evidence. In response to the growing trend among state legislatures, Congress passed the Innocence Protection Act, which affords post-conviction DNA access within the federal court system. Despite federal and state support for post-conviction DNA access, Massachusetts remains one of the few states without such a law, and instead relies on general rules of post-conviction discovery and relief procedures for those seeking post-conviction DNA access.

15. See infra Part II.A (discussing federal post-conviction DNA access).
17. See infra Part II.C (analyzing Massachusetts case law on post-conviction DNA testing).
19. See infra Part II.E (reviewing Maine statute on post-conviction DNA testing).
20. See infra Part III (outlining reasons for Massachusetts statute on post-conviction DNA testing).
21. See supra note 4 and accompanying text (discussing DNA advancements and resulting exonerations).
25. See supra notes 12-14 and accompanying text (discussing Massachusetts’s treatment of post-
A. Overview of Federal DNA Access

In 2004, the United States Congress passed the Innocence Protection Act, affording post-conviction DNA testing for certain individuals. In order for a person to qualify under the Innocence Protection Act, a court must have convicted and incarcerated the person for committing a federal offense. Alternatively, persons convicted of state offenses can qualify for relief if evidence of the state offense is introduced during a federal sentencing hearing, and the petitioner has exhausted all state procedures, but no adequate remedy exists under state law. In addition, the identity of the perpetrator must have been at issue at the trial that resulted in the petitioner’s conviction. Finally, applicants must submit a signed affidavit under the penalties of perjury swearing that they are innocent of their convicted crimes.

The Innocence Protection Act also sets a number of requirements for the type of evidence an applicant may test after conviction. The evidence must not have been previously tested, or if it was, new technology must now be available to perform a different test on the forensic material. Applicants must also show they did not “knowingly and voluntarily” waive testing at the original trial or in a previous motion for post-conviction DNA testing. Furthermore, failure to request DNA testing of that evidence in a prior motion constitutes a waiver. The law also requires that the evidence in question be material and “raise a reasonable probability that the applicant did not commit
the offense.” 35 In order to avoid inconsistent defense strategies, the newly tested evidence must remain consistent with the same theory of defense presented at trial. 36 Finally, the evidence must be in the government’s possession and have a chain of custody demonstrating that the evidence remains free of tampering or contamination. 37 Applicants pay for the testing, unless they are indigent, in which case the government pays. 38

Along with requirements as to the type of evidence that may be tested, the Innocence Protection Act also imposes timing constraints. 39 The federal statute first mandates that all motions for further testing be “timely.” 40 The motion is presumed timely if filed within three years of the applicant’s conviction, which may be rebutted if the applicant has been denied DNA access on the same evidence or upon evidence that the defendant’s motive for the motion is delay or harassment. 41 A presumption against timeliness exists if the applicant does not file within the three-year window, but a showing of the applicant’s incompetence, newly discovered evidence, or any “good cause” can also rebut this. 42

Courts have also examined whether the federal constitution itself affords post-conviction DNA access. 43 The United States Supreme Court recently analyzed post-conviction DNA access for state convicts in District Attorney’s Office v. Osborne. 44 The case involved a defendant (Osborne) petitioning the United States Supreme Court after the Alaska Court of Appeals denied his motion for DNA testing. 45 The Supreme Court first considered whether

35. Id. § 3600(a)(8).
36. See id. § 3600(a)(6)(A) (prohibiting contradiction in defense theories).
37. See id. § 3600(a)(4) (requiring evidence have been retained under specific conditions to ensure proper preservation); see also Nat’l Comm’n on the Future of DNA Evidence, Nat’l Inst. of Justice, NCJ 177626, Postconviction DNA Testing: Recommendations for Handling Requests 23 (1999), available at http://www.ncjrs.gov/pdffiles1/nij/177626.pdf [hereinafter Recommendations] (discussing proper storage of DNA samples).
38. See 18 U.S.C. § 3600(c)(3) (stating payment options). The court can also force the applicant to pay for testing if the results ultimately affirm the applicant’s guilt. See id. § 3600(f)(2)(B)(ii) (describing actions following inculpatory test results).
39. See id. § 3600(a)(10) (establishing time period for motions).
40. Id. § 3600(a)(10) (establishing time limitations).
44. See id. (setting forth issue before Court).
45. See id. at 2314 (reviewing history of case). The Alaska Court of Appeals rejected Osborne’s motion for post-conviction DNA tests in part because of the persuasive weight of other evidence and because the testing Osborne sought would not be conclusive in regards to his innocence. See Osborne v. State, 163 P.3d 973, 975-78 (Alaska Ct. App. 2007) (denying appellant’s motion for post-conviction DNA testing). The prosecution also presented the testimony of an accomplice who stated Osborne was at the scene of the rape and the victim’s identification of Osborne from a photograph. See Osborne, 129 S. Ct. at 2313 (listing evidence
Alaska’s lack of a statute affording post-conviction DNA testing violated Osborne’s procedural due process rights. Holding Osborne’s procedural due process rights were not violated, the Court stressed that a convicted person has less liberty interests than an innocent person, and federal courts may only interfere with a state’s post-conviction procedures when they are “fundamentally inadequate.” The Court reasoned that Alaska’s post-conviction procedures were adequate in part because of the similarities between Alaska’s requirements and the federal government’s standards under the Innocence Protection Act.

Secondly, the Court rejected Osborne’s substantive due process claim in part by focusing on the importance of allowing state governments to address the
issues of DNA evidence and post-conviction access. The Court argued that recognizing a constitutional right to DNA testing for convicted persons would lead to a “myriad of other issues” that would clog the federal courts, as well as jeopardize the constitutionality of those post-conviction statutes already adopted in a majority of states. As a result, the Court ultimately held that the issue of post-conviction DNA testing is one best left to state legislatures.

B. Rule 30 of Massachusetts Rules of Criminal Procedure

Rule 30 of the Massachusetts Rules of Criminal Procedure establishes the state’s legal standards for post-conviction motions. In its most basic application, Rule 30 empowers a judge to “grant a new trial at any time if it appears that justice may not have been done.” The original trial judge entertains the motion, and barring any constitutional violation, decides the matter within reasonable discretion. Originally, defendants filing a post-conviction motion under Rule 30 had to do so within one year of the trial’s conclusion, but a 1964 amendment allows the court to consider a Rule 30 motion up to five years after the conclusion of the trial.

49. See Dist. Attorney’s Office v. Osborne, 129 S. Ct. 2308, 2322 (2009) (deferring to state legislatures on issue of post-conviction DNA access). The Court pointed out in its argument for state control that elected officials would better resolve the tension between new DNA technologies and notions of finality in the court system. See id. (advocating state control over issue). The Court also rejected Osborne’s substantive due process claim because “[t]here is no long history of such a right, and [t]he mere novelty of such a claim is reason enough to doubt that substantive due process sustains it.” See id. (quoting Reno v. Flores, 507 U.S. 292, 303 (1993)) (internal quotation marks omitted) (rejecting Osborne’s substantive due process claim). Osborne claimed he had an independent substantive due process right to post-conviction DNA access under the United States Constitution. See id. at 2321-22 (discussing Osborne’s second due process claim). In order to establish a fundamental right under a substantive due process claim, an appellant must demonstrate that the right or liberty is “deeply rooted in this Nation’s history and tradition.” Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (analyzing standards for fundamental right); see also Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997) (describing substantive due process analysis). The Court has also described the fundamental rights that afford a freestanding substantive due process claim as those “implicit in the concept of ordered liberty,” such that “neither liberty nor justice would exist if they were sacrificed.” Palko v. Connecticut, 302 U.S. 319, 325-26 (1937) (explaining fundamental right criteria), overruled on other grounds by Benton v. Maryland, 395 U.S. 784 (1969).

50. See Osborne, 129 S. Ct. 2322-23 (explaining consequences on current state statutes). See generally Brandon L. Garrett, Claiming Innocence, 92 MINN. L. REV. 1629 (2008) (surveying state statutes on post-conviction testing); Access to Post-Conviction DNA Testing, supra note 10 (listing Massachusetts and Oklahoma as only states without DNA access statute). The Court feared that recognizing a freestanding federal right to post-conviction DNA access would force federal courts to consider things such as standards of DNA testing, evidence preservation, and collection. See Osborne, 129 S. Ct. at 2323 (listing new issues federal courts must consider if right recognized).

51. See Osborne, 129 S. Ct. at 2323 (concluding issue best reserved for state legislatures).

52. See MASS. R. CRIM. P. 30 (instituting requirements and procedures for post-conviction relief).

53. MASS. R. CRIM. P. 30(b) (creating legal standard for granting new trial).

motion at any time. In addition, defendants can use a Rule 30 motion as a way to invalidate a previous guilty plea or admission to sufficient facts.

Newly discovered evidence, such as new DNA test results, is one of the many reasons under Rule 30 a party can move for a new trial. The moving party “must show that the evidence is newly discovered, that it is material and credible, and that it casts real doubt on the justice of the conviction.” The moving party has the burden to show both that the evidence was not available at trial, and that counsel would not have discovered it with “reasonable pretrial diligence.” In regards to the weight of the newly discovered evidence, the Supreme Judicial Court of Massachusetts established in *Commonwealth v. Grace* that a “judge decides not whether the verdict would have been different, but rather whether the new evidence would probably have been a real factor in the jury’s deliberations.” Subsequent cases have also required a judge to hold that the new evidence “casts real doubt on the justice of the conviction” in order to grant a new trial.

Rule 30(c)(4) of the Massachusetts Rules of Criminal Procedure also provides a method for post-conviction discovery. In the instance of new DNA testing, a defendant must “make a prima facie showing that the test

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57. See SMITH, supra note 55, § 41.1 (listing new trial motions on newly discovered evidence).


60. 491 N.E.2d 246 (Mass. 1986).

61. Id. at 306 (emphasis added) (establishing judicial standard for admission of newly discovered evidence); see also Commonwealth v. Moore, 556 N.E.2d 392, 398-99 (Mass. 1990) (analyzing significance of newly discovered evidence).

62. Pike, 726 N.E.2d at 945 (discussing requirement for newly discovered evidence). The burden also requires the evidence to be “material and credible.” Id. (citing Commonwealth v. Brown, 390 N.E.2d 1107, 1111-12 (Mass. 1979)) (articulating significance of newly discovered evidence in motion for new trial). In addition, the newly discovered evidence must otherwise comply with the rules of evidence. See Weichell, 847 N.E.2d at 1090 (requiring new evidence to be admissible under applicable rules of evidence); Commonwealth v. Lopez, 742 N.E.2d 1067, 1074-75 (Mass. 2001) (upholding denial of new trial because new evidence inadmissible); Commonwealth v. Doherty, 476 N.E.2d 169, 174 (Mass. 1985) (affirming lower court’s denial of new trial based on inadmissibility of newly discovered evidence).

63. See MASS. R. CRIM. P. 30(c)(4) (creating opportunity for post-conviction discovery via Rule 30 motion).
results would warrant a new trial” in order to gain access to forensic material in the Commonwealth’s possession. Thus, the ability to access DNA tests goes back to the previous discussion of Rule 30 in requiring the defendant to show that “justice may not have been done” in the original trial, and that the new DNA evidence was previously unavailable and “would probably have been a real factor in the jury’s deliberations.” In addition, a 2001 amendment to Rule 30(c)(4) requires notice and an opportunity for the opposing party to contest the additional discovery. As a result, judges entertaining motions for post-conviction DNA access must consider the totality of the facts in the case when measuring the potential relevance of the test results.

C. Massachusetts Judicial Decisions on Post-Conviction DNA Access

1. Significance of Tested Evidence

Hearings concerning Rule 30(c)(4) discovery motions frequently rest on an appellant’s ability to show the materiality of the evidence to be tested. In Commonwealth v. Conkey, the defendant moved for funds to conduct further DNA testing and a new trial under Rule 30. The defendant argued that the Commonwealth inappropriately failed to test three hairs found at the scene, as well as blood found on a note the victim gave her landlord, who the defendant claimed actually perpetrated the crime. The superior court denied the motion.

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66. See generally MASS. R. CRIM. P. 30(c)(4) (establishing procedure for requesting discovery).

67. See SMITH, supra note 55, § 41.1 (noting requirement of notice to opposition and resulting consequences). See generally RECOMMENDATIONS, supra note 37, at 51-53 (describing methods to handle post-conviction DNA access requests).


70. See id. at *1 (reciting facts of case and Rule 30 motion). A jury convicted the defendant of first-degree murder, armed burglary, and armed assault in a dwelling. Id. (listing defendant’s convictions). The victim’s boss called the police after she failed to report to work; police found the deceased in her home, and an autopsy determined the cause of death to be strangulation and blunt force trauma to the head. Id. Police also found a shattered glass pane on the back door, and a neighbor testified to hearing the sound of breaking glass on the night of the murder. Id.

71. See id. at *5 (articulating defendant’s grounds for post-conviction relief). The defendant’s defense at trial was that the victim’s landlord, who unsuccessfully tried to date the victim and had a key to the victim’s apartment, perpetrated the crimes. Id. at *4-5 (reviewing defendant’s arguments at trial). Police found the three hairs in question on the victim’s pajama top. Id. at *1. Expert testimony at trial revealed that one of the
for further DNA testing, holding that the defendant failed to show that the
results would have influenced the jury’s verdict. The court reasoned that
even if the hairs belonged to the landlord, the Commonwealth could easily
argue that they were present months before the murder or just a few days
before, when the landlord admitted doing repairs inside the victim’s bedroom.
As for the blood sample on the note, the court pointed out that the prosecutor
asked the jury to assume that the blood belonged to the victim, and resulted
from a paper cut long before the murder. As a result, under the current
system, Massachusetts courts will review the totality of the facts used in the
appellant’s conviction, as well as potential arguments the prosecution could
make in light of DNA results, in conducting a stringent yet fair analysis of post-
conviction DNA access.

2. Laboratory and Methods

Rule 30(c)(4) hearings on post-conviction discovery and DNA access can
also involve situations where two parties disagree on how to test forensic
evidence. In Commonwealth v. Laguer, the Commonwealth did not oppose
the defendant’s request for post-conviction DNA testing. The dispute arose,
hares had been “forcibly removed,” although it was unclear how much force was applied, whether it was
directly or indirectly placed on the pajama top, and the time of the hair’s removal. Id. (considering expert
testimony on hair samples). The note in question was a four-page handwritten message the victim had
previously sent the landlord that contained a dark red spot, which initial tests showed to be blood. See id. at *2.
As to the defendant’s arguments on ineffective counsel, in order to secure a new trial, a defendant must show:
“(1) that trial counsel’s conduct fell measurably below that which might be expected of an ordinarily fallible
lawyer; and (2) that trial counsel’s conduct likely deprived the defendant of an otherwise available, substantial
(internal quotation marks omitted); see also Strickland v. Washington, 466 U.S. 668, 690 (1984) (articulating
(setting forth Massachusetts standard for ineffective counsel).

72. Conkey, 2003 WL 22120176, at *14 (stating defendant failed to meet prima facie burden). In
addition, the court dismissed the defendant’s motion for a new trial under the Saferian-
Strickland standard because counsel’s decision to test the hair and note would have produced minimal results
and the defendant agreed with his counsel’s strategy not to test. See id. at *11-14 (discussing defendant’s
argument of ineffective counsel).

73. See id. at *14 (evaluating significance if hairs found at scene belonged to landlord). The court
dismissed the significance of the “forcibly removed” hair because nothing indicated the hair was removed
during a struggle. Id. (discrediting defendant’s “forcibly removed” hair argument); see also supra note 71
(discussing expert testimony and unknown status of “forcibly removed” hair).

74. See Conkey, 2003 WL 22120176, at *15 n.7 (dismissing significance of blood sample in new trial
motion). The court also noted that the significance of the blood on the note belonging to the victim was
“wholly speculative,” which, by itself, is inadequate to establish an argument of ineffective counsel. See id. at
*15 (citing Commonwealth v. Duran, 755 N.E.2d 260, 266 (Mass. 2001)).

75. See supra notes 73-74 and accompanying text (highlighting court’s use of both prior and future
arguments for appellant’s conviction).

2001) (noting Commonwealth’s desire to establish reliable testing methods).


78. See id. (noting Commonwealth’s acquiescence to post-conviction DNA testing). A jury convicted the
however, over which lab would conduct the DNA testing after scientists could not duplicate all of the forensic materials, meaning that only one laboratory could analyze portions of the material.\(^7\) Ultimately, the court ordered the Commonwealth’s laboratory to split those samples that could be split and send those that could not to the defendant’s laboratory.\(^8\) Thus, Massachusetts has recognized a defendant’s right to determine which laboratory will test the evidence, while at the same time reserving the right to test the materials in its own laboratories.\(^8\)

3. Payment

In *Commonwealth v. Davis*,\(^8\) the Massachusetts Supreme Judicial Court established that Massachusetts defendants have no constitutional right to funds for forensic testing.\(^8\) Under Massachusetts’s original Rule 30, appellants could only seek funds related to a pending trial or appeal.\(^8\) As a result, the court in *Davis* rejected an appellant’s motion for funds to conduct DNA testing where it was not made as part of a pending appeal.\(^8\) The court recognized the circular reasoning in this instance, noting that “funds to pay for scientific testing . . . are not available until a new trial is granted, yet there may be no grounds to move for a new trial without the test results.”\(^8\) Despite its recognition that such a standard could prevent access to exculpatory evidence, the court still held that
“[w]here the Legislature has chosen not to fund certain procedures not constitutionally mandated . . . this court may not rewrite the statute to do so.”

A 2001 amendment to Rule 30 attempted to solve this problem by authorizing judges to allow state funds to pay for a defendant’s fees in preparing a Rule 30 motion. 88 In Conkey, the superior court considered an appellant’s motion for funds to test forensic evidence based on the probability that the results would allow for a new trial. 89 Ultimately, the Conkey court denied the appellant’s motion for funds and access to DNA tests because the test results would not “have influenced the jury’s conclusion,” after the defendant already admitted being in the victim’s bedroom on the night of the murder. 90

4. Evidence Preservation

In 2004, Congress passed the Justice for All Act, which awards financial incentives to states that meet certain guidelines for preserving forensic evidence. 91 Despite this, Massachusetts has no law that requires the preservation of forensic evidence. 92 Dennis Maher first began petitioning the Massachusetts courts for post-conviction DNA testing in 1993, nine years after

87. Id. (refusing to provide funds for DNA testing). The court specifically recognized the “hardship on convicted indigents seeking the funds to carry out a newly discovered scientific technique which could yield exculpatory evidence.” Id. (acknowledging limitations caused by denial of funding). Massachusetts eventually amended Rule 30 of its Rules of Criminal Procedure to allow a judge the discretion to provide funds for appellants seeking post-conviction DNA testing. See MASS. R. CRIM. P. 30 reporter’s notes (explaining 2001 amendment to Rule 30(c)(5) allowing for judicial discretion).

88. MASS. R. CRIM. P. 30(c)(5) (codifying access to state funds in preparing post-conviction motions). The amended law specifically gives judges “discretion to allow the defendant costs associated with the preparation and presentation of a motion under this rule.” Id. (authorizing funds for both preparation and presentation of Rule 30 motion).

89. Conkey, 2003 WL 22120176, at *13 (citing MASS. R. CRIM. P. 30 (c)(5) reporter’s notes) (analyzing grounds for state funds access).

90. See supra notes 73-74 and accompanying text (explaining court’s reasoning in denying DNA tests).

91. See Justice for All Act of 2004, Pub. L. No. 108-405, § 413, 118 Stat. 2260, 2285 (2004) (establishing incentives for state preservation statutes). See generally Preservation of Evidence, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Preservation_Of_Evidence.php (last visited Oct. 11, 2010) (discussing Justice for All Act). The law provides funding for states that have statutes with the same preservation standard as the federal government, which is to preserve all evidence through the duration of one’s incarceration. See Innocence Protection Act, 18 U.S.C. § 3600A(a) (2004) (codifying federal policy of preserving evidence throughout sentence of imprisonment); Justice for All Act of 2004, Pub. L. No. 108-405, § 413, 118 Stat. 2260, 2285 (2004) (awarding funding for states meeting federal standards). Section 3600A(c) of the Innocence Protection Act, however, does provide instances when forensic material may be destroyed before prisoners complete their sentences, including if they have exhausted all appeals and are given 180 days notice of the plan to destroy the evidence. 18 U.S.C. § 3600A(c) (listing exceptions to preservation requirement). The Innocence Protection Act also allows for the destruction of biological material when post-conviction DNA testing proves the defendant is the source of the evidence. See id. § 3600A(c)(5) (allowing destruction after further incriminating test results).

a jury convicted him of three counts of rape. His petitions were unsuccessful, however, because the evidence Maher sought to test could not be located. Then, in 2001, a law student accidentally discovered the evidence in the basement of the Middlesex County Courthouse. It was not until 2003, nineteen years after Maher’s incarceration, that DNA tests successfully proved that Maher could not have committed the crime. Although the Middlesex County District Attorney’s Office assisted Maher’s efforts to drop all charges against him after the 2003 test, the fact that an innocent man had to spend an extra ten years in jail because of missing evidence illustrates a disturbing flaw within Massachusetts’s current system.

5. Mistakes Under the Current System

Not all denials of post-conviction DNA tests are final, as seen in *Commonwealth v. Hernandez*. In 1998, a Massachusetts jury convicted Angel Hernandez of two counts of aggravated rape, indecent assault and battery, assault by means of a dangerous weapon, and assault and battery. During the trial, a forensic expert for the state testified that blood samples taken from the victim were inconsistent with Hernandez’s. Hernandez was sentenced to twelve to eighteen years in prison. *Commonwealth v. Hernandez*, No. 99-P-1288, 2000 WL 1807319, at *2 (Mass. App. Ct. Dec. 6, 2000) (overruling lower court’s denial of post-conviction DNA testing).
from the victim matched that of Hernandez, although, approximately eleven percent of the Hispanic population share this blood trait. Following his conviction, Hernandez filed motions for access to new DNA samples in 1991, 1993, and 1998, all of which the courts either ignored or denied. Finally, in 2000, the Appeals Court of Massachusetts overturned the 1998 denial, granting access to DNA testing because “new technology had vastly improved the testing process,” which resulted in newly discovered evidence deserving a new trial. These new tests subsequently revealed that the assailant’s ejaculate found at the scene could not have come from Hernandez, leading to his exoneration and release in August of 2001. The Hernandez case highlights the need for Massachusetts to enact its own post-conviction DNA statute to ensure that courts cannot ignore or deny post-conviction motions for access to exculpatory DNA evidence.

D. New York Statute on Post-Conviction DNA Testing

In 1994, New York became one of the first states to enact a specific statute that authorizes post-conviction DNA testing. In order to grant post-conviction DNA testing, section 440.30 of New York Criminal Procedure Law places a prima facie burden on a defendant to show a “reasonable probability” that a different verdict would result if the DNA results existed at trial. A

100. See Eduardo Velasquez, supra note 99 (questioning significance of original DNA identification). The prosecution also relied on the victim’s identification of Hernandez’s voice and police officer testimony that Hernandez had his pants off near the scene of the crime. See id. (discussing grounds for original conviction).

101. See Hernandez, 2000 WL 1807319, at *1 (discussing denial of previous motions). Hernandez’s 1991 pro se motion for a new trial remains undecided, and the court denied his 1991 motion to allow DNA testing on the grounds that he had waived his rights to such testing. See id. (explaining status of previous motions for DNA testing).

102. Id. (articulating reasons for granting new DNA testing). The court held that the new testing techniques resulted in “advances that yield results different not only in degree but in kind and that any test result favoring Hernandez would thus be newly discovered evidence.” Id. (discussing significance of new testing technology). Forensic Science Associates laboratory performed spermatozoa testing on the assailant’s ejaculate originally found at the scene of the crime. See Eduardo Velasquez, supra note 99 (describing source of new DNA test).

103. See Eduardo Velasquez, supra note 99 (explaining details of test results and exoneration). At the time of his exoneration, Hernandez had already served twelve and a half years of his eighteen-year sentence. See id. (noting amount of time Hernandez incarcerated). DNA evidence has led to the exoneration of a number of persons wrongfully convicted in Massachusetts, which has lead to attempted reform. See generally Fisher, supra note 14 (analyzing exoneration cases in Massachusetts); supra note 12 and accompanying text (discussing efforts and failed attempts at passing post-conviction DNA statute).

104. See Eduardo Velasquez, supra note 99 (discussing Hernandez’s previous motions and subsequent exoneration).

105. See N.Y. CRIM. PROC. LAW § 440.30 (McKinney 2004) (codifying post-conviction DNA access procedure); Hearings, supra note 22 (explaining New York’s leadership on issue).

106. CRIM. PROC. § 440.30 (placing burden on defendant to show DNA’s significance); see also Anna Franceschelli, Comment, Motions for Postconviction DNA Testing: Determining the Standard of Proof Necessary in Granting Requests, 31 CAP. U. L. REV. 243, 249-50 (2003) (analyzing burden of proof under New York law). Section 440.30 also requires that the DNA evidence in question “was secured in connection with
2004 amendment removed a cut-off date that originally excluded persons convicted before 1996 from seeking relief under this statute. The 2004 amendment also added paragraph (b), requiring the state to provide the defendant with the location of the forensic evidence in question.

New York Executive Law also established an independent Commission on Forensic Science that institutes minimum standards for state forensic laboratories and allows defendants to retest DNA evidence used in their convictions if the state laboratory does not meet the commission’s standards. In addition, the law created a DNA databank that ensures proper evidence preservation and identification.

1. Significance of the Tested Evidence

In weighing the significance of newly tested material, New York courts...
consider whether there is a “reasonable probability” of a different verdict if the DNA tests had been introduced at trial. In People v. Kaminski, a New York appeals court denied an appellant’s request for further DNA testing on the victim’s bed sheets after a jury convicted him of rape, sodomy, and burglary. The court held further DNA testing unnecessary because the only issue at trial was whether the sexual intercourse was consensual. In its reasoning, the court rejected the appellant’s argument that a lack of the victim’s DNA on the bed where the rape occurred would indicate that intercourse was consensual, and highlighted evidence showing that the appellant broke into the victim’s residence while wearing gloves and a mask.

Appellants can also lose a motion for DNA testing if they cannot demonstrate why DNA samples would even exist on a piece of evidence. For example, in People v. Simpson, the appeals court denied the appellant’s motion for further DNA testing on rags and ropes found at the scene because no evidence indicated that either object ever made contact with the victim’s skin. In addition, in People v. Figueroa, the New York appeals court

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111. See Pugh, 732 N.Y.S.2d at 674 (assessing motion for post-conviction DNA testing); see also Kaminski, 876 N.Y.S.2d at 256-57 (rejecting motion because assailant wore mask and gloves); People v. Figueroa, 826 N.Y.S.2d 256, 256-57 (App. Div. 2007) (rejecting motion because defendant’s DNA presence “highly speculative”); People v. Simpson, 825 N.Y.S.2d 578, 580 (App. Div. 2006) (denying motion because tested material never exposed to bare skin); Pugh, 732 N.Y.S.2d at 674 (dismissing motion because nothing to indicate seminal fluid at rape scene).
112. Id. at 245-46 (rejecting appellant’s motion for DNA access).
113. Id. at 245 (discussing issue at trial). The court also rejected appellant’s new grounds for DNA testing on the theory that the victim’s bed sheets could show DNA from another perpetrator because “the fact that defendant forced his way into the victim’s residence while wearing a mask and gloves on the night in question was never a substantive issue to be resolved by the jury in its deliberations.” Id. (noting presence of other perpetrator never issue).
114. Id. (reasoning DNA tests immaterial to consent issue). In a recorded phone conversation between the victim and the defendant introduced at trial, the defendant admitted that he hurt the victim and wore gloves and a mask so she would not know who he was. Id. at 245 n.5 (discussing recorded phone conversation). The defendant’s attorney also stated at trial that

we admit that defendant did at first go into that house, into [the victim’s] house, and that [defendant] at the time was wearing a mask and gloves, and he went upstairs, and into [the victim’s] bedroom, and that for a period of time he did have his hands placed over her mouth.

Id. at 245.
115. See, e.g., Figueroa, 826 N.Y.S.2d at 256-57 (stating nothing to indicate blood from anyone other than victim); Simpson, 825 N.Y.S.2d at 580 (noting nothing to indicate tested material contacted victim’s skin); People v. Pugh, 732 N.Y.S.2d 673, 674 (App. Div. 2001) (indicating no evidence assailant ejaculated during rape).
116. Id. at 580 (detailing reasons for denying motion). The victim testified at trial that the defendant placed the rag over her mouth, not inside it, and thus it was unlikely any of her DNA would be present. Id. The victim also testified that the defendant placed the ropes used to bind her over her clothing, again making it unlikely that her DNA would be present. Id. In addition, any test that showed the defendant’s DNA was not at the scene would be immaterial because the victim testified that the defendant made her swallow his semen. Id.
denied the appellant’s motion for DNA testing on blood found at the scene because nothing indicated that the blood came from anyone but the victim. Thus, an appellant’s theory of defense based on new DNA testing must be more than just “highly speculative.”

2. Evidence Production and Preservation

Although New York Executive Law establishes guidelines for gathering and testing forensic evidence, the courts still determine the burden of production for such evidence for post-conviction DNA testing. In People v. Pitts, an appellant sought new DNA testing on rape kit material collected by the state’s laboratory. Although the court rejected the appellant’s motion, it did hold that the burden was on the state to show whether the evidence was still available, and “mere assertion that the evidence no longer exists . . . is insufficient as a matter of law under CPL 440.30(1-a).” Furthermore, in People v. West, the New York Supreme Court, Appellate Division, approved an appellant’s motion for DNA testing and ordered a hearing to investigate the storage and disposal of forensic materials after the state reported that the evidence was destroyed.

The state’s burden to produce the location of the evidence in question, however, does not mean that the state can never destroy evidence while a person is serving a prison sentence. In People v. Ahlers, a defendant

Furthermore, the defendant stated during a standoff with police that the victim had come with him of her own free will. Id. (highlighting other evidence indicating defendant’s guilt).

120. Id. at 256 (rejecting significance of DNA test on blood). The State of New York convicted the appellant of murder. Id. The appellant’s theory of defense for new DNA testing was that the victim had been in a fight with someone else in a club near the scene of the shooting, and blood samples taken off the street could identify this person as the real shooter. Id.
121. See id. (explaining denial of appellant’s motion for DNA testing). The court noted that the trial testimony, including testimony by the appellant himself, never indicated that the blood around the victim could belong to another perpetrator. Id. (concluding reason for DNA test “highly speculative”).
122. See infra notes 123-133 and accompanying text.
124. Id. at 69.
125. Id. at 72 (placing burden of production on state). The court went on to suggest that the state provide an affidavit indicating the evidence’s location or “an official record indicating its existence or nonexistence.” Id. (proposing ways state can meet production burden).
127. Id. at 417 (remanding on issue of evidence location). A jury convicted the appellant of rape in the first degree, sexual abuse in the first degree, and endangering the welfare of a child. Id. at 416. The appellant sought a new method of DNA testing on semen found on vaginal and rectal swabs taken from the victim. Id. The court held that there was a reasonable probability that the test results would produce a verdict more favorable to the appellant because the appellant recanted his previous confession, and “the jury was informed that DNA testing had not excluded defendant as the source of the semen found inside the victim.” Id. (reasoning new DNA test material to verdict).
128. See People v. Watkins, 592 N.Y.S.2d 347, 347 (App. Div. 1993) (holding evidence must be preserved only until “all appeals have been exhausted”).
sought DNA testing on a towel supposedly used to clean up semen. The state, however, destroyed the towel in question because the defendant had already exhausted all his appeals within the court system. As a result, the court denied the appellant’s motion for new DNA testing solely because he failed to meet his statutory burden of showing the evidence “still exists.” Consequently, although the New York statute does not place a time limit on seeking post-conviction DNA testing, testing may still be unavailable because the state may have already destroyed all trial evidence.

3. Newly Discovered Standard

One concern expressed about post-conviction DNA access is that defendants can use the statute to offer alternative theories of defense and delay the court system. New York’s post-conviction statute requires that the defendant was not previously in a position to test the evidence, but a judge can make an exception “in the interest of justice.” For example, in People v. Pugh, the New York Supreme Court, Appellate Division, rejected a defendant’s motion for DNA access in part because the physical evidence in question was available to the defendant at trial. The court reasoned that the appellant’s motion was not deserving of the “interest of justice” exception, because the appellant had moved to suppress the very same forensic evidence he now sought to test under the post-conviction statute.

130. See id. at 247 (identifying material sought tested). The defendant had been convicted eighteen years earlier for sodomy and sexual abuse. See id. The appellant’s conviction totaled two counts of sodomy in the first degree, three counts of sexual abuse in the first degree, two counts of endangering the welfare of a child, one count of sodomy in the second degree, and one count of sodomy in the third degree. See id. One year later, the Appellate Division of the Supreme Court of New York upheld his conviction after he appealed on the grounds that the victim’s testimony was uncorroborated. See People v. Ahlers, 470 N.Y.S.2d 483, 485 (App. Div. 1983) (affirming original convictions).
132. See Ahlers, 728 N.Y.S.2d at 248 (requiring defendant show evidence still exists under New York post-conviction access law). New York courts interpret New York’s DNA access law to require that an appellant “show that the evidence to be tested still exists and is available in quantities sufficient to make testing feasible.” Washpon, 625 N.Y.S.2d at 878 (interpreting evidence shown in post-conviction motion).
133. See Ahlers, 728 N.Y.S.2d at 248 (noting state may destroy evidence after appeals exhausted); see also N.Y. CRIM. PROC. LAW § 440.30 practice cmts. (McKinney 2005) (discussing elimination of 1996 cut-off date); People v. Pitts, 828 N.E.2d 67, 72 (N.Y. 2005) (noting no time limit to motion under New York state law).
135. See CRIM. PROC. § 440.10(3)(c) (requiring evidence not previously available).
137. Id. at 675 (noting evidence available at trial); see also People v. Kellar, 640 N.Y.S.2d 908, 910 (App. Div. 1996) (holding no “second opportunity” on previously available DNA).
138. See Pugh, 732 N.Y.S.2d at 675 (highlighting appellant’s inconsistent defense). The federal statute on
4. Payment

New York state law affords funds to appellants for the use of experts if they can show they are financially unable to obtain necessary expert services, but only in “extraordinary circumstances” will the court provide compensation greater than one thousand dollars per expert. In People v. Dearstyne, the appellant sought state funding for experts in his post-conviction DNA testing of the victim’s underwear after a jury convicted him of attempted rape and aggravated sexual abuse. The court rejected the appellant’s motion for funds and DNA access because “he failed to establish that the experts were necessary for him to succeed on his... motion.” The court reasoned that funds for expert testing on the victim’s underwear were unnecessary because prosecutors never alleged that the assailant ejaculated, and a lack of DNA on the victim’s underwear would be immaterial to the attempted rape conviction. Thus, accessing state funds for post-conviction DNA testing under New York’s statute is virtually identical to Massachusetts’s requirement that the new tests would likely result in a new trial.

E. Maine Statute on Post-Conviction DNA Testing

Chapter 305-B of Maine’s Criminal Procedure Law provides for post-conviction DNA access for persons convicted of a crime that carries a potential sentence of incarceration for at least one year. Defendants seeking further DNA analysis under the statute must make a prima facie case that the forensic evidence is available for testing; such evidence has a “chain of custody” proving that no one has tampered with or altered it; and the evidence was not previously tested, or if it was, it was not subject to current DNA analysis technology. In addition, the identity of the defendant as the perpetrator of the crime must have been at issue during trial, and the new evidence must be

post-conviction DNA testing also requires that the DNA evidence not have been available to the defendant at the time of trial. See supra notes 32-33 and accompanying text (discussing federal newly discovered evidence requirement).

139. See N.Y. COUNTY LAW § 722-c (McKinney 1996) (codifying use of state funds on appellant motions); see also People v. Dove, 731 N.Y.S.2d 769, 771 (App. Div. 2001) (listing requirements for state funds); People v. Lane, 600 N.Y.S.2d 848, 850 (App. Div. 1993) (requiring necessity and extraordinary circumstances). The appellant may not choose any expert he or she wants, and must show that the cost would be reasonable. See Lane, 600 N.Y.S.2d at 850-51 (holding defendant’s expert cost “exorbitant”).

141. Id. at 119-21 (reciting appellant’s motion).
142. Id. at 121 (assessing defendant’s need for funds).
143. Id. (explaining insignificance of test results). The court also noted that a rape kit performed shortly after the attack did not show the presence of semen, making a DNA test on the underwear unnecessary. Id.
146. See id. § 2138(4-A) (listing requirements for evidence testing).
material to whether that person committed, or was an accomplice to, the crime.\textsuperscript{147}

If the test results show that the DNA evidence in questions does not match the defendant, he or she may get a new trial upon showing that only the true perpetrator of the crime could be the source of the evidence, and all other evidence in the case supports the defendant’s innocence or “make[s] it probable that a different verdict would result upon a new trial.”\textsuperscript{148} A 2006 amendment removed the requirement of showing that only the true perpetrator could be the source of the evidence.\textsuperscript{149} Under the revision, the statute now alternatively allows a new trial based on newly discovered evidence if defendants can show that: the DNA results, combined with all other evidence, “make it probable that a different verdict would result upon a trial”; the “DNA test results have been discovered by the person since the trial”; the test results could not be obtained through due diligence before the trial; the test results are material as to who committed the crime; and the results are “not merely cumulative or impeaching, unless it is clear that such impeachment would have resulted in a different verdict.”\textsuperscript{150} The amended statute also requires that defendants file this


\textsuperscript{148} See tit. 15, § 2138(1)(A)-(B) (creating standard for granting new trial upon motion).

\textsuperscript{149} An Act to Amend the Law Governing DNA Testing, 2006 Me. Legis. Serv. ch. 659, § 4 (West) (amending tit. 15, § 2138(B)).

\textsuperscript{150} See tit. 15, § 2138(10)(C) (allowing new trial based on newly discovered evidence); see also Editorial, Are Deadlines Appropriate in New DNA Evidence Bill? Critics Say a Flood of Retrial Petitions May Be the Result of a Measure Heading to the Legislature, PORTLAND PRESS HERALD, Mar. 20, 2006, at A10 (analyzing two-year deadline in law); Tom Bell, Panel Backs DNA Bill with Appeals Deadline; State House: The Judiciary Committee Would Give Inmates Two Years in Which to Seek Trials, PORTLAND PRESS HERALD, Mar. 16, 2006, at A1 (discussing amendment changes); Leanne M. Robicheau, Judiciary Committee Endorses Bill to Expand DNA Options for Convicts, BANGOR DAILY NEWS, Mar. 16, 2006, at B1 (reporting change in amended bill); Leanne M. Robicheau, Lawmakers Weigh Change to DNA Law, BANGOR DAILY NEWS, Mar. 8, 2006, at B1 (discussing debate on less stringent standards for DNA access). The amendment was in part a response to Dennis Dechaine’s highly-publicized attempt to obtain DNA testing after a jury convicted him of murder in 1989. See generally State v. Dechaine, 572 A.2d 130 (Me. 1990) (analyzing case and denying motion for new trial); Bill Inspired by Dechaine Case Amended, ASSOCIATED PRESS, Mar. 17, 2006 (examining impact of amendment on Dechaine’s DNA access); Clarke Canfield, Support for Convicted Killer Grows in Political Campaign, ASSOCIATED PRESS, Apr. 16, 2005 (discussing growing support for Dechaine’s exoneration); Abigail Curtis, Dechaine Gains Ally in Trial Bid: F. Lee Bailey Consults Convicted Murderer, BANGOR DAILY NEWS, Apr. 9, 2009, at A1 (reporting DNA other than Dechaine’s in victim’s nail clippings); Gregory D. Kesich, DNA Is Only New Evidence for Dechaine; A Judge Limits What Can Be Presented in the Convicted Killer’s New Bid for a New Trial, PORTLAND PRESS HERALD, Sept. 21, 2005, at A1 (stating limitations on Dechaine’s new trial motion); Gregory D. Kesich, Lawyer: Test Aids Bid for New Trial; Lab Results Rule Out Key People as the Source of DNA Found on the Murder Victim, Sarah Cherry, PORTLAND PRESS HERALD, Mar. 23, 2005, at B1 (reporting DNA on victim from neither Dechaine nor its handlers); Gregory D. Kesich, Watered-Down DNA Bill Headed for Passage; State House: The Law is Expected to Help Convicted Killer Dennis Dechaine’s Effort to Get a New Trial, PORTLAND PRESS HERALD, Apr. 17, 2006, at B1 (discussing reduced standards for DNA access under amended bill); Editorial, No Easy Path Toward a Dechaine Retrial; The State Sets an Appropriately Tough Standard for Overturning Old Convictions, PORTLAND PRESS HERALD, Sept. 4, 2008, at A8 (advocating stringent standards for post-conviction DNA access); Leanne M. Robicheau, Review Affirms Deschaine Casework; No Misconduct Seen in ‘88 Murder Probe, BANGOR DAILY NEWS, Aug.
motion within two years of their conviction, unless new DNA analysis technology becomes available and is “capable of providing new material information” after the two-year window.\footnote{ME. REV. STAT. tit. 15, § 2137(2) (2006) (placing time limitation on motion). The amended statute also allowed persons convicted by September 1, 2006, to file a motion before September 1, 2008; this deadline has since expired. \textit{See id.}}

In addition to establishing the legal requirements for post-conviction DNA access, the statute also requires the preservation of all biological evidence throughout the defendant’s incarceration and allows a court to impose sanctions for intentional destruction of evidence.\footnote{See \textit{id.} § 2138(2), (14) (codifying evidence preservation requirements). Upon the filing of a motion, the state must submit an inventory of all forensic evidence relating to the testing in its possession to the court and the defense team. \textit{See id.} § 2138(2).} The state crime lab also pays for the new DNA testing if the court finds the moving party “indigent.”\footnote{See \textit{id.} § 2138(7) (providing for state funding in certain situations).} Finally, the statute requires the state attorney to make a “good faith effort” to give notice to the victim of the crime in question, including the time and place of any motion hearing upon request.\footnote{See \textit{id.} § 2138(13) (listing victim notification requirements). In the case of a deceased victim, the state attorney must then notify the victim’s family. \textit{See id.} Post-conviction motions can be very difficult for victims and their families; some describe the process as causing them to “go through it again.” \textit{See Leanne M. Robicheau, DNA Law Changes Stir Emotions, BANGOR DAILY NEWS, Feb. 16, 2006, at B5 (discussing impact on victim families in Dechaine case).}}

1. Maine Case Law on Post-Conviction DNA Testing

The most significant case on Maine’s post-conviction DNA statute is \textit{State v. Donovan}.\footnote{853 A.2d 772 (Me. 2004). The case was “the first time” Maine’s highest court interpreted “the meaning of Maine’s post-conviction DNA analysis statute.” \textit{See id.} at 775.} The appellant in \textit{Donovan} sought further DNA testing after a jury convicted him of gross sexual assault.\footnote{See \textit{id.} at 774 (detailing procedural history).} The appellant contended that the victim had sexual intercourse with another individual before her hospital examination, and that further DNA testing would reveal that individual’s identity.\footnote{See \textit{id.} (discussing appellant’s theory of defense). The victim went to the hospital after reporting the rape, but refused to consent to a physical examination until she returned to the hospital a second time several hours later. \textit{See id.} Testing performed at trial indicated that the semen found in a condom matched that of Donovan’s blood group, and a pubic hair was similar to Donovan’s sample. \textit{See id.}} The first issue the Supreme Judicial Court of Maine considered was whether “[t]he evidence sought to be analyzed . . . is material to the issue” of the person’s identity.\footnote{See \textit{id.} (discussing appellant’s theory of defense).} In holding that the appellant’s motion did meet the materiality requirement, the court adopted Illinois’s standard on material evidence, holding that “[t]his requirement may be met not only when the results of DNA testing could exonerate the defendant, but also when testing has the
‘potential to produce new . . . evidence’ that ‘tends to significantly advance’ the defendant’s claim of innocence."159 In this case, the court held that DNA tests on the condom collected at the scene would “significantly advance” the appellant’s argument that the victim had consensual sex with someone else.160

The second issue the court addressed is the statute’s requirement that identity must have been an issue at trial.161 The superior court denied the appellant’s motion on the ground that the identity of the “[victim’s] assailant was never at issue,” and the defense’s argument was not one of mistaken identity, but that the victim was untruthful about her consensual intercourse with another man in an attempt to frame the defendant.162 In overturning the trial court, the Supreme Judicial Court held that “identity may be at issue during a trial even when the alleged victim identifies only the defendant as the perpetrator of a crime but the defendant claims no crime was committed."163 As a result, the appellant in this motion did meet the statute’s identity requirement because both the source of semen found on the condom at the scene and the identity of the person who had intercourse with the victim were an issue at trial.164 Thus, the court lessened the statute’s identity requirement even further by holding that “identity is always an issue in a criminal trial unless the defendant admits having engaged in the alleged criminal conduct and relies on a defense such as consent or justification."165

III. ANALYSIS

The Massachusetts legislature should pass legislation that provides a statutory process for post-conviction DNA access.166 Because Massachusetts courts already allow post-conviction DNA access when newly discovered DNA evidence “would have produced results that likely would have influenced the jury’s conclusion,” it already employs a standard virtually identical to the post-conviction statutes enacted by the federal government, New York, and Maine.167 A Massachusetts statute on post-conviction DNA testing would,

160. See id. (granting post-conviction DNA testing). The court reasoned that a showing that the DNA inside the condom belonged to someone other than either the victim or Donovan would advance Donovan’s theory that “he did not rape the alleged victim and that [the victim] instead attempted to frame him by having consensual sex with someone else.” Id. (discussing additional testing material for defendant’s conviction).
161. Tit. 15, § 2138(4-A)(E) (establishing identity requirement).
163. Donovan, 853 A.2d at 776 (analyzing identity requirement).
164. Id. (holding identity at issue in trial).
165. Id. (quoting Anderson v. State, 831 A.2d 858, 865 (Del. 2003)) (adopting Delaware’s definition of when identity at issue).
166. See infra Part III.
however, address many concerns opponents have regarding post-conviction DNA access—namely the effect on finality of judgments, the potential to clog the courts, and the impact on victims and their families.\textsuperscript{168} For example, a Massachusetts statute should mandate the evidence or test methods were not previously available and adopt the federal requirement that convicts face perjury and prison sanctions should the results confirm their guilt, in an effort to prevent abuse of the process.\textsuperscript{169} In addition, unlike now, where there is no mandate that victims receive notice or any type of counseling services during a motion for retesting, a Massachusetts statute could adopt a requirement similar to the one found in Maine’s post-conviction DNA law.\textsuperscript{170} Finally, the most important reason Massachusetts needs to adopt a post-conviction DNA statute is that it would include specific mandates on evidence preservation so that convicts would be able to access their DNA after the development of new identification technology.\textsuperscript{171}

\textbf{A. Applicability}

The Massachusetts statute on post-conviction DNA access should apply to all persons currently serving a prison sentence, serving parole, subject to sex offender registration, or who have completed their prison sentence.\textsuperscript{172} Those who have finished their prison sentence should still receive an opportunity for DNA testing to prove their innocence and make them eligible to receive access; Commonwealth v. Tague, 751 N.E.2d 388, 397 (Mass. 2001) (holding appellant failed to establish prima facie case for relief); Commonwealth v. Conkey, No. 95-99, 2003 WL 22120176, at *13 (Mass. Super. Ct. Aug. 26, 2003) (discussing standard of review for post-conviction DNA evidence); see also Innocence Protection Act of 2004, 18 U.S.C. § 3600(a)(8)(b) (2004) (requiring test “raise a reasonable probability that the applicant did not commit the offense”); Me. Rev. Stat. tit. 15, § 2138(10)(B) (2006) (requiring test results “make it probable” different verdict would result); N.Y. CRIM. PROC. LAW § 440.30 (McKinney 2004) (mandating test result lead to “reasonable probability” of different verdict).

168. See Dist. Attorney’s Office v. Osborne, 129 S. Ct. 2308 (2009) (highlighting tensions between motions and finality of judgment concepts); Osborne, 129 S. Ct. at 2324 (Alito, J., concurring) (warning against inconsistent defense strategies); Meier, supra note 5, at 659-60 (discussing impact motions have on victims).


170. See supra note 154 and accompanying text (explaining impact on families and victim notification requirement); see also Meier, supra note 5, at 660 (arguing testing process difficult on victims even when results prove innocence). See generally, PICKING COTTON, supra note 5 (discussing impact on victim who gave false identification).

171. See Jones, Right Remedy, supra note 108, at 2940 (arguing prejudice against appellants after evidence destroyed); Jones, Evidence Destroyed, supra note 108, at 1269-70 (advocating improved evidence preservation standards); see also Richardson & Mulvihill, supra note 97 (analyzing Maher exoneration case); Dennis Maher, supra note 93 (discussing exoneration only after law student coincidently found evidence).

172. See Postconviction Model, supra note 11 (listing who should qualify under statute).
compensation under Massachusetts state law. In addition, those who have pled guilty at trial should still be eligible for DNA access under the statute, if allowing access would be in the best interests of justice in the judge’s discretion. Although this may be controversial, the Massachusetts Rules of Criminal Procedure already allow post-conviction relief for those who plead guilty; often these pleas are the result of incompetent representation in a court system that constantly pushes for plea bargains. In addition, the statute should not have a time limit for post-conviction relief, similar to the standard already in Rule 30 of the Massachusetts Rules of Criminal Procedure and New York’s post-conviction DNA access law.

B. Affidavit Requirement

The Massachusetts statute should require a sworn affidavit by appellants declaring their innocence in order to proceed with their motions for post-conviction DNA access, mirroring the requirement contained in the Federal Innocence Protection Act. Additionally, sanctions should be imposed when DNA results confirm the appellant’s guilt. A court should not issue sanctions when the test results are insufficient to grant a new trial, but only when the tests produce conclusive incriminating results. These sanctions should include charges of perjury, potential denial of parole, and elimination of any good behavior privileges acquired in prison. As a result, the creation of a post-conviction DNA statute in Massachusetts would actually deter frivolous claims more than the current system with no such sanctioning process.

173. See MASS. GEN. LAWS ch. 258D, § 5 (2004) (allowing up to $500,000 award, social services, and state tuition for wrongfully convicted); see also Oh, supra note 56, at 181-82 (discussing lasting impact wrongful convictions have on society, defendants, and victims).
174. See Oh, supra note 56, at 187 (advocating DNA access after guilty plea).
175. See supra note 56 and accompanying text (discussing rules of criminal procedure and reasons for relief after guilty plea). A study of New York attorneys revealed only twenty-six percent of private attorneys representing indigent clients interviewed their clients in homicide cases. See Oh, supra note 56, at 165 (highlighting problems of indigent representation leading to unjust guilty pleas).
176. See MASS. R. CRIM. P. 30 reporter’s note (detailing Rule 30 time requirement history); N.Y. CRIM. PROC. LAW § 440.30 practice cmts. (McKinney 2005) (discussing amendment eliminating time limit). The federal courts employ a rebuttable timeliness standard dependent on the facts of the case and the timing of the appellant’s motion. See supra notes 40-42 (discussing time standards under Innocence Protection Act). Maine adopted a strict time limit whereby appellants must file their motions within two years of conviction. See supra note 151 (reviewing Maine’s amended statute creating two-year time limit).
178. See id. § 3600(f)(2) (listing sanctions for incriminating results).
179. See id. (authorizing sanctions only when evidence clearly proves appellant’s guilt).
180. See id. (listing possible sanctions for results further proving guilt). A court could also force the appellant to pay the state back for the DNA testing. See id. § 3600(f)(2)(B)(ii) (forcing appellants to pay for incriminating results).
181. See 18 U.S.C. § 3600(f)(2)(B) (detering frivolous federal claims with sanctions); see also Kreimer & Rudovsky, supra note 5 at 561 (discussing fear that frivolous motions will clog courts).
C. Standard of Evidence to Be Tested

A Massachusetts statute on post-conviction testing should codify the current case law standard requiring appellants to make a prima facie showing that DNA tests “would have produced results that likely would have influenced the jury’s conclusion.”182 It should also incorporate the newly discovered requirement, currently found in Rule 30 of the Massachusetts Rules of Criminal Procedure, and mandate that the evidence an appellant seeks to test was either unavailable at trial or new identification technology exists for testing.183 This standard should deny testing to appellants who chose to suppress DNA evidence at trial, but there should be an exception, similar to the New York statute, that allows access “in the interest of justice.”184 As the Hernandez case illustrates, some lower Massachusetts courts mistakenly ignore motions for new methods of DNA testing that could lead to exonerations.185 Finally, the statute should adopt the evidence chain of custody standard used by the federal government, New York, and Maine.186 This would improve the legitimacy of tested evidence in Massachusetts because currently no standard establishes its validity.187

D. Payment

A Massachusetts statute should adopt the same standard for funds already employed through the common law and the amendments to Rule 30.188

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187. See supra note 186 (discussing other statutes requiring proof evidence not tampered with).

Indigent defendants should receive state funds based on the judge’s determination of the probability new testing would warrant a new trial. The decision should also include something similar to New York’s precedent, which excludes payment for exorbitant expert fees. Ultimately, however, payment would not be a fundamental issue in Massachusetts’s new statute because the “likelihood that meritorious” standard used today is similar to New York’s statute, and Massachusetts district attorneys have already pledged their support for those seeking funds for DNA testing.

E. Evidence Preservation and Laboratory Requirements

The most important part of the potential legislation is a requirement that the state preserve all forensic evidence collected in the course of a trial for the duration of one’s incarceration. This requirement not only works to avoid evidence going missing (as seen in the Dennis Maher case), but also ensures that incarcerated persons can still retest evidence with the advent of new DNA technologies. In addition to preservation requirements, the new statute should also create laboratory standards similar to New York’s requirements. The story of Stephan Cowans, a man convicted of shooting a police officer only to be exonerated after post-conviction DNA testing, best illustrates the need for

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189. See MASS. R. CRIM. P. 30(c)(5) reporter’s notes (discussing grounds for state funding); see also Conkey, 2003 WL 22120176, at *13 (basing fund request on significance of test results).


191. See MASS. R. CRIM. P. 30(c)(5) (codifying determination of state funds access); supra note 139 and accompanying text (discussing New York’s standards for state funds). In 2001, Mark Lee, Assistant District Attorney in the Homicide Unit of the Suffolk County District Attorney’s Office, stated that “the DA’s office has adopted a position that it will not oppose a defendant’s request for funds to have DNA testing performed.” Lee, supra note 13, at 664 (explaining district attorney’s stance on funding).

192. See Model Preservation, supra note 108 (advocating preservation throughout one’s incarceration).

193. See supra notes 93-97 (discussing Dennis Maher case and need for preservation reform). See generally Jones, Right Remedy, supra note 108 (advocating sanctions for evidence destruction); Jones, Evidence Destroyed, supra note 108 (discussing issues surrounding forensic evidence preservation). Requiring preservation throughout the duration of one’s incarceration avoids the pitfall in New York’s law that allows convicted persons to test DNA evidence if new technology is available, but also permits destruction of forensic evidence after all appeals have been exhausted, thus making the new technology exception virtually impotent. See supra notes 131-133 and accompanying text (discussing tension between preservation policies and time limitations under New York post-conviction DNA law). The federal government has a general policy of preserving forensic evidence throughout one’s incarceration, although it does allow the destruction of evidence if all appeals are exhausted, but only after the government gives the defendant 180 days notice. See Innocence Protection Act of 2004, 18 U.S.C. § 3600A (a) (2004) (listing exceptions to preservation throughout one’s incarceration).

194. See N.Y. EXEC. LAW § 995-a (McKinney 2008) (creating New York’s Forensic Science Commission); About the Office of Forensic Sciences, supra note 109 (explaining role of New York’s commission). Massachusetts can also follow New York in creating a DNA database that effectively stores and locates DNA materials used in criminal cases. See N.Y. EXEC. LAW § 995-c (McKinney 2008) (establishing New York’s DNA databank); The NYS DNA Databank and CODIS, supra note 110 (discussing uses of DNA databank).
oversight in Massachusetts’s forensic analysis program.\textsuperscript{195} A jury convicted Cowan after a police officer testified that Cowan’s thumbprint was found on a mug the shooter handled.\textsuperscript{196} An internal investigation by Boston Police following Cowan’s exoneration, however, revealed the testing officer knew Cowan’s fingerprint did not match that found at the scene of the shooting, but nevertheless testified that the print belonged to Cowan.\textsuperscript{197} Statutory laboratory standards would help ensure the accuracy of DNA testing, and not place the courts in the precarious position of determining which laboratory methods to use.\textsuperscript{198}

\textbf{F. Victim Services}

Motions for post-conviction DNA testing can be a very difficult process for victims and their families.\textsuperscript{199} Victims, often trying to move on with their lives, must now relive the process.\textsuperscript{200} In addition, exonerations can be very difficult for victims who may have provided inaccurate testimony or now realize that the real perpetrator remains at large.\textsuperscript{201} Currently, Massachusetts provides no formal process for victims and their families during a post-conviction motion.\textsuperscript{202} Under a new statute, Massachusetts should provide victims notification similar to that which Maine’s post-conviction access statute requires, as well as state counseling and social services throughout the process.\textsuperscript{203}

\textbf{IV. CONCLUSION}

Advancements in DNA technology have made and will continue to make fundamental changes in how the American justice system operates. The ability to use DNA technology in the identification of criminal perpetrators has not only led to more successful convictions, but has also highlighted mistakes within the criminal justice system. As a result, many convicted persons have seen new DNA tests as the best opportunity to prove their innocence. Critics of

\begin{itemize}
\item \textsuperscript{195} See Garrett & Neufeld, supra note 109, at 73-74 (discussing Cowan case).
\item \textsuperscript{196} Id.
\item \textsuperscript{197} See id. (noting officer’s knowledge that print not Cowan’s).
\item \textsuperscript{199} See Oh, supra note 56, at 181-82 (noting lasting impact wrongful convictions have on society, defendants, and victims); supra note 154 and accompanying text (explaining impact on families and victim notification requirement).
\item \textsuperscript{200} See Robicheau, supra note 154 (describing process as causing victims and their families to “go through it again”).
\item \textsuperscript{201} See Meier, supra note 5, at 660 (arguing testing process difficult for victims even when results prove innocence). See generally PICKING COTTON, supra note 5 (giving narrative of impact on both victim and wrongfully convicted).
\item \textsuperscript{202} See Meier, supra note 5, at 659-60. (explaining current process for victims).
\item \textsuperscript{203} See ME. REV. STAT. tit. 15, § 2138(13) (2006) (describing victim notification requirements).
\end{itemize}
such open post-conviction DNA access, however, have legitimate concerns that an abundance of motions for DNA access will not only clog the court system, but may also have a damaging effect on victims and their families.

In response to the growing debate between post-conviction DNA access in the pursuit of justice and genuine concerns about the impact these motions will have on the court system, both federal and state governments have enacted statutes addressing post-conviction DNA access. In 2004, Congress passed the Innocence Protection Act, which outlined specific procedures and requirements for DNA access in federal courts. New York was one of the first states to enact a post-conviction DNA statute and has subsequently amended its legislation to codify when, how, and who will pay for an appellant’s motion for post-conviction DNA testing. Finally, Maine has also recently amended its statute on post-conviction DNA access, despite having only one post-conviction DNA motion reach its supreme court since the legislation’s passage in 2006.

Despite legislative action by both federal and state governments, Massachusetts continues to be one of only two states in the country that does not have a post-conviction DNA access statute. Instead, appellants seeking such access must rely on general rules of criminal procedure. As a result, the current case-by-case process leaves many aspects of post-conviction DNA access unanswered, where a statute could directly address these issues. First, an affidavit requirement in the Massachusetts statute, similar to the one in the Innocence Protection Act, would deter the possibility of frivolous lawsuits, which concerns opponents of post-conviction DNA access. Second, the statute could establish the specific standard judges should use in determining proper payment procedures for new post-conviction DNA access. Third, a statute would affirmatively address victim services concerns by requiring victim notification and counseling similar to that found in Maine’s post-conviction DNA statute. Fourth, and most importantly, a new statute would codify specific evidence preservation and testing requirements to ensure that defendants would never lose their ability to prove their innocence simply because the state has misplaced or destroyed evidence from trial. Finally, it is important to note that because Massachusetts courts already apply the same requirements as those found in other post-conviction statutes when analyzing a motion for post-conviction DNA access, a statute on post-conviction DNA access would not radically alter the Massachusetts court system, but would instead provide a more definitive and practical method for assessing post-conviction DNA motions.

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