Survey of Post-Conviction DNA Testing Statutes[1]

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Thirty-eight states and the federal government have passed statutes specifically providing for post-conviction DNA testing of biological evidence relating to a crime for which an offender has been convicted. This project presents and summarizes the major features of those statutes in the form of two charts. The charts are based on the state statutes present in the Westlaw database as of September 1, 2004, and incorporate the federal Justice for All Act of 2004. This information is provided as a service by the American Society of Law, Medicine and Ethics, and does not constitute legal advice.

When reading the charts and the explanatory text, the reader should consider the following: Statutes may provide informative, but not definitive, pictures of their subjects. Such is likely to be the case with the post-conviction DNA testing statutes, as the process and standards by which an individual may petition for and obtain post-conviction testing will necessarily depend on the judicial and legal framework within which they operate. Thus, other statutes and rules, particularly as they pertain to criminal procedure and evidence, will inform the interpretation of any state or federal post-conviction DNA testing statute. Additionally, these other statutes and rules, although lacking specific provisions relating to post-conviction DNA testing, may contain general provisions that may be broad enough to encompass such DNA testing. Nonetheless, the focus of this project remains on the specific provisions for post-conviction DNA testing, and only such provisions have been included as entries in the charts.

The two charts survey the statutes on post-conviction DNA testing by asking a series of questions, and by answering the questions with the relevant statutory language. The first chart deals with the procedures and requirements for obtaining the post-conviction DNA testing. The second chart deals with the consequences of such testing—procedures for exonerating or punishing the petitioner, based on whether the test results are favorable or unfavorable, respectively. Note that the chart entries, in most cases, reflect the actual statutory language; however, some changes have been made for purposes of clarity, brevity, and/or formatting. Thus, references are provided for all the information presented in the chart if the reader wishes to refer back to the original text.

Obtaining Post-Conviction DNA Testing

The questions asked and answered by the chart on obtaining post-conviction DNA testing are as follows:

- Who May Apply for Post-Conviction DNA Testing?

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These entries identify the subset of convicts eligible to apply for post-conviction DNA testing. The entries can be distinguished primarily by two criteria: the severity of the offense and whether the convict is currently imprisoned. With respect to the severity of the offense, more than half of the state statutes limit eligible convicts to felons or a subset of felons. Kentucky and Nevada represent the extreme cases, limiting applicability to capital offenders.[2] Less than half of the states, and the federal government, include those who have been convicted for any crime. The second criterion, state custody, provides a means of restricting the potential post-conviction remedy to those who need it to escape or reduce their imprisonment.

- When Can One Apply?

  This section identifies any time restrictions on application for post-conviction DNA testing. Most statutes are either silent, or expressly place no time restriction on the application period. The remaining statutes either expire at a certain date,[3] expressly limit the period during which applications may be accepted,[4] or require that applications be made in a timely manner.[5]

- In What Court Does One Apply?

  In the vast majority of states with specific statutes for post-conviction DNA testing, a petition for such testing must be submitted to a court, so that a judge may decide whether granting the petition is warranted pursuant to the statute. This section identifies the court in which the petition must be filed; typically, the appropriate court is the one which entered the judgment of conviction or the defendant's sentence.

- What Contents Must the Application Contain?

  This section identifies the claims and/or information that the defendant or the defendant's counsel must provide in the petition for post-conviction DNA testing. Note that some state statutes do not specifically identify the requisite contents of the application; in such cases, the requisite contents can be inferred from the review criteria that the court will use to decide whether or not to grant the post-conviction motion.

- What Evidence Can Be Tested? / What Criteria Must the Evidence Meet?

  All of the state statutes place some restriction on the evidence that can be subjected to the requested DNA testing. The restrictions may be minimal, as in the case of Washington (requiring only that the evidence still exists);[6] more common, however, are requirements that the evidence was secured in relation to the crime, was

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2 See Ky. Rev. Stat. Ann. §§ 422.285 and 422.287, and Nev. Rev. Stat. § 176.0918.
3 See, e.g., Wash. Rev. Code Ann. § 10.73.170.
4 See, e.g., La. Code Crim. Proc. Arts. 926.1.
5 See Justice for All Act of 2004 (codified at 18 USC § 3600).
6 See Wash. Rev. Code Ann. § 10.73.170.

maintained or stored in a manner to ensure that the evidence has not degraded or been tampered with, and/or either was not previously tested, or was previously tested, but there exists good reason for retesting.

- Is the Prosecutor Involved in the Process?

  The American criminal justice system is an adversarial system; accordingly, all of the post-conviction statutes except for North Carolina and Oregon explicitly provide for prosecutorial involvement. At the minimum is the requirement of notice to the prosecution of the motion for post-conviction DNA testing, and at the maximum is Washington's requirement for prosecutorial approval of the request.[7] A typical statute will require notice to the prosecution and afford the prosecution an opportunity to respond to the motion.[8]

- Is There a Hearing?

  This section identifies the statutory provisions regarding the issue of whether the court will hold a hearing on the petition for post-conviction DNA testing. Note that state rules of criminal procedure may address this issue and, thus, may be of special importance where the post-conviction DNA statute is silent.

- What Are the Review Criteria for the Petition?

  This section lists the criteria that the decision-maker (usually the judge) will use in reviewing the defendant's motion for post-conviction DNA testing. Thus, this section identifies the barriers that the defendant must overcome in order to persuade a court to grant his or her post-conviction motion. In general, the courts require a showing that: the identity of the perpetrator (or accomplice) was an issue at trial; the evidence to be tested is relevant to the identity of the perpetrator; the evidentiary criteria have been met; and/or exculpatory DNA results, had they been introduced at trial, likely would have resulted in a different outcome at trial.

- Which Laboratory Tests the Evidence?

  Should a motion for post-conviction DNA testing be granted, some states restrict testing to certain laboratories. This section identifies any such statutory provisions. For example, some states provide minimal requirements that a testing laboratory must meet,[9] whereas others require that the state forensic laboratory perform the testing;[10]

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7 See Wash. Rev. Code Ann. § 10.73.170. Note that Washington's procedure for post-conviction DNA testing is unique, in that the court plays no role in the process. The state Office of Public Defense presents worthy cases to the prosecutor and, in the event of a denial of testing, appeals to the attorney general.

8 See Va. Code Ann. § 19.2-327.1.

9 See, e.g., N.M. Stat. Ann. § 31-1A-2.

10 See, e.g., Va. Code Ann. § 19.2-327.1.

in addition, some states require the judge to designate the testing laboratory,[11] whereas others allow the parties to choose, if they can mutually agree upon a laboratory.[12]

- Is There Additional Court Oversight of the Testing Process?

  Certain statutes allow the court to exercise oversight of the DNA testing. For example, Arizona allows the court to designate the type of DNA testing to be used, the procedures to be followed during the testing, the preservation of a portion of the sample for replicate testing, and the collection of elimination samples from third parties.[13] Other states like Illinois give the court a broader charge, allowing it to impose reasonable conditions on the testing process to ensure the integrity of the evidence and the testing process.[14]

- Who Pays for the Costs of Testing?

  This section identifies the allocation of the costs of DNA testing, if present in the statutory provision. The federal Justice for All Act of 2004 exemplifies a typical provision. The statute allocates the costs of testing to the applicant, except in cases where the applicant is indigent.[15]

- Is There a Right to Counsel?

  The federal statute and many of the state statutes contain provisions allowing for the appointment of counsel for indigent defendants for purposes of petitioning for post-conviction DNA testing. Each jurisdiction may attach the right to counsel at different stages in the proceeding.[16] However, note that it is not always clear from the statute as to what stage in the proceedings this right to counsel attaches.[17]

- Is There a Right to Appeal?

  Because the decision of whether or not to grant post-conviction DNA testing is, in most cases, a judicial decision (and in all cases a governmental decision), the potential for appealing the decision exists. This section identifies the statutory provisions that either allow[18] or restrict[19] the parties' ability to appeal decisions on DNA testing. The federal statute is silent on the issue.[20]

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11 See, e.g., Nev. Rev. Stat. § 176.0918.
12 See, e.g., Cal. Penal Code § 1405.
13 See Ariz. Rev. Stat. § 13-4240.
14 See 725 lll. Comp. Stat. Ann. 5/116-3.
15 See Justice for All Act of 2004 (codified at 18 USC § 3600).
16 See W. Va. Code Ann. § 15-2B-14., providing for legal assistance in preparing the petition for DNA testing; see also Fla. Stat. Ann. § 925.11, granting legal assistance at the hearing stage.
17 See, e.g., N.C. Gen. Stat. § 15A-269.
18 See, e.g., Mich. Comp. Laws Ann. § 770.16.

With regard to comparing the various state statutes to each other, the reader should note the special cases of Oklahoma and Washington, whose names are highlighted in red on the chart. These states employ a procedural process for obtaining post-conviction DNA testing that differs dramatically from the other states. In Oklahoma, the Oklahoma Indigent Defense System (the "System") oversees the process by which defendants apply for DNA testing. The System reviews and screens the defendants' requests for DNA testing, and is authorized to arrange for forensic testing in order to determine whether evidence of factual innocence exists. Once the System has completed its investigation, it presents worthy claims of factual innocence to the appropriate prosecutorial agency. Should the System refuse to accept a petitioner's case, the refusal is final and cannot be appealed.[21]

In Washington, the state Office of Public Defense collects all petitions for post-conviction DNA testing and transmits them to the appropriate prosecutorial office. The prosecutor then screens the request, and orders forensic testing for those requests that meet the review criteria. Any denials may be appealed to the attorney general's office.[22] Thus, the lack of court involvement in both Washington and Oklahoma's post-conviction DNA testing processes separates these two states from the other existing remedial state and federal processes.

Results of Post-Conviction DNA Testing

The questions asked and answered by the chart on the results of post-conviction DNA testing are as follows:

- What are the Consequences if the Results Do Not Favor the Petitioner?

  This section identifies the consequences if the results of the post-conviction DNA testing are unfavorable to the petitioner—i.e., if the test results include the petitioner as a source of the DNA evidence. Some statutes, like Maryland, simply deny the petition for post-conviction relief upon unfavorable test results.[23] Others penalize the petitioner in some manner, e.g., by requiring inclusion of the petitioner's DNA profile into the DNA database.[24] The federal statute's punitive consequences arise as a result of its requirement that the petition for post-conviction DNA test contain an assortment of actual innocence under penalty of perjury; thus, upon the receipt of unfavorable test results, the petitioner can be held in contempt, or potentially prosecuted for making false assertions.[25]

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19 See, e.g., Me. Rev. Stat. Ann. 15 § 2138.
20 See Justice for All Act of 2004 (codified at 18 USC § 3600).
21 See Okla. Stat. Ann. 22 §§ 1371 - 1371.2.
22 See Wash. Rev. Code Ann. § 10.73.170.
23 See Md. Code Ann., Crim. Proc. § 8-201.
24 See, e.g., Mont. Code Ann. § 46-21-110.
25 See Justice for All Act of 2004 (codified at 18 USC § 3600).

- What are the Consequences if the Results Do Favor the Petitioner?

  In the event that the test results exclude the petitioner as the source of DNA evidence, the state and federal statutes specify the subsequent procedural steps a petition may take to challenge his conviction. The federal statute requires the petitioner to file a motion for a new trial, which the court shall grant upon a showing of compelling evidence that the new trial would result in an acquittal.[26] The state statutes either similarly require a motion for a new trial, or provide the court more procedural flexibility upon reception of the favorable test results. North Carolina, for example, allows the court to enter any order "that serves the interests of justice," which may include an order setting a new trial or an order vacating and setting aside the petitioner's conviction.[27]

- What are the Consequences if the Results are Inconclusive?

  Seven states and the federal government contain statutory provisions that address (indirectly or directly) the situation when test results are inconclusive. Maine and Michigan deny the petitioner further post-conviction relief,[28] and Oregon treats the situation as if the results were unfavorable to the petitioner.[29] The remaining states—Kansas, Montana, Texas, and Utah—and the Federal Government give the court discretion in terms of deciding the future of post-conviction relief proceedings.[30]

- May One Request Reanalysis of the DNA Evidence?

  Only Maine and Michigan contain provisions allowing for the reanalysis of the DNA evidence. In both states, only the State can make such a motion for reanalysis, temporarily staying the petitioner's motion for a new trial pending the new test results.[31]

- May One Appeal a Decision Occurring After the DNA Test Has Been Performed?

  The previous chart presented statutory provisions regarding appeals from a decision not to perform post-conviction DNA testing. This chart presents the provisions regarding the availability of appeals from any post-test decisions (e.g., the denial of a motion for a new trial). The chart identifies 8 state statutory provisions that explicitly allow such post-test decision appeals.

- Will Compensation Be Awarded if the Petitioner is Exonerated?

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26 See Id.
27 See N.C. Gen. Stat. § 15A-270.
28 See Me. Rev. Stat. Ann. 15 § 2138 and Mich. Comp. Laws Ann. § 770.16.
29 See Or. Rev. Stat. Tit. 14, Ch. 138, Prec. 138.005.
30 See, e.g., Kan. Stat. Ann. § 21-2512.
31 See Me. Rev. Stat. Ann. 15 § 2138 and Mich. Comp. Laws Ann. § 770.16.

Missouri, Montana, and Federal Government have statutes providing for restitution for wrongfully imprisoned persons exonerated through DNA testing.[32] The Montana statute provides educational aid to exonerated petitioners, whereas the Missouri and Federal statutes provide direct financial restitution. Also, this grid does not include those state laws, such as a recently enacted law in Massachusetts,[33] that provides compensation for certain exonerated individuals regardless of the nature of the evidence used to convict them.

- Notes Regarding the Use of the Petitioner's DNA Profile; Other Notes

  All 50 states and the federal government have established DNA databases providing for the retention of offenders' DNA samples and the comparison of such samples with biological evidence obtained from crime scenes. A number of states allow for the entry into a DNA database of DNA samples obtained for purposes of post-conviction testing. Georgia allows for the entry of all samples obtained for post-conviction testing.[34] Other states, like Kentucky, allow for database entry only if the results from the post-conviction testing are unfavorable to the petitioner.[35]

  This section also identifies any other statutory provisions implicating privacy rights in DNA profiles or the results of the post-conviction DNA testing. For example, California and West Virginia exempt DNA profile information gathered as a result of post-conviction DNA testing from any laws requiring disclosure of information to the public.[36] In contrast, Ohio designates the results from post-conviction DNA testing a public record,[37] and Nevada accepts the petition for DNA testing as consent for the release and use of the petitioner's genetic profile.[38]

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[32] See Mo. Ann. Stat. § 650.055, Mont. Code Ann. § 53-1-214, and Justice for All Act of 2004 (codified at 18 USC § 3600).

[33] See M. G.L.A. ch. 444 § 1

[34] See Ga. Code Ann. § 5-5-41.

[35] See Ky. Rev. Stat. Ann. § 422.285.

[36] See Cal. Penal Code § 1405 and W. Va. Code Ann. § 15-2B-14.

[37] See Ohio Rev. Code Ann. § 2953.81.

[38] See Nev. Rev. Stat. § 176.0918.