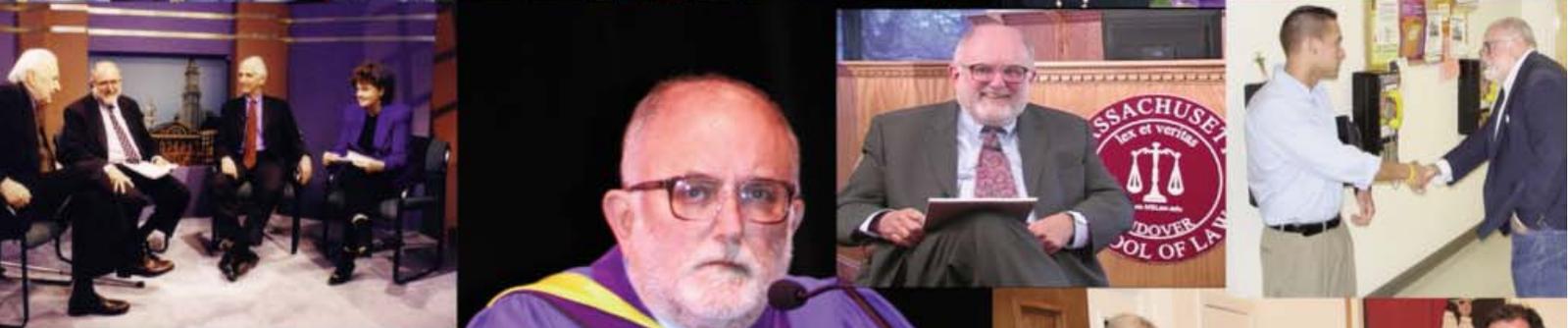
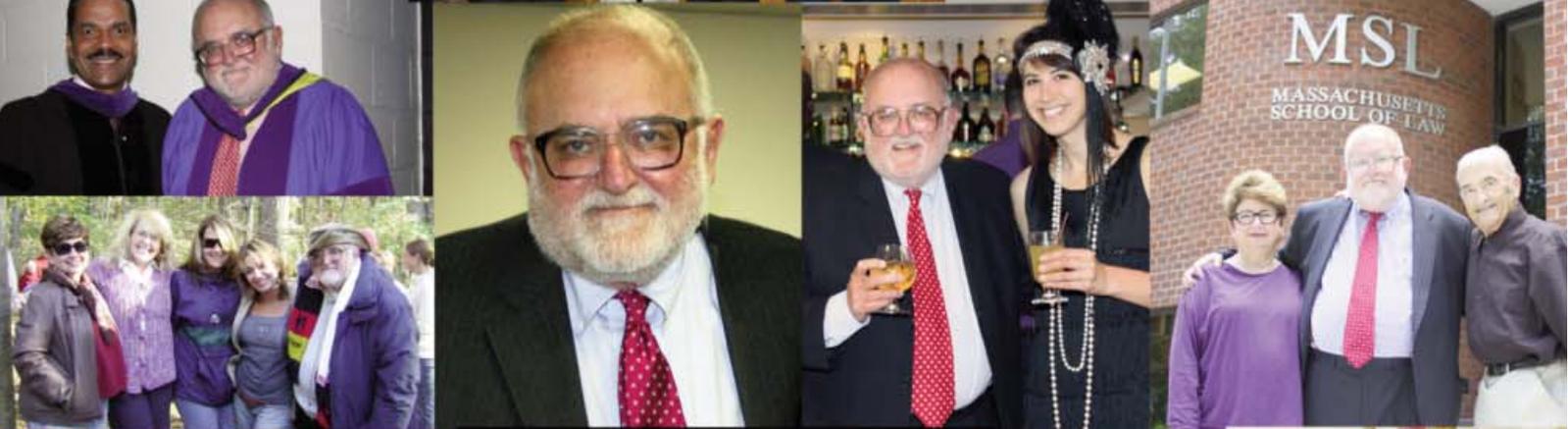




The Reformer



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Post-Conviction DNA Testing: A Primer Interview With Members of the CPCS Innocence Program

Lisa Kavanaugh and Ira Gant answered MSLaw's questions about recent SJC decisions, DNA testing, and their program

This year, the SJC decided two important cases construing the 2012 statute setting forth procedures for ordering post-conviction DNA testing, Commonwealth v. Wade and Commonwealth v. Donald. Can you explain what the Court held in each of these cases?

*Commonwealth v. Wade*¹ and *Commonwealth v. Donald*² are the first two appellate cases to consider the scope and legislative purpose of our state's relatively new post-conviction innocence law, Chapter 278A,³ which went into effect in 2012. Mr. Wade and Mr. Donald were each convicted of violent crimes that occurred in the late 1990s. Starting as early as 2002, each filed motions to perform post-conviction DNA analysis of the physical evidence that was collected in his respective case; in each case, the post-conviction request was denied on the ground that it failed to meet the post-conviction discovery standard under Rule 30 of the Massachusetts Rules of Criminal Procedure (see *infra*). Following the 2012 passage of Chapter 278A, each filed a renewed request for DNA analysis, relying on the new law's apparently more permissive standard for securing post-conviction access and testing. However, each motion met the same fate as prior motions and was denied without a hearing.

Statutory Procedural Framework-Preliminary Issues

Before delving into the specific holdings of *Wade*

and *Donald*, it might be helpful to briefly describe the Chapter 278A procedural framework for obtaining testing. Unlike Rule 30—which requires litigants to make a preliminary showing that any post-conviction test results, if favorable, would warrant a new trial—Chapter 278A focuses solely on the question of whether the requested analysis has the *potential* to yield information that is *material* to the *identity of the perpetrator* of the crime.⁴ The statute lays out a two-step procedure for making this determination. In step one, the movant files an affidavit of factual innocence accompanied by a motion addressing each of the five preliminary requirements identified in Section 3 of the statute.⁵ If these documents meet the statutory requirements, the movant is entitled to an evidentiary hearing, which is step two.⁶ There, the movant must establish by a preponderance of the evidence that *each* of the six criteria laid out in Section 7 of the statute are present.⁷

Commonwealth v. Wade

Wade and *Donald* each examine aspects of the threshold burden of proof needed to satisfy step one of this new procedure. In *Wade*, the defendant was convicted in 1997 of the 1993 death of an elderly woman.⁸ In 2012, he sought DNA testing of the semen and sperm collected from the victim's body and clothing.⁹ At the original trial, a serology expert testifying for the Commonwealth opined that Mr. Wade could not be excluded as a

¹ 467 Mass. 496 (2014).

² 468 Mass. 37 (2014).

³ Mass. Gen. Laws ch. 278A, §§ 1-18 (2014).

⁴ *Id.* § 3(b)(4).

⁵ *Id.* § 3.

⁶ *Id.* § 6.

⁷ *Id.* § 7.

⁸ 467 Mass. at 498.

⁹ *Id.* at 497.

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possible contributor of the sperm and semen. He also testified that serology testing revealed the presence of an A antigen, a major blood group (ABO) antigen which defines human blood type A, that did not match either Wade or the victim and must therefore have been deposited by a third party.¹⁰ The Superior Court judge who denied Mr. Wade's Chapter 278A motion concluded that, in light of the above evidence suggesting that a third party was present at the crime scene, even DNA testing that excluded Mr. Wade as the source of biological material on the victim was not sufficiently probative of the identity of the perpetrator to satisfy the Chapter 278A materiality requirement.¹¹ The SJC disagreed, holding that Mr. Wade had not been tried on a joint venture theory and had no obligation under Chapter 278A to establish that the testing sought would rebut all possible theories of guilt. Rather, his burden was merely to establish that the testing sought has the potential to result in evidence material to the identity of the perpetrator.¹² The Court also emphasized that "[w]hether Wade is likely to obtain such a result is *not relevant* to the [Chapter 278A] analysis; what is relevant is that DNA testing has the potential to produce a result that is material to Wade's identification as the perpetrator."¹³

A second issue in *Wade* concerned the adequacy of Mr. Wade's showing as to why DNA testing was not performed prior to trial. In his Chapter 278A motion, Mr. Wade alleged, as he had in a prior unsuccessful Rule 30 motion, that trial counsel was ineffective in failing to request DNA testing of the semen and sperm prior to trial.¹⁴ In reply, the Commonwealth contended that the standard for determining whether trial counsel was reasonably effective under the relevant portion of the new DNA statute is the same as that for assessing a claim of ineffective assistance of counsel under Rule 30, and that Mr. Wade was thus collaterally estopped from re-litigating this issue.¹⁵

The SJC once again disagreed, holding that "an interpretation of this phrase that imports the standard of ineffective assistance of counsel does not accord with the Legislature's intent of promoting access to DNA testing regardless of the presence of overwhelming evidence of guilt in the underlying trial."¹⁶ The Court went on to state that "a determination that the failure of Wade's trial counsel to seek DNA testing was a reasonable, strategic decision, and not manifestly unreasonable, *does not preclude* a determination that 'a reasonably effective attorney' would have done so."¹⁷ Specifically, although pre-trial DNA testing might have involved a risk that the result would inculpate Wade, "a reasonably effective attorney in these circumstances might have chosen to incur [this risk], particularly where there already was some evidence of a third party's involvement."¹⁸

Commonwealth v. Donald

In *Donald*, the central question was "whether G.L. c. 278A permits a moving party access to a more advanced form of a particular scientific test, such as DNA testing, where an older version of such a test previously has been conducted."¹⁹ At the time of Donald's trial on the 1997 charge of aggravated rape, the Commonwealth presented the testimony of a DNA analyst who performed testing of biological material found in the victim's underwear that examined six independent DNA regions or loci. The analyst concluded on the basis of this testing that Mr. Donald was included as a potential contributor to the male DNA retrieved from the victim's underwear, and that the probability that another random, unrelated African-American male matched the DNA profile was one in 7,800.²⁰ Mr. Donald's Chapter 278A motion, as in his previous Rule 30 motions, sought to analyze the evidence using a newer form of DNA testing that examined a total of 13

¹⁰ *Id.* at 507 n.13.

¹¹ *Id.* at 507.

¹² *Id.* at 508.

¹³ *Id.* (emphasis added).

¹⁴ *Id.* at 510.

¹⁵ *Id.* at 511 (citing *Commonwealth v. Saferian*, 366

Mass. 89, 96-97 (1974)).

¹⁶ *Id.* at 511.

¹⁷ *Id.*

¹⁸ *Id.* at 510.

¹⁹ *Donald*, 468 Mass. at 43.

²⁰ *Id.* at 46.

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loci. The Commonwealth opposed the motion, arguing among other things that because the new 13-loci test is “merely a more refined version” of the DNA testing previously performed, Mr. Donald was not entitled to conduct further testing. The Court rejected this argument, concluding instead that where a movant seeks to perform a newer form of analysis, s/he need only “provide information demonstrating that the requested analysis offers a *material improvement* over any previously conducted analysis in accurately identifying or excluding the party as the perpetrator of the crime.”²¹ “Whether a test offers a material improvement in accuracy over a previous test will require a case-specific inquiry, both because of the many ways in which testing may be improved and because of differences in the types of forensic testing and analyses, such as DNA testing or fingerprint analysis, that a moving party may seek.”²²

Applying this analysis, the Court found that Mr. Donald’s motion included two pieces of information, each of which independently was sufficient to demonstrate that the requested analysis offered a material improvement in accuracy over the previous testing.²³ First, Donald submitted an expert’s letter asserting that the analysis sought by his motion was “statistically more powerful” than the testing previously performed, and had resulted in many exonerations in other cases.²⁴ And second, Donald’s motion described the testing technique of the kit he sought to use, making clear that the new tests examine a completely different set of DNA regions than those examined in previous testing, and that the analysis has the potential to produce more discriminating test results, or put otherwise to more definitively establish the source of the biological material.²⁵

A second issue in *Donald* (and the basis for the SJC’s rejection of Mr. Donald’s request for a hearing) concerned the showing needed to establish that the analysis sought had not yet been developed at the time of his conviction. In this

regard, the Court found that Mr. Donald’s bare assertion in his pleadings that the more advanced testing he requested “had not yet been developed at the time of conviction” was inadequate to satisfy his burden.²⁶ The Court went on to offer several possible ways in which this threshold burden might be met with enough specificity to require a hearing: (a) by “citi[ng] to existing case law, a court order, or a scholarly article;” or (b) by “attach[ing] a letter or affidavit from an expert in the field in which the testing is sought, containing the information that the requested analysis was not available at the time of conviction.”²⁷ Although the Court affirmed the motion judge’s order denying Mr. Donald’s request for testing, it identified a roadmap for successful future litigation of this issue. It is fully expected that Mr. Donald will re-file his request for testing in a manner consistent with the Court’s recommendations.

The Evidentiary Hearing

Although neither *Wade* nor *Donald* explicitly addressed the showing needed to prevail after an evidentiary hearing under Chapter 278A, the Court’s liberal reliance on the legislative history and intent of the statute strongly suggests that the Court will favor an expansive interpretation of the law in this regard as well. Noting the extraordinary procedural and logistical hurdles faced by pre-Chapter 278A exonerees, the Court acknowledged in *Wade* that—at least in the view of the legislature—Rule 30 did not adequately protect against the possibility that a wrongfully convicted individual would languish in prison without a meaningful and timely opportunity to establish his innocence.²⁸

The Court took similar pains in *Donald* to acknowledge the legislature’s concern with ensuring that movants have adequate access to newer forms of DNA analysis as they become available, noting the real world implications of DNA advancements. The Court cited a study of

²¹ *Id.* at 44.

²² *Id.* at 44-45.

²³ *Id.* at 45.

²⁴ *Id.*

²⁵ *Id.* at 45-46.

²⁶ *Id.* at 48.

²⁷ *Id.* at 47.

²⁸ *Wade*, 467 Mass. at 504-05.

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the first 194 DNA exonerations that identified several individuals who were implicated prior to trial using DQAlpha testing (the test utilized in *Donald*) and later excluded by means of more discriminating post-conviction DNA testing.²⁹ Finally, the Court summarily rejected the Commonwealth's position that the strength of the other non-DNA evidence should be a factor in determining whether testing was required, thus adopting a view that applies with equal force to litigants at the evidentiary hearing stage of Chapter 278A.³⁰ For all of these reasons, there is much reason to hope that the Court will continue to interpret the law with an eye toward eliminating unnecessary barriers to post-conviction testing and will evaluate future claims through the lens of past DNA exonerations.

Massachusetts was fairly late to the party, becoming the 49th state to enact a statute governing the availability of post-conviction DNA testing. Can you tell us a little about the history of this issue in the Commonwealth that eventually led up to the enactment of Mass. Gen. Laws ch. 278A?

Massachusetts was indeed quite late to join the nationwide movement in establishing a stand-alone statute designed to ensure post-conviction access to and forensic testing of evidence by defendants who claim factual innocence. Some of this delay may have been due to a misguided belief that the discovery and funding provisions of Rule 30 were adequate to protect against the possibility of wrongful convictions. Whatever the cause of the delay, it is undeniable that although bills providing post-conviction forensic testing had been filed in the Massachusetts legislature in nearly every session since the publication of the 1999 Report of the U.S. Attorney General's National Commission on the Future of DNA

Evidence,³¹ it was not until the Boston Bar Association Task Force to Prevent Wrongful Convictions published its 2009 report, *Getting it Right: Improving the Accuracy and Reliability of the Criminal Justice System in Massachusetts*,³² that the push to enact legislation gained any significant traction. The bill that resulted from the Task Force report, unlike past legislative initiatives, endeavored to create a streamlined procedure that was intended to be largely *non-adversarial* and did not attach the outcome of testing to any legal effect on the underlying conviction, thus readily standing apart from the procedures under Rule 30. As history now tells us, this was evidently a critical factor that differentiated Chapter 278A from unsuccessful past bills aimed at the same important issues. Yet even then, it would be several more years before Chapter 278A was finally signed into law in 2012.

Can you explain briefly the state of DNA testing today, and how it differs from testing available in the 1990s or early 2000s?

Simply stated, today's DNA tests are more accurate at predicting whether an individual can be included or excluded as having contributed the DNA sample. As John Butler explains in his comprehensive book, *Forensic DNA Typing*, methods of DNA typing historically fell into two broad categories, restriction fragment length polymorphism (RFLP)-based methods and polymerase chain reaction (PCR)-based methods. The RFLP method, developed in the mid-1980s, examined six loci or independent DNA regions and offered a high power of discrimination, meaning that it was fairly accurate in identifying the source of biological material.³³ However, it took weeks to obtain results and required relatively large quantities of biological material, making it less useful in testing degraded or small samples. PCR-based

²⁹ *Donald*, 468 Mass. at 46 n.13.

³⁰ *Id.* at 41.

³¹ U.S. Dep't of Justice, National Commission on the Future of DNA Evidence, *Postconviction DNA Testing: Recommendations for Handling Requests* (1999), available at <https://www.ncjrs.gov/pdffiles1/nij/177626.pdf>.

³² Boston Bar Association Task Force to Prevent Wrongful Convictions, *Getting it Right: Improving the Accuracy and Reliability of the Criminal Justice System in Massachusetts* (2009), available at http://www.bostonbar.org/prs/reports/BBA-Getting_It_Right_12-16-09.pdf.

³³ John Butler, *Forensic DNA Typing* 4-5 (2d ed. 2005).

methods, which were developed in the 1990s and have now replaced RFLP in forensic casework, require far less time and far less biological material to achieve results, making these methods far more useful in cases involving small or degraded quantities of biological material. And while early PCR-based tests (which examined three to six loci) were not as discriminating as RFLP, modern PCR-based tests (which examine 13-16 loci) have now significantly surpassed the accuracy of RFLP.³⁴

The *Donald* and *Wade* trials (and the investigations that preceded them) occurred during a transition period in DNA testing. PCR-based testing was beginning to replace RFLP as the preferred method of DNA analysis in forensic casework, but had not yet achieved the level of accuracy now possible with modern DNA testing. By 1997, the FBI had defined what it called the “core 13 STR loci” test that examines genetic regions known as “short tandem repeats,” or STR, is still in use in the federal DNA database. However, the testing kits that examined the core loci were not commercially available and validated for forensic casework until late 1999, after the *Wade* and *Donald* trials.³⁵ The SJC correctly noted that today’s standard testing methods are more accurate and reliable than those in effect when Mr. Donald was tried.³⁶

With respect to the question of what constitutes a “material” advancement within the meaning of Chapter 278A, it does seem that the more challenging cases will be those in which a defendant has already been implicated to a power of one in multiple quadrillion by means of a test that examines 13 or more STR loci, and/or those in which such testing was available at the time of trial but was not sought by trial counsel. While it is not yet clear how those cases will be resolved, it may well be that the availability of testing under Chapter 278A will depend on developments in the scientific community’s interpretation of probabilities and population statistics, rather than on a raw evaluation of the relative discriminating power of the two testing methods.

Impact of Scientific Improvements

It does bear noting that the above improvements in the discriminating power of modern PCR-based testing kits have demonstrable, real world implications for defendants seeking to establish their innocence. As the Court noted in *Donald*, “a study of the first 194 DNA exonerations in the United States revealed that, in four out of five cases in which DQA1 testing was performed prior to conviction and the defendant was included as a possible contributor to evidence introduced at trial, the defendants were subsequently excluded by means of more discriminating post-conviction DNA testing.”³⁷ In other words, it is not merely an academic possibility that an individual such as Mr. Donald – who was identified through DQA1 and PM testing as a possible contributor to the semen in the victim’s underwear – could be *excluded* as the source of that semen through more advanced DNA testing.

What should an attorney who is considering pursuing DNA post-conviction relief on behalf of a client consider in assessing whether the motion will be successful, in order to properly advise the client [in other words should the lawyer review the record and assess whether the DNA evidence had or will have a material effect on the finding of guilt? And what about cases in which pleas were entered?]

In one sense, the *Wade* and *Donald* cases dramatically simplified the analysis of whether to pursue a motion seeking post-conviction testing. After all, the Court’s opinions made clear that the existence of other (non-DNA) evidence of guilt – however seemingly compelling that evidence may appear – does not *and should not* prevent a movant from seeking to test evidence that is potentially material to the identity of the perpetrator.

However, in both *Wade* and *Donald*, the materiality of the biological evidence to the identity of the perpetrator was fairly clear cut. In each

³⁴ *Id.*

³⁵ *Id.* at 98.

³⁶ *Donald*, 468 Mass. at 46-47.

³⁷ *Id.* at 46 n.13 (citing Hampikian, West & Akselrod, *The Genetics of Innocence: Analysis of 194 DNA Exonerations*, Ann. Rev. Genomics & Hum. Genetics, vol. 12, at 97, 107 (Sept. 2011)).

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case, the Commonwealth's trial theory was that the defendant acted alone in sexually assaulting the female victim. In each case, biological material was detected at the time of trial, and that material was clearly left by a male. Finally, in each case, the Commonwealth argued at trial that the defendant could be included (through DNA or serology testing) as a possible contributor to the biological material. While nothing in the Court's decisions limits the analysis to the facts of these cases, prosecutors may well seek to distinguish future cases on this or other related grounds (e.g., where the defendant was tried as a joint venturer; where the evidence sought to be tested is less clearly attributable to a single perpetrator; or where there was no evidence at trial suggesting that the defendant could be forensically associated with crime scene evidence). It therefore would be prudent for attorneys who are screening potential Chapter 278A cases to keep in mind that the more attenuated a piece of physical evidence becomes from the identity of the perpetrator, the more care must be given to articulating a theory of materiality.

Also, Chapter 278A requires an affidavit of innocence, but it also makes clear that a defendant is not barred from asserting innocence by the fact that s/he confessed, made incriminating statements, or pleaded guilty to the crime.³⁸ The statute's explicit language, that "[t]he court shall not find that the identity was not or could not have been a material issue in the underlying case because of the plea ... [or] because the moving party made, or is alleged to have made, an incriminating statement,"³⁹ further underscores the legislature's intent to give greater post-conviction access to defendants and to preclude the Commonwealth from arguing that a confession or guilty plea should be a bar to testing. In *Wade*, the Court further clarified that the affidavit of innocence need only state words to the effect of "I am innocent of this crime" or "I did not do this crime," and that the defendant need not claim innocence of all possible theories of guilt, only the theory under which he was convicted.⁴⁰

What does one call that motion? What has to be in that motion? Who will hear it? Does the client have to aver in an affidavit that he is innocent? Factually innocent? Did not commit the crime?

A Chapter 278A motion is generally entitled something like "Motion for Access and Post-conviction Analysis" (or, in the case of a litigant seeking discovery in order to satisfy the preliminary Section 3 burden, "Motion for Access and for Discovery in Aid of Request for Post-conviction Analysis"). Although what goes in a particular motion is highly dependent on the facts of the particular case, the general requirements for the motion appear in Section 3 of the statute. In essence, the motion must identify the evidence and type of analysis being sought; must aver that the analysis is admissible and has the potential to yield evidence that is material to the identity of the perpetrator; and must assert that testing was not done for one of five enumerated reasons. The motion must be accompanied by an affidavit from the defendant averring that (s)he is factually innocent of the Massachusetts crime for which (s)he was convicted.⁴¹

Should the attorney anticipate opposition from the prosecutor at this stage, and if so, how should the attorney address the opposition in order to prevail at this preliminary stage?

It seems increasingly unlikely that most prosecutors will oppose an initial request for a hearing in light of *Wade* and *Donald*. Moreover, at this early juncture in the statute's existence, trial courts appear to be interpreting these decisions to require a hearing in nearly every case. That said, it behooves attorneys to file comprehensive pleadings in support of any request for a hearing, because this stage of the case provides an important opportunity to educate the motion judge and prosecutor about any issues that may need to be resolved at the Section 7 hearing. It is also a useful tool to secure agreement from the Commonwealth since in many instances we have found that thorough motions supported by

³⁸ Mass. Gen. Laws ch. 278A, § 3(d).

³⁹ *Id.*

⁴⁰ *Wade*, 467 Mass. at 512-13.

⁴¹ Mass. Gen. Laws ch. 278A, § 3(b).

expert affidavits substantially reduce the scope of disagreement between the parties. Our program therefore advises attorneys to consult with an expert prior to filing the initial request for a hearing and provides assistance in identifying appropriate experts and securing funding for this purpose.

If a prosecutor does oppose the filing of the motion itself, the first step is to assess whether the opposition is based on an actual deficiency in the movant's initial burden of proof, and if so, whether seeking discovery under Section 3 would enable the litigant to address these deficiencies. In support of a request for discovery, the attorney should emphasize that Chapter 278A imposes a far lower bar for obtaining discovery than Rule 30, and in particular does not require movants to establish a prima facie case for relief before obtaining discovery. The *Wade* decision also contains very helpful language about the non-adversarial purpose of this initial stage of Chapter 278A litigation.⁴²

Based on your experience, and the experience of the attorneys with whom you have worked, what are the chances that the motion for a hearing will be allowed?

It is extremely likely that the trial courts will grant requests for a hearing but far less clear how frequently requests for testing will be granted. These cases are highly fact-specific, and the law is simply too new to offer any clear-cut answer to that question. Moreover, while the *Donald* and *Wade* decisions do offer important guidance to trial courts on how to interpret the Chapter 278A burden needed to get a hearing, neither of these cases concerned the burden of proof at the evidentiary hearing itself.

Based on your experience, and the experience of the attorneys with whom you have worked, what are the chances that the motion for further testing will be allowed?

It is difficult to quantify the probability of success in a Chapter 278A motion at the hearing stage, given the fact-specific nature of every case and

the fact that several issues were left unresolved by *Wade* and *Donald*. In some cases, prosecutors have opposed requests for testing at the Section 7 hearing stage, continuing to advocate—as they did in *Wade* and *Donald*—for a very limited view of the circumstances in which testing is required under Chapter 278A. For example, Section 7 mandates that the defendant show by a preponderance of the evidence that the evidence or biological material for which s/he seeks testing “has been subject to a chain of custody that is sufficient to establish that it has not deteriorated, been substituted, tampered with, replaced, handled or altered such that the results of the requested analysis would lack any probative value.”⁴³ Some prosecutors have interpreted this to mean that the defendant cannot satisfy this burden unless s/he can affirmatively demonstrate that no one has touched or handled the evidence since its collection—such as jurors, court personnel, or police officers. It is our program's position that this reading of the statute is inconsistent with the language and spirit of Chapter 278A and imposes far too high a burden at what is intended to be a preliminary stage of determining whether testing is warranted, as opposed to the later stage of determining whether test results are sufficiently probative to warrant a new trial. We further take the position that the majority of chain of custody issues that are raised by the Commonwealth are more appropriately viewed as relevant to the weight of the evidence of any test results at future trial court proceedings, rather than to the threshold question of whether to test at all. This is one example of the type of issue we anticipate will need to be addressed in future appellate court decisions, and we will of course be closely following the outcomes in *Wade* and *Donald*, which are now proceeding in trial court in a manner consistent with the Court's rulings.

Who pays for all this?

Under the language of Chapter 278A, the trial court “must” authorize funds to pay for testing if a defendant has met his/her burden under Section 7 and the court has determined him/her to be indigent. If evidence is sent to either the

⁴² *Wade*, 467 Mass. at 503.

⁴³ Mass. Gen. Laws ch. 278A, § 7(b)(2).

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Boston Police Crime Laboratory or the Massachusetts State Police Crime Laboratory for testing, then the cost of testing is borne by those agencies without any additional cost. However, the statute also provides that the parties may agree to testing by an accredited, out-of-state, private laboratory. When this occurs and the defendant has been determined to be indigent, these costs are paid out of the Indigent Court Costs fund (a statutorily created fund that is overseen by CPCS for use in indigent criminal matters).

An additional wrinkle with regard to funding is the frequent necessity of consulting with a DNA expert prior to filing a motion for testing. Chapter 278A does not explicitly authorize funds for this purpose, although Rule 30 does contain discovery and funds provisions that might be found to apply. However, we have found that issues such as feasibility of testing, degradation and contamination frequently arise, necessitating input by an expert with experience conducting post-conviction DNA testing in older cases. Anticipating that this issue would arise, the CPCS Innocence Program applied for and was awarded a FY13 Post-conviction DNA Testing Assistance Program grant from the National Institute for Justice. This award—which funded the creation and staffing of a Working Group comprised of our program, the New England Innocence Project, the Middlesex and Suffolk District Attorneys’ Offices and the Middlesex Superior Court Clerk’s Office—also authorizes CPCS to pay for private DNA expert consultation in Chapter 278A cases. The fund has been an important resource to the attorneys who are litigating these cases, substantially improving their ability to satisfy their evidentiary burden at the Section 7 hearings.

How long does the testing generally take?

There really isn’t much of a baseline yet to evaluate how long testing takes. In the cases that have proceeded under Chapter 278A since the statute first went into effect, testing has primarily been handled by private out-of-state laboratories and has tended to take several months. It is our

understanding that the Massachusetts State Police Crime Laboratory and the Boston Police Crime Laboratory both labor under significant forensic casework backlogs. For this reason, it may be that testing performed by those two facilities will take significantly longer than at the private laboratories. However, delays can also occur as a result of the steps that must be taken to ensure proper chain of custody in transferring evidence from the state agencies with custody of the evidence to the laboratory that will perform the testing.

Assuming the testing yields what could be considered a favorable result, how does the process proceed?

The steps after obtaining a favorable result can vary, but ultimately the defendant’s goal is to challenge and overturn his/her conviction and secure a new trial. The principle mechanism for obtaining post-conviction relief in Massachusetts is Rule 30 of the Massachusetts Rules of Criminal Procedure. Under this rule, the trial judge may grant a new trial at any time “if it appears that justice may not have been done.”⁴⁴ When a new trial motion is based on newly developed exculpatory DNA results, the defendant typically argues that the results constitute “newly discovered evidence” that casts real doubt on the justice of the conviction (i.e., that the new test results would have been a real factor in the jury’s deliberations).⁴⁵

In the event that the trial court grants an evidentiary hearing on the Rule 30 motion, the defendant and his/her attorney will want to present the test results from the laboratory that performed the testing. In cases involving mixture interpretation, by which we mean cases in which test results indicate the presence of two or more contributors to a single piece of evidence, there may be factual disputes that need to be resolved with expert testimony from both sides. Mixture interpretation issues are particularly prominent in cases involving touch DNA (e.g. small quantities of DNA that are detected on an object and were deposited through casual contact or touch-

⁴⁴ Mass. R. Crim. P. 30(b).

⁴⁵ *Commonwealth v. Grace*, 397 Mass. 303, 305-306 (1986).

ing of the object). In addition, many of the cases in which favorable DNA results are obtained will also present other factual issues, including eyewitness identifications, false confessions, flawed or invalidated forensic evidence, recantations, and ineffective assistance of counsel. In this regard, it is important to note that studies of the first 250 DNA exonerations have revealed the presence of many of these other factors in known wrongful convictions.⁴⁶

Tell us about the program you work for.

The CPCS Innocence Program (IP) was established in 2010 with a Wrongful Conviction Review Program federal grant award from the Bureau of Justice Assistance, No. 2009-FA-BX-0037. Our program works to identify and assign experienced post-conviction counsel to litigate meritorious innocence cases, as well as to provide advice, training, and expert funds to support this litigation. Following the passage of Chapter 278A, we partnered with four other criminal justice stakeholders, the New England Innocence Project, the Middlesex and Suffolk County District Attorney Offices and the Middlesex Superior Court Clerk's Office, to secure a two-year grant award from the National Institute for Justice Post-conviction DNA Testing Assistance Program, No. 2013-DY-BX-K006. As a result of that grant, we expanded our staff to include a full-time staff attorney and part-time support specialist who are together responsible for conducting case review, litigation and other aspects of the IP's efforts to identify viable DNA-based innocence claims, locate and test evidence in such cases, and adopt best practices for inventorying and storing evidence for future analysis. The grant also funded the creation of an Expert Funding System that allows attorneys appointed by CPCS or assigned by NEIP to consult with private DNA experts to aid in case review and Chapter 278A litigation. ■

Lisa Kavanaugh is the program director, a position she has held since the fall of 2011. During her tenure at the IP, Kavanaugh has overseen and advised the litigation of over a

dozen new trial motions and administered grant funding to support expert and investigator consultation in more than 40 innocence cases. She administers the Expert Funding System for Chapter 278A cases and authored the amicus brief filed on behalf of CPCS, the New England Innocence Project and MACDL in the Donald case. Kavanaugh first joined CPCS in 2002 as a staff attorney in the Somerville Superior Court trial unit; from 2007-2009, she worked in the Appeals Unit and litigated numerous felony appeals. She is a 1996 graduate of Yale University and a 2000 graduate of Harvard Law School.

Ira Gant is the CPCS Innocence Program staff attorney, a position he has held since January 2014. His position is funded by the Post-conviction DNA Testing Assistance Program mentioned above. He focuses on reviewing and litigating DNA-based innocence claims across Massachusetts; supervising, advising, and training attorneys handling innocence cases; and, with the Working Group, improving the tracking and storage of evidence collected in criminal cases. Prior to joining the IP, Gant was employed as a staff attorney in the Alternative Commitment Unit at CPCS, representing at trial clients facing lifetime commitments after the conclusion of their criminal sentences. Before that, he was a trial attorney with CPCS's Public Defender Division for two years. Gant graduated from Northeastern University School of Law in 2010.

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⁴⁶ Brandon L. Garrett, *Convicting The Innocent: Where Criminal Prosecutions Go Wrong* 8-10 (2011).