California Western School of Law

From the SelectedWorks of Justin P Brooks

February 5, 2011

Blood Sugar Sex Magik: A Review of Post-Conviction DNA Testing Statutes and Legislative Recommendations

Justin P Brooks, California Western School of Law

Available at: https://works.bepress.com/justin_brooks/1/
Justin Brooks and Alexander Simpson

On August 10, 1993, Pamela Richards was severely beaten with two fist-sized rocks, manually strangled, and her skull was crushed with a concrete steppingstone. At the time of her death, Pamela was living with her husband, William Richards, in a remote desert community in San Bernardino, California. The couple was in the process of building a home on their property. They were temporarily living in a motor home and running their power from a gasoline-powered generator.

August 10, 1993 was a typical day for William Richards. Neighbors reported that he was seen walking with Pamela holding hands. Co-workers reported that he worked a normal shift and didn’t seem agitated in any way. He clocked out from work at his usual time and filled his ice chest with ice from a machine at work because he didn’t have refrigeration at his property. He drove home, arriving just after midnight, and was surprised to find that there were no lights on inside his motor home or on his property. He went to their shed and restarted his generator, and then walked toward the motor home to find Pamela and ask her why the generator wasn’t restarted. Walking across the yard he experienced the horrific act of tripping over Pamela’s half-naked body, his hands discovering that her head had been bashed in and her brain exposed.

William immediately called 911, and called two more times over the next half-hour. Finally, at 12:32 a.m., an officer arrived, but homicide detectives didn’t arrive until 3:15 a.m. Because it was dark, they decided not to process the scene until first light, almost three hours later.

During the time the officers waited, the area wasn’t secured. Dogs were allowed to roam in and out, obscuring footprints and blood evidence, contaminating the scene, and partially burying the victim.

With the police unable to place anyone else on the crime scene, William was put on trial for the murder of his wife. There were no defensive injuries, no confession, and no reason he would have called the police to bring them to his remote desert home had he been the killer. His conviction was largely based on the prosecution’s repeated assertion, through testimony and argument, that no one other than William could have committed the murder because there was no evidence that anyone other than William and his wife were at the crime scene. A blue thread that allegedly came from William’s shirt and was allegedly found under Pamela’s fingernail was introduced and it was argued that there was what appeared to be a bite mark on Pamela’s body that allegedly matched William’s bite mark. Without another suspect, and after three trials, a jury finally convicted William and he was sentenced to life in prison.

2 Justin Brooks is the Director and Co-Founder of the California Innocence Project and Institute Professor of Law at California Western School of Law. Alexander Simpson is the Litigation Coordinator of the California Innocence Project. Thanks to our research assistant Jihan Younis for her outstanding work.
Had a proper and timely investigation been conducted in the early morning hours of August 11, 1993, it is likely that evidence would have been gathered that could have exonerated William. There was a clear timeline of when he clocked out of work, and it could be established how long it took him to drive home. Simple time of death tests could have been conducted to determine how long Pamela had been lying dead on the ground. Fingerprinting of the home, shed, cars, and the two fist-size rocks used to beat Pamela could have led to other suspects. Swabbing the bite size mark on Pamela’s body could have garnered saliva for DNA tests. None of this was done. And while there was some DNA testing performed on some of the material from the crime scene using testing available in the early 1990s, that testing was inconclusive and not enough to help William avoid a life in prison.

In 2001, the California Innocence Project filed a post-conviction DNA testing motion on Richards’ behalf. The items sought to be tested included the murder weapons, several items at the house that were covered in blood, and the hairs found under Pamela’s fingernails. The testing revealed that the DNA on the murder weapons and the hairs under Pamela’s fingernails were neither William’s nor Pamela’s. New experts evaluated the “bite mark” and determined that it may not have even been a bite mark, and instead could have been a mark from a piece of metal on the crime scene. If it was a bitemark, experts further concluded that it may have been a dog bite, but if it was human it didn’t match William Richards. It was also discovered that the thread wedged in Pamela’s nail was nowhere to be seen on early crime scene photos and may have been planted.

Judge Brian McCarville of the San Bernardino Superior Court granted Richards an evidentiary hearing to present his evidence beginning in January of 2009. The hearing took place over several days in the spring and summer months of that year. At the hearing, Richards challenged the state’s evidence that had been presented against him at his trial in 1997. Two bite mark experts who had previously testified against Richards in 1997 were put on the stand to explain how the state of the science today excluded Richards as being the contributor of the bite mark found on Pamela. The blue fiber found at autopsy under the victim’s fingernail, and matching the shirt Richards was wearing that night, was found to be missing from photographs of the victim’s fingers before she was moved from the crime scene.

At the conclusion of the hearing, Judge McCarville determined that the totality of the evidence presented at the hearing required reversal of the conviction:

Taking the evidence as to the tuft fiber . . . and the DNA and the bite mark evidence, the Court finds that the entire prosecution case has been undermined, and that petitioner has established his burden of proof to show that the evidence before me points unerringly to innocence. Not only does the bite mark evidence appear to be questionable, it puts the petitioner as being excluded. And . . . the DNA evidence establishes that someone other than petitioner and the victim was at the crime scene.\(^3\)

\(^3\) Reporter’s Transcript of Oral Proceedings on Appeal at 480-81, People v. Richards, No. E049135 (Cal. Ct. App. 4th Dist. Aug. 11, 2009) (on file with ____). The celebration was short-lived. The district attorney
DNA may be the most significant forensic advance of the past century. Its accuracy is unparalleled when biological materials are gathered and tested properly. Thousands of defendants have been convicted of rape and murder using the technology; hundreds have been exonerated by way of post-conviction testing. DNA testing has brought a scrutiny to the mistakes of the criminal justice system that is unprecedented. Death row inmates have been exonerated, while others like Frank Lee Smith, who died an agonizing death from cancer awaiting execution on Florida’s death row only to be later exonerated by DNA testing, are unable to benefit from the testing.

For all of its benefits to the forensic community, however, the Supreme Court determined in 2009 that inmates have no constitutional right to DNA evidence which could prove their innocence. In the Alaska case of District Attorney v. Osborne, Chief Justice John Roberts wrote that those previously convicted have only limited rights to due process, and the right to DNA testing – even when that testing could conclusively determine the perpetrator – is not part of that due process right. Osborne’s holding means that the ability of an inmate to get access to DNA testing depends entirely on legislators.

appealed Judge McCarville’s decision, arguing, as it had at the evidentiary hearing, that the DNA found at the scene – under the victim’s fingernails, on the murder weapon – was “historical” in nature, and unrelated to the crime. Stiglitz, Jan. View From the Trenches: The Struggle to Free William Richards, 73 ALBANY L. REV. 1357, 1373 (2010). The district attorney petitioned to have the superior court grant a stay of the reversal pending its appeal. And on November 19, 2010, the Court of Appeal, Fourth Appellate District, reversed Judge McCarville’s decision. In re William Richards on Habeas Corpus, Case No. E049135. The California Innocence Project continues to pursue William Richards’ freedom.

4 There have been 261 post-conviction exonerations based on DNA evidence. The Innocence Project Case Profiles, http://www.innocenceproject.org/know/ (last visited October 31, 2010).


6 Smith was convicted of raping and murdering an 8-year-old girl and spent 14 years on death row protesting his innocence. Yet even after Smith died, prosecutors continued to object to the DNA test, saying he had been duly convicted.” Editorial, Protect the Innocent, ST. PETERSBURG TIMES, Apr. 13, 2002, at 14A.


8 Id. at 2320 (“A criminal defendant proved guilty after a fair trial does not have the same liberty interests as a free man”).

9 Ibid. (“Osborne’s right to due process is not parallel to a trial right, but rather must be analyzed in light of the fact that he has already been found guilty at a fair trial, and has only a limited interest in postconviction relief. . . . Instead, the question is whether [Alaska's statute] 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,' or 'transgresses any recognized principle of fundamental fairness in operation.'”)

10 Id. at 2322 (“The elected governments of the States are actively confronting the challenges DNA technology poses to our criminal justice systems and our traditional notions of finality, as well as the opportunities it affords”).
Forty-eight states and the federal government have adopted some form of post-conviction DNA testing law, but there are significant challenges when these laws are applied to cases like Richards which don’t involve rape kits and require a broader view of how DNA testing can prove innocence. Furthermore, the laws are not uniform, and in the politically charged atmosphere of criminal law making, not surprisingly some of the laws are poorly thought out. This article reviews these post-conviction statutes from the perspective of practitioners who litigate these cases while exploring the major questions that should be addressed by the statutes including:

1. For what crimes should DNA testing be available?
2. What standards must be met for post-conviction testing?
3. Who should do the testing?
4. Who should pay for the testing?
5. Should counsel be appointed?
6. Should there be time limits on the testing?
7. How long should biological material be maintained after conviction, and should there be sanctions for the failure to do so?
8. Should the courts order that DNA results be run through the DNA databank?
9. Should the denial of a DNA testing motion be appealable?
10. Should post-conviction DNA testing be granted to those inmates who plead guilty and/or confessed to their crime?
11. Should testing be available to individuals who are no longer incarcerated and/or who may be subject to requirements such as sex-offender registration?

Ultimately, we make recommendations for statutory changes and interpretations. We refer to the Richards case throughout this article as a reference point for the rationales behind these recommendations.

I. For What Crimes Should DNA Testing Be Available?

---

11 The only two states that do not have post-conviction DNA testing statutes are Oklahoma and Massachusetts. Oklahoma’s statute had a “sunset provision” (see part VI, infra) which expired on July 1, 2005. OKLA. STAT. tit. 22, § 1371(B) (West 2010). Massachusetts never enacted a DNA testing statute. The Innocence Project, http://www.innocenceproject.org/fix/state2.php?state=MA (last visited July 6, 2010).
The classic and best case for post-conviction DNA testing is a rape case, where consent is not the defense, and semen is collected from a live victim. The victim can testify about all consensual sexual encounters, and if the semen doesn’t match those individuals or the suspect, then there is a clear exclusion.\textsuperscript{12}

Modern DNA techniques are applicable to a broad range of crimes beyond rape and murder. For example, with the development of mitochondrial DNA, it is now possible to obtain DNA results from a hair strand without the root.\textsuperscript{13} Thus, DNA testing could be an important forensic tool in any case involving a crime scene where the presence or absence of hair strands could be exculpatory (e.g. a burglary where hair was left on the crime scene).

In William Richards’ case the hair strands found under Pamela’s fingernails could only be DNA tested due to advances in mitochondrial DNA testing over the past decade. Although the Richards’ case is a murder case, this type of evidence could obviously be relevant to any case where hair can be linked to, or exclude, a suspect.

Furthermore, the amount of biological material needed to get a cellular DNA result has decreased greatly over the past two decades. Early DNA testing required a stain roughly the size of a quarter,\textsuperscript{14} whereas now a profile can be obtained from a microscopic amount of biological material.\textsuperscript{15} This also broadens the number of crimes where there is the possibility of exculpatory DNA results.

The majority of the forty-eight states that currently have some type of post-conviction DNA testing statute limit the testing to specific crimes or classes of crimes. The most stringent state is Kentucky, which limits the ability to make a motion for post-conviction DNA testing to those who were convicted of a capital offense and sentenced to death.\textsuperscript{16} Alabama is a close second in that an actual death sentence is not required, but a right to post-conviction DNA testing is limited to capital offense convictions.\textsuperscript{17} Nevada, Indiana, Kansas, and Maryland are states which mandate a conviction for murder and/or certain categories of felonies.\textsuperscript{18}

\textsuperscript{12} When the victim is dead prosecutors have sometimes argued in post-conviction that there must have been a second attacker in addition to the defendant and the defendant simply did not ejaculate explaining why his semen is not present. Defense attorneys refer to this as the “unindicted co-ejaculator” theory.


\textsuperscript{15} Id. at 1492 n.108.

\textsuperscript{16} KY. REV. STAT. ANN. § 422.285(1) (West 2010).

\textsuperscript{17} ALA. CODE § 15-18-200(a) (2010). A capital offense is a list of eighteen crimes involving some variation of murder. ALA. CODE § 13A-5-40(a)(1)-(18) (2010).

\textsuperscript{18} Nevada requires a category A or B felony. NEV. REV. STAT. ANN. § 176.0918(1) (West 2010). Indiana requires either murder or a Class A, B, or C felony. IND. CODE ANN. § 35-38-7-1 (West 2010). Kansas’ statute only applies to those convicted of murder and rape. KAN. STAT. ANN. § 21-2512(a) (West 2010). Lastly, those individuals petitioning in Maryland must have been convicted of either murder, manslaughter, rape, or a sexual offense. MD. CODE ANN., CRIM. PROC. § 8-201(b) (West 2010).
Oregon’s adds the distinction between individuals who are in custody, and those who are not. If an individual is in custody, then their underlying conviction must have been for aggravated murder or a person felony; whereas if the applicant is not in custody, they must have been convicted of aggravated murder, murder, or a sex crime.

Seven of the forty-eight states have less stringent statutes. The District of Columbia’s post-conviction DNA statute is only applicable to those convicted of “a crime of violence.” With similar restrictions, the statute of Georgia only applies to those convicted of “a serious violent felony.” South Carolina has an even broader statute, which contains twenty-four qualifying offenses. Vermont’s statute lists fourteen qualifying offenses.

[19-23] A “person felony” includes: escape I, supplying contraband as defined in Crime Categories 6 and 7, aggravated murder, murder, felony murder, manslaughter I and II, negligent homicide, felony domestic assault, assault I, II, and III, criminal mistreatment I, female genital mutilation, assaulting a public safety officer, use of a stun gun, tear gas, mace I, kidnapping I and II, coercion as defined in Crime Category 7, rape I, II, and III, sodomy I, II, and III, sexual penetration I and II, sexual abuse I and II, felony public indecency, unlawful contact with a child, custodial sexual misconduct in the first degree, incest, abandon child, buying/selling custody of a minor, child neglect I, using child in display of sexual conduct, encouraging child sex abuse I and II, possession of material depicting sexually explicit conduct of child I and II, stalking, violation of court’s stalking order, theft by extortion as defined in Crime Category 7, burglary I as defined in Crime Categories 8 and 9, arson I, robbery I, II, and III, tree spiking (injury), abuse of corpse I, intimidation I, unlawful use of a weapon, inmate in possession of weapon, felony possession of a hoax destructive device, unlawful possession of soft body armor as defined in Crime Categories 6, promoting prostitution, compelling prostitution, felony animal abuse I, aggravated animal abuse I, environmental endangerment, causing another to ingest a controlled substance as defined in Crime Categories 8 and 9, unlawful administration of a controlled substance as defined in Crime Categories 5, 8, and 9, maintaining dangerous dog, hit and run vehicle (injury), felony driving under the influence of intoxicants, hit and run boat, purchase or sale of a body part for transplantation or therapy, alteration of a document of gift, subjecting another person to involuntary servitude I and II, trafficking in persons, aggravated vehicular homicide, luring a minor, online sexual corruption of a child I and II, aggravated harassment, aggravated driving while suspended or revoked, manufacturing or delivering a schedule IV controlled substance thereby causing death to a person, and attempts or solicitations to commit any Class A or Class B person felonies as defined herein. Or. Admin. R. 213-003-0001(14) (2010).


[21] D.C. Code § 22-4151(a) (2010). A “crime of violence”: means aggravated assault; act of terrorism; arson; assault on a police officer (felony); assault with a dangerous weapon; assault with intent to kill, commit first degree sexual abuse, commit second degree sexual abuse, or commit child sexual abuse; assault with intent to commit any other offense; burglary; carjacking; armed carjacking; child sexual abuse; cruelty to children in the first degree; extortion or blackmail accompanied by threats of violence; gang recruitment, participation, or retention by the use or threatened use of force, coercion, or intimidation; kidnaping; malicious disfigurement; manslaughter; manufacture or possession of a weapon of mass destruction; mayhem; murder; robbery; sexual abuse in the first, second, or third degrees; use, dissemination, or detonation of a weapon of mass destruction; or an attempt or conspiracy to commit any of the foregoing offenses.


[23] S.C. Code Ann. § 17-28-30(A) (2010). The “qualifying offenses” are as follows: murder; killing by poison; killing by stabbing or thrusting; voluntary manslaughter; homicide by child abuse; aiding and abetting a homicide by child abuse; lynching in the first degree; killing in a duel; spousal sexual battery; first, second, and third degree criminal sexual conduct; criminal sexual conduct with a minor; arson in the
qualifying crimes, but also allows any felony not enumerated in the list of qualifying crimes. Tennessee’s statute parallels Vermont in the sense that it lists certain offenses, but gives the trial judge the discretion to grant a post-conviction DNA testing motion for any other offense.

The majority of states and the federal government impose minimal to no conditions on individuals with respect to the underlying conviction. Seventeen of the forty-eight states and the federal statute explicitly require that the underlying conviction was a felony. The remaining nineteen states permit an individual convicted of any crime to bring a post-conviction motion for DNA testing.

There is no reason, other than cost, for limiting the number or type of crime or crimes. As DNA testing becomes cheaper, faster, and more discriminating, the possibility for discovering determinate samples (samples which could determine

26  TENN. CODE ANN. § 40-30-303 (West 2010).
culpability if their results were known) becomes much greater. And, as discussed below, dangers of cost overruns can be limited by ensuring that the proper standards and procedures for granting testing are followed.

II. WHAT STANDARDS MUST BE MET FOR POST-CONVICTION TESTING?

A. The one-step, two-step, three-step dance

In California, in order to obtain post-conviction DNA testing, Penal Code Section 1405 requires that a petitioner establish: that the “evidence sought to be tested is material to the issue of the convicted person's identity as the perpetrator of, or accomplice to, the crime, special circumstance, or enhancement allegation that resulted in the conviction or sentence;”\(^29\) and that “the requested DNA testing results would raise a reasonable probability that, in light of all the evidence, the convicted person’s verdict or sentence would have been more favorable if the results of DNA testing had been available at the time of conviction.”\(^30\)

Section 1405 was enacted in 2000.\(^31\) Since then, the courts have had great difficulty in interpreting what “reasonable probability” means, and to what specifically the standard should be applied. Some judges have interpreted this provision as requiring the court to first, without having the testing conducted, decide whether there is a reasonable probability that the testing will result in exculpatory evidence. Further, these same judges have ruled that it is a separate question as to whether there is “a reasonable probability that, in light of all the evidence,” the verdict or sentence would have been different.

For example, in the case of Mark McFadden, a molestation case, the California Innocence Project sought to have the victim’s panties tested; investigators confirmed the presence of semen on the panties, but these were never tested for DNA. The victim had positively identified McFadden at trial as the one who had committed the molestation. In denying McFadden’s motion for DNA testing, the court had this to say:

> Well, I heard this trial. And I remember the evidence that was presented in this case. . . . The Court does not conclude that there’s a reasonable probability that a different result would have been obtained if testing had been available and performed at the time of the trial.\(^{32}\)

In the McFadden case the court never got to the question of whether the evidence could be potentially exculpatory because the judge pre-determined the outcome of the DNA testing. This “two-step” approach makes it very difficult to win a post-conviction testing motion because there has already been a judge or jury determination that the

\(^{29}\) [CAL. PENAL CODE § 1405(f)(4) (West 2010)].

\(^{30}\) [CAL. PENAL CODE § 1405(f)(5) (West 2010)].

\(^{31}\) 2000 Cal. Legis. Serv. 821 (West).

\(^{32}\) Reporter’s Transcript of Motion re: DNA Testing at 6-7, *People v. McFadden*, No. FVI010285 (Sup. Ct. San Bernardino, March 10, 2006) (on file with ____).
defendant was guilty beyond a reasonable doubt. Thus, in the face of that, it is difficult for the judge to conclude that it is likely the test results will be exculpatory.

In other words, in the William Richards case, William was convicted based upon all of the evidence presented by the prosecution – the bite mark, the thread under Pamela’s nail, and whatever else the jury considered in convicting. Under the two-step approach the judge would have to be confident, without that testing, that the jury got it wrong. Otherwise, how could the judge conclude that there was a reasonable probability that the testing would be exculpatory?

Compounding the futility of this approach is the fact that the statute provides for the trial court to rule on a DNA testing motion. This is presumably because the trial court has more familiarity with the case, and is thus better able to make a determination as to whether, “in light of all the evidence” that was presented at trial, there exists a “reasonable probability” that DNA evidence would have affected the outcome at trial. In effect, under the two-step approach the judge who actually presided over the case must determine, without first ordering the testing, whether there is a reasonable probability that the testing would be exculpatory – in effect, whether it is likely that the judge presided over a wrongful conviction. Indeed, under the two-step analysis the only inmates who would be able to meet the requirement would be those inmates who don’t need post-conviction DNA testing: testing would be limited to those cases where the judge is already convinced of innocence without the testing.

The only way the statute can be interpreted without frustrating its purpose is to take a “one-step” approach. The court should determine whether the result of a favorable DNA test could produce evidence that, even when considering all the evidence produced at trial, creates a reasonable probability that the convicted person’s verdict or sentence would have been more favorable if the results of the DNA testing had been available at the time of trial. If the court fails to make the presumption of a favorable DNA testing result, the statute can never achieve its purpose.

In California, this issue was resolved only after extensive litigation. In Richardson v. Superior Court of Tulare County, decided a full eight years after California’s DNA statute was enacted, the California Supreme Court explained the proper posture for a superior court’s analysis is to presume favorable results when evaluating whether a defendant has met his burden under the statute.  

---

33 CAL. PENAL CODE § 1405(a) (West 2010).
34 CAL. PENAL CODE § 1405(f)(5) (West 2010).
35 43 Cal.4th 1040 (2008).
36 Id. at p. 1047 (Explaining that a reviewing court’s review of the superior court determination to grant or deny a motion for testing, “is necessarily based upon the trial court's judgment – that is, its evaluation of the weight of trial evidence in relation to DNA testing presumably favorable to petitioner . . .”).
37 Id. at p. 1051 (Explaining that, in determining whether a defendant has met his burden under the statute, “the trial court does not, and should not, decide whether, assuming a DNA test result favorable to the defendant, that evidence in and of itself would ultimately require some form of relief from the conviction.”).
The potential ambiguity in California’s statute is also present in the post-convictions DNA testing statutes of the District of Columbia, Georgia, and Iowa.

Hawaii’s recently enacted statute was drafted almost identically to California’s. Hawaii’s statute, however, states that the court shall order the testing if it finds, among other things: “a reasonable probability exists that the defendant would not have been prosecuted or convicted if exculpatory results had been obtained through DNA analysis, even if the defendant later plead guilty or no contest.”

By inserting “exculpatory” before the word “results,” Hawaii makes the reasonable probability requirement unambiguous. Hawaii’s statute thus leaves little room for misinterpretation by requiring the assumption that the results will be favorable.

Similarly, the Arizona statute, which also uses the “reasonable probability” standard, requires the court to order the testing if it finds, among other things: “a reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through deoxyribonucleic acid testing.”

The Texas statute requires the court to order the testing if it finds, among other things: “the person would not have been convicted if exculpatory results had been obtained through DNA testing.”

The language of the Hawaii, Arizona, and Texas statutes removes the judicial determination of whether the test result would be exculpatory by requiring the court to base its analysis on a presumably exculpatory result. The post conviction DNA testing

---

38 D.C. CODE § 22-4131(d) (2010) (“[T]here is a reasonable probability that testing will produce non-cumulative evidence that would help establish that the applicant was actually innocent of the crime for which the applicant was convicted . . . ”).
39 GA. CODE ANN. § 5-5-41(c)(3)(D) (West 2010) (“The requested DNA testing would raise a reasonable probability that the petitioner would have been acquitted if the results of DNA testing had been available at the time of conviction, in light of all the evidence in the case.”).
40 IOWA CODE ANN. § 81.10(7)(e) (West 2010) (“DNA analysis of the evidence would raise a reasonable probability that the defendant would not have been convicted if DNA profiling had been available at the time of the conviction and had been conducted prior to the conviction.”).
41 HAW. REV. STAT. § 844D-123(a)(1) (West 2010). Hawaii’s statute has two independent standards: one that orders the court to grant the motion, and another that gives the court discretion to grant the motion. The trial court may order testing if it finds that “[a] reasonable probability exists that DNA analysis of the evidence will produce results that would have led to a more favorable verdict or sentence for the defendant had the results been available at the proceeding leading to the verdict or sentence, even if the defendant pled guilty or no contest.” HAW. REV. STAT. § 844D-123(b)(1) (West 2010).
42 ARIZ. REV. STAT. ANN. § 13-4240(B)(1) (2010) (West) (emphasis added). If this standard is met, then the court must order testing. Id. However, an Arizona court may order testing if it finds that: “[a] reasonable probability exists that either: (a) The petitioner's verdict or sentence would have been more favorable if the results of deoxyribonucleic acid testing had been available at the trial leading to the judgment of conviction [or] (b) Deoxyribonucleic acid testing will produce exculpatory evidence. ARIZ. REV. STAT. ANN. § 13-4240(C)(1) (2010) (West).
43 TEX. CODE CRIM. PROC. ANN. art 64.03(a)(2)(A) (West 2010) (emphasis added).
statutes in Connecticut, Colorado, Indiana, Kentucky, Missouri, Nevada, New Mexico, Pennsylvania, Rhode Island, Tennessee, Wisconsin, and Wyoming all

44 CONN. GEN. STAT. ANN. § 54-102kk(b)(1) (West 2010) (“A reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing.”). A Connecticut court may order testing if “[a] reasonable probability exists that the requested testing will produce DNA results which would have altered the verdict or reduced the petitioner’s sentence if the results had been available at the prior proceedings leading to the judgment of conviction.” CONN. GEN. STAT. ANN. § 54-102kk(c)(1) (West 2010).

45 COLO. REV. STAT. ANN. § 18-1-413(1)(a) (West 2010) (“A court shall not order DNA testing unless the petitioner demonstrates by a preponderance of the evidence that: (a) Favorable results of the DNA testing will demonstrate the petitioner’s actual innocence.”).

46 IND. CODE ANN. § 35-38-7-8(4) (West 2010) (“A reasonable probability exists that the petitioner would not have been prosecuted or convicted of the offense if exculpatory results had been obtained through the requested DNA testing and analysis.”).

47 KY. REV. STAT. ANN. § 422.285(2)(a) (West 2010) (“A reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing and analysis.”). Kentucky also gives courts discretion to grant the motion for testing if: “A reasonable probability exists that either: The petitioner’s verdict or sentence would have been more favorable if the results of DNA testing and analysis had been available at the trial leading to the judgment of conviction; or DNA testing and analysis will produce exculpatory evidence.” KY. REV. STAT. ANN. § 422.285(3)(a) (West 2010).

48 MO. ANN. STAT. § 547.035(7)(1) (West 2010) (“A reasonable probability exists that the movant would not have been convicted if exculpatory results had been obtained through the requested DNA testing.”).

49 NEV. REV. STAT. ANN. § 176.0918(7)(a) (West 2010) (“A reasonable possibility exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through a genetic marker analysis of the evidence identified in the petition.”).

50 N.M. STAT. ANN. § 31-1A-2-(C)(5) (West 2010) (“If the DNA testing he is requesting had been performed prior to his conviction and the results had been exculpatory, there is a reasonable probability that the petitioner would not have pled guilty or been found guilty.”).

51 42 PA. STAT. ANN. § 9543.1(c)(3)(ii)(A) (West 2010) (“DNA testing of the specific evidence, assuming exculpatory results, would establish: (A) the applicant’s actual innocence of the offense for which the applicant was convicted.”).

52 R.I. GEN. LAWS § 10-9.1-12(a)(1) (2010) (“A reasonable probability exists that the petitioner would not have been convicted if exculpatory results had been obtained through DNA testing.”). Rhode Island also gives courts discretion to grant the motion for testing if: “A reasonable probability exists that the requested testing will produce DNA results which would have altered the verdict or reduced the petitioner’s sentence if the results had been available at the prior proceedings leading to the judgment of conviction.” R.I. GEN. LAWS § 10-9.1-12(b)(1) (2010).

53 TENN. CODE ANN. § 40-30-304(1) (West 2010) (“A reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA analysis.”). Tennessee also gives courts discretion to grant the motion for testing if: “A reasonable probability exists that analysis of the evidence will produce DNA results that would have rendered the petitioner’s verdict or sentence more favorable if the results had been available at the proceeding leading to the judgment of conviction.” TENN. CODE ANN. § 40-30-305(1) (West 2010).

54 WIS. STAT. ANN. § 974.07(7)(a)(2) (West 2010) (“It is reasonably probable that the movant would not have been . . . convicted . . . for the offense . . . if exculpatory deoxyribonucleic acid testing results had been available before the prosecution, conviction, finding of not guilty, or adjudication for the offense.”). Wisconsin also gives the judge discretion to grant the motion if: “It is reasonably probable that the outcome of the proceedings that resulted in the conviction . . . or the terms of the sentence . . . would have been more favorable to the movant if the results of deoxyribonucleic acid testing had been available before he or she was . . . convicted . . .”).

55 WYO. STAT. ANN. § 7-12-305(d) (West 2010) (“DNA testing of the specified evidence would, assuming exculpatory results, establish . . . [t]he actual innocence of the movant of the offense for which the movant
assume that test results will be favorable to the defendant. Confusingly, Wyoming’s statute assumes exculpatory results, but does not mandate testing; the statute merely provides that the court “may order testing” if the defendant meets the statute’s requirements. Thus, Wyoming’s statute adds an additional caveat: even in cases where favorable results would lead to a reversal, testing is still ordered only at the court’s discretion – meaning a court in Wyoming could deny testing even when all parties agree the testing could not only exonerate a defendant but find the real perpetrator.56

The statutes of thirteen states and the federal government are written such that they require the judge to take two steps in determining whether or not the standard is met.57

---

56 WYO. STAT. ANN. § 7-12-305(e) (West 2010). Hopefully, courts in Wyoming would have more sense than to do this.

57 Alaska, S.B. 110, 26th Leg., 2d Sess. (Alaska 2010) (“The proposed DNA testing of the specific evidence may produce new material evidence that would raise a reasonable probability that the applicant did not commit the offense.”). Alabama, ALA. CODE § 15-18-200(a) (2010) (“The results of the forensic DNA testing, on its face, would demonstrate the convicted individual’s factual innocence of the offense convicted.”). Florida, FLA. STAT. ANN. § 925.11(2)(f)(3) (West 2010) (“Whether there is a reasonable probability that the sentenced defendant would have been acquitted or would have received a lesser sentence if the DNA evidence had been admitted at trial.”). Louisiana, LA. CODE CRIM. PROC. ANN. art. 926.1(C)(1) (2010) (“There is an articulable doubt based on competent evidence, whether or not introduced at trial, as to the guilt of the petitioner and there is a reasonable likelihood that the requested DNA testing will resolve the doubt and establish the innocence of the petitioner. In making this finding the court shall evaluate and consider the evidentiary importance of the DNA sample to be tested.”). Maryland, MD. CODE ANN., CRIM. PROC. § 8-201(d)(1)(i) (West 2010) (“A reasonable probability exists that the DNA testing has the scientific potential to produce exculpatory or mitigating evidence relevant to a claim of wrongful conviction or sentencing.”). Mississippi, MISS. CODE ANN. § 99-39-5(1)(f) (West 2010) (“That there exists biological evidence secured in relation to the investigation or prosecution attendant to the petitioner’s conviction not tested, or, if previously tested, that can be subjected to additional DNA testing, that would provide a reasonable likelihood of more probable results, and that testing would demonstrate by reasonable probability that the petitioner would not have been convicted or would have received a lesser sentence if favorable results had been obtained through such forensic DNA testing at the time of the original prosecution.”). Montana, MONT. CODE ANN. § 46-21-110(5)(e) (2010) (“The results of the requested testing would establish, in light of all the evidence, whether the petitioner was the perpetrator of the felony that resulted in the conviction.”). New York, N.Y. CRIM. PROC. LAW § 440.30(1-a)(a) (McKinney 2010) (“If a DNA test had been conducted on such evidence, and if the results had been admitted in the trial resulting in the judgment, there exists a reasonable probability that the verdict would have been more favorable to the defendant.”). North Carolina, N.C. GEN. STAT. ANN. § 15A-269(b)(2) (West 2010) (“If the DNA testing being requested had been conducted on the evidence, there exists a reasonable probability that the verdict would have been more favorable to the defendant.”). Oregon, OR. REV. STAT. ANN. § 138.692(2)(d)(A)-(B) (West 2010) (“There is a reasonable possibility that the testing will produce exculpatory evidence that would establish the innocence of the person of: (A) The offense for which the person was convicted; or (B) Conduct, if the exoneration of the person of the conduct would result in a mandatory reduction in the person’s sentence.”). Vermont, VT. STAT. ANN. tit. 13, § 5566(a)(1) (West 2010) (“‘A reasonable probability exists that the petitioner would not have been convicted or would have received a lesser sentence for the crime which the petitioner claims to be innocent of in the petition if the results of the requested DNA testing had been available to the trier of fact at the time of the original prosecution.’”) Washington, WASH. REV. CODE ANN. § 10.73.170(3) (West 2010) (“The convicted person has shown the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis.”). West Virginia, W. VA. CODE ANN. § 15-2B-14(f)(5) (West 2010) (“The requested DNA testing results would raise a reasonable probability that, in light of all the evidence, the convicted person’s verdict
The statutes of ten states require three steps to be taken before a judge can grant a post-conviction DNA testing motion. In these states, courts must determine whether the results would be favorable: whether favorable results would have made a difference in the verdict; and finally, whether the DNA results would have been merely cumulative to the evidence already presented at trial.\(^\text{58}\) Only if a defendant passes all three steps is he or she entitled to relief.

Only four states have statutes that require a single step in determining whether or not the standard is met.\(^\text{59}\)

\(^{58}\) Delaware, Del. Code Ann. tit. 11, § 4504(a)(5) (West 2010) (“The requested testing has the scientific potential to produce new, noncumulative evidence materially relevant to the person’s assertion of actual innocence.”). Idaho, 2010 Idaho Sess. Laws 135 (“The result of the testing has the scientific potential to produce new, noncumulative evidence that would show that it is more probable than not that the petitioner is innocent.”). Illinois, 725 Ill. Comp. Stat. Ann. 5/116-3(c)(1) (West 2010) (“The result of the testing has the scientific potential to produce new, noncumulative evidence materially relevant to the defendant’s assertion of actual innocence even though the results may not completely exonerate the defendant.”).

Kansas, Kan. Stat. Ann. § 21-2512(c) (West 2010) (“The court shall order DNA testing . . . upon a determination that testing may produce noncumulative, exculpatory evidence relevant to the claim of the petitioner that the petitioner was wrongfully convicted or sentenced.”). Minnesota, Minn. Stat. Ann. § 590.01(1a)(c)(2) (West 2010) (“The testing has the scientific potential to produce new, noncumulative evidence materially relevant to the defendant’s assertion of actual innocence.”). North Dakota, N.D. Cent. Code § 29-32.1-15(3)(b) (West 2010) (“The testing has the scientific potential to produce new, noncumulative evidence materially relevant to the defendant’s assertion of actual innocence.”). Nebraska, Neb. Rev. Stat. § 29-4120(5) (2010) (“Testing may produce noncumulative, exculpatory evidence relevant to the claim that the person was wrongfully convicted or sentenced.”). Utah, Utah Code Ann. § 78B-9-301(2)(f) (West 2010) (“The testing has the scientific potential to produce new, noncumulative evidence that would establish the person's factual innocence.”). Virginia, Va. Code Ann. § 19.2-327.1(A)(iii) (West 2010) (“The testing is materially relevant, noncumulative, and necessary and may prove the convicted person's actual innocence.”).

\(^{59}\) New Hampshire, N.H. Rev. Stat. Ann. § 651-D:2-III(e) (2010) (“If the requested DNA testing produces exculpatory results, the testing will constitute new, noncumulative material evidence that will exonerate the petitioner by establishing that he or she was misidentified as the perpetrator or accomplice to the crime.”). New Hampshire does not require the court to grant the motion for DNA testing if this standard is met. Rather, the court may grant the motion for DNA testing if numerous factors have been met. N.H. Rev. Stat. Ann. § 651-D:2(III) (2010) (emphasis added). New Jersey, N.J. Stat. Ann. § 2A:84A-32a(d)(5) (West 2010) (“The requested DNA testing result would raise a reasonable probability that if the results were favorable to the defendant, a motion for a new trial based upon newly discovered evidence would be granted. The court in its discretion may consider any evidence whether or not it was introduced at trial.”). Ohio, ORC Ann. § 2953.74(C)(5) (2010) (“The court determines that, if DNA testing is conducted and an exclusion result is obtained, the results of the testing will be outcome determinative regarding that offender.”).
Two states, Maine and Michigan, create their own variation on the problem explained above by providing only one step for the courts to decide – the first. In determining whether the defendant’s motion should be granted, courts in Maine are required to show whether the evidence or results of testing “is material to the issue of” identity; that is, whether the defendant is “the perpetrator of, or accomplice to, the crime that resulted in the conviction.” The related statutes do not discuss how “materiality” is defined under the section, but presumably this means the courts must determine whether DNA testing results would be favorable or not. If, as discussed above, the court believes the evidence used to convict was sufficient, then it is likely to conclude that the DNA testing results will not be favorable, and the testing will not be ordered.

Finally, South Dakota’s statute provides for relief if the defendant can “identif[y] a theory of defense that: (a) Is consistent with an affirmative defense presented at trial; or (b) Would establish the actual innocence of the petitioner of the felony offense.” There have been no cases interpreting this cryptic language, so the defendant’s burden under the statute is altogether unclear, but presumably this means that he or she must show that the results of DNA testing would be in line with a third-party culpability defense that had previously been presented at his or her trial, or that the requested results would be favorable to the defendant. If so, this would mean South Carolina’s statute runs afoul of the same problems outlined above.

As has been demonstrated in hundreds of DNA exonerations across the country, reliance on a two-step approach to determining whether testing should be ordered will often preclude testing from being performed when in fact it should be completed.

A study of the first 225 cases of DNA exonerations performed by the New York based Innocence Project shows that 77% involved eyewitness misidentification; 52% involved improper forensics; 16% involved police informants; and 23%, or, 1 in 4, involved false confessions or admissions.

the Revised Code, there is a strong probability that no reasonable factfinder would have found the offender guilty of that offense or, if the offender was sentenced to death relative to that offense, would have found the offender guilty of the aggravating circumstance or circumstances the offender was found guilty of committing and that is or are the basis of that sentence of death.

OH ST § 2953.71(L) (2010) (later effective date). South Carolina, S.C. CODE ANN. § 17-28-90(B)(5) (2010) (“[I]f the requested DNA testing produces exculpatory results, the testing will constitute new evidence that will probably change the result of the applicant's conviction or adjudication if a new trial is granted and is not merely cumulative or impeaching.”). 60 ME. REV. STAT. ANN. tit. 15, § 2138(4-A)(E) (2010) (ordering testing is the defendant shows that “[t]he evidence sought to be analyzed, or the additional information that the new technology is capable of providing regarding evidence sought to be reanalyzed, is material to the issue of whether the person is the perpetrator of, or accomplice to, the crime that resulted in the conviction”); MICH. COMP. LAWS ANN. § 770.16(4)(a) (West 2010) (ordering testing if the defendant provides “prima facie proof that the evidence sought to be tested is material to the issue of the convicted person’s identity as the perpetrator of, or accomplice to, the crime that resulted in the conviction.”). As with many states’ DNA testing statutes, the language used is substantially the same; undeniably, they either share a common source or one was modeled after the other.

61 S.D. CODIFIED LAWS § 23-5B-1(9) (2010).

This last statistic is particularly telling and demonstrative of why a two-step approach does not work. Courts employing a two-step analysis would invariably conclude that further DNA testing would produce inculpatory, not exculpatory, results in cases where the inmate has confessed to the crime. Yet, in 1 in 4 of the first 225 exonerations, courts who concluded this would have prevented testing under a two-step analysis.

Clearly a one-step analysis should be required by and post-conviction DNA testing statute. The alternative is simply untenable given what we know about DNA exonerations.

III. THE IDENTITY ISSUE

A common and generally misguided worry is that post-conviction DNA laws might “open the floodgate” of inmate litigation. States have addressed this concern by only considering motions in cases where the “identity of the perpetrator was at issue” in the trial. This limitation is in the post-conviction DNA testing statutes of the following statutes: Alaska, Alabama, Arkansas, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Missouri, Maine, Michigan, Minnesota, New Jersey, New Mexico, North Dakota, Ohio, Pennsylvania, South Dakota, and the federal government.

---

64 AK (S.B. 110, 26th Leg., 2d Sess. (Alaska 2010).
65 ALA. CODE § 15-18-200(e)(3) (2010). In Alabama, the motion must contain “prima facie evidence demonstrating that the identity of the perpetrator was at issue in the trial.” However, this is not a condition that must be fulfilled in order for the court to grant the motion. See ALA. CODE § 15-18-200(f)(1) (2010).
66 ARK. CODE ANN. § 16-112-202(7) (West 2010).
67 DEL. CODE ANN. tit. 11, § 4504(a)(3) (West 2010).
68 FLA. STAT. ANN. § 925.11(2)(a)(4) (West 2010).
69 GA. CODE ANN. §§ 5-5-41(c)(7)E (West 2010).
70 HAW. REV. STAT. § 844D-123(a)(2) (2010). This limitation only applies to post-conviction DNA testing motions which the court must grant. HAW. REV. STAT. § 844D-123(a) (West 2010) (emphasis added). If the court has discretion in granting the post-conviction DNA testing motion, then identity need not be an issue in the case. See HAW. REV. STAT. § 844D-123(b) (West 2010).
71 IDAHO CODE ANN. § 19-4902(c)(1) (West 2010).
72 725 ILL. COMP. STAT. ANN. 5/116-3(b)(1) (West 2010).
73 IOWA CODE ANN. § 81.10(7)(c) (West 2010).
74 MO. ANN. STAT. § 547.035(2)(4) (West 2010). In Missouri, the motion must allege that “identity was an issue in the trial.” Id. However, this is not a condition that must be fulfilled in order for the court to grant the motion. See MO. ANN. STAT. § 547.035(7) (West 2010).
76 MICH. COMP. LAWS ANN. § 770.16 (4)(b)(iii) (West 2010).
77 MINN. STAT. ANN. § 590.01(1a)(b)(1) (West 2010).
79 N.M. STAT. ANN. 31-1A-2 (C)(5) (West 2010). Alternatively, if the DNA testing the petitioner is requesting had been performed prior to his conviction and the results had been exculpatory, [the petitioner must show] there is a reasonable probability that [he] would not have pled guilty or been found guilty,” in lieu of identity having been an issue in his case. N.M. STAT. ANN. 31-1A-2 (C)(5) (West 2010).
A similar (albeit less restrictive) standard is employed in California. California courts will only consider cases where the “identity of the perpetrator of the crime was, or should have been, a significant issue in the case.” These cases are referred to by defense attorneys as cases where the defense is T.O.D.D.I (AKA “The Other Dude Did It”).

Notably, the California statute does not require a showing that the defendant knows or suspects who was the actual perpetrator of the crime. The statute merely requires that the identity of the perpetrator is “at issue,” meaning that, at the time of trial, there was a genuine prima facie dispute between the prosecution and the defense as to who committed the crime. Further, the statute also allows for situations where the identity of the perpetrator “should have been [a] significant issue in the case.” Thus, even if the defense presented at trial did not involve the issue of identity, the statute can still be used to secure post-conviction DNA testing if identity should have been argued, but was not.

For example, suppose a defendant is charged with murder. There are no witnesses. The defendant is developmentally disabled, or cannot remember the events because of intoxication, or is otherwise unable to assist the attorney in forming a defense. The defense pursues a self-defense believing it is the best opportunity for acquittal. By arguing self-defense, the identity of the defendant is no longer an issue. However, if evidence later shows that his client was not involved in the crime, unless a post-conviction DNA statute allows testing where evidence was or should have been an issue, the defendant may be prohibited from pursuing post-conviction DNA testing.

One need look no further than the legislative history for the correct interpretation of this part of the statute. Discussion from the Senate Committee meeting on April 11, 2000, noted the intended limitations for who may qualify for relief under section 1405:

[T]he only persons who could request DNA testing under this bill are those who had cases in which “identity” was the key issue. Thus, these are cases where a person was identified by a victim or witness as the person who had committed the crime and no defense such as self-defense or consent was used. This will limit the number of cases that this bill will apply to. The number of cases will also be limited because there must be some sort of genetic material available to be tested.

81 OH ST § 2953.74(C)(3) (2010) (later effective date).
83 S.D. CODIFIED LAWS § 23-5B-1(10) (2010). This only applies “[i]f the petitioner was convicted following a trial.” Id.
87 CAL. PENAL CODE § 1405(f)(3) (West 2010).
Montana,\textsuperscript{99} West Virginia,\textsuperscript{90} South Carolina,\textsuperscript{91} New Hampshire,\textsuperscript{92} and Oregon impose the same limitation that California does.\textsuperscript{93} However, the majority of post-conviction DNA testing statutes are silent on the matter. The post-conviction DNA statutes of the following states have no such requirement: Arizona,\textsuperscript{94} Colorado,\textsuperscript{95} Connecticut,\textsuperscript{96} District of Columbia,\textsuperscript{97} Nebraska,\textsuperscript{98} Mississippi,\textsuperscript{99} Nevada,\textsuperscript{100} Rhode Island,\textsuperscript{101} Utah,\textsuperscript{102} Indiana,\textsuperscript{103} Kansas,\textsuperscript{104} Kentucky,\textsuperscript{105} Louisiana,\textsuperscript{106} Maryland,\textsuperscript{107} New York,\textsuperscript{108} North Carolina,\textsuperscript{109} Tennessee,\textsuperscript{110} Vermont,\textsuperscript{111} Virginia,\textsuperscript{112} and Wisconsin.\textsuperscript{113}

Given the examples above, it is clear that legislatures addressing the identity issue have struggled to balance the goals of exclusion and inclusion. On one hand, there are valid interests in limiting testing where identity is not an issue since DNA is ultimately a tool for confirming or excluding a suspect. However, the purpose of any DNA statute is to ensure that individuals have access to testing where the results of that testing would be

\textsuperscript{89} MONT. CODE ANN. § 46-21-110(5)(c) (2010).
\textsuperscript{90} W. VA. CODE ANN. § 15-2B-14(f)(3) (West 2010).
\textsuperscript{91} S.C. CODE ANN. § 17-28-40(C)(5) (2010). In South Carolina, the application must “explain why the identity of the applicant was or should have been a significant issue during the original court proceedings.” \textit{Id.} However, this is not a condition that must be fulfilled in order for the court to grant the motion. \textit{See} S.C. CODE ANN. § 17-28-90(B) (2010).
\textsuperscript{92} N.H. REV. STAT. ANN. § 651-D:2(I)(a) (2010). In New Hampshire, the petition must “explain why the identity of the applicant was or should have been a significant issue during the original court proceedings.” \textit{Id.} However, this is not a condition that must be fulfilled in order for the court to grant the motion. \textit{See} N.H. REV. STAT. ANN. § 651-D:2(III) (2010). (However, a requirement that the court must find by clear and convincing evidence is that “the evidence sought to be tested is material to the issue of the petitioner’s identity as the perpetrator of, or accomplice to, the crime,” and “DNA results of the evidence sought to be tested would be material to the issue of the petitioner’s identity as the perpetrator of, or accomplice to, the crime that resulted in his or her conviction or sentence.” N.H. REV. STAT. ANN. § 651-D:2(III)(c)-(d) (2010).)
\textsuperscript{93} OR. REV. STAT. ANN. § 138.694(1)(b)(C) (West 2010). This only applies if the applicant is filing a petition requesting the appointment of counsel. OR. REV. STAT. ANN. § 138.694(1) (West 2010). Oregon provides an exception, whereby “if the person was document as having mental retardation prior to the time the crime was committed,” then identity need not have been at issue, and simply should have been at issue. OR. REV. STAT. ANN. § 138.694(1)(b)(C) (West 2010).
\textsuperscript{94} ARIZ. REV. STAT. ANN. §§ 13-4231 to -4240 (2010) (West).
\textsuperscript{95} COLO. REV. STAT. ANN. §§ 18-1-411 to -416 (West 2010).
\textsuperscript{96} CONN. GEN. STAT. ANN. §§ 54-102jj to -102kk (West 2010).
\textsuperscript{97} D.C. CODE §§ 22-4131 to -4135 (2010).
\textsuperscript{98} NEB. REV. STAT. §§ 29-4118 to -4124 (2010).
\textsuperscript{99} MISS. CODE ANN. §§ 99-39-1 to -29 (West 2010).
\textsuperscript{100} NEV. REV. STAT. ANN. § 176.0918 (West 2010).
\textsuperscript{101} R.I. GEN. LAWS §§ 10-9.1-10 to -12 (2010).
\textsuperscript{102} UTAH CODE ANN. §§ 78B-9-300 to -304 (West 2010).
\textsuperscript{103} IND. CODE ANN. §§ 35-38-7-1 to -19 (West 2010).
\textsuperscript{104} KAN. STAT. ANN. § 21-2512 (West 2010).
\textsuperscript{105} KY. REV. STAT. ANN. § 422.285 (West 2010).
\textsuperscript{106} LA. CODE CRIM. PROC. ANN. art. 926.1 (2010).
\textsuperscript{107} MD. CODE ANN., CRIM. PROC. § 8-201 (West 2010).
\textsuperscript{108} N.Y. CRIM. PROC. LAW §§ 440.10-.70 (McKinney 2010).
\textsuperscript{109} N.C. GEN. STAT. ANN. §§ 15A-269 to -270.1 (West 2010).
\textsuperscript{110} TENN. CODE ANN. §§ 40-30-301 to -313 (West 2010).
\textsuperscript{111} VT. STAT. ANN. tit. 13, §§ 5561-5570 (West 2010).
\textsuperscript{112} VA. CODE ANN. § 19.2-327.1 (West 2010).
\textsuperscript{113} WIS. STAT. ANN. § 974.07 (West 2010).
dispositive of their guilt or innocence, which means they must be broadly construed to prevent innocent inmates from falling through the cracks.

Statutes incorporating the “should have been” language seem closer to balancing those interests. However, in cases where identity was not, or should not have been an issue in the case, statutes should grant courts the discretion to order testing in the interest of justice. This allows those individuals who may have presented consent defenses or self-defense to be granted testing even where such a defense is used should the court determine there is merit to testing.

IV. WHO SHOULD DO THE TESTING?

The question as to who should do the testing is a difficult one. Police crime labs have often been accused of bias against the defense and even specific fraud. The most recent and notorious example of this is the F.B.I. crime lab frauds in Houston where 280 boxes of lost evidence, including a fetus and body parts, were found involving more than 8,000 cases after the laboratory’s DNA testing division had already been shut down as a result of an audit that revealed poor training, flawed recordkeeping, and misinterpreted data where defendants should have been exonerated instead of convicted.114 There is also the notorious case of Fred Zain, the West Virginian DNA lab specialist who developed a reputation for being able to get results in the toughest of cases.115 The reason was because he faked the results in hundreds of cases, simply confirming the suspects who were given to him without conducting the tests.

Zain worked as the Chief of Serology at the West Virginia Division of Public Safety from 1979 to 1989.116 In 1987, Glen Dale Woodall was convicted of multiple felonies, including two counts of sexual assault.117 Zain’s testimony was that, based upon his scientific testing of the semen recovered from the victims, “[T]he assailant’s blood types . . . were identical to Mr. Woodall’s;”118 and that the probability of this occurring was 6 in 10,000.119 Pursuant to a petition for writ of habeas corpus, subsequent DNA testing conclusively established that Glen Dale Woodall could not have been the


117 Id. at 509.

118 Id. (quoting State v. Woodall, 385 S.E.2d 253, 260 (W. Va. 1989).

119 Id. at 509.
perpetrator. 120

Following Woodall’s release, an investigation revealed serious misconduct on Zain’s part. 121 Employees whom Zain supervised testified that “they observed Zain recording on his worksheet results from enzyme test plates which appeared to them and to other employees . . . to be blank.” 122 The investigation yielded evidence that

Zain had falsely reported results on worksheets that could not be supported by data on the laboratory notes, including falsely reporting that testing had been performed on multiple items, when only a few had been tested, and falsely reporting that multiple genetic markers had been identified, when only a few had been identified. . . . [There were] improprieties in every case . . . reviewed in which Zain had been involved. 123

Even when the laboratory is free from fraud or bias, state-run labs may not be a good option to conduct testing, for the simple reason that they may not be motivated to perform and complete tests on a case they consider to be “closed.” As such, the lab may give the testing of evidence in a postconviction case a very low priority, with current, “active” cases – where the results of testing could result in a conviction – taking precedence. This is exactly what happened in the Richards case. The superior court granted Richards’s order for testing, and directed the testing facility at the Department of Justice to perform preliminary testing, in 2003. Five years later, this preliminary testing – merely to determine whether there was sufficient biological material to perform full tests – had not been completed. It was only after the California Innocence Project threatened to seek another court order that the DOJ admitted it could not complete the testing due to a backlog of “active” cases. Richards arranged for the testing to be completed at a private lab; this lab completed the testing in fewer than three months.

Of all the provisions found in post-conviction DNA testing statutes, the issue of who should conduct the testing seems to be the most highly variable. Generally, however, the statutes can be grouped into four broad categories:

120 Id.
121 American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD) issued a report that revealed numerous acts of misconduct by Fred Zain, which included:

(1) overstating the strength of results; (2) overstating the frequency of genetic matches on individual pieces of evidence; (3) misreporting the frequency of genetic matches on multiple pieces of evidence; (4) reporting that multiple items had been tested, when only a single item had been tested; (5) reporting inconclusive results as conclusive; (6) repeatedly altering laboratory records; (7) grouping results to create the erroneous impression that genetic markers had been obtained from all samples tested; (8) failing to report conflicting results; (9) failing to conduct or to report conducting additional testing to resolve conflicting results; (10) implying a match with a suspect when testing supported only a match with the victim; and (11) reporting scientifically impossible or improbable results.

Id. at 503, 516.
122 Id. at 511. One of the employees estimated that she had observed Zain reporting results from a blank plate at least 100 times. Id.
123 Id. at 513.
Category I – State Labs

Nineteen states specifically direct that testing be done at the state lab or state affiliated lab, or in the case of the federal government, by the FBI.\(^{124}\)

Category II – Party Determination

Eleven states allow for the parties to agree between themselves on a private lab, or if they are unable to agree, the statute authorizes the court to determine a lab.\(^{125}\)

Category III – Court Determination

Five states allow for the court to decide the lab and are silent about the parties.\(^{126}\)

---

\(^{124}\) Alaska, S.B. 110, 26th Leg., 2d Sess. (Alaska 2010). Arkansas, ARK. CODE ANN. § 16-112-208(a)(1) (West 2010). The court, however, may order another qualified lab to do the testing. ARK. CODE ANN. § 16-112-208(a)(2)(A) (West 2010). Florida, FLA. STAT. ANN. § 925.11(2)(h) (West 2010). Georgia, GA. CODE ANN. § 5-5-41(c)(9) (West 2010). Kentucky, KY. REV. STAT. ANN. § 422.287(3) (West 2010). The testing may also be done at another lab chosen by the Department of Kentucky State Police Laboratory. Id. Maine, ME. REV. STAT. ANN. tit. 15, § 2138(5) (2010). For a definition of “crime lab,” see ME. REV. STAT. ANN. tit. 15, § 2136(2) (2010). Nevada, NEV. REV. STAT. ANN. § 176.0918(9)(b)(1) (West 2010). New Hampshire, N.H. REV. STAT. ANN. § 651-D:2(IV)(c)-(d) (2010). Rhode Island, R.I. GEN. LAWS § 10-9.1-12(c) (2010). Oregon, OR. REV. STAT. ANN. § 138.692(4) (West 2010). The state crime lab will conduct the testing unless the parties agree otherwise. Id. (emphasis added). Pennsylvania, 42 PA. STAT. ANN. § 9543.1(e)(1)(i)-(iii) (West 2010). Pennsylvania’s statute permits the parties to agree to conduct the testing at an alternate lab, however, if the applicant is indigent, then the testing is conducted by the Pennsylvania State Police or its designee. 42 PA. STAT. ANN. § 9543.1(e)(1)(iii) (West 2010). Idaho, 2010 Idaho Sess. Laws 135. The state will conduct the testing if the petitioner qualifies for the test at public expense. If the petitioner can afford it, he may choose an accredited lab to conduct the testing. Id. South Dakota, S.D. CODIFIED LAWS § 23-5B-6 (2010). Texas, TEX. CODE CRIM. PROC. ANN. art 64.03(c)(1)-(3) (West 2010). The state crime lab, or one of its affiliates, will conduct the testing the defendant requests another laboratory accredited by the state. Id. Utah, UTAH CODE ANN. § 78B-9-301(7)(a) (West 2010). The state crime lab will conduct the testing “unless the person establishes that the state crime laboratory has a conflict of interest or does not have the capability to perform the necessary testing.” Id. Virginia, VA. CODE ANN. § 19.2-327.1(E) (West 2010). West, Virginia, W. VA. CODE ANN. § 15-2B-14(g) (West 2010). “Testing shall be conducted by a DNA forensic laboratory in this state.” Id. Wyoming, WYO. STAT. ANN. § 7-12-306(a) (West 2010). Washington, WASH. REV. CODE ANN. § 10.73.170(5) (West 2010). Federal statute, 18 U.S.C. 3600(c)(1). The court may order testing “by another qualified laboratory if the court makes all necessary orders to ensure the integrity of the specific evidence and the reliability of the testing process and test results.” 18 U.S.C. § 3600(c)(2).


\(^{126}\) Arizona, ARIZ. REV. STAT. ANN. § 13-4240(F) (2010) (West). Indiana, IND. CODE ANN. § 35-38-7-12 (West 2010). Michigan, MICH. COMP. LAWS ANN. § 770.16(6) (West 2010). Tennessee, TENN. CODE ANN. § 40-30-310 (West 2010). Ohio, OH ST § 2953.78(A) (2010). However, “[a] court shall not select or use a testing authority for DNA testing unless the attorney general approves or designates the testing authority
Category IV – No Designation

Thirteen states have no language relating to the selection of the lab, or are silent about whether the parties or the court ultimately determine the selection of the lab.127

In terms of cost, private labs can also be more cost-effective. For example, in 2006, the Department of Justice conducted a cost study of DNA testing and analysis.128 The study results revealed that the average cost of analyzing a rape kit in a state crime lab was $568.96.129 A private lab could conduct the same testing for $445.130

In order to avoid the taint of bias post-conviction DNA testing, and avoid potential delay, testing should be done by private labs. Such labs have sprung up across the U.S. over the past two decades and there are now 360 labs from which to choose.131 There is a formal accreditation for these labs and they are often used by both prosecutors and defense attorneys.

V. WHO SHOULD PAY FOR THE TESTING?

Prior to the passage of California’s post-conviction testing law, if inmates were lucky enough to get a judge to grant a DNA testing motion, they had to pay for the testing. The cost of the tests is typically well beyond the means of most inmates and their families.132 Without the means to pay for the testing it would not happen.

pursuant to division (C) of this section and unless the testing authority satisfies the criteria set forth in section 2953.80 of the Revised Code.” Id.


129 OFFICE OF STATE BUDGET & MGMT., DEPT’ OF JUSTICE, COST STUDY OF DNA TESTING AND ANALYSIS, 7 (2006), available at www.osbm.state.nc.us/files/pdf_files/3-1-2006FinalDNAReport.pdf. This estimate includes pre-screening costs, evidence control, quality reviews, and searching CODIS. Id. In response to a Request for Proposal to outsource rape kits involved in cases without a suspect, a private lab submitted a bid in this amount to the State Bureau of Investigation Crime Lab. This cost did not include the State Bureau of Investigation in-house costs for evidence control, quality reviews, or searching CODIS for a match. OFFICE OF STATE BUDGET & MGMT., DEPT’ OF JUSTICE, COST STUDY OF DNA TESTING AND ANALYSIS, 7 (2006), available at www.osbm.state.nc.us/files/pdf_files/3-1-2006FinalDNAReport.pdf.

130 This only includes the number of accredited labs. American Society of Crime Laboratory Directors, Laboratory Accreditation Board. http://www.ascld-lab.org/accreditedlabs.html (last visited June 28, 2010). As of June 12, 2010, there are 376 crime labs that have ASCLD/LAB accreditation. The list includes: 184 state labs, 124 local agency labs, 24 federal labs, and 16 international labs (located outside of the U.S.). Id.

131 The cost of STR or Y-STR Analysis of evidence and a reference sample is $1,295 per sample. E-mail from Joan Gulliksen, Customer Liaison, Orchid Cellmark, to Jihan Younis, Research Assistant, California Western School of Law (Aug. 16, 2010, 08:49 PDT) (on file with author). The cost of mtDNA Analysis is
One of the arguments against passing California’s Post-Conviction DNA testing law was that it would break the state budget as thousands of inmates filed for testing. The limiting provisions within the statute discussed herein have made that a false concern, as very few motions have been filed or granted. The California Innocence Project and the Northern California Innocence Project, for example, have together filed fewer than twenty motions for DNA testing in the past ten years.  

Even with the high cost of DNA testing, it pales in comparison to the societal costs when a wrongfully convicted person is in prison. First, there are all of the costs associated with supporting families who have often lost their main support when a father, mother, wife or husband goes to prison. Then, there are often costs associated with a wrongful conviction when there is an actual offender who is not brought to justice and continues to commit crimes. Finally, there are the most basic and quantifiable costs of housing, feeding, and providing medical care to a wrongfully convicted person.  

In California, the state pays for DNA testing if an inmate can hurdle all of the other requirements of Penal Code 1405. In other states there are various approaches. Twenty-one statutes are similar to California in that the state pays for testing. The statutes of nine states and the federal government permit the court to order the government to pay for testing, provided that the inmate is indigent or in the interests of justice. Three other states have two standards; one in which the court must order $2,850 for a sample of evidence; $1,450 per sample reference if it is blood or a buccal swab; $2,250 per sample reference if it is hair, bone, or other; $3,500 per sample if it is a highly degraded sample; and lastly, it costs $1,000 per sample to only extract and amplify DNA. Id. The cost of expert testimony, reserved with four-weeks notice, is $2,000 per day plus expenses. Id.

133 Based on internal records.


135 CAL. PENAL CODE § 1405(i)(1) (West 2010).


137 Arkansas, Ark. CODE ANN. § 16-112-208(a)(3) (West 2010). Connecticut, CONN. GEN. STAT. ANN. § 54-102kk(d) (West 2010). In Connecticut, a court may not deny testing because of an applicant’s inability to pay. Id. Delaware, Del. CODE ANN. tit. 11, § 4504(e) (West 2010). Delaware’s statute implies that the
testing, and another in which the court may order testing, financial responsibility depending upon which standard the court applies.\(^{138}\)

Three states condition financial responsibility on where the testing is conducted.\(^{139}\) Three states require the applicant to pay for testing,\(^{140}\) and nine states do not specify who is responsible for the costs of testing.\(^{141}\)

Of all of the statutes, eight states provide the court with the ability to make the petitioner pay for the costs of testing if the results were unfavorable to the petitioner.\(^{142}\)

\(^{138}\) Arizona, ARIZ. REV. STAT. ANN. § 13-4240(D) (West) (“If the court orders testing pursuant to subsection B, the court shall order the method and responsibility for payment, if necessary. If the court orders testing pursuant to subsection C, the court may require the petitioner to pay the costs of testing.”).

\(^{139}\) In Mississippi, if the applicant is indigent and the state performs the testing, then the state bears the costs. MISS. CODE ANN. § 99-39-11(6) (West 2010). Alternatively, if a private lab performs the testing, then the court may assess the costs against either the applicant or the state. Id. § 99-39-11(7). If Mississippi’s state crime lab lacks the ability or the resources to conduct the testing, then the state is required to pay. Id. § 99-39-11(8). Texas’s statute relieves the state from liability for payment if the court orders the testing to be done at a lab other than the Department of Public Safety lab or a lab under contract with the Department of Public Safety, unless good cause is shown. TEX. CODE CRIM. PROC. ANN. art 64.03(d) (West 2010). Vermont’s statute requires the state to pay if the state crime lab performs the testing. VT. STAT. ANN. tit. 13, § 5568(c)(1) (West 2010). Alternatively, the court may impose costs against the applicant or the state or both if testing is performed at a private lab. Id. § 5568(c)(2). If, however, the state crime lab does not have the ability or lacks the resources to conduct the testing, then the state must pay the costs of testing at a private lab. Id. § 5568(c)(3).


\(^{141}\) Illinois, Indiana, Iowa, Minnesota, Missouri, New York, North Dakota, Washington, and Virginia. Iowa and Missouri provide that the court may order the costs of testing to be borne by the inmate if the results are unfavorable, but do not specify who is to pay for the testing “up front.” IOWA CODE ANN. § 81.10(12) (West 2010); MO. ANN. STAT. § 650.058(2)(1) (West 2010). Indiana’s statute states that the court shall determine “the method and responsibility” for the testing, but provides no further language. IND. CODE ANN. § 35-38-7-10 (West 2010). Minnesota’s statute does provide for costs and filing fees to be borne by the state, but does not specify who pays for testing. MINN. STAT. ANN. § 590.02(2) (West 2010).
Conversely, only half that amount require the state to pay for testing if the results are favorable to the petitioner.\textsuperscript{143}

California inmates make between $0.30-$.95 per hour \textit{before} deductions.\textsuperscript{144} Considering that the average cost of analyzing a rape kit is $568.96, it would take an inmate earning $0.95/hour over 598 hours to pay for the testing (not including taxes, and assuming the inmate puts his or her entire paycheck towards saving for a rape kit).

The government should bear the cost of DNA testing, regardless of the circumstances or results of the test. If the inmate has the means to pay for the testing, then he or she can cover the costs of testing, but the simple realities of incarceration mean that the presumption should always be the state pay for testing. This would ensure that inmates who are wrongfully convicted have realistic means to get access to DNA evidence.

\textbf{VI. SHOULDN’T COUNSEL BE APPOINTED?}

The right to counsel in criminal proceeding has come a long way since the days of \textit{Gideon v. Wainwright} when defendants were forced to represent themselves in felony trials.\textsuperscript{145} However, although modern criminal procedure requires counsel be appointed in all criminal trials where a defendant is facing incarceration,\textsuperscript{146} and all fifty states require counsel for the initial criminal appeal,\textsuperscript{147} inmates are often left on their own in the world

\textsuperscript{142} In Kansas, the court cannot impose such a requirement if the petitioner is indigent. \textsc{kan. stat. ann.} § 21-2512(f)(1)(B) (West 2010). In South Carolina, the court is required to make the petitioner pay for testing upon by the state. \textsc{s.c. code ann.} § 17-28-100(B)(2) (2010). In North Carolina, the court is required to make the petitioner pay so long as he or she is not indigent. \textsc{n.c. gen. stat. ann.} § 15A-270(b) (West 2010). In Utah, the court is required to make the petitioner pay regardless of whether or not he or she is indigent. \textsc{utah code ann.} § 78B-9-304(1)(b) (West 2010). In Arkansas, if, upon motion by the state, the court determines that the applicant’s claim of actual innocence was false, then the court may assess costs against the applicant. \textsc{ark. cod. ann.} § 16-112-208(c)(2)(B) (West 2010). In Iowa, the defendant pays for the testing if the results “indicate conclusively” that he or she is the perpetrator. \textsc{iowa code ann.} § 81.10(12) (West 2010). In Missouri, the applicant must pay the costs of the testing if the testing confirms the applicant’s guilt. \textsc{mo. ann. stat.} § 650.058(2)(1) (West 2010). In South Dakota, the court must assess the costs against the applicant upon motion by the state. \textsc{s.d. codified laws} §23-5B-13(2)(a) (2010).

\textsuperscript{143} Maryland, \textsc{md. code ann.}, crim. proc. § 8-201(h)(2) (West 2010). In Nevada, the petitioner does not have to pay for testing if the petitioner is incarcerated at the time it is filed, indigent, and the results are favorable to the petitioner. \textsc{nev. rev. stat. ann.} § 176.0918(13) (West 2010). In Utah, the petitioner must pay for testing unless the petitioner is serving a sentence of imprisonment, indigent, and the testing is favorable to the petitioner. \textsc{utah code ann.} § 78B-9-302(4) (West 2010). Similarly, in Wyoming, the petitioner bears the cost unless the petitioner is imprisoned, indigent, and “[t]he DNA test supports the person’s motion.” \textsc{wyo. stat. ann.} § 7-12-309(a)(i)-(iii), (b) (West 2010).

\textsuperscript{144} \textsc{california prison industry authority}, \url{http://pia.ca.gov/About_PIA/FastFacts.html} (last visited Dec. 8, 2010).


\textsuperscript{146} \textit{Argersinger v. Hamlin}, 407 U.S. 25, 37 (1972) (holding that “absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanar, or felony, unless he was represented by counsel at his trial.”).

\textsuperscript{147} See \textit{Douglas v. People of State of Cal.}, 372 U.S. 353, 357 (1963) (“W]here the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor.”).
of post-conviction litigation.\footnote{See Murray v. Giarratano, 492 U.S. 1 (1989) (holding that states are not constitutionally required to appoint counsel for death row inmates seeking postconviction relief).} Thirty years ago, when faced with the choice of offering inmates access to counsel or a prison law library,\footnote{Bounds v. Smith, 430 U.S. 817, 830 (1977) (“[A]dequate law libraries are one constitutionally acceptable method to assure meaningful access to the courts . . . .”) \footnote{CAL. PENAL CODE § 1405(f)(1) (West 2010).}} states took the cheaper route of the barely functional and inadequate law libraries that can now be found in prisons from Maine to Hawaii.

The difficulty of litigating a post-conviction DNA motion varies based upon the statute. However, it is universally difficult for an inmate to pursue these motions unassisted by counsel. In order to achieve success with these motions a litigant must be able to: investigate for the evidence; draft the testing motion; litigate the testing motion; negotiate and oversee the lab testing; understand the test results; and then be able to draft and litigate whatever motions, petitions, and appeals are appropriate in light of the results.

The difficulty of litigating a post-conviction DNA motion varies based upon the statute. However, it is universally difficult for an inmate to pursue these motions unassisted by counsel. In order to achieve success with these motions a litigant must be able to: investigate for the evidence; draft the testing motion; litigate the testing motion; negotiate and oversee the lab testing; understand the test results; and then be able to draft and litigate whatever motions, petitions, and appeals are appropriate in light of the results.

The first step, investigating the evidence, can be very difficult. States such as California require a determination that biological material is available and in a testable condition.\footnote{CAL. PENAL CODE § 1405(f)(1) (West 2010).} This often requires a scavenger hunt of courthouses, crime labs, and evidence rooms to find the evidence. It is impossible for this type of work to be conducted from the confines of a cell.

For example, in the case of William Richards, there were several items needed for DNA testing including the murder weapon (paving stone), the victim’s fingernail, hair recovered from underneath the fingernail, the victim’s clothing, as well several areas on the crime scene where blood was found. In order to establish that the evidence existed and was in testable condition required an expert to accompany a lawyer to the evidence room and document the evidence.

Drafting the testing motion is another difficult step. The motions are not simple. They require facts and argument sufficient to justify the legal standards that are statutorily required. They require an understanding of the law, and to some extent the science of DNA. It is not simply a process of filling in forms.

Making the litigation even more difficult is the fact that cooperation from prosecutors hasn’t been the experience of the majority of litigants in the world of post-conviction DNA testing. Therefore, these motions are universally litigated requiring court appearances and the ability to articulate to the judge the basis for the motion, including explaining how the scientific testing can lead to exculpatory results. In the William Richards case, that required an understanding of both mitochondrial DNA (which was needed to test the hair under the fingernail), traditional DNA testing on the blood, as well as the legal knowledge needed to conduct the hearing. Typically, lawyers struggle with the scientific issues in these cases, even after litigating many of them. It is unrealistic to expect that inmates can prepare themselves for this type of litigation.
Even if there is success in the DNA motion, the litigant must then negotiate the order for testing and oversee the lab testing to some degree. Once the testing results are known, there is the task of understanding what they mean. The labs are not in the business of making forensic conclusions as to what the results mean in the context of the case, so that is another difficult task.

Finally, there is the task of using exculpatory testing results to gain a reversal of a conviction. That again requires the legal knowledge to draft and litigate whatever motions, petitions, and appeals are appropriate in light of the results.

Post-conviction DNA testing statutes that discuss the appointment of counsel can be organized in two categories: those that allow a court to appoint counsel at the discretion of the court, and those that require the appointment of counsel. Within these categories, the statutes can be further subdivided by the timing of the appointment of counsel: statutes that provide for counsel before the motion is brought; statutes that provide for counsel after the motion is brought; and statutes that do not specify when – or even if – counsel may be appointed.

**Category I – Discretionary Appointment**

The following states give judges discretion in appointing counsel, but if they are appointed, the appointment occurs prior to bringing the motion for DNA testing: Alabama,\(^{151}\) Arkansas,\(^{152}\) Idaho,\(^{153}\) and Washington.\(^{154}\)

The following states give judges discretion in appointing counsel, but if they are appointed, the appointment occurs after bringing the motion for DNA testing: Florida,\(^{155}\) Maine,\(^{156}\) Nevada,\(^{157}\) Mississippi,\(^{158}\) and Utah.\(^{159}\) The federal statute also falls into this category.\(^{160}\)

---

\(^{151}\) See ALA. CODE § 15-18-200(g)(3) (2010) (“The circuit court may appoint counsel for an indigent petitioner solely for the purpose of proceeding under this provision providing for post-conviction DNA testing”).

\(^{152}\) ARK. CODE ANN. § 16-112-207(a)(1) (West 2010) (“A person financially unable to obtain counsel who desires to pursue the remedy provided in this subchapter may apply for representation by the Arkansas Public Defender Commission or appointed private attorneys”).

\(^{153}\) IDAHO CODE ANN. § 19-4904 (2010) (West 2010) (“If the applicant is unable to pay court costs and expenses of representation, including stenographic, printing, witness fees and expenses, and legal services, these costs and expenses, and a court-appointed attorney may be made available to the applicant in the preparation of the application, in the trial court, and on appeal, and paid, on order of the district court, by the county in which the application is filed”).

\(^{154}\) WASH. REV. CODE ANN. § 10.73.170(4) (West 2010) (“Upon written request to the court that entered a judgment of conviction, a convicted person who demonstrates that he or she is indigent under RCW 10.101.010 may request appointment of counsel solely to prepare and present a motion under this section, and the court, in its discretion, may grant the request”).

\(^{155}\) FLA. STAT. ANN. § 925.11(2)(e) (West 2010) (“Counsel may be appointed to assist the sentenced defendant if the petition proceeds to a hearing and if the court determines that the assistance of counsel is necessary and makes the requisite finding of indigency”).

\(^{156}\) ME. REV. STAT. ANN. tit. 15. § 2138(3) (2010) (“If the court finds that the person filing a motion under section 2137 is indigent, the court may appoint counsel for the person at any time during the proceedings under this chapter”).
Indiana is the only state that truly gives the judge discretion to appoint counsel at any time.\textsuperscript{161}

**Category II – Appointment Required**

Other states have provisions that require the judge to appoint counsel to a defendant bringing or having brought a DNA testing motion. The following states require the judge to appoint counsel before the petition is brought: California,\textsuperscript{162} Oregon,\textsuperscript{163} Texas,\textsuperscript{164} West Virginia,\textsuperscript{165} and Wyoming.\textsuperscript{166}

\begin{itemize}
\item \textsuperscript{157} Nev. Rev. Stat. Ann. § 176.0918(4)(b) (West 2010) ("If a petition is filed pursuant to this section, the court may: After determining whether the petitioner is indigent pursuant to NRS 171.188 and whether counsel was appointed in the case which resulted in the conviction, appoint counsel for the limited purpose of reviewing, supplementing and presenting the petition to the court").
\item \textsuperscript{158} Miss. Code Ann. §§ 99-39-23(1) (West 2010) ("If an evidentiary hearing is required, the judge may appoint counsel for a petitioner who qualifies for the appointment of counsel under Section 99-15-15"). However, if the defendant was sentenced to death, the court must appoint counsel. Miss. Code Ann. § 99-39-23(9) (West 2010) ("In cases resulting in a sentence of death and upon a determination of indigence, appointment of post-conviction counsel shall be made by the Office of Capital Post-Conviction Counsel upon order entered by the Supreme Court promptly upon announcement of the decision on direct appeal affirming the sentence of death").
\item \textsuperscript{159} Utah Code Ann. § 78B-9-302(5)(a) (West 2010), Utah Code Ann. § 78B-9-109(1) (West 2010). If any portion of the petition is not summarily dismissed, the court may, upon the request of an indigent petitioner, appoint counsel on a pro bono basis to represent the petitioner in the post-conviction court or on post-conviction appeal. Counsel who represented the petitioner at trial or on the direct appeal may not be appointed to represent the petitioner under this section.
\item \textsuperscript{160} Utah Code Ann. § 78B-9-109(1) (West 2010).
\item \textsuperscript{161} Federal statute, 18 U.S.C. § 3600(b)(3).
\item \textsuperscript{162} Ind. Code Ann. § 35-38-7-11 (West 2010) ("The court may appoint defense counsel for the person who was convicted of the offense at any time during any proceedings under this chapter if the person is indigent").
\item \textsuperscript{163} Cal. Penal Code § 1405(b)(3)(A) (West 2010) ("Upon a finding that the person is indigent, he or she has included the information required in paragraph (1), and counsel has not previously been appointed pursuant to this subdivision, the court shall appoint counsel to investigate and, if appropriate, to file a motion for DNA testing under this section and to represent the person solely for the purpose of obtaining DNA testing under this section").
\item \textsuperscript{164} Or. Rev. Stat. § 138.694(1) (West 2010) ("The court shall grant a petition [for appointment of counsel if certain conditions are met]").
\item \textsuperscript{165} Tex. Code Crim. Proc. Ann. art 64.01(c) (West 2010).
\item A convicted person is entitled to counsel during a proceeding under this chapter. The convicting court shall appoint counsel for the convicted person if the person informs the court that the person wishes to submit a motion under this chapter, the court finds reasonable grounds for a motion to be filed, and the court determines that the person is indigent. Counsel must be appointed under this subsection not later than the 45th day after the date the court finds reasonable grounds or the date the court determines that the person is indigent, whichever is later.
\item Id.
\item W. Va. Code Ann. § 15-2B-14(b)(3)(A) (West 2010) ("Upon a finding of indigency, the inclusion of information required in subdivision (1) of this section, and that counsel has not previously been appointed pursuant to this subdivision, the court shall appoint counsel. Counsel shall investigate and, if appropriate, file a motion for DNA testing under this section. Counsel represents the indigent person solely for the purpose of obtaining DNA testing under this section").
\end{itemize}
The following states require the judge to appoint counsel, but only after the motion is brought: Colorado, Connecticut, Hawaii, Iowa, Kentucky.

166 WYO. STAT. ANN. § 7-12-308 (West 2010) (“A convicted person is entitled to counsel during a proceeding under this act. Upon request of the person, the court shall appoint counsel for the convicted person if the court determines that the person is needy and the person wishes to submit a motion under W.S. 7-12-303(c). Counsel shall be appointed as provided in W.S. 7-6-104(c)(viii).”)

167 COLO. REV. STAT. ANN. § 18-1-412(4) (West 2010) (“If the court does not deny the petitioner's motion for testing, the court shall appoint counsel if the court determines the petitioner is indigent and has requested counsel. The court shall forward a copy of the motion for DNA testing to the district attorney.”)

168 CT (CONN. GEN. STAT. ANN. § 54-102kk(e) (West 2010) (“Upon a showing by the person that DNA testing may be relevant to the person's claim of wrongful conviction, the court shall appoint counsel for an indigent person as follows”). It is not clear from the language of the statute whether an inmate can secure counsel before the filing of a motion upon a proper showing. The structure of the statute seems to indicate Connecticut inmates are only entitled to representation after the court has received a petition for testing, not before.

169 HAW. REV. STAT. § 844D-124(b) (West 2010) (“If the defendant has filed pro se, upon a showing that DNA testing may be material to the defendant's claim of wrongful conviction, the court shall appoint counsel for the defendant”).

170 IOWA CODE ANN. § 81.10(11) (West 2010) (“If the court determines a defendant who files a motion under this section is indigent, the defendant shall be entitled to appointment of counsel as provided in chapter 815”).

171 KY. REV. STAT. ANN. § 422.285(4) (West 2010) (“If the court orders testing and analysis under subsection (2) or (3) of this section the court shall appoint counsel to those petitioners who qualify for appointment under KRS Chapter 31”).
Missouri, 172 Michigan, 173 Montana, 174 Nebraska, 175 New Jersey, 176 New Mexico, 177 North Carolina, 178 South Carolina, 179 Virginia, 180 and Wisconsin. 181

**Category III – Counsel at Issue**

The following jurisdictions give courts discretion in appointing counsel, but do not explicitly specify when the appointment is to occur: Kansas, 182 District of Columbia, 183 Minnesota, 184 New Hampshire, 185 North Dakota, 186 Tennessee, 187 Vermont, 188 and Arizona. 189

---

172 MO. ANN. STAT. § 547.035(6) (West 2010) (“If a hearing is ordered, counsel shall be appointed to represent the movant if the movant is indigent”).

173 A court is not required to appoint counsel until the DNA testing has been ordered, and shows that the defendant was not the source. MICH. COMP. LAWS ANN. § 770.16(8) (West 2010) (“If the results of the DNA testing show that the defendant is not the source of the identified biological material, the court shall appoint counsel”).

174 MONT. CODE ANN. § 46-21-201(2) (2010) (“If the death sentence has not been imposed and a hearing is required or if the interests of justice require, the court shall order the office of state public defender, provided for in 47-1-201, to assign counsel for a petitioner who qualifies for the assignment of counsel under Title 46, chapter 8, part 1, and the Montana Public Defender Act, Title 47, chapter 1”). See also MONT. CODE ANN. § 46-21-201(3) (2010) (“Within 30 days after a conviction for which a death sentence was imposed becomes final, the sentencing court shall notify the sentenced person that if the person is indigent, as defined in 47-1-103, and wishes to file a petition under this chapter, the court will order the office of state public defender, provided for in 47-1-201, to assign counsel who meets the Montana supreme court’s standards and the office of state public defender’s standards for competency of assigned counsel in proceedings under this chapter for an indigent person sentenced to death”).

175 NEB. REV. STAT. § 29-4122 (2010) (“Upon a showing by the person that DNA testing may be relevant to the person’s claim of wrongful conviction, the court shall appoint counsel for an indigent person as follows”). Like Connecticut’s statute, Nebraska’s law is vague about whether there would be any case where a defendant could secure counsel before filing a motion for testing. The structure of the statute seems to indicate that counsel may only be appointed after, not before, filing.

176 N.J. STAT. ANN. § 2A:84A-32a(c) (West 2010) (“The court shall appoint counsel for the convicted person who brings a motion pursuant to this section if that person is indigent”).

177 N.M. STAT. ANN. § 31-1A-2(D) (West 2010) (“If the petitioner satisfies the requirements set forth in Subsection C of this section, the district court shall appoint counsel for the petitioner, unless the petitioner waives counsel or retains his own counsel”).

178 N.C. GEN. STAT. ANN. § 15A-269(c) (West 2010) (“The court shall appoint counsel for the person who brings a motion under this section if that person is indigent. If the petitioner has filed pro se, the court shall appoint counsel for the petitioner upon a showing that the DNA testing may be material to the petitioner’s claim of wrongful conviction”).

179 S.C. CODE ANN. § 17-28-60 (2010) (“The applicant must request counsel at the time he files his application. The court must appoint counsel for an indigent applicant after the court has determined that the application is sufficient to proceed to a hearing but prior to the actual hearing”).

180 VA. CODE ANN. § 19.2-327.1(H) (West 2010) (“In any petition filed pursuant to this chapter, the defendant is entitled to representation by counsel subject to the provisions of Article 3 (§ 19.2-157 et seq.) of Chapter 10 of this title”).

181 WIS. STAT. ANN. § 974.07(11) (West 2010) (“A court considering a motion made under sub. (2) by a movant who is not represented by counsel shall, if the movant claims or appears to be indigent, refer the movant to the state public defender for determination of indigency and appointment of counsel under s. 977.05(4)(f)”).

182 KAN. STAT. ANN. § 21-2512(e) (2010) (“The court may at any time appoint counsel for an indigent applicant under this section”).

183 D.C. CODE § 22-4133(e)(2) (2010) (“The court may appoint counsel for an applicant for DNA testing pursuant to this section who is financially unable to obtain adequate representation”).

29
The following states require counsel to be appointed in postconviction proceedings, but do not state when appointment is to occur: Alaska,\(^{190}\) Rhode Island.\(^{191}\)

The statutes of the following states do not contain any provisions relating to the appointment of counsel: Delaware, Georgia, Illinois, Louisiana, Maryland, New York, Ohio, and Pennsylvania.

The only state that explicitly denies a defendant the right to counsel is South Dakota.\(^{192}\)

---

\(^{184}\) MNN. STAT. ANN. § 590.05 (West 2010) (“A person financially unable to obtain counsel who desires to pursue the remedy provided in section 590.01 may apply for representation by the state public defender. The state public defender shall represent such person under the applicable provisions of sections 611.14 to 611.27, if the person has not already had a direct appeal of the conviction. The state public defender may represent, without charge, all other persons pursuing a postconviction remedy under section 590.01, who are financially unable to obtain counsel.”). A portion of this statute allowing the public defender to decline representation if the defendant had pleaded guilty at trial was found unconstitutional under the Minnesota Constitution in *Deegan v. State*, 711 N.W.2d 89 (Minn. 2006).

\(^{185}\) N.H. REV. STAT. ANN. § 651-D:2(V) (2010) (“The court may appoint counsel for an indigent petitioner under this section”).

\(^{186}\) N.D. CENT. CODE § 29-32.1-05(1) (West 2010) (“If an applicant requests counsel and the court is satisfied that the applicant is indigent, counsel shall be provided at public expense to represent the applicant”). North Dakota has held that indigent defendants are only entitled to counsel in postconviction relief situations at the discretion of the court, “when it would be beneficial to the applicant,” and in any case only when “a substantial issue of law or fact may exist.” *State v. McMorrow*, 332 N.W.2d 232, 237 (ND 1983).

\(^{187}\) TENN. CODE ANN. § 40-30-307 (West 2010) (“The court may, at any time during proceedings instituted under this part, appoint counsel for an indigent petitioner”).

\(^{188}\) VT. STAT. ANN. tit. 13, § 5562 (West 2010) The court may appoint counsel if the petitioner is unable financially to employ counsel and may order that all necessary costs and expenses incident to the matter, including but not limited to court costs, stenographic services, printing, and reasonable compensation for legal services, be paid by the state from the appropriation to the defender general.

*Id.*

\(^{189}\) ARIZ. REV. STAT. ANN. § 13-4240(E) (2010) (West) (“The court may appoint counsel for an indigent petitioner at any time during any proceedings under this section”).

\(^{190}\) S.B. 110, 26th Leg., 2d Sess. (Alaska 2010) (“If an applicant is indigent, filing fees must be paid under AS 09.19, and counsel shall be appointed under AS 18.85.100 to represent the applicant”).

\(^{191}\) R.I. GEN. LAWS § 10-9.1-5 (2010) (“An applicant who is indigent shall be entitled to be represented by the public defender”). It should be noted that the public defender may decline to represent a defendant if it believes there is no “reasonable likelihood of success” in the case. *Louro v. State*, 740 A.2d 343, 344 (RI 1999). Of course, many of the defendants applying for testing, and appointment of counsel, under this section had likely been represented by the public defender at their trial. The structure of the statute and the relevant case law seems to create a potential conflict: if a defendant is asserting that the public defender who represented him or her was ineffective for failing to investigate a potential DNA claim, it is possible, and probable, that the public defender would decide the claim has no “reasonable likelihood of success” and decline to represent him, leaving the defendant without representation.

\(^{192}\) S.D. CODIFIED LAWS § 23-5B-3 (2010) (“The court may not appoint counsel for an indigent petitioner under this chapter. However, the court may refer requests for DNA testing to the innocence Project in South Dakota or such volunteer attorney as the State Bar of South Dakota may designate”).
If nothing else, this article should illuminate to even the casual reader the complexities of postconviction DNA testing statutes and the potential difficulties involved in gaining access to DNA evidence. Counsel should be appointed as early in the proceedings as possible, before the time for filing of a motion for testing. In this manner, innocent inmates may actually have a chance at navigating the labyrinthine statutory schemes they will no doubt face.

VII. SHOULD THERE BE TIME LIMITS ON THE TESTING?

There are two types of time limits that are put on DNA testing. The first type limits how long an inmate will have to bring a testing motion. The second type actually puts a time limit on how long the testing statute will be in effect. These are known as sunset provisions. Both types of limits increase the possibility that innocent inmates, who could prove their innocence through the use of post-conviction DNA testing, will die in prison.

In terms of limiting the time to bring an individual DNA testing motion, there are several reasons why an inmate may not be able to bring the motion for a long time. The inmate may not have knowledge of the law or the availability of the evidence. The legal resources as discussed above may not be available under the state’s law, and even if it is possible to get a lawyer under the state’s statute, an inmate might spend years on unsuccessful attempts at getting legal assistance. From the confines of a prison cell, all an inmate can do is write letters, and those more often than not go unanswered.

Even if an inmate has the ability and resources to bring a DNA motion, there may exculpatory facts in the case that come to light long after a filing deadline has passed. For example, a defendant may be wrongfully convicted of rape even though there was biological evidence on the crime scene that matched neither the victim nor the defendant. Years later, even if the actual rapist is arrested and his DNA can be matched to the crime scene, a filing deadline could make it impossible to prove innocence.

The vast majority of post-conviction DNA statutes permit an individual to bring a motion at any time. The statutes in the following jurisdictions expressly permit an individual to bring a motion at any time: Arizona, Connecticut, Florida, Georgia, Hawaii, Idaho, Nebraska, Utah, District of Columbia, Kansas, Kentucky, New Hampshire, Rhode Island, Tennessee, and Wisconsin.

194 Conn. Gen. Stat. Ann. § 54-102kk(a) (West 2010). The motion must be brought while the person is incarcerated. Id.
196 Ga. Code Ann. § 5-5-41(a)-(c) (West 2010)). Georgia treats a postconviction motion for DNA testing as an “extraordinary writ,” meaning the defendant must show “good reason” for filing the motion more than 30 days after the conviction (Union Life Ins. Co. v. Aaronson, 109 Ga. App. 384 (GA 1964)), and at any rate the basis for granting such a motion is “much stricter” than a normal motion (Gordon v. The State, 193 Ga. App. 94, 95 (GA 1989)).
200 Utah Code Ann. § 78B-9-301(2) (West 2010).
Other states do not expressly state that the individual can bring a motion at any time, but it can be inferred due to the lack of a time restriction: California, Colorado, Illinois, Indiana, Iowa, Missouri, Ohio, Maryland, Montana, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, South Dakota, Texas, Virginia, Washington, and West Virginia.

Two states impose time limitations if certain conditions aren’t met. In Vermont, if the underlying conviction is not for a “qualifying offense,” then the petition must be filed within 30 months after the conviction. Otherwise, the petition may be filed at any time. Similarly, in South Carolina, there is no time limit unless the applicant pled guilty or nolo contendere, whereby the applicant has seven years to file.

Alaska, Arkansas, Delaware, Mississippi, and the federal government impose variations of a three-year limitation. The statutes of Alaska and Arkansas presume the application is timely if it is filed before three years after the date of conviction, and conversely, presume the application is untimely if it is filed three years or more after the conviction. Alaska’s statute also requires that the claim be filed by July 1, 2020 if the conviction was entered before July 1, 2010. Unlike Alaska and Arkansas, an

---

201 D.C. CODE § 22-4133(a) (2010).
202 KAN. STAT. ANN. § 21-2512(a) (West 2010).
204 N.H. REV. STAT. ANN. § 651-D:2(1) (2010).
206 TENN. CODE ANN. § 40-30-303 (West 2010).
207 WIS. STAT. ANN. § 974.07(2) (West 2010).
208 CAL. PENAL CODE § 1405 (West 2010).
209 COLO. REV. STAT. ANN. § 18-1-411 to -417 (West 2010).
210 725 ILL. COMP. STAT. ANN. 5/116-3 (West 2010).
211 IND. CODE ANN. § 35-38-7-1 to -19 (West 2010).
212 IOWA CODE ANN. § 81.10 (West 2010).
213 MO. ANN. STAT. § 547.035 (West 2010).
214 OH ST S 2953.71-84 (2010) (later effective date).
215 MD. CODE ANN., CRIM. PROC. § 8-201 (West 2010).
217 NEV. REV. STAT. ANN. § 176.0918 (West 2010).
218 N.J. STAT. ANN. § 2A:84A-32a (West 2010)
219 N.M. STAT. ANN. 31-1A-2 (West 2010).
220 N.Y. CRIM. PROC. LAW § 440.30 (McKinney 2010).
221 N.C. GEN. STAT. ANN. § 15A-269 to -270.1 (West 2010).
222 N.D. CENT. CODE § 29-32.15 (West 2010).
223 S.D. CODIFIED LAWS § 23-5B-1 to -17 (2010).
224 TEX. CODE CRIM. PROC. ANN. art 64.01-.05 (West 2010).
225 VA. CODE ANN. § 19.2-327.1 (West 2010).
226 WASH. REV. CODE ANN. § 10.73.170 (West 2010).
228 VT. STAT. ANN. tit. 13, § 5561(b)(2)(B) (West 2010).
229 VT. STAT. ANN. tit. 13, § 5561(a) (West 2010).
231 S.B. 110, 26th Leg., 2d Sess. (Alaska 2010); ARK. CODE ANN. § 16-112-202(10) (West 2010).
232 S.B. 110, 26th Leg., 2d Sess. (Alaska 2010).
application made in Delaware or Mississippi must be made within three years. For the federal statute, there is a presumption the application is timely within three years, and a rebuttable presumption it is not timely after three years; the presumption may be rebutted by, among other things, a showing of good cause.

Maine, Minnesota, and Oregon have similar limitations. A motion filed in Maine must be filed within the later of: two years after the date of conviction, or in cases in which the request for testing is based on new DNA technology, “within two years from the time that the technology became commonly known and available.” A motion filed in Minnesota must be filed within two years after the entry of judgment if no direct appeal is filed, or an appellate court’s disposition of a direct appeal, whichever is later. A motion filed in Oregon must be filed within two years.

Only two states impose a one-year time limit. In Alabama, if the case was appealed, then the applicant must file within one year of the certificate of judgment; if the case was not appealed, then within one year after the time for filing an appeal lapses; or, within 12 months of August 1, 2009. In Pennsylvania, a petition must be filed within one year from the date the judgment becomes final.

---

233 In Delaware, the motion must be made within three years after the judgment of conviction is final. Del. Code Ann. tit. 11, § 4504(a) (West 2010). In Mississippi, the motion must be made within three (3) years after the time in which the petitioner’s direct appeal is ruled on by the Supreme Court of Mississippi or, in case no appeal is taken, within three (3) years after the time for taking an appeal from the judgment of conviction or sentence has expired, or in case of a guilty plea, within three (3) years after entry of the judgment of conviction.


234 Federal statute, 18 U.S.C. § 3600(a)(10)(B) (the presumption may also be rebutted upon a finding “(i) that the applicant was or is incompetent and such incompetence substantially contributed to the delay in the applicant’s motion for a DNA test; (ii) the evidence to be tested is newly discovered DNA evidence; (iii) that the applicant’s motion is not based solely upon the applicant’s own assertion of innocence and, after considering all relevant facts and circumstances surrounding the motion, a denial would result in a manifest injustice; or (iv) upon good cause shown.”)


237 Or. Rev. Stat. Ann. § 138.510(3) (West 2010). If no appeal was taken, then two years from the date of the judgment or order. Or. Rev. Stat. Ann. § 138.510(3)(a) (West 2010). If an appeal was taken, then two years from the date the appeal became final. Or. Rev. Stat. Ann. § 138.510(3)(b) (West 2010). If a petition for certiorari to the U.S. Supreme Court was filed, then within two years of the date of denial, or the date of entry of a final state court judgment following remand from the Supreme Court, whichever is later. Or. Rev. Stat. Ann. § 138.510(3)(c)(A)-(B) (West 2010).


239 Ala. Code § 32.2(c)(1)-(2) (2010).


In Wyoming, an applicant may proceed with the motion so long as it is brought prior to bringing a motion for a new trial.\footnote{WYO. STAT. ANN. § 7-12-303(c) (West 2010).}

Louisiana\footnote{LA. CODE CRIM. PROC. ANN. art. 926.1(A)(1) (2010).} and Michigan\footnote{Mich. Comp. Laws Ann. § 770.16(1) (West 2010).} do not have limitations applicable to the individuals bringing the motion; however, they have imposed limitations on the length of time the statute is in effect, virtually eliminating their post-conviction DNA statutes at some point in the future. In Louisiana and Michigan, if an inmate fails to meet that deadline, then he is barred from ever being able to challenge his conviction on grounds of DNA evidence. In Louisiana, an inmate convicted of a felony must file an application for DNA testing prior to August 31, 2014.\footnote{LA. CODE CRIM. PROC. ANN. art. 926.1(A)(1) (2010). If the inmate was sentenced to death prior to the effective date of the Act, then the inmate may file the application at any time. LA. CODE CRIM. PROC. ANN. art. 926.1(A)(2) (2010).} In Michigan, an inmate convicted of a felony before January 8, 2001, has until January 1, 2012 to petition for DNA testing.\footnote{Mich. Comp. Laws Ann. § 770.16(1) (West 2010). Michigan’s statute does not impose a time limit for inmates convicted \textit{after} January 8, 2001. \textit{Id.} (emphasis added).}

Oklahoma’s DNA testing statute expired on July 1, 2005.\footnote{OKLA. STAT. tit. 22, § 1371(B) (West 2010) (“There is hereby created the Oklahoma Indigent Defense System DNA Forensic Testing Program to continue until July 1, 2005”).}

There is no logical argument, other than an appeal to cost savings, why there should be any time limits on the request for testing or the testing statute itself. If one admits that wrongful convictions exist in this country, and that postconviction DNA testing can address the issue of wrongful convictions, then time limits on testing make no sense.

**VIII. HOW LONG SHOULD BIOLOGICAL MATERIAL BE MAINTAINED AFTER CONVICTION AND SHOULD THERE BE SANCTIONS FOR THE FAILURE TO DO SO?**

California Penal Code Section 1417.9, entitled “Retention of Biological Material,” states that “the appropriate governmental entity \textit{shall retain all biological material} that is secured in connection with a criminal case for the period of time that any person remains incarcerated in connection with that case.”\footnote{CAL. PENAL CODE § 1417.9(a) (West 2010) (emphasis added).} The statute also states that, before any destruction of biological materials, a number of individuals be notified, including the defendant, his or her attorney, the county public defender, and the district attorney.\footnote{CAL. PENAL CODE § 1417.9(b)(1) (West 2010).} Further, if a motion for post-conviction DNA testing is filed pursuant to 1405 (and other requirements are met), then the destruction should be halted.\footnote{CAL. PENAL CODE § 1417.9(b)(2)(A) (West 2010).}

This is a tremendous step forward in the treatment of evidence after conviction and in the protection of a convicted defendant’s due process rights. And it is arguably an
appropriate nod to those counties whose evidence lockers are full from floor to ceiling with unused evidence and need to clean house every once in a while. However, if the “appropriate governmental entity” does, in fact, wind up destroying the evidence in violation of the statute, the statute provides for absolutely no remedy. No damages, no rehearing, nothing. The defendant seeking relief is afforded a plethora of rights pursuant to statute, but if those rights are violated, he or she is up the proverbial creek without a paddle.

What this means is that post-conviction defendants must remain hyper-vigilant if they wish to have their evidence retained, a daunting prospect for any *pro se* litigant who may or may not have knowledge of the law, procedures, or what the evidence can prove.

The following jurisdictions require evidence to be preserved for the period the defendant is incarcerated: Alaska, Arizona, Connecticut, Florida, Kentucky, Mississippi, Nevada, Texas, Wisconsin, District of Columbia, Hawaii, Illinois, Maine, Michigan, Maryland, Minnesota, Nebraska, New Hampshire, New Mexico, North Carolina, Rhode Island, South Carolina, and the federal government.

---

251 “Incarcerated” may also refer to statutes that provide for evidence preservation until the defendant’s sentence expires.
252 S.B. 110, 26th Leg., 2d Sess. (Alaska 2010). The duty to preserve evidence for the period the defendant remains incarcerated only applies to those convicted of a crime under AS 11.41.100-11.41.130, 11.41.410, or 11.41.434. *Id.* The duty to preserve remains while the defendant is subject to registration as a sex offender. *Id.*
253 ARIZ. REV. STAT. ANN. § 13-4221(A)(1) (2010) (West). This provision only applies to evidence secured in connection with a felony sexual offense or homicide, and continues to apply until the completion of the defendant’s supervised release. *Id.*
254 CONN. GEN. STAT. ANN. § 54-102j(b)-(c) (West 2010).
255 FLA. STAT. ANN. § 925.11(4)(b) (West 2010).
258 NEV. REV. STAT. ANN. § 176.0912(1) (West 2010). This only applies to a category A or B felony.
259 TEX. CRIM. PROC. CODE ANN. § 38.43(c)(1)-(2) (West 2010). Texas expressly eliminates the duty to preserve once the defendant is released on parole. *Id.*
260 WIS. STAT. ANN. §§ 165.81(3)(b) (West 2010).
261 D.C. CODE § 22-4134(a)-(b) (2010). This provision only applies to a crime of violence. *Id.*
262 HAW. REV. STAT. § 844D-126(a) (West 2010).
263 725 ILL. COMP. STAT. ANN. 5/116-4(b) (West 2010). If death was imposed, then evidence must be permanently retained. *Id.* If the underlying conviction was for an offense or an attempt of an offense defined in Article 9 of the Criminal Code of 1961 or in Section 12-13, 12-14, 12-14.1, 12-15, or 12-16 of the Criminal Code of 1961, then the duty to preserve evidence exists until the completion of the sentence, including supervised release. *Id.* However, the state only has to preserve evidence for 7 years following any conviction for any other felony. *Id.*
264 ME. REV. STAT. ANN. tit. 15, § 2138(14) (2010).
265 MICH. COMP. LAWS ANN. § 770.16(12) (West 2010).
266 MD. CODE ANN., CRIM. PROC. § 8-201(j)(2) (West 2010).
267 MINN. STAT. ANN. § 590.10(1) (West 2010).
268 NEB. REV. STAT. § 29-4125(1)-(2) (2010).
269 N.H. REV. STAT. ANN. § 651-D:3(I) (2010).
270 N.M. STAT. ANN. § 31-1A-2(L) (West 2010).
A few states require the evidence to be preserved for a certain number of years after a conviction. In Arkansas, the evidence must be preserved permanently if it relates to a conviction for a violent offense;\textsuperscript{275} for 25 years if it relates to a conviction for a sex offense;\textsuperscript{276} and for seven years if it relates to any other felony for which the defendant’s genetic profile may be taken.\textsuperscript{277} In Georgia, the evidence must be preserved until the sentence has been carried out if the death penalty is imposed.\textsuperscript{278} However, if the case involved one of a number of enumerated serious violent felony, such as sexual assault, sodomy, statutory rape, child molestation, bestiality, incest, or sexual battery, then the evidence must be maintained for a period of ten years after the judgment becomes final, or ten years after May 27, 2003, whichever is later.\textsuperscript{279} Iowa requires evidence samples be preserved for only three years from “the commencement of criminal actions,” presumably referring to trial.\textsuperscript{280} Montana imposes a preservation period of three years after the conviction becomes final, or for any period more than 3 years that is required by a court order issued within 3 years after the conviction became final.\textsuperscript{281} And Wyoming’s statute provides for biological material to be preserved for five years or the length of incarceration, whichever is longer;\textsuperscript{282} authorities may dispose of evidence after five years provided they notify the defendant and give the defendant an opportunity to respond.\textsuperscript{283}

If the conviction was for a felony, or a class 1 felony, or a sex offense that carries an indeterminate sentence,\textsuperscript{284} Colorado requires the evidence to be preserved for the life of the defendant.\textsuperscript{285}

A small minority of states impose an obligation to preserve evidence only after the inmate has filed a motion for DNA testing. These states are as follows: Indiana,\textsuperscript{286} Kansas,\textsuperscript{287} Louisiana,\textsuperscript{288} Pennsylvania,\textsuperscript{289} Washington,\textsuperscript{290} Tennessee,\textsuperscript{291} Utah,\textsuperscript{292} and Ohio.\textsuperscript{293}

\textsuperscript{271} N.C. GEN. STAT. ANN. § 15A-268(a6) (West 2010). If the defendant was convicted based on a guilty plea, then the evidence is only preserved for the earlier of three years from the date of conviction or until the defendant is released. \textit{Id.}
\textsuperscript{272} R.I. GEN. LAWS § 10-9.1-11(a)-(b) (2010).
\textsuperscript{273} S.C. CODE ANN. § 17-28-320(C) (West 2010). The duty to preserve evidence only applies to a list of convictions. S.C. CODE ANN. § 17-28-320(A)(1)-(24) (West 2010). However, if the conviction in the list is based on a plea of guilty or nolo contendere, then the evidence must be preserved for seven years from the sentencing date, or until the defendant is released, dies while incarcerated, or is executed, whichever is sooner. S.C. CODE ANN. § 17-28-320(C) (West 2010).
\textsuperscript{274} Federal statute, 18 U.S.C. 3600A. The statutory scheme provides for the evidence to be tested “if a defendant is under a sentence of imprisonment for such offense”; the evidence may be destroyed after 180 days if the defendant is provided with proper notice and does not file a motion for testing.
\textsuperscript{275} ARK. CODE ANN. § 12-12-104(b)(2)(A) (West 2010).
\textsuperscript{276} ARK. CODE ANN. § 12-12-104(b)(2)(B) (West 2010).
\textsuperscript{277} ARK. CODE ANN. § 12-12-104(b)(2)(C) (West 2010).
\textsuperscript{278} GA. CODE ANN. § 17-5-56(b) (West 2010).
\textsuperscript{279} \textit{Id.}
\textsuperscript{280} IOWA CODE ANN. § 81.10(10) (West 2010).
\textsuperscript{281} MONT. CODE ANN. § 46-21-111(1)(a) (2010). This only applies to a felony conviction. \textit{Id.}
\textsuperscript{282} WYO. STAT. ANN. § 7-2-105(r) (West 2010).
\textsuperscript{283} \textit{Id.}
\textsuperscript{284} COLO. REV. STAT. ANN. § 18-1-1102(1)(b)(c) (West 2010)
\textsuperscript{285} COLO. REV. STAT. ANN. § 18-1-1103(2) (West 2010).
\textsuperscript{286} IND. CODE ANN. § 35-38-7-14(1) (West 2010).
At least one state, Missouri, provides for evidence preservation, but does not state the length of time such evidence must be preserved.294

The remainder of states do not have an evidence preservation statute.295

DNA evidence should be preserved indefinitely, or at the very least for the length of time the inmate is incarcerated. DNA technology is constantly evolving. Increasingly refined tests are continuously being developed, and evidence previously thought to be “untestable” is now being processed as a matter of course. An individual convicted and sentenced to twenty years may find relief through a new, more discriminating testing procedure at some point of their incarceration – but only if the evidence still exists.

Very few states impose any meaningful remedy to the defendant if evidence is destroyed. Maryland’s statute is the only statute that provides a meaningful remedy to the defendant, but the remedy is limited to instances where the “failure to produce evidence was the result of intentional and willful destruction.”296 If such is the case, then the court must order a post-conviction hearing and infer that the results of the post-conviction DNA testing would have been favorable to the defendant.297

The following jurisdictions impose criminal penalties for violating an evidence preservation statute: Arkansas,298 Kentucky,299 South Carolina,300 Wyoming,301 District

287 KAN. STAT. ANN. § 21-2512(b)(2) (West 2010).
288 LA. CODE CRIM. PROC. ANN. art. 926.1(H)(3) (2010). The duty to preserve evidence exists only until August 31, 2014. Id.
289 42 PA. STAT. ANN. § 9543.1(b)(2) (West 2010).
290 WASH. REV. CODE ANN. § 10.73.170(6) (West 2010).
291 TENN. CODE ANN. § 40-30-309 (West 2010). In Tennessee, this provision only applies “when the petition is not summarily dismissed.” Id.
292 UTAH CODE ANN. § 78B-9-301(5) (West 2010).
293 OH ST s § 2953.81(A) (2010) (later effective date). It is important to note that the duty to preserve evidence only applies if DNA testing is performed based on the petition. Id.
294 MO. ANN. STAT. § 650.056 (West 2010) (“Any evidence leading to a conviction of a felony described in subsection 1 of section 650.055 which has been or can be tested for DNA evidence shall be preserved by the investigating law enforcement agency.”).
295 Alabama, Delaware, Idaho, New Jersey, New York, North Dakota, Oregon, South Dakota, Vermont, and West Virginia.
298 ARK. CODE ANN. § 12-12-104 (e)(1)-(2) (West 2010) (“A person who violates this section is guilty of a Class A misdemeanor”). Arkansas’s statute only applies to those who purposely fail to comply with the provisions of the evidence preservation statute. ARK. CODE ANN. § 12-12-104 (e)(1) (West 2010).
299 KY. REV. STAT. ANN. § 524.140(1)(6) (West 2010). “Tampering with physical evidence is a Class D felony.” KY. REV. STAT. ANN. § 524.100(2) (West 2010).
301 A person who willfully and maliciously destroys, alters, conceals, or tampers with physical evidence or biological material that is required to be preserved pursuant to this article with the intent to impair the integrity of the physical evidence or biological material, prevent the physical evidence or biological material from being subjected to DNA testing, or prevent the production or use of the physical evidence or biological material in an official proceeding, is guilty of a misdemeanor and, upon conviction, must

The following states give the court discretion to order whichever remedies, or impose whichever sanctions, the court deems appropriate: Alaska, Colorado, Maine, Mississippi, Minnesota, and Indiana.

be fined not more than one thousand dollars for a first offense, and not more than five thousand dollars or imprisoned for not more than one year, or both, for each subsequent violation.

Id. However, also note that § 17-28-360 states: “unless there is an act of gross negligence or intentional misconduct this article may not be construed to give rise to a claim for damages against the State of South Carolina” and/or its agents, and that the failure “of a custodian of evidence to preserve physical evidence or biological material pursuant to this section does not entitle a person to any relief from conviction or adjudication but does not prohibit a person from presenting this information at a subsequent hearing or trial.”

Id. WYO. STAT. ANN. § 7-2-105(s) (West 2010) (“Whoever willfully or maliciously destroys, alters, conceals or tampers with evidence that is required to be preserved under subsection (r) of this section with the intent to impair the integrity of that evidence, to prevent that evidence from being subjected to DNA testing or to prevent the production or use of that evidence in an official proceeding shall upon conviction be subject to a fine of not more than ten thousand dollars ($10,000.00), imprisonment for not more than five (5) years, or both”).

D.C. CODE § 22-4134(d) (2010) (“Whoever willfully or maliciously destroys, alters, conceals, or tampers with evidence that is required to be preserved under this section with the intent to (1) impair the integrity of that evidence, (2) prevent that evidence from being subjected to DNA testing, or (3) prevent the production or use of that evidence in an official proceeding, shall be subject to a fine of $100,000 or imprisoned for not more than 5 years, or both”).

N.C. GEN. STAT. ANN. § 15A-268(i)(1)-(2) (West 2010):

Whoever knowingly and intentionally destroys, alters, conceals, or tampers with evidence that is required to be preserved under this section, with the intent to impair the integrity of that evidence, prevent that evidence from being subjected to DNA testing, or prevent production or use of that evidence in an official proceeding, shall be punished as follows:

1) If the evidence is for a noncapital crime, then a violation of this subsection is a Class I felony; 2) If the evidence is for a crime of first degree murder, then a violation of this subsection is a Class H felony.

Id.

Louisiana only imposes criminal penalties for “willful or wanton misconduct or gross negligence.” LA. CODE CRIM. PROC. ANN. art. 926.1(H)(6) (2010).

Except in the case of willful or wanton misconduct or gross negligence, no clerk of court or law enforcement officer or law enforcement agency, including but not limited to any district attorney, sheriff, the office of state police, local police agency, or crime laboratory which is responsible for the storage or preservation of any item of evidence in compliance with the requirements of Paragraph (H)(3) shall be held civilly or criminally liable for the unavailability or deterioration of any such evidence to the extent that adequate or proper testing cannot be performed on the evidence.

Id.

TENN. CODE ANN. § 40-30-309 (West 2010) (“The intentional destruction of evidence after such an order may result in appropriate sanctions, including criminal contempt for a knowing violation”).

Federal statute, 18 U.S.C. § 3600A(f) (“Whoever knowingly and intentionally destroys, alters, or tampers with biological evidence that is required to be preserved under this section with the intent to prevent that evidence from being subjected to DNA testing or prevent the production or use of that evidence in an official proceeding, shall be fined under this title, imprisoned for not more than 5 years, or both.”)

S.B. 110, 26th Leg., 2d Sess. (Alaska 2010) (“If a court finds that evidence was destroyed in violation of the provisions of this section, the court may order remedies the court determines to be appropriate”).

However, the statute also states: “A person may not bring a civil action for damages against the state or a
The following states’ statutes contain provisions that expressly eliminate the existence of any cause of action that may arise from evidence destruction: Virginia and Iowa.

The remaining states do not address any potential remedies or sanctions for a failure to preserve evidence.

Obviously, it is difficult to state that there is one appropriate remedy for all situations and violations of a preservation statute, and perhaps the best thing that can be said is that each violation invites a remedy tailored to the particular situation. However, an order without the threat of punishment for violation invites the violation. Therefore, in the interests of ensuring adherence to the statute and its edicts, there must be some penalty for violation.

IX. SHOULD THE COURTS ORDER THAT DNA RESULTS BE RUN THROUGH THE DNA DATABANK?

In 1990, the FBI created the Combined DNA Index System (CODIS) as a pilot project throughout 14 states and labs. Three years later, Congress passed the DNA Identification Act, which granted the FBI the ability to establish a national “[i]ndex to
facilitate law enforcement exchange of DNA identification information.” 317 Pursuant to the statute, the index

[s]hall include . . . information on DNA identification records and DNA analysis that are . . . maintained by Federal, State, and local criminal justice agencies . . . pursuant to rules that allow disclosure of stored DNA samples and DNA analyses only . . . to criminal justice agencies for law enforcement identification purposes . . . in judicial proceedings, if otherwise admissible pursuant to applicable statutes or rules . . . for criminal defense purposes, to a defendant, who shall have access to samples and analyses performed in connection with the case in which such defendant is charged . . . . 318

All fifty states including the District of Columbia, Puerto Rico, and the U.S. Army319 have “statutory provision[s] for the establishment of a DNA database that allow[] for the collection of DNA profiles from offenders convicted of particular crimes.” 320

CODIS contains two indices used to solve crimes: the convicted offender index and the forensic index. 321 The convicted offender index houses DNA profiles of individuals convicted of certain crimes. 322 DNA profiles acquired from crime scenes are maintained in the forensic index. 323 CODIS software automatically searches these indexes for a match. 324

CODIS contains DNA profiles from the local, state, and national levels. 325 As of July 2010, “[t]he National DNA Index (NDIS) contains over 8,649,605 offender profiles and 328,067 forensic profiles.” 326 All fifty states including the District of Columbia, Puerto Rico, and the U.S. Army participate in CODIS. 327

---

318 Id. § 14132(b)(3)(A)-(C).
322 Id.
323 Id.
324 Id.
“CODIS software enables state, local, and national law enforcement crime laboratories to compare DNA profiles electronically, thereby linking serial crimes to each other and identifying suspects by matching DNA profiles from crime scenes with profiles from convicted offenders.”

CODIS has gained notoriety for solving crimes and identifying missing and unidentified persons. CODIS’s ability to exonerate innocent inmates, however, has been under-utilized and under-rated. Of all the post-conviction DNA testing statutes, only 6 jurisdictions provide for the DNA results to be run through CODIS. Sadly, the federal statute does not provide for defense access to its own index.

As with many of the issues relating to DNA testing statutes, the failure of legislatures to include language allowing defendants access to CODIS is generally defended by pointing to the potential cost. Police and investigative agencies claim that defendants cannot, and should not, be allowed access to CODIS to conduct their own investigations because to do so would “open the floodgates” of potential litigation.

This creates real-life problems in many different cases. Often, DNA profiles will be found at the crime scene that do not match the victim or the suspect. If the profile were to be run through CODIS, there may be a match to an individual in the system. Without defense access to CODIS, however, police and prosecuting agencies are free to disregard such evidence and claim that they have the “right” man, leaving the defendant without any recourse.

___


327 Id.


330 The FBI’s CODIS brochure focuses on CODIS’s ability to solve crimes. However, an inmate’s claim that he or she did not commit the crime for which he or she stands convicted is not a crime the FBI is looking to solve, as the inmate’s conviction implies that the crime was actually solved (and favorably, that is). See generally U.S. Dep’t of Justice, Fed. Bureau of Investigation, CODIS, available at http://www.fbi.gov/filelink.html?file=hq/lab/pdf/codisbrochure2.pdf.

331 In Colorado, the court must determine that “a reasonable probability exists that the database search will produce exculpatory or mitigating evidence relevant to a claim of wrongful conviction or sentencing,” before a search against the state database. COLO. REV. STAT. ANN. § 18-1-412(9) (West 2010). Illinois, 725 ILL. COMP. STAT. ANN. 5/116-3(a) (West 2010). In Maryland, the court must find “that a reasonable probability exists that the database search will produce exculpatory or mitigating evidence relevant to a claim of wrongful conviction or sentencing,” before it orders a database search. MD. CODE ANN., CRM. PROC. § 8-201(d)(2) (West 2010). Mississippi, MISS. CODE ANN. § 99-39-11(10) (West 2010) (“The court may order additional testing, paid for in accordance with subsections (6) through (8), upon a showing by the petitioner that the comparison of a DNA profile derived from the biological evidence at the scene of the crime for which he was convicted could, when compared to the DNA profiles in the SDIS or CODIS database systems, provide evidence that raises a reasonable probability that the trier of fact would have come to a different outcome by virtue of that comparison demonstrating the possible guilt of a third party or parties.” It is unclear whether this language allows for defendants to petition, and for courts to order, profiles to be run through CODIS.). North Carolina, N.C. GEN. STAT. ANN. § 15A-269(b) (West 2010). Ohio, OH ST s § 2953.74(E) (2010) (later effective date).
In William Richards’ case the prosecution repeatedly asserted that there was no evidence of anyone on the crime scene except William and Pamela. Biological evidence found on the scene that did not match either of them countered this theory. However, the opportunity to run the evidence through CODIS could have made the evidence much more powerful had it matched a convicted murderer. There is no provision in California’s DNA statute authorizing such a search.

A. The Case of Ray Krone

No case more clearly illustrates the need to allow defendants access to CODIS than the case of Ray Krone. Ray was a mailman living in Arizona in December of 1991 when Kimberly Ancona’s body was found in a pool of blood on the floor of a bar in Phoenix.332 Ancona was a bartender at the CBS Lounge and she was apparently stabbed to death at closing time.333 Ray became a suspect in the case when the police received information that he might have been at the bar at closing time and his name was found in Ancona’s address book.334

When Krone was initially taken into custody he had no idea what was going on. He worried that he would miss his softball game that weekend, but figured the police would soon learn that he had nothing to do with the killing and let him go. He had no idea that over the next decade he would be convicted not once, but twice for the death of Ancona, and that he would spend years on Arizona’s death row.335

Krone, like William Richards, was convicted of murder based upon an alleged matching bite mark found on Ancona’s neck.336 Krone was questioned the day her body was found and he gave a Styrofoam impression of his teeth to the police. His bite was determined to be unique and a match, and was so critical to his conviction that he became known as the “snaggle tooth killer.”337

DNA proved to be a much more powerful weapon than the science of bite marks when years after Krone’s conviction DNA tests on blood and saliva on Ancona’s clothing not only excluded Krone and Ancona as potential donors, but matched a man named

333 Henry Weinstein, *Death Penalty Foes Mark a Milestone; Crime: Ariz. Convict Freed on DNA Tests is said to be the 100th Known Condemned U.S. Prisoner to be Exonerated Since Executions Resumed*, L.A. TIMES, Apr. 10, 2002, at A16.
334 Henry Weinstein, *Death Penalty Foes Mark a Milestone; Crime: Ariz. Convict Freed on DNA Tests is said to be the 100th Known Condemned U.S. Prisoner to be Exonerated Since Executions Resumed*, L.A. TIMES, Apr. 10, 2002, at A16.
Kenneth Phillips. The match was only possible because the government agreed to do a search of the DNA databank. Phillips was in the data bank as a result of his conviction for attempted child molestation. At the time of Ancona’s murder Phillips lived 600 yards from the CBS Lounge. Phillips admitted to being at the bar the night of the killing and to waking up the next day covered in blood. Krone was exonerated and released from prison in 2002, after spending more than 10 ½ years in prison for a crime he did not commit.

The case of Ray Krone exemplifies the importance of providing CODIS access to incarcerated inmates who claim that DNA testing can prove their innocence. Without CODIS access Krone could only prove there was biological material on Ancona’s clothes that was not his or hers, but could have come from a variety of sources. A jury convicted Krone, not just once, but twice, of murder despite this fact, so it certainly was not sufficient evidence to exonerate him. It took the match to a convicted felon, Phillip’s opportunity to commit the crime, and Phillip’s confession to secure a reversal of Krone’s conviction.

X. SHOULD THE DENIAL OF A DNA TESTING MOTION BE APPEALABLE?

Under the California DNA testing statute motions for DNA testing are made before the trial court where the conviction occurred, presumably because those courts can best deal with the motion having the most knowledge about the case. While this is often

341 Richard Willing, Exonerated Prisoners Are Rarely Paid For Lost Time, USA TODAY, June 18, 2002, at 1A.
342 Teresa Ann Boeckel & Laura Laughlin, DNA Frees Former Death-Row Inmate, YORK DAILY RECORD, Apr. 9, 2002 (on file with author).
345 Barry Scheck, Co-Founder, The Innocence Project, Benjamin N. Cardozo School of Law, used the Krone case in his testimony before the Senate Judiciary Committee to illustrate the need to provide CODIS access to defendants.

Ray Krone was able to get testing of blood and saliva stains, originally thought to have been left by the murder, that were found on the pant leg and tank top of the victim. An STR (Short Tandem Repeat) DNA test performed on the stains showed Krone was not the source, yet that new evidence alone might not have been enough to vacate his conviction. The stains, it could be argued, might not have come from the murderer at all; unlike semen in a sexual assault . . . , where samples can be taken from any possible prior consensual partners, getting ‘elimination samples’ for small blood and saliva stains could prove more difficult. Luckily, however, the STR profile from the stains could be run through the national DNA databank . . . , and it generated a ‘hit,’ a sex offender who had committed similar crimes (he bit his rape victims) in the Phoenix area.

Senate Judiciary Committee Testimony of Barry Scheck, On the Need for Passage of the Innocence Protection Act (June 18, 2002).
true, certain biases can creep into the process due to perhaps too much exposure to the case. Courts, like prosecutors, can be hesitant to reopen cases that required a great deal of effort in the past. Fundamentally, the basis for appeal in all legal processes is to get a fresh view on a ruling.

Twenty-three states’ provisions permit an individual to appeal a judge’s decision to grant or deny post-conviction DNA testing. Three states do not allow for an appeal, but permit review through alternate means. The statutes of only two states explicitly state that a decision is not appealable. The statutes of 20 states, the District of Columbia, and the federal government do not specify whether a decision is appealable.

There is no reason why the denial of a motion for DNA testing should not be appealable, other than cost. Conversely, there are many reasons why such denials should be appealable, as the case law in those states that allow it have shown. The simple truth is that courts make mistakes, and that testing statutes (as with any statutes) are often misinterpreted.

XI. SHOULD POST-CONVICTON DNA TESTING BE GRANTED TO THOSE INMATES WHO PLEAD GUILTY AND/OR CONFESSIONED TO THEIR CRIME?

One thing we have learned from the hundreds of DNA exonerations over the past two decades is that sometimes people confess to crimes that have not committed and sometimes people plead guilty to crimes they have not committed. This happens for a

---


350 According to innocenceproject.org, false confessions or admissions occurred in roughly 1 in 4 of the 265 DNA exonerations the office has handled to date. The Innocence Project: Understand the Causes. http://www.innocenceproject.org/understand/False-Confessions.php (last visited January 9, 2011).
number of reasons. In the area of confessions, it is largely due to the fact that police training on interrogations is focused on getting a suspect to confirm the officers’ suspicions, not necessarily get the truth. In the area of plea-bargaining sometimes innocent people do not want to roll the dice in the criminal justice casino and instead plea to a lesser crime to avoid more jail time.

The fact that many people confess or plead guilty to crimes they have not committed almost mandates that these people should not be closed off from relief under a postconviction DNA testing statute.

The statutes of five states either eliminate or impose restrictions on an inmate’s ability to access post-conviction DNA testing if the inmate pleaded guilty or nolo contendere. Ten statutes candidly state that a plea of guilty does not matter. Only two states’ statutes disregard whether the inmate pleaded guilty or confessed. However, the majority of statutes (34), including the federal statute, do not address the issue.

---

351 In Ohio, “[a]n offender is not an eligible offender . . . regarding any offense to which the offender pleaded guilty or no contest.” OH ST’s 2953.72 (C)(2) (2010) (later effective date). In Pennsylvania, postconviction motions for DNA testing following a plea of guilty are permitted if the defendant also makes a claim that the plea was “unlawfully induced” and where the court determines “the circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent.” 42 PA. STAT. ANN. § 9543(a)(2)(iii) (West 2010). In South Carolina, if an inmate pleads guilty or nolo contendere to the underlying crime, then a post-conviction DNA testing motion must be brought within 7 years from the date of sentencing. S.C. CODE ANN. § 17-28-30(B) (2010). In Wyoming, [the] court may not order DNA testing in cases in which the trial or a plea of guilty or nolo contendere occurred after January 1, 2000 and the person did not request DNA testing or present DNA evidence for strategic or tactical reasons or as a result of a lack of due diligence, unless the failure to exercise due diligence is found to be a result of ineffective assistance of counsel. A person convicted before January 1, 2000 shall not be required to make a showing of due diligence under this subsection.

WY WYO. STAT. ANN. § 7-12-303(d) (West 2010). In Vermont, postconviction DNA testing is not permitted if the individual’s conviction was the result of a plea agreement “until after July 1, 2008.” VT. STAT. ANN. tit. 13, § 5561(e) (2010). The strange wording of this statute seems to indicate that individuals convicted by plea agreement need merely wait until 2008 before the courts will entertain a motion.

352 Alaska, Alaska Stat. 12.73.020(3) and (8). (Alaska 2010). Alaska’s statute states that DNA testing is available unless the “admit[ted] or conde[d] guilt under oath;” however, “the entry of a guilty or nolo contendere plea is not an admission or concession of guilt.” Confusingly, the statute also states that DNA testing is available only if “the applicant was convicted after a trial,” leaving open the question whether an individual who pled guilty may be granted relief under this section (since the guilty plea means there was no trial). District of Columbia, D.C. CODE § 22-4133(b)(4) (2010). Florida, FLA. STAT. ANN. § 925.11(1)(a)(2) (West 2010) (as long as the person entered a plea of guilty or nolo contendere to a felony before July 1, 2006). Hawaii, HAW. REV. STAT. § 844D-123(a)(1) (West 2010). Iowa, IOWA CODE ANN. 81.10(7)(d) (West 2010). Idaho, 2010 Idaho Sess. Laws 135. New Mexico, N.M. STAT. ANN. § 31-1A-2(3)(5) (West 2010). New York, N.Y. CRIM. PROC. LAW § 440.10(7) (McKinney 2010). Oregon, OR. REV. STAT. ANN. § 138.698 (West 2010). Missouri, MO. ANN. STAT. § 547.035(5) (West 2010).


XII. **Should Testing Be Available to Individuals Who Are No Longer Incarcerated and/or Who May Be Subject to Requirements Such as Sex-Offender Registration?**

In the age of sexual violent predator laws, notification laws, and registration laws in relation to people convicted of sex crimes, the fact that an individual is no longer incarcerated does not mean that they do not continue to suffer ramifications of their conviction. Furthermore, there are still the traditional negative ramifications of probation, parole, and a criminal record. Therefore, it seems that the same opportunities for DNA testing should be available regardless of incarceration status.

The statutes of six states permits individuals who are not incarcerated to bring a motion for post-conviction DNA testing. Nineteen post-conviction DNA statutes require a person seeking testing to be incarcerated. The statutes of 21 states are silent

---

355 In Alaska, the petitioner can not be “unconditionally discharged.” S.B. 110, 26th Leg., 2d Sess. (Alaska 2010). Presumably, this means a defendant may still petition for relief while he or she is on parole or otherwise suffers from the collateral consequences of a conviction. In Mississippi, the petitioner can be on parole, probation, or registered as a sex offender. MISS. CODE ANN. §99-39-5(1) (West 2010) In Ohio, the inmate can be sentenced to a community control sanction. OH ST’s 2953.72(C)(1)(b)(ii) (2010) (later effective date). Oregon’s statute requires that the petitioner be “incarcerated . . . as the result of a conviction for aggravated murder or a person felony,” but the petitioner can also bring a motion if they are not in custody so long has they have been “convicted of aggravated murder, murder or a sex crime.” OR. REV. STAT. ANN. § 138.690(1)-(2) (West 2010). Wyoming’s statute implies that the petitioner does not need to be incarcerated because the petitioner must pay for the costs of testing unless certain conditions are met, one of which is that he or she is incarcerated. WYO. STAT. ANN. § 7-12-309(a)(i) (West 2010).

The statutes of five states contain conflicting language, making the issue of whether the individual must be incarcerated simply unclear.\footnote{Arizona, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana, Maryland, Minnesota, New Mexico, North Carolina, North Dakota, New York, Texas, Tennessee, Vermont, Virginia, and Wisconsin.}

The rise of, and increasingly draconian consequences of, sex offense registration and other collateral consequences means that individuals subject to these laws have a very real claim that they should be allowed access to postconviction DNA testing even after their release from prison. The argument against such inclusion is, again, one of cost.

\section{Conclusion}

It is no surprise that the post-conviction DNA testing statutes enacted over the past two decades have been flawed. The complicated and evolutionary nature of this new science, combined with the political nature of lawmaking--particularly when legislators are extending rights to those who have been convicted and sent to prison--are a recipe for shortcomings. Some of those shortcomings have been addressed by this article, although surely there are more we will discover as the science evolves. At a minimum, post conviction DNA statutes:

\begin{itemize}
  \item Should not limit testing to any particular crimes. The only reason to limit testing in this way is cost, but the cost of DNA testing is dwarfed by the societal costs of a wrongful prosecution and conviction, and the incarceration costs of an individual who is wrongfully incarcerated for even a relatively minor crime. Further, with the advent of mitochondrial DNA testing it is possible to prove the presence or absence of a person from a crime scene…any type of crime science…or connect or disconnect a person from clothes or weapons used in a crime.
  \item Should allow for testing when results are potentially exculpatory and not give judges the discretion to make pre-testing predictions part of their analysis as to whether to grant testing. Such predictive analysis is at the root of wrongful convictions that can sometimes be righted with the hard science of DNA.
  \item Should not preclude testing based upon whether or not identity was raised as a trial defense when testing is potentially exculpatory. The fears of a floodgate
\end{itemize}

\footnote{For example, in Pennsylvania, the petitioner must be “currently serving a sentence of imprisonment, probation or parole for the crime.” 42 PA. STAT. ANN. § 9543(a)(1)(i) (West 2010). However, § 9543.1(a)(1) states that only those “serving a term of imprisonment or awaiting execution” are entitled to testing under this section. Nevada has a similar conflict in its statutory scheme. NEV. REV. STAT. ANN. §§ 176.0918(1) and 176.0918(13) (West 2010). Utah’s statute states that the Department of Corrections will pay for testing if the defendant is indigent and incarcerated, but does not otherwise mention the defendant’s status as an incarcerated inmate, leaving open the question of whether non-incarcerated individuals may be allowed postconviction testing. UTAH CODE ANN. § 78B-9-301(8)(a)(iii) (West 2010). In Arkansas, an individual “convicted of a crime” may make a motion “to discharge the petitioner or to resentence the petitioner or grant a new trial or correct the sentence or make other disposition as may be appropriate;” this seems to cover many bases, but does not explicitly address whether non-incarcerated individuals may be...}
of testing necessitating this type of restriction have been proven to be false, and such limitations can sometimes be contrary to the interests of justice.

- Should allow for testing in private labs to avoid bias and delay which has sometimes been associated with government labs.

- Should provide government payment for testing. The overwhelming majority of inmates are indigent and unable to pay the costs. This should not be a barrier in proving their innocence and potentially establishing the guilt of another party.

- Should provide for the appointment and compensation of counsel. Post conviction DNA litigation is a highly complex and specialized area of the law. There is no benefit to society in forcing inmates to navigate these processes alone.

- Should not include time limits for seeking testing nor sunset provisions, which serve no purpose except to frustrate the pursuit of an otherwise valid claim. New developments in DNA technology are a strong argument against these provisions as are basic notions of justice and fairness.

- Should provide reasonable requirements for maintaining biological evidence and penalties for failure to preserve evidence consistent with the law. Again, new technology can make untestable evidence testable in the future, and the cost of preservation is minimal when countered against wrongful conviction costs.

- Should provide the right to petition the court to order CODIS searches. Inmates should have access to this tool to prove their innocence which can sometimes also lead to the actual perpetrator.

- Should provide for the right to appeal denials of testing. Often there is potential bias in the courts considering these motions. There should be an opportunity for review to make sure the standards of the law are being followed.

- Should allow DNA testing to those who have confessed or pleaded guilty. The exoneration of similarly situated people has proven that innocent people do confess and do plead guilty, and they should not be prevented from obtaining relief.

- Should not be limited to those who are incarcerated considering the increasing severity of post-incarceration requirements, particularly for those who have been convicted of sex offenses.

If these issues are not addressed, then three things are guaranteed to occur. First, innocent men and women will continue to be incarcerated for crimes they did not
commit, and will continue to serve prison sentences – and even die in prison – without being given the opportunity to establish their innocence. Second, guilty men and women will continue to remain free, avoiding the just punishment they should receive for their crimes. Finally, the cost of litigating DNA cases will increase. For each confusing, misleading, or inadequate statute in a given jurisdiction, there are many innocent individuals who will be forced to spend thousands, perhaps even hundreds of thousands, of dollars to convince a court to properly interpret that statute to grant him or her relief. These costs will always be passed on to the taxpayer, directly or indirectly, and they need not occur at all.

DNA is an amazing forensic tool, but its utility in the post-conviction world is only as good as the statutes that govern its use. Through thoughtful reform we can make these statutes practical, easier to apply, and more effective in serving the legislative goals.