

CHAPTER 11

USING POST-CONVICTION DNA TESTING TO ATTACK YOUR CONVICTION OR SENTENCE*

A. Introduction

As of March 11, 2013, 303 individuals have been exonerated in the United States through post-conviction DNA testing.¹ This is because DNA is uniquely capable of proving innocence in crimes where biological material was left by the perpetrator.² Many people in prison were convicted before DNA testing was possible, or before it was considered reliable, and they were not able to present DNA evidence at their trial that might have helped prove their innocence. There are many organizations throughout the country that help prisoners recover DNA evidence and secure DNA testing. Because of the complexity of applying for DNA testing, we strongly recommend that you contact one of these organizations rather than proceed *pro se* (on your own).

If you do decide to go forward on your own, this Chapter can help you understand some legal issues involved in the process. This Chapter explains how you may be able to use DNA testing of physical evidence to challenge your conviction or sentence. It can also help you understand how DNA testing is currently being used within the criminal justice system. Part B of this Chapter discusses some ways you can reopen your case based on DNA testing. Part C explains how to seek assistance from a legal organization. Appendix A lists some legal organizations that might be able to help you obtain DNA testing.

B. Common Procedures Used to Obtain DNA Testing

In the past, methods of testing evidence found at crime scenes were unreliable, and identifications based on crime scene evidence were often inaccurate. DNA testing is much more accurate than older methods. If you believe there might have been biological evidence (like blood, semen, hair, or sweat) collected at the scene of the crime for which you were convicted, and if you think DNA tests of the biological evidence would exonerate you, you can file several types of motions in court to try to get the evidence tested and have the results admitted in court.

Finding evidence is one of the biggest obstacles to getting DNA testing. A big part of finding evidence is understanding the difference between biological evidence that was introduced at your trial (for instance, a bloody shirt) and evidence that was collected during the investigation, but not introduced at your trial (for instance, a rape kit—the evidence collected from a rape victim when she was examined by a doctor). You do not need to actually locate the evidence you want tested. You only need to prove that it was either collected during the course of the investigation or introduced into evidence at your trial (or both). When filing a motion to get certain evidence tested, you must be specific about what evidence you want to test, why that evidence is important, and the last known location of the evidence. It is very important to identify the last known location of the evidence.

1. Motion to Secure DNA Testing

Before filing a motion for a new trial based on newly discovered evidence (see Part B(2) for more information), you need to file a motion to secure DNA testing. How you must file your motion will depend on whether your state has a post-conviction DNA testing statute. Forty-nine states have some sort of post-conviction DNA testing statute.³ If you are a state prisoner in one of these states, read Subsection (a) below on how to make your motion.

* This Chapter was revised by Susan Maples, based on previous versions by Kristin Jamberdino, Oluwashola Ajewole, and Sara Manaugh.

1. See The Innocence Project, *available at* http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php (last visited Mar. 11, 2013).

2. DNA (which stands for “deoxyribonucleic acid”) is a substance contained in every human cell. Each strand of DNA is encoded with information about the specific physical characteristics of the individual from whom it came.

3. See The Innocence Project, *available at*

As of March 2013, the only state that does NOT have a post-conviction DNA statute is Oklahoma.⁴ If you are a prisoner in Oklahoma, you will need to file a Section 1983 action to obtain DNA testing. See Subsection (b) below and Chapter 16 of the *JLM* to learn about Section 1983 claims. If you are a federal prisoner, you should file your motion under the recently passed Justice for All Act. Subsection (c) below explains how this statute works.

(a) State Prisoners in States with a Post-Conviction DNA Testing Statute

As of March 2013, forty-nine U.S. states had laws allowing post-conviction DNA testing.⁵ State laws vary greatly with regard to when you may request DNA testing. For example, some states only allow prisoners who were convicted of certain felonies to petition for DNA testing.⁶ Other states impose strict “due diligence” requirements⁷ or only grant DNA testing if an individual’s identity was an issue at trial.⁸ You should carefully read the requirements and conditions for petitioning for post-conviction DNA testing under your state’s law. Footnote 16 (on the next page) lists the relevant statute in each state to help you do this research.

New York was the first state to allow post-conviction DNA testing, and its provisions are some of the most flexible.⁹ According to the provisions of New York’s law, which are incorporated into Article 440 of the New York Criminal Procedure Law,¹⁰ there is no express due diligence requirement,¹¹ identity does not need to have been an issue at trial, and there is no time limit for filing a petition. In New York, the court will order testing if it determines that you have met the following requirements:

- (1) Your Article 440 motion requests that a forensic test be performed on *specific* evidence, which you have clearly identified;
- (2) The evidence you are requesting to have tested was obtained in connection with the trial which resulted in your conviction; and

http://www.innocenceproject.org/Content/Access_To_PostConviction_DNA_Testing.php (last visited Nov. 11, 2012).

4. See The Innocence Project, *available at*

http://www.innocenceproject.org/Content/Access_To_PostConviction_DNA_Testing.php (last visited Mar. 11, 2013).

5. Oklahoma is currently the only state that does not have any DNA access provisions in its state laws.

6. See, e.g., Ind. Code Ann. §§ 35-38-7-1, 35-38-7-3, 35-38-7-5 (LexisNexis 2012) (indicating that only those convicted of murder or a class A, B, or C felony may petition).

7. “Due diligence” means you believe that the evidence you want tested will show that you are innocent and that you are pursuing the testing within the proper amount of time, usually an amount of time determined by the statute. See, e.g., Ark. Code Ann. § 16-112-201 (LexisNexis 2012) (strict due diligence requirement); Fla. Stat. Ann. § 925.11 (LexisNexis 2012) (due diligence requirement).

8. “Identity at issue at trial” means that you or your attorney claimed that you did not commit the crime for which you were on trial. See, e.g., 725 Ill. Comp. Stat. Ann. 5/116-3 (LexisNexis 2012) (requiring that identity must have been an issue at trial); Mich. Comp. Laws Serv. § 770.16(4)(a)(iii) (LexisNexis 2012) (requiring that identity must have been an issue at trial); Mo. Rev. Stat. § 547.035(2)(4) (2012) (requiring that identity must have been an issue at trial); Tex. Code Crim. Proc. art. 64.03(a)(1)(B) (2012) (requiring that identity must have been an issue at trial).

9. The text of the New York provision reads as follows:

Where the defendant’s motion requests the performance of a forensic DNA test on specified evidence, and upon the court’s determination that any evidence containing deoxyribonucleic acid (“DNA”) was secured in connection with the trial resulting in the judgment, the court shall grant the application for forensic DNA testing of such evidence upon its determination that 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.

N.Y. Crim. Proc. Law § 440.30(1-a)(a)(1) (Consol. 2012).

10. For more information on Article 440, see *JLM*, Chapter 20, “Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence.”

11. *But see* *People v. Kellar*, 218 A.D.2d 406, 410, 640 N.Y.S.2d 908, 910 (3d Dept. 1996) (finding that the legislature did not mean to eliminate the due diligence requirement for DNA testing: “We do not read CPL 440.30(1-a) as granting a second opportunity to those who have failed to take advantage of available DNA testing prior to trial”); *People v. Sterling*, 6 Misc. 3d 712, 719, 787 N.Y.S.2d 846, 851 (Sup. Ct. Monroe County 2004) (noting “CPL 440.10(1)(g), in fact, does contain the additional requirement that a motion based upon the ground of newly discovered evidence must be made with due diligence after its discovery.”).

- (3) There is a “reasonable probability” that if the results of a DNA test had been admitted at your trial, the verdict would have been more favorable to you.¹²

The “reasonable probability” requirement is probably the most important. The court will not order a DNA test if it believes there is no “reasonable probability” that the verdict at your trial would have been different, *even if you are right about whatever you are trying to prove with the DNA test*.¹³ This requirement does not mean that the court must be certain that the evidence will prove you are innocent, but it does place a significant burden on you. A court can legally deny your request for testing if it believes that your conviction was justifiable, regardless of what a new DNA test might show.¹⁴

The New York law is unusual in that it allows you to request DNA testing as part of your Article 440 motion to vacate judgment (request a new trial).¹⁵ Not all states allow you to combine the request for DNA testing and the request for a new trial in the same motion. You may find that the law in your state is more difficult. For instance, some states have different deadlines, called “statutes of limitations,” for filing a motion for a new trial and for requesting post-conviction DNA testing. The deadline to request a new trial may have passed even though your opportunity to request DNA testing is still available. Also, some states have stricter requirements for granting a request for DNA testing than for granting a motion for a new trial (or vice versa).

Because there is such variation among state laws, you must look carefully at your state’s post-conviction DNA testing statute. When deciding whether to request post-conviction DNA testing, consult both the statute governing motions for a new trial and the case law, if any, governing post-conviction DNA testing in your state.¹⁶

12. N.Y. Crim. Proc. Law § 440.30(1-a)(a)(1) (Consol. 2012).

13. N.Y. Crim. Proc. Law § 440.30(1-a)(a)(1) (Consol. 2012); *see also* *People v. Tookes*, 167 Misc. 2d 601, 604–06, 639 N.Y.S.2d 913, 915–16 (Sup. Ct. N.Y. County 1996) (finding no reasonable probability that the verdict would have been different where (1) there was no case for mistaken identity, (2) there was clear evidence of rape, and (3) available biological specimens were unlikely to have helped defendant’s case, given the unclear results of blood and saliva tests, the defendant’s earlier failure to pursue an enzyme analysis, and the unknown age of the recovered sperm).

14. *See, e.g., People v. Smith*, 245 A.D.2d 79, 79, 665 N.Y.S.2d 648, 649 (1st Dept. 1997) (finding that, in prosecution for first degree rape and related crimes, post-conviction DNA tests probably would not have resulted in more favorable verdict for defendant where (1) fact that defendant was not the source of semen was consistent with victim’s testimony that she had intercourse with her boyfriend shortly before rape and that she did not know whether defendant ejaculated; (2) evidence of guilt was overwhelming; and (3) there was no claim of mistaken identity); *People v. De Oliveira*, 223 A.D.2d 766, 767–68, 636 N.Y.S.2d 441, 443 (3d Dept. 1996) (finding defendant not entitled to DNA testing because it was improbable that results of DNA testing would have effect on his second degree murder conviction where it was undisputed that victim was sexually active about the time of her murder, there was no evidence that the killing was part of a sexual encounter, and there was no critical testimony that could be seriously called into question by test results).

15. For more information on Article 440, see *JLM*, Chapter 20, “Using Article 440 of the New York Criminal Procedure Law to Attack Your Unfair Conviction or Illegal Sentence.”

16. The following lists all the state laws governing post-conviction DNA testing, in alphabetical order of the states: Alabama: Ala. Code § 15-18-200 (2009); Alaska: Alaska Stat. Ann. §§ 12.73.010–.090 (West 2010); Arizona: Ariz. Rev. Stat. Ann. § 13-4240 (2000); Arkansas: Ark. Code Ann. §§ 16-112-201 to -208 (2005); California: Cal. Penal Code § 1405 (2005); Colorado: Colo. Rev. Stat. Ann. §§ 18-1-411 to -416 (2003); Connecticut: Conn. Gen. Stat. Ann. § 54-102kk (2003); Delaware: Del. Code Ann. tit. 11, § 4504 (2001); District of Columbia: D.C. Code Ann. § 22-4133 (2002); Florida: Fla. Stat. Ann. § 925.11 (2006); Fla. R. Crim. P. 3.853 (2009); Georgia: Ga. Code Ann. § 5-5-41 (2003); Hawaii: Haw. Rev. Stat. Ann. §§ 844D-121 to -133 (2005); Idaho: Idaho Code Ann. § 19-4902 (2004); Illinois: 725 Ill. Comp. Stat. Ann. § 5/116-3 (2005); Indiana: Ind. Code Ann. §§ 35-38-7-1 to -19 (2006); Iowa: Iowa Code Ann. § 81.10 (2005); Kansas: Kan. Stat. Ann. § 21-2512 (2001); Kentucky: Ky. Rev. Stat. Ann. §§ 422.285, 422.287 (2007); Louisiana: La. Code Crim. Proc. Ann. art. 926.1 (2011); Maine: Me. Rev. Stat. Ann. tit. 15, §§ 2136–2138 (2006); Maryland: Md. Code Ann., Crim. Proc. § 8-201 (2009); Michigan: Mich. Comp. Laws Ann. § 770.16 (2011); Minnesota: Minn. Stat. Ann. §§ 590.01–.06 (2005); Mississippi: Miss. Code § 99-39-9 (2009); Missouri: Mo. Ann. Stat. § 547.035 (2001); Montana: Mont. Code Ann. § 46-21-110 (2003); Nebraska: Neb. Rev. Stat. §§ 29-2101, 29-4120 (2001); Nevada: Nev. Rev. Stat. Ann. §§ 176.0917–.0919 (2009); New Hampshire: N.H. Rev. Stat. Ann. §§ 651-D:1 to -D:4 (2005); New Jersey: N.J. Stat. Ann. § 2A:84A-32a (2002); New Mexico: N.M. Stat. § 31-1A-2 (2005); New York: N.Y. Crim. Proc. Law § 440.30 (2012); North Carolina: N.C. Gen. Stat. § 15A-269 (2011); North Dakota: N.D. Cent. Code § 29-32.1-15 (2005); Ohio: Ohio Rev. Code Ann. §§ 2953.71 to 2953.75 (2010); Oklahoma: Okla. St. Ann. tit. 22, §§ 1360, 1371.1, 1371.2 (2008); Oregon: Or. Rev. Stat. § 138.690 (2007); Pennsylvania: 42 Pa. Cons. Stat. Ann. § 9543.1 (2002); Rhode Island: R.I. Gen. Laws §§ 10-9.1-10 to 10-9.1-

When filing your motion, it is important that you know which pieces of evidence you want tested, show that you understand your state's post-conviction DNA testing statute, and explain why you believe you meet every requirement set out by that statute. You should write out your state's entire post-conviction DNA testing statute in your motion, then go through each requirement of the statute separately and show how the facts of your case meet each requirement. If you clearly identify the pieces of evidence you want tested, explain why you are seeking post-conviction DNA testing, and explain how you meet all the requirements of your state's DNA testing statute, your motion will have a better chance of succeeding.

(b) Possible Constitutional Rights

Until recently, it was unclear whether there was a right to DNA testing under the U.S. Constitution. However, in a case called *District Attorney's Office for Third Judicial District v. Osborne*, the Supreme Court held that state and federal prisoners do NOT have a constitutional right to post-conviction DNA testing.¹⁷ According to the Court, the decision whether to allow prisoners access to DNA testing services is best left up to state legislatures.¹⁸ However, a prisoner who has been denied DNA testing under a state's post-conviction DNA testing statute may still bring a § 1983 lawsuit to challenge the constitutional adequacy of the state's DNA testing statute.¹⁹ Additionally, if you are a prisoner in Oklahoma, which does not have a post-conviction DNA testing statute, you can also bring a § 1983 lawsuit challenging the constitutional adequacy of Oklahoma's post-conviction procedures.²⁰

(c) Federal Prisoners and the Federal Post-Conviction DNA Testing Statute: The Justice for All Act of 2004

On October 30, 2004, the Justice for All Act was signed into law. Because it is a relatively new law, there might not be much case law about it yet in your jurisdiction. This law gives prisoners the right to request post-conviction DNA testing, but it applies only to federal prisoners.²¹ If you are a state prisoner, you must use your state's post-conviction DNA testing statute listed in Footnote 16 (see Part B(1)(a) of this Chapter). If your state does not have a statute (Oklahoma), then you must file a § 1983 action (see Part B(1)(b)).

12 (2006); South Carolina: S.C. Code § 17-28-90 (2009); South Dakota: S.D. Cod. Laws §§ 23-5B-1 to 23-5B-17 (2009); Tennessee: Tenn. Code Ann. §§ 40-30-110, -301 to -313 (2004); Texas: Tex. Code Crim. Proc. arts. 64.01-.05 (2011); Utah: Utah Code Ann. §§ 78B-9-301 to -304 (2011); Vermont: 13 V.S.A. §§ 5561 to 5570 (2007); Virginia: Va. Code Ann. § 19.2-327.1 (2005); Washington: Wash. Rev. Code Ann. § 10.73.170 (2005); West Virginia: W. Va. Code Ann. § 15-2B-14 (2004); Wisconsin: Wis. Stat. Ann. §§ 974.02, .06, .07 (2012); Wyoming: Wyo. Stat. §§7-12-303 to 7-12-305 (2008). For information about statutes versus cases, see Chapter 2 of the *JLM*.

17. *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 73, 129 S. Ct. 2308, 2323, 174 L.Ed.2d 38, 55 (2009).

18. *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 62, 129 S. Ct. 2308, 2316, 174 L.Ed.2d 38, 48 (2009) (stating that figuring out how to use DNA testing is a task that "belongs primarily to the legislature").

19. In *Skinner v. Switzer*, the Supreme Court clarified that a state prisoner *may* pursue post-conviction DNA testing in a § 1983 action if he or she can prove the applicable state DNA testing statute violates the prisoner's procedural due process rights and is therefore unconstitutional. *Skinner v. Switzer*, 131 S. Ct. 1289, 1297-1300, 179 L. Ed. 2d 233, 242-46 (2011) (finding that the state prisoner properly invoked § 1983 to challenge the constitutionality of the Texas DNA statute). Though the Supreme Court in *Osborne* did not establish any explicit requirements for state DNA testing statutes, federal courts have used the Alaska statute at issue in *Osborne* as a reference point. *See, e.g., In re Smith*, 349 Fed. Appx. 12, 15-16 (6th Cir. 2009) (finding a prisoner's due process claim "untenable because Michigan's [DNA testing] scheme is more comprehensive than the state procedures sanctioned by the *Osborne* Court."); *see also* *Tevlin v. Spencer*, 621 F.3d 59, 71 (1st Cir. 2010); *Thompson v. Rundle*, 393 Fed. Appx. 675, 679-80 (11th Cir. 2010).

20. Though such a challenge may be brought against post-conviction discovery procedures in Oklahoma, such efforts have not been successful to date in other states. *E.g., Tevlin v. Spencer*, 621 F.3d 59, 71 (1st Cir. 2010) (upholding the constitutionality of Massachusetts's post-conviction procedures). For more information on how to bring a § 1983 claim, see *JLM*, Chapter 16, "Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief from Violations of Federal Law."

21. 18 U.S.C. § 3600(a) (2006).

The Justice for All Act works exactly like a state post-conviction DNA statute if you are serving time for a federal crime. It lays out the standards states should have for post-conviction DNA testing, and it provides the rules and procedures for federal prisoners who are serving a prison or death sentence and applying for DNA testing.²² To qualify for DNA testing, the Act requires that:

- (1) The applicant assert under penalty of perjury that he is “actually innocent” of the federal offense for which he is imprisoned or on death row, or, in death penalty cases, that he is “actually innocent” of another offense, if being exonerated of this offense would give him the right to a reduced sentence or a new sentencing hearing; and
- (2) The specific evidence to be tested not have been previously tested, unless a newer and more reliable method of testing is being requested; and
- (3) The proposed DNA testing may produce new evidence raising a reasonable probability that the applicant did not commit the offense; and
- (4) The applicant provide a current DNA sample for comparison with existing evidence.²³

You should file for DNA testing within three years of your conviction. If you do not, your motion will be considered late, and you will have to show that you had a specific reason or “good cause” for filing late.²⁴

The government is not allowed to destroy DNA evidence from a federal criminal case while the defendant remains in prison, unless: (1) a court has denied a motion for DNA testing; (2) the defendant knowingly and voluntarily waived the right to DNA testing; (3) the defendant was notified after his conviction became final that the evidence might be destroyed and did not file a motion for DNA testing; (4) the evidence has already been tested and the results included the defendant as the source. Also, if the evidence is large or bulky, the government may preserve only a representative sample.²⁵

One important word of caution: *If you assert your innocence and the DNA evidence does not show you to be innocent, the court can hold you in contempt. If you are convicted of making false assertions, your term of imprisonment will be extended by at least three years.*²⁶ However, if the evidence excludes you as the source of the DNA evidence, then you can petition for a new trial. The new trial will be granted if the DNA test results, considered with all other evidence in the case (whether introduced at trial or not), establish by compelling evidence that a new trial would result in your acquittal.²⁷ Also, if you are a federal prisoner, you may file a motion for a new sentencing hearing if evidence of an offense was admitted during a federal death sentencing hearing and exoneration of that offense would entitle you to a reduced sentence or to a new sentencing proceeding.²⁸

2. Motion for a New Trial Based on Newly Discovered Evidence

Once you have succeeded in your motion to secure DNA evidence, received the DNA testing you asked for, and obtained results that point to your innocence, it is time to file a motion for a new trial. Each state, and the federal government, allows you to file a motion for a new trial based on newly discovered evidence. Because DNA technology is so new, the results of DNA analysis may be considered “newly discovered evidence,” even if the substance being analyzed is not *itself* newly discovered.

22. 18 U.S.C. § 3600 (2006).

23. 18 U.S.C. §§ 3600(a)(1)(A)–(B), 3600(a)(3)(A), 3600(a)(8)–(9) (2006).

24. 18 U.S.C. §§ 3600(a)(10)(A)–(B) (2006). If you do not file within three years of your conviction, there is a presumption that your motion is late. That presumption can be rebutted by showing (1) that you did not file earlier due to incompetence (incompetence in this situation means that there is reasonable cause to believe you suffered from a mental disease or defect that rendered you unable to understand the proceedings against you or to assist properly in your defense); (2) that the DNA evidence to be tested is newly discovered; or (3) the appeal is not only based on your assertion of your innocence and that denying the appeal would be a manifest injustice, or (4) that you had “good cause” for the delay. *See also* the Death Penalty Information Center, *available at* <http://www.deathpenaltyinfo.org/article.php?scid=40&did=1234#subA> (last visited Mar. 11, 2012).

25. 18 U.S.C. §§ 3600A(a), 3600A(c)(1)–(5) (2006).

26. 18 U.S.C. §§ 3600(f)(2)(B)(i), 3600(f)(3) (2006).

27. 18 U.S.C. § 3600(g)(2) (2006).

28. 18 U.S.C. § 3600(g)(2)(B) (2006).

Every jurisdiction has a test that its courts apply in deciding whether to grant a motion for a new trial based on newly discovered evidence. In the federal system, courts traditionally ask five questions to determine whether to grant a defendant's motion for a new trial based on newly discovered evidence:²⁹

- (1) Was the evidence available before the trial?
- (2) Could it have been discovered before the trial through the exercise of due diligence?³⁰
- (3) Is the evidence "material" (relevant) to the issue you raise in your motion?
- (4) Is the evidence merely "cumulative" (does it only support other similar evidence already admitted at trial) or "impeaching" (does it only contradict other evidence admitted at trial)?
- (5) Would the evidence probably change the trial's result if a new trial were granted?³¹

State courts, including New York courts,³² use similar tests to decide whether to grant a motion for a new trial based on newly discovered evidence. While courts are bound by their test, they generally have some discretion to decide whether to grant a new trial. Motions for new trials are extraordinary, so courts do not grant them freely, and appellate courts rarely reverse a lower court judge's decision to deny a new trial.

Most states, as well as the federal government, limit the period of time after your conviction during which you can file a motion for a new trial.³³ These time limits, called "statutes of limitations," are based on the idea that evidence becomes less reliable over time. If time has expired for you to file your motion for a new trial, you will have to pursue other post-conviction remedies (such as seeking a writ of habeas corpus, discussed in Section 3 below), which may not be time-barred.

To file your motion on time, you need to establish that you have newly discovered evidence. Depending on your jurisdiction, you may be able to establish this if biological evidence from the crime for which you were convicted still exists, and:

- (1) DNA testing was never performed on it;
- (2) DNA analysis was performed, but the results were not admitted in court (because, for example, DNA testing was not regarded as reliable at the time of your trial); or
- (3) DNA analysis was performed, but the methods then used to analyze the evidence are now known to be unreliable (for example, microscopic hair comparison).

Your motion for a new trial based on newly discovered evidence (and/or your request for DNA testing) may be denied if you pleaded guilty at your trial. New York does not explicitly bar people who pleaded guilty from requesting DNA testing, but New York courts have held that those who pleaded guilty have admitted their factual guilt and have waived their right to a new trial based on newly discovered evidence.³⁴ You

29. In federal courts, Rule 33 of the Federal Rules of Criminal Procedure authorizes a request for a new trial. Rule 33 allows the court to grant a new trial on defendant's motion if "the interest of justice so requires." Fed. R. Crim. P. 33.

30. In this context, due diligence means that you and/or your attorney should have been able to find the evidence had you looked for it. There should be a reason why you were not able to find the evidence before trial, and you should make this known to the court.

31. See John A. Glenn, *What Constitutes "Newly Discovered Evidence" Within Meaning of Rule 33 of Federal Rules of Criminal Procedure Relating to Motions for New Trial*, 44 A.L.R. Fed. 13 (2002); see also *United States v. Carlone*, 603 F.2d 63, 66–67 (8th Cir. 1979) (using this standard to deny a new trial when a newly discovered defense witness claimed that F.B.I. agents asked him to plant weapons and drugs in the defendant's home); *Pitts v. United States*, 263 F.2d 808, 810–11 (9th Cir. 1959) (going through all five questions to show that evidence submitted by defense would not meet any of the standards, even if it had been newly discovered); *United States v. Bertone*, 249 F.2d 156, 160 (3rd Cir. 1957) (rejecting motion for a new trial based on testimony from newly available witnesses because the witnesses were available and known by defendant during trial); *United States v. Marachowsky*, 213 F.2d 235, 238–39 (7th Cir. 1954) (applying this test to reject three witnesses newly brought by the defense to secure a new trial).

32. See *People v. Priori*, 164 N.Y. 459, 472, 58 N.E. 668, 672 (1900) (using a six-step test to deny the defendant's motion for a new trial, and splitting question four of the federal test into two separate questions about cumulative and impeaching evidence).

33. *Herrera v. Collins*, 506 U.S. 390, 410–11, 113 S. Ct. 853, 865–66, 122 L. Ed. 2d 203, 223 (1993) (finding that while some states required filing a motion within weeks of conviction, some provide a time limit of one, two, or three years, and a few states have no time limit). Since *Herrera*, the federal statute of limitations for filing a motion based on new evidence was extended from two to three years. Fed. R. Crim. P. 33.

34. See *People v. Jackson*, 163 Misc. 2d 224, 226, 620 N.Y.S.2d 240, 241 (N.Y. Sup. Ct. 1994) (finding that "By pleading guilty, the defendant admitted his factual guilt and waived his right to confront his

should consult both your state's statutes and case law to determine whether a guilty plea prevents you from seeking a new trial based on DNA evidence.

Remember that you can request DNA testing even if your state has not passed a statute explicitly providing for post-conviction DNA testing. Courts might treat such a request as a matter of discretion and will probably determine whether to grant it based on a combination of factors similar to the ones listed in the various state statutes that have been passed.

3. Habeas Corpus Relief

It might be possible for you to get post-conviction relief by petitioning for a writ of habeas corpus, but it is unlikely.³⁵ A habeas corpus writ is a court's written order demanding that a prisoner be brought before the court to see whether his imprisonment or detention is illegal. Unlike most post-conviction DNA cases, in which motions are made to find evidence, it is assumed you already have the evidence to exonerate yourself in habeas cases.³⁶ So, this remedy is not available unless the biological evidence from the crime scene has already been subjected to DNA testing. Another problem federal habeas corpus petitioners encounter is that it is traditionally assumed that relief cannot be granted unless a constitutional error occurred at trial.³⁷

You may request access to crime scene evidence through the right to demonstrate actual innocence in habeas corpus review. This idea is based on *Herrera v. Collins*, in which the Supreme Court left open the possibility that "a truly persuasive post-trial demonstration of 'actual innocence'" in a capital case could lead to relief in the event there was not a state-sanctioned review of the evidence.³⁸ In *House v. Bell*, the Supreme Court decided that in some cases where new evidence would have been likely to cast a reasonable doubt on a state prisoner's conviction, that state prisoner may file for a federal habeas corpus writ, even if the laws of the state where he was convicted would have normally barred a federal habeas filing.³⁹

In connection with habeas review, you may find success through the *Brady* obligation (also known as the *Brady* material doctrine).⁴⁰ Under this rule, the prosecution in a criminal case must reveal any evidence that

accusers. He may not now seek to defend himself against those accusers by a motion based upon newly discovered evidence.").

35. See Chapter 13 of the *JLM*, "Federal Habeas Corpus," for more information on habeas corpus petitions.

36. If you are already bringing a petition for habeas corpus on other grounds, then you can also request DNA testing; however, because a petition for habeas corpus is a difficult route to take to seek testing, it is only recommended if you are already filing a habeas petition. See *Cherrix v. Braxton*, 131 F. Supp. 2d 756, 767, 775–76 (E.D. Va. 2001) (defending decision to order DNA testing on previously tested material due to technological advances and principle that newly-discovered DNA evidence would "illuminate" federal habeas claim). See also *Thomas v. Goldsmith*, 979 F.2d. 746, 749–50 (9th Cir. 1992) (requiring state to turn over allegedly exculpatory DNA evidence in order to allow the prisoner to make a possible showing of innocence and overcome procedural default on habeas claim).

37. *But see In re Davis*, 130 S. Ct. 1, 1, 174 L. Ed. 2d 614, 614 (2009) (remanding case to district court for hearing where defendant made a strong claim of "actual innocence" in an original habeas petition). Although there was no constitutional error in the defendant's trial, the extraordinary showing of innocence later presented by the defendant forced the Court to remand the case in order to decide whether the defendant had grounds for relief under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). It remains to be seen whether *In re Davis* has significant value as precedent.

38. *Herrera v. Collins*, 506 U.S. 390, 417, 113 S. Ct. 853, 869, 122 L. Ed. 2d 203, 227 (1993) (noting that in a capital case a truly persuasive demonstration of "actual innocence" made after trial would make the execution of a defendant unconstitutional and warrant federal habeas relief if there were no state procedure available to process such a claim).

39. *House v. Bell*, 547 U.S. 518, 535–37, 126 S. Ct. 2064, 2076–77, 165 L. Ed. 2d 1, 21 (2006).

40. See *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196–97, 10 L. Ed. 2d 215, 218 (1963) (holding "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution"); *United States v. Agurs*, 427 U.S. 97, 110, 96 S. Ct. 2392, 2401, 49 L. Ed. 2d 342, 353–54 (1976) ("[T]here are situations in which evidence is obviously of such substantial value to the defense that elementary fairness requires it to be disclosed even without a specific request."). The *Agurs* standards used to determine when evidence must be disclosed are no longer good law, but the idea behind them is. See *United States v. Bagley*, 473 U.S. 667, 675, 105 S. Ct. 3375, 3380, 87 L. Ed. 2d 481, 489–90 (1985) (holding that the prosecutor is required to "disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial"). See Chapter 13 of the *JLM*, "Federal Habeas Corpus," for information

may prove your innocence. Note, however, the evidence referred to is the *results* from DNA testing, not the *material* being tested. Thus, you may have a claim for habeas corpus relief if (1) evidence was subjected to DNA testing; (2) the prosecution withheld the results of that test from you; and (3) the results may have helped to prove your innocence at trial. But, if DNA analysis was never performed on the material, you cannot allege a *Brady* violation based on the prosecution's withholding of that evidence (since the "evidence" did not exist).⁴¹

The Supreme Court has interpreted *Brady* not to impose a constitutional duty on the state to perform DNA tests on evidence, nor to preserve evidence so that it can be tested.⁴² But, this rule changed when Congress passed the Justice for All Act of 2004.⁴³ The Justice for All Act imposes uniform rules for the preservation of evidence for DNA testing in federal crimes but does not provide for damages.⁴⁴ Whether a violation of those rules would be the basis for other claims for relief, like a claim under § 1983, is unclear.

C. Legal Assistance for Those Seeking Post-Conviction DNA Testing

If you do not have a lawyer and want to seek post-conviction DNA testing, there are many not-for-profit organizations—usually called “innocence projects”—that might be able to help you. These organizations are often forced to choose a few cases over others that may be just as worthy because they receive huge numbers of requests. You may want to consider contacting multiple organizations for help.

Appendix A (below) lists organizations that may help you use DNA evidence to prove your innocence. To have one of these offices consider your case, you should mail a brief factual summary of your case and a list of the evidence used against you. Your case must involve biological evidence (semen, blood, saliva, skin, sweat, or hair). If possible, you should indicate what evidence you want to test, why it would be important to your case, and the last known location of that evidence (if you include this information, it may help the attorneys get back to you faster). Include your full name, mailing address, and prison identification number.

D. Conclusion

If you believe DNA can prove your innocence, you should pursue the legal options summarized in the sections above. The legal options differ depending on whether you are in a state or federal prison, and, if you are in a state prison, whether you are in a state with or without a post-conviction DNA testing statute. Appendix A provides a list of organizations with expertise in helping prisoners seek post-conviction DNA testing. These organizations may be able to help you.

on the *Brady* duty.

41. *But see* *Godschalk v. Montgomery Cnty. Dist. Attorney's Office*, 177 F. Supp. 2d 366, 370 (E.D. Pa. 2001) (“Since DNA testing of the genetic material could indeed provide material exculpatory [*Brady*] evidence for a jury to consider along with the inculpatory evidence of plaintiff's detailed confession, we find that plaintiff has a due process right of access to the genetic material for the limited purpose of DNA testing.”).

42. *See Arizona v. Youngblood*, 488 U.S. 51, 57–58, 109 S. Ct. 333, 337, 102 L. Ed. 2d 281, 289 (1988) (holding that absent a showing of bad faith, “failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant,” does not violate the Due Process clause).

43. 18 U.S.C. § 3600A (2006).

44. 18 U.S.C. § 3600A (2006).

APPENDIX A

PROJECTS THAT MAY OFFER ASSISTANCE IN OBTAINING DNA TESTING—BY STATE

AlaskaInnocence Project Northwest

University of Washington School of Law
William H. Gates Hall, P.O. Box 85110
Seattle, WA 98145

ArizonaArizona Justice Project

c/o Sandra Day O'Connor College of Law
P.O. Box 875920
Tempe, AZ 85287
Phone: 602-258-1702
E-mail: info@azjusticeproject.org

Northern Arizona Justice Project

Department of Criminal Justice
Northern Arizona University
P.O. Box 15005
Flagstaff, AZ 86011-5005
Phone: 928-523-7028

ArkansasInnocence Project Arkansas

Robert A. Leflar Law Center
1 University of Arkansas
Fayetteville, AR 72701
Phone: 479-575-3056

Midwestern Innocence Project

6320 Brookside Plaza
P.O. Box 1500
Kansas City, MO 64113
Phone: 816-221-2166
Email: office@theMIP.org

California (Northern)Northern California Innocence Project

Santa Clara University, School of Law
900 Lafayette Street, Suite 105
Santa Clara, CA 95050
Phone: 408-554-4790
Fax: 408-554-5440
E-mail: ncip@scu.edu

California (Southern)California Innocence Project

California Western School of Law
225 Cedar Street

San Diego, CA 92101

Phone: 619-525-1485

Fax: 619-615-1443

ColoradoColorado Innocence Project

Colorado Law School
Wolf Law Building, 404 UCB
Boulder, Colorado 80309
Phone: 303-492-2640
Fax: 303.492.4587
E-mail:
ColoradoInnocenceProject@colorado.edu

ConnecticutConnecticut Innocence Project

c/o McCarter & English
City Place 1, 36th Floor
185 Asylum Street
Hartford, Connecticut 06103
Phone: 860-275-6140

New England Innocence Project

160 Boylston Street
Boston, MA 02116
Phone: 857-277-7858
E-mail: intake@newenglandinnocence.org

DelawareOffice of the Public Defender

Carvel State Building
820 North French Street, 3rd floor
Wilmington, DE 19801
Phone: 302-577-5200

District of ColumbiaMid-Atlantic Innocence Project

American University,
Washington College of Law
4801 Massachusetts Avenue, NW
Washington, DC 20016-8184
Phone: 202-895-4519
Fax: 202-774-4226
E-mail: RCicurel@exonerate.org

FloridaInnocence Project of Florida, Inc.

1100 East Park Avenue

Tallahassee, FL 32301
 Phone: 850-561-6767
 Fax: 850-561-5077

Georgia

Georgia Innocence Project
 2645 North Decatur Road
 Decatur, Georgia 30033
 Phone: 404-373-4433

Hawaii

Hawai'i Innocence Project
 Attention: Prof. Hench
 University of Hawai'i School of Law
 2515 Dole Street
 Honolulu, HI 96822
 Phone: 808-956-6547
 Fax: 808-443-0554
 E-mail: hench@hawaii.edu

Idaho

Idaho Innocence Project
 Idaho Innocence Project
 Boise State University
 Chrisway Annex 2103 University Drive
 Boise, ID 83725
 Phone: 208-426-4207

Innocence Project Northwest

University of Washington School of Law
 William H. Gates Hall, P.O. Box 85110
 Seattle, WA 98145
 E-mail: jackiem@uw.edu

Illinois

Center on Wrongful Convictions
 Northwestern University School of Law
 375 East Chicago Avenue
 Chicago, IL 60611
 Phone: 312-503-2391
 Fax: 312-503-8977
 Email: csc@law.northwestern.edu

Medill Innocence Project

Northwestern University
 1845 N. Sheridan Ave.
 Evanston, IL 60208
 Phone: 847-491-5840

Illinois Innocence Project

Institute for Legal and Policy Studie
 University of Illinois Springfield
 One University Plaza
 MS Public Affairs Center 451

Springfield, IL 62703-5407
 Phone: 217-206-6569

Indiana

Innocence Project of Indiana
 Indiana University School of Law,
 Indianapolis
 Fran Watson, Professor of Law
 530 West New York Street
 Indianapolis, IN 46202
 Phone: 317-274-8523

Wisconsin Innocence Project

Frank J. Remington Center
 University of Wisconsin Law School
 975 Bascom Mall
 Madison, WI 53706-1399
 Phone: 608-262-2240

Iowa

Nebraska Innocence Project*

P.O. Box 24183
 Omaha, NE 68124-0183
 Phone: 402-341-7954

*For individuals convicted in Nebraska.

Wisconsin Innocence Project

Frank J. Remington Center
 University of Wisconsin Law School
 975 Bascom Mall
 Madison, WI 53706-1399
 Phone: 317-274-8523

Midwestern Innocence Project

6320 Brookside Plaza
 P.O. Box 1500
 Kansas City, MO 64113
 Phone: 816-221-2166
 Email: office@theMIP.org

Kansas

Midwestern Innocence Project

6320 Brookside Plaza
 P.O. Box 1500
 Kansas City, MO 64113
 Phone: 816-221-2166
 Email: office@theMIP.org

Kentucky

Kentucky Innocence Project
 Department of Public Advocacy
 100 Fair Oaks Lane, Suite 302
 Frankfort, KY 40601
 Phone: 502-564-8006

Fax: 502-564-7890

Louisiana

Innocence Project New Orleans

Case Review Manager
Innocence Project New Orleans
3301 Charters Street
New Orleans, LA 70117
Phone: 504-943-1902
Fax: 504-943-1905
Email: info@ip-no.org

Innocence Project of Northwest Louisiana

400 Travis Street, Suite 1222
Shreveport, LA 71101

Maine

New England Innocence Project

160 Boylston Street
Boston, MA 02116
Phone: 857-277-7858
E-mail: intake@newenglandinnocence.org

Maryland

Mid-Atlantic Innocence Project

American University,
Washington College of Law
4801 Massachusetts Avenue, NW
Washington, DC 20016-8184
Phone: 202-895-4519
Fax: 202-774-4226
E-mail: RCicurel@exonerate.org

Massachusetts

New England Innocence Project

160 Boylston Street
Boston, MA 02116
Phone: 857-277-7858
E-mail: intake@newenglandinnocence.org

Committee for Public Counsel Services

Innocence Program

Lisa Kavanaugh, Program Director
44 Bromfield Street
Boston, MA 02108
Phone: 617-623-0591

Michigan

Thomas M. Cooley Innocence Project

300 S. Capitol Avenue
P.O. Box 13038
Lansing, MI 48901
Phone: 517-371-5140, ext. 2914
Email: flinnm@cooley.edu

Wisconsin Innocence Project

Frank J. Remington Center
University of Wisconsin Law School
975 Bascom Mall
Madison, WI 53706-1399
Phone: 608-262-1002

Michigan Innocence Clinic

University of Michigan Law School
625 South State Street
Ann Arbor, MI 48109
Phone: 734-763-9353
Fax: 734-764-8242

Minnesota

Innocence Project of Minnesota

Erika Applebaum, Executive Director
Hamline University School of Law
1536 Hewitt Avenue, MS-D2205
St. Paul, MN 55104
Phone: 651-523-3152
Fax: 651-523-2967

Wisconsin Innocence Project

Frank J. Remington Center
University of Wisconsin Law School
975 Bascom Mall
Madison, WI 53706-1399
Phone: 608-262-1002

Mississippi

Innocence Project New Orleans

Case Review Manager
Innocence Project New Orleans
3301 Chartres Street
New Orleans, LA 70117
Phone: 504-943-1902
Fax: 504-943-1905
Email: info@ip-no.org

Mississippi Innocence Project

P.O. Box 1848
University, MS 38677-1848
Phone: 662-915-5207

Missouri

Midwestern Innocence Project

6320 Brookside Plaza
P.O. Box 1500
Kansas City, MO 64113
Phone: 816-221-2166
Email: office@theMIP.org

MontanaMontana Innocence Project

P.O. Box 7607
Missoula, MT 59807

Innocence Project Northwest

University of Washington School of Law
William H. Gates Hall, P.O. Box 85110
Seattle, WA 98145

NebraskaNebraska Innocence Project

P.O. Box 24183
Omaha, NE 68124-0183
Phone: 402-341-7954

Midwestern Innocence Project

6320 Brookside Plaza
P.O. Box 1500
Kansas City, MO 64113
Phone: 816-221-2166
Email: office@TheMIP.org

NevadaRocky Mountain Innocence Center

358 South 700 East, Box B235
Salt Lake City, UT 84102
Phone: 801-355-1888
E-mail: contact@rminnocence.org

New HampshireNew England Innocence Project

160 Boylston Street
Boston, MA 02116
Phone: 857-277-7858
E-mail: intake@newenglandinnocence.org

New JerseyCenturion Ministries

221 Witherspoon Street
Princeton, NJ 08542
Phone: 609-921-0334
Fax: 609-921-6919

New MexicoNew Mexico Innocence and Justice Project

Professors April Land,
Barbara Bergman and Rob Schwartz
University of New Mexico School of Law
1117 Stanford Drive NE
Albuquerque, NM 87131
Phone: 505-277-2671

New YorkInnocence Project

Benjamin N. Cardozo School of Law
40 Worth St., Suite 701
New York, NY 10013
Phone: 212-364-5340
Fax: 212-364-5341
E-mail: info@innocenceproject.org

Pace Post-Conviction Project

Barbara C. Salken Criminal Justice Clinic
78 North Broadway
White Plains, NY 10603

The Exoneration Initiative

350 Broadway
Suite 1207
New York, NY 10013
Phone: 212-965-9335
Fax: 212-965-9375
E-mail: info@exonerationinitiative.org

North CarolinaNorth Carolina Center on Actual Innocence

PO Box 52446, Shannon Plaza Station
Durham, North Carolina 27717-2446
Phone: 919-489-3268

Wrongful Convictions Clinic

Duke University Law School
Box 90360
Durham, NC 27708-0360
Phone: 919-613-7241

North Carolina Innocence inquiry Commission

Administrative Office of the Courts
NC Innocence Inquiry Commission
P.O. Box 2448
Raleigh, NC 27602
Phone: 919-890-1580
Fax: 919-890-1937
Email: nciic@nccourts.org

North DakotaInnocence Project of Minnesota

Erika Applebaum, Executive Director
Hamline University School of Law
1536 Hewitt Avenue, MS-D2205
St. Paul, MN 55104
Phone: 651-523-3152
Fax: 651-523-2967

Ohio

Lois and Richard Rosenthal Institute for
Justice/Ohio Innocence Project

University of Cincinnati College of Law
 P.O. Box 210040
 Cincinnati, OH 45221-0040
 Phone: 513-861-2946
 Fax: 513-556-0702

Oklahoma

Oklahoma Indigent Defense System
 DNA Forensic Testing Program
 P.O. Box 926
 Norman, OK 73070
 Phone: 405-801-2666

Midwestern Innocence Project

6320 Brookside Plaza
 P.O. Box 1500
 Kansas City, MO 64113
 Phone: 816-221-2166
 Email: office@TheMIP.org

Oregon

Innocence Project Northwest
 University of Washington School of Law
 William H. Gates Hall, P.O. Box 85110
 Seattle, WA 98145

Pennsylvania

Pennsylvania Innocence Project
 Temple University
 Beasley School of Law
 1719 North Broad Street
 Philadelphia, PA 19122
 Phone: 215-204-4255
 E-mail: innocenceprojectpa@temple.edu

Post Conviction DNA Project

Duquesne University School of Law
 Professor John T. Rago, Director
 600 Forbes Avenue,
 Pittsburgh, PA 15282
 Phone: 412-396-6183

Rhode Island

New England Innocence Project
 160 Boylston Street
 Boston, MA 02116
 Phone: 857-277-7858
 E-mail: intake@newenglandinnocence.org

South Dakota

Innocence Project of South Dakota
 University of South Dakota School of Law
 414 E. Clark Street
 Vermillion, SD 57014

Phone: 605-677-5443
 Fax: 605-677-5417
 Email: ipsd@usd.edu

Innocence Project of Minnesota

Erika Applebaum, Executive Director
 Hamline University School of Law
 1536 Hewitt Avenue, MS-D2205
 St. Paul, MN 55104
 Phone: 651-523-3152
 Fax: 651-523-2967

Tennessee

Tennessee Innocence Clinic

c/o UT - Pro Bono
 University of Tennessee Innocence Clinic
 1505 West Cumberland Avenue, Suite 83
 Knoxville, TN 37996
 Phone: 865-974-2331
 Fax: 865-974-6782

Texas

Texas Innocence Network

University of Houston Law Center
 Professor David Dow, Director
 University of Houston Law Center
 100 Law Center
 Houston, TX 77204-6060
 Email: CJI@uh.edu

Texas Center for Actual Innocence

University of Texas School of Law
 727 East Dean Keeton Street
 Austin, TX 78705
 Phone: 512-471-1317
 Email: tcai@law.texas.edu

Innocence Project of Texas

1511 Texas Ave
 Lubbock, Texas 79401
 Phone: 806-744-6525
 Fax: 806-744-6480
 Email: info@ipoftexas.org

Thurgood Marshall School of Law Innocence Project

3100 Cleburne Street
 Houston, TX 77004
 Phone: 713-313-1139

Utah

Rocky Mountain Innocence Center

358 South 700 East, Box B235
 Salt Lake City, UT 84102

Phone: 801-355-1888
E-mail: contact@rminnocence.org

Vermont

New England Innocence Project
160 Boylston Street
Boston, MA 02116
Phone: 857-277-7858
E-mail: intake@newenglandinnocence.org

Virginia

Mid-Atlantic Innocence Project
American University,
Washington College of Law
4801 Massachusetts Avenue, NW
Washington, DC 20016-8184
Phone: 202-895-4519
Fax: 202-774-4226
E-mail: RCicurel@exonerate.org

Washington

Innocence Project Northwest
University of Washington School of Law
William H. Gates Hall, P.O. Box 85110
Seattle, WA 98145

Idaho Innocence Project

Idaho Innocence Project
Boise State University
Chrisway Annex 2103 University Drive
Boise, ID 83725
Phone: 208-426-4207

West Virginia

Innocence Project
West Virginia University College of Law
P.O. Box 6130
Morgantown, WV 26506
Phone: 304-293-7249

Wisconsin

Wisconsin Innocence Project
Frank J. Remington Center
University of Wisconsin Law School
975 Bascom Mall
Madison, WI 53706-1399
Phone: 608-262-2240

Wyoming

Rocky Mountain Innocence Center
358 South 700 East, Box B235
Salt Lake City, UT 84102
Phone: 801-355-1888
E-mail: contact@rminnocence.org