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The Fast Lane to Finality's End: The Causes and Consequences of Post-Conviction Over-Testing

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ABSTRACT

Post-conviction DNA testing has contributed greatly to the urgent work of remedying wrongful convictions, and all fifty states and the federal government now have statutes to facilitate such testing. But not all post-conviction testing is worthwhile. Post-conviction testing is

sometimes immaterial in that it has little potential to generate exculpatory evidence. The optimal conditions for pursuing post-conviction testing and the costs of pursuing immaterial testing have so far received virtually no scholarly attention.

Using Massachusetts as a case study, this Article shines a light on this overlooked aspect of the post-conviction landscape to provide a concrete understanding of when post-conviction testing has the potential to yield material exculpatory evidence and why such testing should not be pursued when it cannot possibly justify a new trial. Massachusetts's experience suggests that setting the "materiality" threshold for post-conviction testing too low induces demand for unproductive testing. This unproductive post-conviction testing, in turn, leads to undesirable procedural accretion, additional layers of fruitless litigation in what could otherwise be closed cases.

The Article introduces the concept of "revelation bias" as a theory to explain why even immaterial post-conviction testing results can generate enough momentum to needlessly prolong serious criminal cases. Immaterial facts can appear significant when they arrive like a revelation outside the context-conferring trial process and amidst misgivings prompted by claims of innocence. But the cases where post-conviction testing successfully precipitated new trials for convicted defendants teach that truly material testing can be determined ex ante using a best-case-scenario-results thought experiment. That is, testing is most promising where the defendant's best-case-scenario result will either directly indicate that the defendant did not commit the crime in question or negate key evidence relied on by the prosecution to show that they did. If testing yields such new evidence, a new trial will likely (and understandably) follow. But, where testing relates only to peripheral matters, the prolonged post-conviction procedural maneuvering that follows further erodes finality and risks retraumatizing victims and survivors while diverting attention and resources away from truly innocent defendants for whom testing could be material.

PROLOGUE: THE "STRAY" ALLELE

In 2009, Shawn Lessieur was convicted of the March 1994 shooting murder of Mark Jones in Lowell, Massachusetts.¹ The trial evidence, including testimony from a co-venturer, showed that Lessieur shot

¹ Commonwealth v. Lessieur, 175 N.E.3d 372, 374–75 (Mass. 2021).

Jones twice while Jones was urinating near an apartment complex's dumpsters.² A 911 caller reported finding a body, and EMTs found the victim lying in the snow with his penis outside his pants but otherwise fully clothed.³ He had been shot from close range in the cheek and on the side of his head, and there was a pool of blood in the snow under his head.⁴ Police collected the blood in the snow, a cigarette butt, and ballistics evidence.⁵ DNA on the cigarette butt matched the victim.⁶ Testing of the blood in the snow indicated the presence of more than one DNA profile (a DNA mixture), but the major male profile matched the victim.⁷

In 2018, after Lessieur's murder conviction and the denial of his first new-trial motion were affirmed on appeal, a trial-level judge allowed Lessieur's motion under the Massachusetts post-conviction testing statute, Massachusetts General Laws ch. 278A ("278A"), for new DNA analysis of the blood under the victim's head.⁸ Using more advanced technology than was available when the mixture was initially tested in 2002, this testing revealed a single allele—half of one gene pair at one of numerous points examined by forensic analysts—that did not match the victim (or Lessieur).⁹

Lessieur used this new DNA evidence in a fresh new-trial motion.¹⁰ The motion was denied, but a single justice of the Supreme Judicial Court (SJC)—Massachusetts's court of last resort—granted Lessieur a

² *Id.* at 374–77.

³ *Id.* at 375–76, 380.

⁴ *Id.* at 375–77.

⁵ *Id.* at 375.

⁶ *Id.* at 378.

⁷ *Id.*

⁸ *Id.* at 375. The prosecution assented to testing the blood in the snow but opposed other proposed testing. Commonwealth's Response to Defendant's "Post-Conviction Motion for Scientific/Forensic Analysis Pursuant to G.L. C. 278A and Discovery of Physical Items Pursuant to G.L. C. 278A, § 3(C)" at 1, 11–14, Commonwealth v. Lessieur, No. 0881CR00529 (Mass. Super. Ct. May 25, 2018), File Ref. No. 59.

⁹ *Lessieur*, 175 N.E.3d at 375, 378. Humans "have two alleles at each genetic locus, with one allele inherited from each parent." *Allele*, NATURE EDUC., <https://www.nature.com/scitable/definition/allele-48/> [<https://perma.cc/BXX7-ZP6N>] (last visited Feb. 20, 2026). A DNA profile is a "combination of alleles, or versions of genes, possessed by the individual at the loci tested." *Lessieur*, 175 N.E.3d at 378 n.3 (quotation omitted). The FBI previously used 13 loci in the Combined DNA Index System (CODIS) but expanded to 20 loci in 2015, and newer tests examine up to 27 locations. *DNA Amplification for Forensic Analysts: Other STR Loci*, NAT'L INST. OF JUST. (July 31, 2023), <https://nij.ojp.gov/nij-hosted-online-training-courses/dna-amplification/locus-selection/other-str-loci> [<https://perma.cc/HEY6-7HQ6>]; Commonwealth v. Linton, 132 N.E.3d 93, 107 (Mass. 2019).

¹⁰ *Lessieur*, 175 N.E.3d at 375.

discretionary appeal to the full court.¹¹ After briefing and oral argument,¹² the high court ruled that the motion judge had not abused her discretion in concluding that the new DNA evidence did not “cast real doubt on the justice of the conviction,” explaining that the “stray allele” evidence lacked “the materiality, weight, and significance to necessitate a new trial.”¹³

The court observed that where the victim was shot in the face while apparently “occupied in smoking and urinating,” this was not a crime—like a “knife fight” or “barroom brawl” with “hand-to-hand combat”—where the perpetrator would likely be injured.¹⁴ The scene did not suggest that “a struggle had taken place in which the perpetrator also had been injured,” and no struggle was likely “given the evidence that both of the victim’s hands had been occupied, and the almost certain immediate incapacitation of someone who had been shot twice in the face and is bleeding from those injuries.”¹⁵ The defendant asserted that the nonmatching allele supported a third-party culprit defense, but the court noted that the allele’s source was “far from obvious” where the victim’s body had been in a public location “where people could have walked, and deposited DNA, on the ground prior to the snowstorm” and where at least one person encountered it ahead of first responders who “spent significant time” there “attempting to assist the victim, before the sample was obtained.”¹⁶

The remarkable thing about the court’s analysis is not its determination that the stray allele did “not create a substantial risk that the jury would have reached a different conclusion”¹⁷ but that the court’s reasoning would yield this same determination even if a full DNA profile had been discovered in the bloody snow. That is, the immateriality of the DNA testing in this case is not driven by the negligibility (and indeterminacy) of the lonely allele that was ultimately discovered.¹⁸ Rather, given the circumstances of the crime,

¹¹ *Id.*

¹² Docket Information for *Commonwealth v. Lessieur*, 175 N.E.3d 372 (Mass. 2021) (No. SJC-13006).

¹³ *Lessieur*, 175 N.E.3d at 379–81 (quotation and textual alteration omitted).

¹⁴ *Id.* at 380.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* (quotation omitted).

¹⁸ It is important to distinguish between testing that is “immaterial” because the results neither exculpate nor inculpate and testing that is “indeterminate” because it does not yield a result (e.g., because no new DNA evidence is detected or no conclusions can be reached

there was *never* any basis to believe that the blood under the victim's head would point to the shooter, whoever that happened to be.¹⁹ This means that the court *could* have determined that post-conviction testing of the bloody snow would not undermine confidence in the verdict *without conducting any post-conviction testing at all*.

Thus, a statutory regime intended to help remedy wrongful convictions of factually innocent defendants²⁰ was used to re-test a DNA mixture into which there was no reason to believe the perpetrator had contributed DNA. This testing had less probative potential than a proverbial fishing expedition because it was clear *ex ante* that even Lessieur's best-case-scenario results (a full third-party DNA profile in the bloody snow) would not support granting a new trial given the circumstances of the crime.

Yet this testing contributed to years of additional litigation, including a fully briefed new-trial motion in the trial court,²¹ an opposed petition for leave to appeal to the state high court,²² and a full appeal to the court of last resort. This procedural accretion could have been avoided by recognizing that testing the blood from under the victim's head could not possibly yield material exculpatory evidence. But Massachusetts's permissive approach to post-conviction testing—exemplified by a materiality threshold that requires mere relevance²³—invites movants to test first while saving the hard questions for later.

INTRODUCTION

If you build it, they will come.²⁴ This is induced demand. Increasing the supply of a good or service or lowering its price makes people more

about the source(s) of DNA detected). See JOHN ROMAN ET AL., URB. INST. JUST. POL'Y CTR., POST-CONVICTION DNA TESTING AND WRONGFUL CONVICTION vi, 2 n.2 (2012), <https://www.urban.org/sites/default/files/publication/25506/412589-Post-Conviction-DNA-Testing-and-Wrongful-Conviction.PDF> [<https://perma.cc/4M2V-HV46>]. Not all determinate results—including DNA exclusions—are material because “that evidence might not be probative (i.e., does not point to guilt or innocence).” *Id.* at 2 n.3.

¹⁹ Cf. *Lessieur*, 175 N.E.3d at 380 (explaining that the “stray allele” was “not necessarily linked to the perpetrator, regardless of the perpetrator’s identity”).

²⁰ *Commonwealth v. Wade*, 5 N.E.3d 816, 823–24 (Mass. 2014).

²¹ Docket Information for *Commonwealth v. Lessieur*, No. 0881CR00529 (Mass. Super. Ct., Middlesex Cnty. June 26, 2019, Sep. 6, 2019, Sep. 23, 2019) (File Ref. Nos. 82, 85, 86).

²² Docket Information for *Commonwealth v. Lessieur*, No. SJ-2019-0408 (Mass. Sup. Jud. Ct.).

²³ See *infra* Section II.C.

²⁴ Cf. *FIELD OF DREAMS* (Gordan Company 1989) (“If you build it, he will come.”).

likely to use it.²⁵ You may have witnessed induced demand yourself if the addition of new driving lanes on your highway commute was offset by the appearance of additional cars jockeying for road position such that you are still slogging through traffic.²⁶ We might expect that lane expansion would simply improve conditions for the highway's existing users, but the theory of induced demand suggests that it actually attracts new drivers.

In 2012, Massachusetts built “it”—a dedicated testing lane that expanded its post-conviction highway—by adopting a post-conviction forensic testing statute.²⁷ As the SJC has explained: “General Laws c. 278A created a new avenue [for criminal defendants] to obtain access to postconviction testing, and a motion brought under that chapter is conceived as separate from the trial process and any postconviction proceedings challenging the underlying conviction.”²⁸ The state high court has “repeatedly emphasized the broad remedial purpose of G. L. c. 278A” and, in its words, the court has “demonstrated a reluctance to import limiting provisions into G. L. c. 278A where they would be inconsistent with a liberal reading of the statute.”²⁹

Massachusetts was the last U.S. jurisdiction to enact a post-conviction testing statute.³⁰ The testing statutes adopted nationwide

²⁵ See, e.g., Benjamin Schneider, *CityLab University: Induced Demand*, BLOOMBERG (Sep. 6, 2018, at 09:30 PT), <https://www.bloomberg.com/news/articles/2018-09-06/traffic-jam-blame-induced-demand> [<https://perma.cc/HYZ3-GL6Y>]; Adam Mann, *What's Up With That: Building Bigger Roads Actually Makes Traffic Worse*, WIRED (June 17, 2014, at 06:30 PT), <https://www.wired.com/2014/06/wuwt-traffic-induced-demand/> [<https://perma.cc/3AFR-ZARY>].

²⁶ See Schneider, *supra* note 25 (describing 3-year, \$2.8 billion “mega-project” “to alleviate severe traffic congestion” where “after the freeway was widened, congestion got worse”).

²⁷ MASS. GEN. LAWS ch. 278A (2025).

²⁸ *Commonwealth v. Tanner*, 274 N.E.3d 531, 540 (Mass. 2026) (quotation and citation omitted).

²⁹ *Id.* at 538–39 (affirming motion judge’s decision to allow post-conviction 278A testing to continue after defendant’s death despite acknowledging that “the conviction can no longer be set aside”).

³⁰ *Commonwealth v. Wade*, 5 N.E.3d 816, 827 & n.16 (Mass. 2014) (“When G.L. c. 278A was enacted on February 17, 2012, Massachusetts was the forty-ninth State, in addition to the Federal government and the District of Columbia, to enact legislation providing for access to postconviction DNA testing.”); see also Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1673 (2008) (“Responding to the increasing political pressure and the lack of available remedies in the state or federal courts, states began enacting statutes providing a right to post-conviction DNA testing and a vacatur if the testing demonstrated innocence, easing the traditional rules of finality that previously

between 1994 and 2013 differ in various respects,³¹ but the hope had been that DNA testing could conclusively establish innocence for defendants claiming wrongful conviction.³² And post-conviction DNA testing has unequivocally accomplished a world of good.³³ Already in 2008, 208 defendants had been exonerated by post-conviction DNA testing.³⁴ By 2020, post-conviction DNA testing had led to 375 exonerations *and* the identification of 165 actual perpetrators.³⁵

But expanding access to post-conviction testing also induces demand for it, and not all post-conviction testing leads to exonerations. For example, the Bureau of Justice Assistance (BJA) provided grants to agencies in at least twenty states and Puerto Rico that led to testing in 2,200 cases but only 65 exonerations in violent felony cases,³⁶ meaning that testing in roughly 97% of cases did not result in an

restricted motions premised on new evidence of innocence.”). The fiftieth state, Oklahoma, previously had such a statute, but it had expired. *Id.* at 1673 n.207.

³¹ See Dist. Att’y’s Off. for Third Jud. Dist. v. Osborne, 557 U.S. 52, 73 (2009) (“The first DNA testing statutes were passed in 1994 and 1997. . . . In the past decade, 44 States and the Federal Government have followed suit”) (citing New York and Illinois statutes). There is already abundant scholarship on statutory post-conviction testing regimes. See, e.g., Justin Brooks & Alexander Simpson, *Blood Sugar Sex Magik: A Review of Postconviction DNA Testing Statutes and Legislative Recommendations*, 59 DRAKE L. REV. 799, 805 (2011); Kathy Swedlow, *Don’t Believe Everything You Read: A Review of Modern “Post-Conviction” DNA Testing Statutes*, 38 CAL. W.L. REV. 355, 356 (2002). Given its late adoption, Massachusetts’s statute has received comparatively little scholarly attention.

³² See, e.g., *Osborne*, 557 U.S. at 55 (observing that “DNA testing has an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty” and alluding to the “prompt and considered response” of the Federal Government and the States to “develop[] special approaches to ensure that this evidentiary tool can be effectively incorporated into established criminal procedure—usually but not always through legislation”); *State v. Dupigny*, 988 A.2d 851, 859–60 (Conn. 2010) (summarizing legislative history behind Connecticut’s testing statute); see also JEREMY TRAVIS & CHRISTOPHER ASPLEN, U.S. DEP’T OF JUSTICE, POST-CONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS vi, xiii (1999), <https://www.ojp.gov/pdffiles1/nij/177626.pdf> [<https://perma.cc/X3DU-788P>] (observing that “introduction of DNA evidence after conviction may definitively prove innocence” and referring to “high level of certainty made possible by DNA technology” and possibility of “obtain[ing] conclusive results in cases in which previous testing had been inconclusive”).

³³ See, e.g., Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 119 (2008) (reporting that at least twenty-four of first 200 DNA exonerees “obtained testing pursuant to a state statute providing for postconviction DNA testing”).

³⁴ See *id.* at 57.

³⁵ *DNA Exonerations in the United States (1989–2020)*, INNOCENCE PROJECT, <https://innocenceproject.org/dna-exonerations-in-the-united-states/> [<https://perma.cc/24GH-UKFW>] (last accessed Jan. 10, 2025).

³⁶ *Postconviction Testing of DNA Evidence (Postconviction) Program*, FORENSICS TTA PROGRAM, <https://www.forensicsta.org/programs/postconviction-testing-of-dna-evidence-postconviction-program/#key-performance-metrics-postconviction> [<https://perma.cc/R3PC-R3KH>] (last visited Jan. 28, 2025).

exoneration. Likewise, a 2012 study of 634 “sexual assault and/or homicide” cases (715 convicted offenders) in Virginia from 1973 to 1987 eliminated the convicted defendant as a DNA contributor to a probative evidentiary item in only fifty-six convictions (8.8% of the cases, 7.8% of convicted defendants), and the elimination only supported exoneration for 38 convictions (6% of the cases, 5.3% of convicted defendants).³⁷ In fact, because the researchers in the Virginia study were “largely limited” to forensic files that “did not always contain sufficient information about the context of the physical evidence . . . that may be critical to ultimate determination of the probative value of DNA testing results,”³⁸ this Virginia data may actually *overstate* the likelihood of *exculpatory* test results.³⁹

In some nonexoneration cases, post-conviction testing confirms the defendant’s guilt.⁴⁰ In others, testing may support a new trial but not a full exoneration.⁴¹ But some post-conviction DNA testing is simply not probative one way or another.⁴² While guilt-confirming testing may receive less attention than innocence-exposing testing,⁴³ virtually no attention has been paid to this third category of testing that neither confirms guilt nor exculpates.⁴⁴

³⁷ ROMAN ET AL., *supra* note 18, at 1, 5–7, 12. “Most determinate results” (194 of 250 or 78%) in the Virginia study were inculpatory. *Id.* at 28.

³⁸ *Id.* at 2, 4 (explaining that while a DNA exclusion “from a questioned stain on clothing recovered from a sexual assault” would be labeled “as supportive of exoneration,” the availability of “more information about the case” could yield facts proving that “the clothing was unrelated to the assault”).

³⁹ *Id.* at 56 (acknowledging that “[e]ssentially, the rates presented in this report are an upper bound” for estimating wrongful conviction rates).

⁴⁰ See Garrett, *supra* note 33, at 72 n.65 (“[U]ntil recently, in approximately 60% of the cases in which the Innocence Project requested testing, the results inculpated.”); TRAVIS & ASPLEN, *supra* note 32, at 58; Tonja Jacobi & Gwendolyn Carroll, *Acknowledging Guilt: Forcing Self-Identification in Post-Conviction DNA Testing*, 102 NW. UNIV. L. REV. 263, 270 (2008).

⁴¹ See, e.g., Keith A. Findley et al., *Plea Bargaining in the Shadow of a Retrial: Bargaining Away Innocence*, 2022 WIS. L. REV. 533, 541–42 (2022) (observing that “after the court granted a new trial, in an apparent attempt to salvage some type of conviction” prosecutors sometimes offered “potentially innocent defendants” plea bargains at “discounts that were uniformly steep—often to time served for even the most serious offenses” and those offers often “proved too good for even these innocence-claiming defendants to reject”).

⁴² See Garrett, *supra* note 30, at 1650 (“[W]here it is unclear if the perpetrator actually left biological evidence at the crime scene, DNA may not be probative of identity.”); TRAVIS & ASPLEN, *supra* note 32, at 35 (acknowledging cases in which biological evidence exists and yet even “favorable results would not be meaningful”).

⁴³ See Garrett, *supra* note 33, at 58–60; Jacobi & Carroll, *supra* note 40, at 263–64.

⁴⁴ See, e.g., Jacobi & Carroll, *supra* note 40, at 270 (reporting that estimated 50–60% of testing in “cases vetted and supported by innocence projects” was inculpatory and

Post-conviction testing that offers no chance of exculpating the defendant should not be pursued.⁴⁵ The stakes of such testing may appear so low that it seems harmless: if testing is immaterial, nothing should come from it one way or the other. Counterintuitively, however, the results of testing where even the defendant's best-case-scenario results would be immaterial can still be pressed to advance new-trial motions.

This Article offers an account of what immaterial post-conviction testing looks like in one U.S. jurisdiction (Massachusetts), but simple database searching yields a handful of cases suggesting a broader problem that is neither new⁴⁶ nor geographically limited.⁴⁷ Some

acknowledging that “[m]any results are neither exculpatory nor guilt-confirming” but focusing on “[p]etitions by guilty parties [that] are overwhelming the post-conviction DNA testing system”).

⁴⁵ In 1999, then-Attorney General Janet Reno explained that the Department of Justice's recommendations for handling requests for post-conviction DNA testing “encourage[d] the pursuit of truth over the invocation of appellate time bars” when “DNA testing may be determinative of innocence” but cautioned that “in those cases in which a DNA exclusion would be of no value in the determination of actual innocence, the recommendations discourage the filing of a DNA-based appeal simply because the attorney's client requests it.” TRAVIS & ASPLEN, *supra* note 32, at iii; *see also* Garrett, *supra* note 30, at 1676, 1684 (“[I]n cases where DNA testing could not possibly be probative of innocence, it should not be granted. . . . Unquestionably, some cases do not deserve DNA testing.”).

⁴⁶ *See* State v. Thomas, 570 So. 2d 1023, 1025–26 (Fla. Dist. Ct. App. 1990) (reversing grant of new trial in child sexual battery case despite post-verdict testing allegedly showing that semen on bedsheet was not defendant's where uncontradicted trial testimony indicated that sheet was not on bed during assault and “semen found on the DNA-tested sheet could have been deposited at any time prior to, or after the assault” such that “defendant's DNA test result evidence” was not “material”).

⁴⁷ *See, e.g.,* State v. Buckman, 971 N.W.2d 791, 793, 799–800 (Neb. 2022) (affirming dismissal of post-conviction proceeding in apparent drug-rip murder despite testing under state's DNA Testing Act that excluded defendant as major contributor to semen/sperm in shooting victim's panties where defendant “was not charged with a sexual assault, and his exclusion as the source of the semen was not material to whether he was guilty of murder or using a weapon to commit a felony” and “[t]he trial record shows that evidence concerning semen was a small part of the overall picture” in which “[t]he presence of semen from someone other than [victim]'s husband seemed to be more of an unexplained happenstance than a focal point of the prosecution”); State v. Bates, 177 A.3d 621, 623–25 (Me. 2018) (post-conviction testing excluding defendant as both major contributor to DNA on exterior of sock in rape-murder victim's mouth and contributor to sock's interior DNA mixture did not justify new trial where, *inter alia*, evidence did not support conclusion that defendant's DNA “would almost certainly have been found on” sock had he touched it and DNA on sock had “no definitive connection to the crime, in that it could have been left by someone at a time and in a manner unrelated to the victim's murder”); State v. Hess, 290 P.3d 473, 476 (Ariz. Ct. App. 2012) (agreeing with trial court that post-conviction testing excluding defendant as contributor to sperm from victim's vagina and sample from toilet in restroom where assault occurred unlikely to affect verdict where, *inter alia*, evidence showed defendant did not ejaculate during sexual assault, neither he nor victim touched toilet, and sperm in victim's vagina was from recent intercourse with husband-to-be);

courts recognize and shut down requests for immaterial testing,⁴⁸ but failure to do so can have problematic sequelae.⁴⁹ So, while the issue of over-testing may manifest differently in different jurisdictions, it is an issue of national concern. Wherever it manifests, over-testing threatens the finality of criminal convictions⁵⁰ and the enterprise of remedying wrongful convictions. A detailed consideration of the causes and consequences of post-conviction over-testing in Massachusetts should help provide traction on this issue anywhere it arises.

The question is not whether a defendant should have to show that post-conviction DNA testing is “material” before a testing motion should be granted as “[a]ll the statutes require some sort of demonstration of materiality by the petitioner, or a materiality finding by the court, prior to the issuance of an order for testing.”⁵¹ The

Greenwell v. State, 884 N.E.2d 319, 326–28 (Ind. Ct. App. 2008) (affirming denial of post-conviction relief where although post-conviction DNA testing excluded defendant as source of semen on couch and prosecution had suggested connection between couch’s semen stain and killer/defendant, appellate court found it “highly unlikely” jury “relied in any great measure on evidence that [defendant] could have been the source of the semen on the couch” given that “State itself presented a second, more plausible explanation for the semen stain on the couch” with evidence showing that victim and husband had intercourse on couch and “the way in which the evidence regarding the semen stain from the couch was presented and argued tended to minimize its impact” and lower court had noted lack of evidence that victim was sexually assaulted on the couch).

⁴⁸ See, e.g., *State v. Dupigny*, 72 A.3d 1009, 1014–15, 1017–19 (Conn. 2013) (affirming denial of second petition for post-conviction testing of bloody knit hat found near murder scene that may have been shooter’s hat after initial petition denied based in part on hat’s “uncertain provenance” where second petition, despite arguably strengthening hat’s connection to shooter, “essentially boils down to . . . fishing expedition on the off chance that it might yield evidence that allows [defendant] to point a finger at someone else” and court envisioned “many reasons” someone else’s DNA could be on the hat that would “in no way” be inconsistent with defendant’s guilt, including his having borrowed or found the hat).

⁴⁹ See *infra* Sections III.D, IV.A.

⁵⁰ See *Williams v. United States*, 401 U.S. 667, 690–91 (1971) (Harlan, J., concurring in part) (“It is, I believe, a matter of fundamental import that there be a visible end to the litigable aspect of the criminal process. Finality in the criminal law is an end which must always be kept in plain view. . . . If law, criminal or otherwise, is worth having and enforcing, it must at some time provide a definitive answer to the question litigants present or else it never provides an answer at all. Surely it is an unpleasant task to strip a man of his freedom and subject him to institutional restraints. But this does not mean that in so doing, we should always be halting or tentative.”). But see *id.* at 693 (“There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose.”). See also *Teague v. Lane*, 489 U.S. 288, 309 (1989) (discussing “the principle of finality which is essential to the operation of our criminal justice system”).

⁵¹ Swedlow, *supra* note 31, at 367 (“The statutes differ, however, in the proof that a petitioner must offer to demonstrate materiality.”); see also *id.* at 368 & n.55 (collecting statutes); see, e.g., ME. STAT. tit. 15, § 2138(4-A)(E) (2025) (“The court shall order DNA

question is what it means for such testing to be “material” and whether the operative materiality standard is sufficiently discriminating to filter out unproductive testing. While some states impose an ostensibly demanding burden by conditioning testing on, for example, a determination that “the requested DNA testing result would raise a reasonable probability that if the results were favorable to the defendant, a motion for a new trial . . . would be granted,”⁵² clarity about the circumstances in which testing will justify a new trial—that is, when testing is “material” or “materially exculpatory”—is essential for the testing regime to function efficiently. This Article seeks to provide that clarity.

Because of idiosyncrasies in the state-level post-conviction frameworks onto which testing statutes are grafted,⁵³ the data necessary to meaningfully assess a given post-conviction testing regime are jurisdiction-specific.⁵⁴ Arriving at even a rough measure of a testing statute’s efficiency requires a closed system in which one can identify the number of cases in which testing was requested (the denominator) and the number of testing-based new trials granted (a numerator that measures productive testing outcomes). Using Massachusetts as a case study,⁵⁵ this Article undertakes a first-of-its-

analysis if a person . . . presents prima facie evidence that: . . . [t]he evidence sought to be analyzed, or the additional information that the new technology is capable of providing regarding evidence sought to be reanalyzed, is *material* to the issue of whether the person is the perpetrator of, or accomplice to, the crime that resulted in the conviction.”) (emphasis added).

⁵² N.J. STAT. ANN. § 2A:84A-32a(d)(5) (2025).

⁵³ See TRAVIS & ASPLEN, *supra* note 32, at 14, 16 (explaining that “precise formulation” for newly-discovered-evidence motions “differs from jurisdiction to jurisdiction” and that “many States [also] have their own habeas statutes, court rules, and/or ‘interests of justice’ case law that permit courts to extend or override time bars on newly discovered evidence motions”).

⁵⁴ See *id.* at 3, 47 (explaining that its categorization of cases in which post-conviction DNA testing is sought is “not intended to spell out legal consequences, which may in any event vary somewhat from jurisdiction to jurisdiction” and that “[e]very State has its own postconviction remedies and procedures”); see also Keith A. Findley, *Defining Innocence*, 74 ALB. L. REV. 1157, 1162 (2011) (observing the “variability between differing contexts and jurisdictions” with “multiple standards governing how much proof of innocence is required for exoneration”); Garrett, *supra* note 30, at 1671 (“[A]ll states have long allowed new trial motions . . . including those brought on the grounds of newly discovered evidence of innocence. Statutes or case law allowing for such motions vary widely in their standards.”).

⁵⁵ Cf. Stanley Z. Fisher, *Convictions of Innocent Persons in Massachusetts: An Overview*, 12 B.U. PUB. INT. L.J. 1, 4 (2002) (“Many of our most critical procedural practices . . . are governed by state law. This suggests the value of studying, in each jurisdiction, the lessons that known miscarriages can teach.”).

kind assessment of the efficiency of a post-conviction testing statute.⁵⁶ Massachusetts's experience shines a light on the role that insufficiently robust materiality standards play in post-conviction over-testing and yields insights into the unexpected ramifications of immaterial testing in dragging out criminal cases and diluting claims of actual innocence.⁵⁷

Massachusetts is a unique laboratory for examining the efficiency of statutory post-conviction testing. Before Massachusetts belatedly adopted a *statutory* regime, defendants were not foreclosed from state-funded post-conviction DNA testing.⁵⁸ Some convicted defendants managed to obtain testing,⁵⁹ while others encountered hurdles.⁶⁰ Where the Massachusetts statute was intended to “provide increased and expeditious access” to testing⁶¹ above and beyond the framework that had already enabled multiple defendants to establish innocence, the permissiveness of the regime⁶² makes it an excellent tool for studying *over-testing*, magnifying trends that might be harder to spot in more restrictive jurisdictions.

Specifically, as operationalized by the Massachusetts SJC (the court of last resort), the materiality threshold of 278A (the state's post-conviction testing statute) is satisfied if, “in combination with other evidence presented at trial, [the DNA evidence] would tend to support

⁵⁶ See *infra* Section I.A–B.

⁵⁷ See *infra* Sections II.C, III.B, and IV.A.

⁵⁸ See Rachel Steinback, Note, *The Fight for Post-Conviction DNA Testing Is Not Yet Over: An Analysis of the Eight Remaining “Holdout States” and Suggestions for Strategies to Bring Vital Relief to the Wrongfully Convicted*, 98 J. CRIM. L. & CRIMINOLOGY 329, 347 (2007) (asserting that a DNA testing statute “failed to make its way to the governor’s desk” in Massachusetts because, “[s]imply put, it has not had to” where “[d]efense attorneys have discovered alternate avenues through which to attempt to secure post-conviction DNA testing for their clients, in both state and federal courts”) (notation omitted); see also Dist. Att’y’s Off. for Third Jud. Dist. v. Osborne, 557 U.S. 52, 64 (2009) (explaining that courts in states that had “yet to enact legislation specifically addressing the issue of evidence requested for DNA testing . . . are addressing how to apply existing laws for discovery and postconviction relief to this novel technology” and that lack of a statute did “not mean that such evidence is unavailable for those seeking to prove their innocence”) (citing, *inter alia*, MASS. R. CRIM. P. 30(c)(4)).

⁵⁹ See, e.g., Commonwealth v. DiCicco, 25 N.E.3d 859, 863 & n.6 (Mass. 2015); Commonwealth v. DiBenedetto, 941 N.E.2d 580, 585 (Mass. 2011).

⁶⁰ See, e.g., Commonwealth v. Davis, 574 N.E.2d 1007, 1008–10 (Mass. 1991) (opining that defendant was not eligible for costs of proposed PCR testing in connection with collateral attack on conviction that had already been upheld on appeal).

⁶¹ Commonwealth v. Wade, 5 N.E.3d 816, 826 (Mass. 2014).

⁶² See *infra* Sections II.B–C.

the defendant's" position.⁶³ This 'materiality' standard is strikingly similar to the standard for mere evidentiary relevance under the Federal Rules of Evidence where "[e]vidence is relevant if . . . it has any tendency to make a fact [of consequence in determining the action] more or less probable than it would be without the evidence."⁶⁴ Thus, a defendant can meet this loose standard if the "DNA evidence he seeks" might merely "bolster" a defense witness's testimony or impeach a prosecution witness on peripheral matters.⁶⁵

For example, one defendant used 278A to test a cigarette butt offered at trial to corroborate a key prosecution witness's location while observing the crime.⁶⁶ In the defendant's best-case scenario, DNA testing would show that the prosecution's witness had not smoked this particular discarded cigarette, impugning an aspect of his incriminating testimony. Losing this corroboration could theoretically make the witness appear less credible and so could 'tend' to make the defendant's guilt appear slightly less probable. But, where the cigarette was not linked to the perpetrator, the identity of the cigarette's smoker could not directly indicate that the defendant had not committed the crime as the witness said that he did. Indeed, the testing *never* had the potential for more than marginal impeachment. Not surprisingly then, when the test results showed that a third party unconnected with the case had smoked the cigarette (the defendant's best-case-scenario result), the SJC agreed with the new-trial-motion judge that the test results did not warrant a new trial because "the evidence that [the witness]'s DNA was not on the cigarette butt found in the parking lot of an apartment building where the getaway driver was to wait for the robbers likely would have made little difference in the jury's thinking about [his] credibility."⁶⁷

Post-conviction testing can be profoundly powerful. It can exculpate a defendant by directly demonstrating that they *could not have* committed the crime. This happens paradigmatically when testing eliminates the defendant from a vaginal swab in a single-perpetrator vaginal rape case where the perpetrator ejaculated and the victim had

⁶³ Commonwealth v. Ramos, 198 N.E.3d 437, 445 (Mass. 2022).

⁶⁴ FED. R. EVID. 401.

⁶⁵ Ramos, 198 N.E.3d at 445; *see also infra* Section III.D.1 (discussing Commonwealth v. Duke, 186 N.E.3d 1223 (Mass. 2022)).

⁶⁶ Duke, 186 N.E.3d at 1235.

⁶⁷ *Id.* at 1237.

no consensual sexual partners at the time.⁶⁸ Testing can also negate evidence at the heart of the prosecution's case by, for example, eliminating the victim from stains on the defendant's clothing that the state had asserted at trial came from the victim.⁶⁹ In such cases, the defendant may still have committed the crime, but the testing undermines the prosecution's theory of the evidence (if not its theory of the case). Massachusetts's 278A framework, however, permits testing even when it offers no hope of directly exculpating or negating key prosecution evidence, thereby wasting time and resources on testing that offers little possible benefit to the defendant.

It is as if Massachusetts already had a multi-lane post-conviction highway that was prone to slow speeds and backups such that meritorious testing motions sometimes stalled. The enactment of 278A added a new lane to expedite testing-related relief. But the lane expansion intended to ameliorate congestion induced more testing. As discussed in depth below, the SJC's operationalization of the testing statute's materiality threshold is too permissive.⁷⁰ Setting the materiality bar this low invites testing motions and allows them to proceed where even the movant's best-case-scenario results would not warrant a new trial. This approach underprices the reopening of the factual universe underlying a criminal conviction, inducing defendants to seek unproductive testing that leads only to procedural accretion, an increase in post-conviction litigation predicated on shiny new scientific evidence that is actually immaterial.⁷¹

Massachusetts's experience shows that making post-conviction testing *too* accessible induces demand for it, including for immaterial testing. Such testing can generate procedural maneuvering even in

⁶⁸ Cf., e.g., Brooks & Simpson, *supra* note 31, at 806 ("The classic type of case for postconviction DNA testing is a rape case, particularly one in which consent is not a defense, and semen is collected from a live victim. The victim can testify about all consensual sexual encounters, and if the semen does not match those individuals or the suspect, then it would appear there is a clear exclusion of the defendant as the perpetrator.").

⁶⁹ See Carrie Leonetti, *The Innocence Checklist*, 58 AM. CRIM. L. REV. 97, 142–43 (2021) (observing that there has been "a great deal of litigation" over the meaning of "notoriously imprecise" terms like "'exculpatory,' 'favorable,' [and] 'material,'" and asserting a "series of factors that together define the evidence that prosecutors need to find and disclose, and defense attorneys need to find and present, to prevent wrongful convictions," including, *inter alia*, "exculpatory scientific evidence, particularly if it conflicts with evidence that was presented by the prosecution at trial" and "testimony relating to the limitations of, or defects in, the prosecution's scientific evidence").

⁷⁰ See *infra* Section II.C.

⁷¹ See *infra* Part III.

the absence of newly discovered materially exculpatory evidence. Post-conviction testing regimes should be optimized to uncover evidence that could remedy wrongful convictions while minimizing unproductive resource consumption and needless retraumatization of victims.⁷² Expanded access to testing can be a salutary measure to rectify injustice but, where the cost-benefit ratio⁷³ ticks up in the absence of hard-nosed materiality limitations, throwing open the gates is an overcorrection.

As Chief Justice Roberts has observed: “The availability of technologies not available at trial cannot mean that every criminal conviction, or even every criminal conviction involving biological evidence, is suddenly in doubt. The dilemma is how to harness DNA’s power to prove innocence without unnecessarily overthrowing the established system of criminal justice.”⁷⁴

In seeking to help resolve this dilemma, this Article proceeds in four parts. Part I presents rough quantitative data for statutory testing in Massachusetts, showing that most testing motions to date have not blossomed into new trials. Only a small fraction of the defendants who have filed 278A motions have had their convictions vacated as a result of post-conviction testing. Although this data set is not complete and not all of the testing petitions that failed to yield new trials actually

⁷² See TRAVIS & ASPLEN, *supra* note 32, at 55, 56 (explaining that “postconviction events may be upsetting to victims” and survivors as “painful reminders of the suffering and loss”) (emphasis omitted).

⁷³ See Dist. Att’y’s Off. for Third Jud. Dist. v. Osborne, 557 U.S. 52, 84 (2009) (Alito, J., concurring) (“My point in recounting the burdens that postconviction DNA testing imposes on the Federal Government and the States is not to denigrate the importance of such testing. Instead, my point is that requests for postconviction DNA testing are not cost free.”).

⁷⁴ *Osborne*, 557 U.S. at 62. The Supreme Court’s more recent post-conviction testing cases focus on a defendant’s standing to claim a due process violation based on denial of DNA testing under a state statute. See *Gutierrez v. Saenz*, 606 U.S. 305, 309, 314 n.1, 317 n.2 (2025) (citing *Reed v. Goertz*, 598 U.S. 230 (2023)). But at least some of the justices appear concerned about such litigation’s impact on finality and the question of what difference, if any, testing would make in the underlying case (i.e., the testing’s materiality). See *Gutierrez*, 606 U.S. at 336–37 (Thomas, J., dissenting) (observing that the “key premise” defendant “hopes that DNA testing will establish—that he was not inside [the victim]’s home when she was stabbed to death with a pair of screwdrivers—is contradicted by *his own confession*, to say nothing of the unanimous statements of his accomplices” and the court of last resort in Texas “has held three times that [defendant] would likely still have been convicted of capital murder as an accomplice even if he could prove that he had not personally been inside [the victim]’s home” such that “Texas could reasonably determine that the need for finality outweighed the upsides of giving [defendant] additional process”); see also *id.* at 350 (Alito, J., dissenting) (observing in redressability discussion that “testing would be pointless because even if the items were tested and revealed what [defendant] hopes for, the Texas courts would not disturb his conviction or sentence”).

made it as far as testing, the numbers demonstrate that far more defendants pursue testing than will ultimately benefit from it. Part II presents the statutory testing framework as judicially constructed in Massachusetts, highlighting the materiality jurisprudence that induces this unproductive, accretive demand,⁷⁵ while also reviewing success stories that model optimal testing conditions. Part III looks at induced demand, revelation bias,⁷⁶ and procedural accretion in the post-conviction testing context, providing additional concrete examples of cases (like *Lessieur*) where immaterial testing led to fruitless post-conviction litigation. Part IV chronicles the harm counterproductive post-conviction testing causes victims/survivors and innocent defendants and proposes a clear, operationalizable materiality standard. Specifically, this Article shows that defining “material” post-conviction testing as testing where the defendant’s best-case-scenario results will either directly indicate that the defendant did not commit the crime or negate key evidence the prosecution relied on at trial to show that they did strikes the appropriate balance to filter out futile testing while preserving access for meritorious motions.

This Article’s analysis is based on cases from Massachusetts, but the ramifications of insufficiently robust materiality standards for over-

⁷⁵ This Article analogizes to traffic-related induced demand to explain 278A’s effects on post-conviction motion practice but takes no position on the validity of induced-demand theory in highway design. See Schneider, *supra* note 25 (acknowledging that “some economists argue that the effects of ID are overstated, or outweighed by the benefits of greater automobility”); see also Randal O’Toole, *Debunking the Induced-Demand Myth*, CATO INSTITUTE (June 18, 2014, 16:26 PST), <https://www.cato.org/blog/debunking-induced-demand-myth> [<https://perma.cc/Y9F8-C9KK>].

⁷⁶ The term “revelation bias” has previously been used in financial economics scholarship (sometimes also referred to as “bidder revelation bias” or “bidder-revelation bias”) to describe the effect on estimates of the value improvement (joint bidder and target shareholder gains) from a takeover/tender offer caused by investor perception of the stand-alone value of the bidder based on its having initiated the takeover. See Sanjai Bhagat et al., *Do Tender Offers Create Value? New Methods and Evidence*, 76 J. FIN. ECON. 3, 4–6, 9–10, 52, 54 (2005) (asserting theory that a tender offer bid can reveal information about the bidder’s stand-alone value separate from the possible combination value post-acquisition that “taints” the estimate of the value improvement from the takeover). The term “revelation bias” has also been used in a religious context to describe the “human filter in any communication with God.” See Pablo, *Revelation Bias Fair and Balanced Part 1*, RATIONAL FAITHS (June 4, 2012), <https://rationalfaiths.com/revelation-bias-fair-and-balanced-part-1/> [<https://perma.cc/2VNU-USMK>]. The use of “revelation bias” herein is distinct from these previous uses.

testing, the cognitive distortion of revelation bias, and the costs of procedural accretion transcend geography.⁷⁷

I

BACKGROUND:

POST-CONVICTION TESTING LITIGATION IN MASSACHUSETTS

A. Research Design and Limitations

Researching 278A litigation in Massachusetts is challenging because there is no central repository of 278A cases.⁷⁸ Instead, this Article uses leads from Westlaw and LexisNexis searches, the National Registry of Exonerations maintained by the University of California Irvine Newkirk Center for Science & Society, the University of Michigan Law School, and the Michigan State University College of Law (“Registry”),⁷⁹ and a public records request to one of Massachusetts’s state-level prosecuting agencies. This catch-as-catch-can approach does not yield a comprehensive universe of 278A cases, and this Article can make no claims as to the representativeness of the data.

Beyond the difficulty of finding 278A cases, there is the additional complication that not all aspects of an identified 278A case will necessarily be publicly available. For example, in *Commonwealth v. Coutu*, the Massachusetts Appeals Court affirmed an order allowing post-conviction DNA testing,⁸⁰ and the case’s electronic docket

⁷⁷ This Article is based on publicly available documents and records (such as were available). See *infra* Section I.A. To the extent it proffers conclusions about the materiality of particular forensic testing or the propriety of granting or denying a new trial, it reflects legal analysis of publicly available facts and not independent knowledge or belief as to a given defendant’s factual guilt or innocence, of which the author has no independent information and expresses no beliefs or opinions.

⁷⁸ Unlike some other states, Massachusetts’s testing statute does not require regular reporting. *Contrast, e.g.*, ME. REV. STAT. ANN. tit. 15, § 2138 (2025) (“Beginning January 2003 and annually thereafter, the Department of Public Safety shall report on post-conviction DNA analysis. . . . The report must include the number of . . . analyses completed, costs of the analyses and the results.”).

⁷⁹ *The National Registry of Exonerations: Massachusetts*, THE NAT’L REGISTRY FOR EXONERATIONS, https://exonerationregistry.org/cases?f%5B0%5D=n_pre_1989%3A0&f%5B1%5D=state%3AMassachusetts&FilterField1=State&FilterValue1=Massachusetts [https://perma.cc/H3YW-49XP] (last visited Feb. 2, 2026) [hereinafter *Massachusetts Registry*].

⁸⁰ 42 N.E.3d 622, 638 (Mass. App. Ct. 2015).

reflects an allowed motion for testing funds.⁸¹ But despite a published decision allowing the testing and 278A's requirement that "[t]he results of the analysis shall be simultaneously disclosed to the moving party, the prosecuting attorney and the court,"⁸² the electronic docket does not disclose the results.⁸³ However, it also does not reflect any post-testing new-trial motion as of March 2026.⁸⁴

Even if a public docket references test results, those results may not be publicly accessible. The Appeals Court remanded *Commonwealth v. Lyons* for discovery regarding the condition and chain of custody of strands of hair found in a murder victim's hands and resolution of the motion to test the hair.⁸⁵ The testing was later allowed by assent,⁸⁶ and a February 27, 2018 entry on the docket alludes to forensic records "received from Bode Cellmark Forensics."⁸⁷ However, these records are not available on the electronic docket, and correspondence with the clerk's office in Plymouth County confirmed that the "records are impounded and are not available to the public at this time."⁸⁸ As in *Coutu*, the electronic docket does not reflect any post-testing new-trial motion in the years that followed (at least not as of March 2026).⁸⁹

Similarly, a public agency responding to a public records request might withhold testing-related information on the basis that it contains impounded genetic information or relates to actions the agency "is considering or plans to take in ongoing litigation" and so constitutes "attorney work product."⁹⁰

⁸¹ Endorsement on Defendant's Motion for Funds for Forensic Testing Pursuant to G.L. Chapter 278A Order, *Commonwealth v. Coutu*, No. 0681CR00372 (Mass. Super. Ct. Jan. 5, 2017).

⁸² MASS. GEN. LAWS ch. 278A, § 12(a) (2025).

⁸³ See Docket Information for *Commonwealth v. Coutu*, No. 0681CR00372 (Mass. Super. Ct., Middlesex Cnty.).

⁸⁴ *Id.*

⁸⁵ 51 N.E.3d 476, 484 (Mass. App. Ct. 2016).

⁸⁶ Endorsement on Defendant's Second Motion for Access to Untested DNA Evidence, *Commonwealth v. Lyons*, No. 0183CR00489 (Mass. Super. Ct. Apr. 21, 2017).

⁸⁷ Docket Information for *Commonwealth v. Lyons* at 02/27/2018, No. 0183CR00489 (Mass. Super. Ct., Plymouth Cnty.). A docket entry on July 23, 2025, states: "Criminal Records from bode Cellmark forensicsDestroyed" [sic]. *Id.*

⁸⁸ E-mail from Clerk's Office, Plymouth Cnty. Super. Ct. (Sep. 10, 2024, at 3:39 ET) (on file with the author).

⁸⁹ Docket Information for *Commonwealth v. Lyons*, No. 0183CR00489 (Mass. Super. Ct., Plymouth Cnty.).

⁹⁰ See, e.g., Letter from Middlesex Dist. Att'y's Off. (Aug. 30, 2024) (on file with the author).

This Article takes no position on the propriety of withholding this information under existing law. But all of this secrecy ill serves public confidence in the criminal justice system.⁹¹ Criminal trials are presumptively public⁹² and any restrictions on public access must be narrowly tailored.⁹³ The public has a right to know whether post-conviction testing (ordered in public proceedings conducted by public employees and often paid for with public funds) yielded inculpatory or exculpatory results (or neither).⁹⁴ The 278A statute itself does not mandate this secrecy and, in requiring disclosure of test results to the court and the victim,⁹⁵ the statute would seem to support greater transparency. Public disclosure would promote confidence in the justice system and could deter guilt-confirming testing.⁹⁶

B. Rough Post-Conviction Testing Numbers in Massachusetts

Meaningful quantitative analysis of 278A's impact is limited by the lack of a centralized, publicly accessible list of post-conviction testing cases.⁹⁷ But looking at the testing that has led to exonerations in Massachusetts both before and after 278A's adoption in 2012 is a helpful starting place. According to the Registry, as of early March 2026, there have been ninety-nine "exonerations"⁹⁸ in Massachusetts

⁹¹ Cf. TRAVIS & ASPLEN, *supra* note 32, at 49 ("Defense counsel should ordinarily expect and agree that the DNA testing results, regardless of outcome, will be made public.").

⁹² U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial . . .").

⁹³ See, e.g., *Waller v. Georgia*, 467 U.S. 39, 45–46 (1984).

⁹⁴ Of course, when results are exculpatory, a new-trial motion summarizing them or an assented-to order for a new trial often follows.

⁹⁵ MASS. GEN. LAWS ch. 278A, §§ 12(a), 14 (2025).

⁹⁶ Cf. TRAVIS & ASPLEN, *supra* note 32, at 7 ("Defense counsel may be unaware of prior DNA testing that confirmed guilt.").

⁹⁷ This problem is not unique to Massachusetts. See Jacobi & Carroll, *supra* note 40, at 273 ("[N]o study has revealed the number of petitions sought for DNA testing.").

⁹⁸ The Registry uses the term "exoneration" to refer to someone who has been "relieved of all the consequences of the criminal conviction, and either: (1) was declared to be factually innocent by a government . . . ; or (2) received (i) a complete pardon . . . , or (ii) an acquittal of all charges factually related to the crime . . . , or (iii) a dismissal of all charges" based on evidence of innocence not presented at trial or known by the defense at the time of a guilty plea. *Understanding the Registry*, THE NAT'L REGISTRY OF EXONERATIONS, <https://exonerationregistry.org/understanding-registry> [http://perma.cc/9525-GRYZ] (last visited Feb. 1, 2026). In content that no longer prominently appears on the Registry's website, the Registry explains: "A person who otherwise qualifies has not been exonerated if there is unexplained physical evidence of that person's guilt." See NAT'L REGISTRY OF EXONERATION, RACE AND WRONGFUL CONVICTION IN THE UNITED STATES 46 n.83 (Samuel R. Gross et al. eds., 2022). The Registry therefore has not purported to track *all* cases in which a new trial has been granted based on post-conviction testing.

since 1989, eighteen of which involved DNA testing.⁹⁹ Of the DNA exonerations, twelve were based on testing obtained prior to the passage of 278A,¹⁰⁰ and six exonerees utilized 278A¹⁰¹ (in five cases¹⁰²).¹⁰³ Of the six Registry exonerees who pursued 278A testing, the testing was the driving exonerative force in only three of the cases: Gary Cifizzari, Ronnie Qualls, and Don Johnson.¹⁰⁴

Indeed, Professor Stanely Fisher includes defendants who do not appear in the Registry in his list of Massachusetts exonerations, including Angel Hernandez whom Fisher reports was convicted of rape in 1988 and exonerated by DNA in 2001. Fisher, *supra* note 55, at 16.

⁹⁹ See *Massachusetts Registry*, *supra* note 79 (entries for Ronjon Cameron, Ulysses Rodriguez Charles, Gary Cifizzari, Frederick Clay, Stephan Cowans, Angel Echavarria, Don Johnson, Dennis Maher, Neil Miller, Marvin Mitchell, Anthony Powell, Ronnie Qualls, Eric Sarsfield, Michael Sullivan, Eduardo Velasquez, Kenneth Waters, James Watson, and Edward Wright). Two other cases involved non-DNA analysis/testing. See Ken Otterbourg, *Darrell Jones*, THE NAT'L REGISTRY OF EXONERATIONS (Sep. 13, 2023), <https://n2t.net/ark:/88112/x2qmlk> [<https://perma.cc/8WV9-USE5>] (forensic analysis of videotape); Maurice Possley, *Michael Washburn*, THE NAT'L REGISTRY OF EXONERATIONS (Nov. 11, 2017), <https://n2t.net/ark:/88112/x26k53> [<https://perma.cc/NM87-NKQL>] (blood test for chlamydia antibodies obtained pre-trial used after conviction to support new-trial motion).

¹⁰⁰ Some DNA-related Registry exonerations post-date 278A's 2012 enactment based on pre-278A testing. See, e.g., Maurice Possley, *Michael Sullivan*, THE NAT'L REGISTRY OF EXONERATIONS (Nov. 20, 2024), <https://n2t.net/ark:/88112/x23m2c> [<https://perma.cc/56QM-NY4L>]; Maurice Possley, *Ronjon Cameron*, THE NAT'L REGISTRY OF EXONERATIONS (Feb. 2, 2018), <https://n2t.net/ark:/88112/x27w2c> [<https://perma.cc/N4JN-C4LK>].

¹⁰¹ The six Registry exonerees who pursued 278A testing are Gary Cifizzari, Don Earl Johnson, Ronnie Qualls, Frederick Clay, James Watson, and Edward Wright. See Ken Otterbourg, *Gary Cifizzari*, THE NAT'L REGISTRY OF EXONERATIONS (Aug. 4, 2025), <https://n2t.net/ark:/88112/x2m596> [<https://perma.cc/L4T8-LZNY>]; Maurice Possley, *Don Johnson*, THE NAT'L REGISTRY OF EXONERATIONS (Jan. 7, 2025), <https://n2t.net/ark:/88112/x2261j> [<https://perma.cc/C3GA-Q4FD>]; Maurice Possley, *Ronnie Qualls*, THE NAT'L REGISTRY OF EXONERATIONS (June 9, 2023), <https://n2t.net/ark:/88112/x2065f> [<https://perma.cc/P3VW-AAG7>]; Maurice Possley & Ken Otterbourg, *Frederick Clay*, THE NAT'L REGISTRY OF EXONERATIONS (Jan. 25, 2023), <https://n2t.net/ark:/88112/x2hd55> [<https://perma.cc/VG4J-73XY>]; Maurice Possley & Ken Otterbourg, *James Watson*, THE NAT'L REGISTRY OF EXONERATIONS (May 14, 2024), <https://n2t.net/ark:/88112/x26s89> [<https://perma.cc/U66C-C7AY>]; Ken Otterbourg, *Edward Wright*, THE NAT'L REGISTRY OF EXONERATIONS (Sep. 8, 2025), <https://n2t.net/ark:/88112/x2g453> [<https://perma.cc/CD97-U4GQ>].

¹⁰² Two of the Massachusetts Registry's DNA exonerees, Frederick Clay and James Watson, were co-defendants. Possley & Otterbourg, *Frederick Clay*, *supra* note 101; Possley & Otterbourg, *James Watson*, *supra* note 101.

¹⁰³ A seventh Massachusetts Registry exoneree, George Perrot, filed a 278A motion, but the hair to be DNA tested was apparently too degraded to be tested. See Docket Information for Commonwealth v. Perrot at 05/17/2012, No. 8579CR05410 (Mass. Super. Ct., Hampden Cnty.); Maurice Possley, *George Perrot*, THE NAT'L REGISTRY OF EXONERATIONS (Nov. 15, 2024), <https://n2t.net/ark:/88112/x2dw4p> [<https://perma.cc/DQE7-KJR6>].

¹⁰⁴ Although the Registry indicates that DNA evidence contributed to the exonerations of co-defendants Frederick Clay and James Watson, their convictions appear to have been

Beyond the Registry, judicial decisions available in online databases indicate that, as of early March 2026, at least forty-four defendants filed motions under 278A. Although not currently/yet listed as “exonerations” on the Registry, two of the defendants whose 278A motions are discussed in judicial decisions available on the electronic databases obtained new trials based on 278A testing.¹⁰⁵ Some of the defendants whose pursuit of 278A testing is discussed in judicial decisions available on the research databases ultimately obtained new trials on other bases,¹⁰⁶ and post-conviction litigation is ongoing in other such cases. In addition, articles related to the work of local innocence projects revealed another 278A movant who obtained a new trial: Thomas Rosa.¹⁰⁷

Based on the numbers from these sources, we might posit that, as of early March 2026, six defendants (Gary Cifizzari, Ronnie Qualls, Don Johnson, Arthur Davis, Elvio Marrero, and Thomas Rosa, Jr.) of roughly fifty-one defendants (the forty-four defendants with 278A decisions on the databases plus the six registry exonerees who pursued 278A testing but do not have overlapping “278A” decisions on the

vacated based on problematic witness issues. See Possley & Otterbourg, *Frederick Clay*, *supra* note 101; Possley & Otterbourg, *James Watson*, *supra* note 101; see also *infra* Section II.D.3.

Similarly, while Edward Wright obtained 278A testing before being granted a new trial, Docket Information for Commonwealth v. Wright at 05/17/2017, No. 8479CR02403 (Mass. Super. Ct., Hampden Cnty.), File Ref. No. 133, the new trial-motion judge explicitly based the decision to grant a new trial on the prosecution’s failure to disclose evidence regarding the preservation of the crime scene and what he considered “blatantly false” trial testimony related thereto, observing in contrast that the DNA evidence probably would not have been a real factor in the jury’s deliberations and/or did not cast real doubt on the justice of the conviction. Memorandum of Decision and Order on Defendant’s Sixth Motion for New Trial at 13–19, 21–31, Commonwealth v. Wright, No. 8479CR02403 (Mass. Super. Ct. Apr. 11, 2025), File Ref. No. 166; Ken Otterbourg, *Edward Wright*, THE NAT’L REGISTRY OF EXONERATIONS (Sep. 8, 2025), <https://exonerationregistry.org/cases/14800> [<https://perma.cc/T6RW-4RCW>].

¹⁰⁵ See discussions of Arthur Davis and Elvio Marrero, *infra* Sections II.D.2.a & b.

¹⁰⁶ For example, the new-trial ruling in Tyrone Clark’s rape case was primarily based on the loss of sperm samples from the sexual assault for which he was convicted and *not* the DNA testing of the knife purportedly used in that assault which he sought in *Commonwealth v. Clark*, 34 N.E.3d 1, 5 (Mass. 2015). See Memorandum of Decision and Order on Defendant’s 2021 Motion for New Trial at 1–2, 14, 19, Commonwealth v. Clark, Nos. 7384CR76049–51 (Mass. Super. Ct. Nov. 23, 2021), File Ref. No. 118. Clark’s case is discussed in more detail *infra* at Sections II.C.1 and IV.B.4.

¹⁰⁷ Thomas Rosa, Jr.’s *Convictions Overturned*, NEW ENG. INNOCENCE PROJECT (Feb. 13, 2025), <https://www.newenglandinnocence.org/innocence-blog/2023/rosaconviction-overturned> [<https://perma.cc/4WKD-L9N6>]; see discussion of Thomas Rosa Jr., *infra* Section II.D.2.c.

databases¹⁰⁸ plus Mr. Rosa) obtained a new trial through 278A testing. But this denominator likely significantly undercounts the number of overall testing petitions. The Registry only reflects cases that both come to its attention and meet its “exoneration” criteria,¹⁰⁹ and not all 278A cases contribute a judicial decision that mentions “278A” to the electronic databases.¹¹⁰ If a prosecuting agency agrees to testing¹¹¹ and then does not dispute that the results of said testing warrant a new trial, there will be no litigation over whether the testing should go forward or its significance, and the judicial endorsement of the agreed-upon new trial is unlikely to reach the electronic databases.¹¹²

Many more 278A motions have undoubtedly been filed than are reflected on the Registry or in judicial decisions on LexisNexis or Westlaw. As of August 2024, Middlesex County, Massachusetts’s largest county by population¹¹³ but generally *not* its leader in homicides,¹¹⁴ identified (in response to a public records request)

¹⁰⁸ As of early March 2026, Westlaw does not appear to host judicial decisions that reference “278A” specifically in connection with six of the seven Massachusetts Registry exonerees who pursued 278A testing: Gary Cifizzari; Frederick Clay; George Perrot; Ronnie Qualls; James Watson; and Edward Wright. There is a published SJC decision related to Don Johnson’s pursuit of 278A testing. *See Commonwealth v. Johnson*, 129 N.E.3d 841, 842 (Mass. 2019).

¹⁰⁹ *See supra* note 98.

¹¹⁰ *See supra* note 108. *Cf.* *Commonwealth v. Marrero*, 224 N.E.3d 478, 482 (Mass. 2024) (referring to motion for DNA testing under “287A” as opposed to “278A”).

¹¹¹ *See* TRAVIS & ASPLEN, *supra* note 32, at 6 (explaining that given DNA testing’s potential to “identify the true culprit . . . , clear up unsolved crimes, and prevent future criminal acts,” “some prosecutors may opt not to take a traditional adversarial stance when their office receives a request for postconviction DNA testing”); MIDDLESEX DIST. ATT’Y’S OFF., GUIDELINES FOR RESPONDING TO MOTIONS FOR FORENSIC TESTING PURSUANT TO G.L. C. 278A at 1 (2018), https://www.middlesexda.com/sites/g/files/vyhlif11841/f/pages/mdao_guidelines_for_c_278a_cases_july_2020.pdf [<https://perma.cc/2U35-3CGR>] (“[I]t is the policy of the MDAO to work cooperatively with the defendant and his or her counsel to resolve motions brought under c. 278A.”); *see also, e.g., supra* note 8 (discussing prosecution’s assent to testing in *Lessieur*).

¹¹² In Arthur Davis’s case, the prosecution withdrew its appeal of the order granting a new trial after the SJC heard oral argument in the case and so, while there is a trial-court decision that discusses the significance of the 278A test results, *Commonwealth v. Davis*, No. MICR85720, 2018 WL 7246976, at *1, *4–6 (Mass. Super. Ct. Nov. 23, 2018), there is no full SJC decision. Docket Information for *Commonwealth v. Davis*, No. SJC-12998 (Mass. Sup. Jud. Ct.).

¹¹³ *See* MASS. CENSUS DATA, <https://malegislature.gov/Redistricting/MassachusettsCensusData/County> [<https://perma.cc/5VB7-6ESB>] (last accessed Jan. 11, 2025).

¹¹⁴ MASS. DEP’T OF PUB. HEALTH, MASSACHUSETTS VIOLENT DEATH REPORTING SYSTEM HOMICIDE 2022, <https://www.mass.gov/doc/2022-mavdrs-homicide-data-table/download> (on file with the Oregon Law Review) (last visited Apr. 27, 2026); MASS. DEP’T OF PUB. HEALTH, DATA BRIEF: VIOLENT DEATHS IN MASSACHUSETTS, SURVEILLANCE

twenty-six cases in which 278A motions had been filed.¹¹⁵ Nineteen of these cases are not reflected in the judicial decisions reviewed on LexisNexis and Westlaw.

The Middlesex County numbers suggest that the sample set of database decisions and Registry exonerees may *overestimate* the productivity of 278A litigation to date by underrepresenting the denominator of 278A testing motions filed. While post-conviction litigation related to testing appears to still be ongoing as of early March 2026 in at least ten of the twenty-six Middlesex 278A cases identified as of August 2024, so far only two defendants have successfully used 278A testing to obtain a new trial in Middlesex County.¹¹⁶ This represents a productivity rate of one in thirteen as of this time. In this regard, it should be noted that the Middlesex District Attorney's Office is one of eleven district attorney offices in Massachusetts¹¹⁷ and that the state attorney general is also authorized to (and does) prosecute criminal cases.¹¹⁸ It is not yet clear, however, if the productivity rate of 278A motions in Middlesex County to date is reflective of the statute's efficiency ratio statewide.

Whether the percentage of 278A motions that mature into new trials is higher or lower than the current incomplete data would suggest, it is already clear that many 278A motions have not produced new trials. In some of these cases, the evidence to be tested had been lost or

UPDATE, 2012-09 (2017), <https://www.mass.gov/doc/violent-deaths-in-massachusetts-surveillance-update-2012-0/download> (on file with the Oregon Law Review).

¹¹⁵ Interoffice Memorandum for the Middlesex Dist. Att'y's Off. (Aug. 28, 2024) [MDAO Memo] (on file with the author). Seven of these cases generated 278A-related decisions available on the databases. This brings the total number of 278A cases identified as of early March 2026 to 70 (the forty-four defendants with 278A decisions on the databases plus the six registry exonerees who pursued 278A testing but do not have overlapping "278A" decisions on the databases, plus Mr. Rosa plus the 19 Middlesex cases that do not have overlapping "278A" decisions on the databases), though there are almost certainly many more.

¹¹⁶ See discussions of Arthur Davis and Angel Perez, *infra* Sections II.D.2.a & d.

¹¹⁷ See *Directory of District Attorney Offices*, MASS.GOV, <https://www.mass.gov/lists/directory-of-district-attorney-offices> [<https://perma.cc/ZFR3-ABKW>] (last visited Mar. 19, 2026).

¹¹⁸ See MASS. GEN. LAWS ch. 12, § 27 (2026); *The Attorney General's Enterprise and Major Crimes Division*, MASS. GOV, <https://www.mass.gov/the-attorney-generals-enterprise-and-major-crimes-division> [<https://perma.cc/F682-4RSM>] (last visited Mar. 19, 2026).

destroyed.¹¹⁹ In others, the testing was denied as immaterial.¹²⁰ In still others, testing was ordered, but no new-trial motion was ever filed.¹²¹ In yet other cases, like *Lessieur*,¹²² a new-trial motion was filed but denied.¹²³ Consistent with the procedural progression in *Lessieur*,¹²⁴ post-conviction testing that does not lead to a new trial can nonetheless cause ostensibly closed cases to lurch back into active litigation.

Despite the quantitative limitations that preclude calculation of a definitive 278A batting average at this time, Massachusetts's experience qualitatively shows the parameters in which testing will be most effective and the unexpected inefficiencies of testing outside of those parameters. Simply stated, 278A has enabled some defendants to obtain conviction-reversing testing, but too much 278A testing was never going to lead anywhere. This Article shows how this new statutory avenue has been used, how its misuse can engender unnecessary post-conviction proceedings, and how such testing can be deployed more efficiently.

C. Post-Conviction Testing: Context Is Everything

The significance of new forensic evidence obtained after conviction is typically assessed against what we thought we knew beforehand.¹²⁵ Commentators have categorized the probative power of such new

¹¹⁹ See, e.g., *Commonwealth v. Perry*, No. 13-P-1278, 17 N.E.3d 1119, 2014 WL 4922606, at *1 (Mass. App. Ct. Oct. 2, 2014) (knife defendant sought to test “was destroyed almost five years prior to the passage of c. 278A”).

¹²⁰ See, e.g., *Commonwealth v. Moffat*, 85 N.E.3d 38, 46 (Mass. 2017) (affirming denial of DNA testing of cigarette butts collected 151 to 239 feet from embankment near victim's body where it was not known “when the cigarette butts might have been deposited on the road” and defendant never mentioned anyone smoking cigarettes at scene).

¹²¹ See *supra* notes 80–89 and accompanying text.

¹²² See *supra* notes 10–16 and accompanying text.

¹²³ See also, e.g., *Commonwealth v. Duke*, 186 N.E.3d 1223, 1237 (Mass. 2022). *Duke* is discussed in depth *infra* in Section III.D.1.

¹²⁴ See *supra* notes 10–13 and accompanying text.

¹²⁵ See, e.g., *Commonwealth v. Ellis*, 57 N.E.3d 1000, 1017 (Mass. 2016) (“The determination of whether newly discovered evidence would have been a real factor in the jury's deliberations requires that the new evidence be considered in light of the totality of the evidence presented at trial”); *Commonwealth v. Grace*, 491 N.E.2d 246, 248 (Mass. 1986) (explaining that “process of judicial analysis” on new-trial motion predicated on newly discovered evidence “requires a thorough knowledge of the trial proceedings”); *ROMAN ET AL.*, *supra* note 18, at 2 n.3 (“Other facts of the case (statements, eyewitnesses, etc.) must also be considered before a convicted offender can be exonerated. For instance, finding a DNA profile matching the suspect at a crime scene is not sufficient to conclude guilt if the suspect had a legitimate reason to be there at some other time.”).

evidence using different taxonomies. For example, the DOJ's 1999 report proposed "five broad categories" of post-conviction DNA testing based on the impact of an exclusion or other "favorable" result on the case: (1) exclusionary results "will exonerate the petitioner"; (2) exclusionary results "would support" an innocence claim "but reasonable persons might disagree as to whether the results are exonerative"; (3) even "favorable" results "will be inconclusive"; (4) testing is not feasible for any number of reasons; and (5) "frivolous" testing requests.¹²⁶

Similarly, Professor Brandon Garrett divides "innocence claims" into "three basic categories" based on the extent to which new evidence of innocence "may undermine the evidence that was introduced at the criminal trial": (1) "substantial claims" where "new evidence overwhelmingly shows that the convict was not the perpetrator"; (2) "outcome-determinative claims" where new evidence "does not substantially undercut an element of a crime" but makes it unlikely a new jury would convict; and (3) "inconclusive claims" where "DNA technology, although providing information regarding a genetic profile, has limited probative value."¹²⁷

The Massachusetts cases in which testing prompted new trials prior to 278A's enactment provide illustrative examples that map to the portions of these taxonomies where testing is most effective; they also provide a check against unrealistic expectations.¹²⁸ While forensic testing can sometimes conclusively exonerate defendants, such cases are relatively rare.¹²⁹ As the Registry cautions, DNA may be central in

¹²⁶ TRAVIS & ASPLEN, *supra* note 32, at xiii–xiv, 3–6, 35.

¹²⁷ Garrett, *supra* note 30, at 1633, 1646.

¹²⁸ Among other things, "[i]t is not possible to determine the age of a biological sample or the time of deposition of the sample by DNA analysis, with the notable exception of sperm detected on vaginal/cervical swabs or in vaginal aspirates." TRAVIS & ASPLEN, *supra* note 32, at 23.

¹²⁹ See, e.g., Findley, *supra* note 54, at 1190 ("Even with DNA, the truth can be obscure. Does an exclusion from crime scene DNA always and with certainty mean the defendant is innocent? Does the presence of the defendant's DNA always and with certainty mean the defendant is guilty? The answer is, of course, no.") (notation omitted); Mark A. Godsey & Marie Alou, *She Blinded Me with Science: Wrongful Convictions and the "Reverse CSI-Effect,"* 17 TEX. WESLEYAN L. REV. 481, 494 (2011) ("[I]f someone walks by the window of the lecture hall where I am speaking and shoots me through a window, there will be no DNA from the perpetrator left at the crime scene. Typically, only in rape cases where the perpetrator ejaculated, or in murder cases where the perpetrator bled or left saliva, sweat or sufficient skin cells, will conclusive DNA testing be an option."); Leonetti, *supra* note 69, at 103 ("[T]here are whole categories of crimes for which DNA cannot exonerate—crimes like robbery, where the perpetrator is not likely to leave a damning biological sample behind,

rape cases where “DNA tests showed that semen recovered from the victim did not come from the defendant in a context that meant that the defendant could not be guilty” but—“among the more recent [homicide] cases—the DNA evidence was more complex” such that “other post-conviction evidence was necessary to prove innocence.”¹³⁰

As discussed more fully below, where post-conviction testing leads to a new trial, it is generally because the results either (1) are independently exculpatory or (2) eliminate the forensic evidence that the prosecution used to link the defendant to the crime or otherwise prove their guilt.

1. Independently Exculpatory Evidence

Testing is independently exculpatory when it directly indicates that the defendant did not commit the crime, at least not in the manner theorized at trial. DNA exclusions from sperm/seminal fluid in single-perpetrator rapes are the paradigmatic example of independently exculpatory evidence.¹³¹ Indeed, the majority of pre-278A Massachusetts Registry DNA exonerations excluded the defendant as the source of biological material almost certainly left by a rapist.¹³² The defendant’s best-case-scenario results in these cases will frequently be not just independently exculpatory but the elusive conclusive exoneration.¹³³ For example, Marvin Mitchell became one of the first

or conspiracy, where intent rather than identity is the disputed issue.”). Obviously, the extent to which DNA testing can or cannot exculpate depends on the specific facts of a given case.

¹³⁰ SAMUEL GROSS, NAT’L REGISTRY OF EXONERATIONS, CHANGES IN DNA EXONERATIONS OVER TIME 1, 3 (Nov. 2022), [https://exonerationregistry.org/sites/exonerationregistry.org/files/documents/NRE.Changes%20in%20DNA%20Exonerations.FINAL.11.7.22.SRG%20\(1\).pdf](https://exonerationregistry.org/sites/exonerationregistry.org/files/documents/NRE.Changes%20in%20DNA%20Exonerations.FINAL.11.7.22.SRG%20(1).pdf) (on file with the Oregon Law Review).

¹³¹ See Garrett, *supra* note 30, at 1647 (“DNA testing is currently most commonly relevant in cases involving sexual assaults committed by a single person who is a stranger to the victim.”); ROMAN ET AL., *supra* note 18, at 30; cf. TRAVIS & ASPLEN, *supra* note 32, at 6 (hypothesizing seven-perpetrator “gang rape” in which victim is not sure all perpetrators “engaged in sexual intercourse” and observing that significance of vaginal-swab exclusion “will be minimal”).

¹³² See *Massachusetts Registry*, *supra* note 79 (entries for Ulysses Rodriguez Charles, Dennis Maher, Neil Miller, Marvin Mitchell, Anthony Powell, Eric Sarsfield, and Eduardo Velasquez).

¹³³ See Dist. Att’y’s Off. for Third Jud. Dist. v. Osborne, 557 U.S. 52, 80–81 (2009) (Alito, J., concurring) (“DNA testing—even when performed with modern STR technology, and even when performed in perfect accordance with protocols—often fails to provide absolute proof of anything.”) (quotation and citation omitted); Garrett, *supra* note 30, at 1646 (“[A]lthough some commentators casually refer to DNA testing as potentially ‘conclusive’ of innocence or guilt, evidence typically cannot be conclusive of innocence or guilt.”).

DNA exonerations in Massachusetts in 1997 when he was excluded as the source of semen from the scene of a 1988 rape of an 11-year-old victim.¹³⁴ This is the quintessential situation where “DNA tests showed that semen recovered from the victim did not come from the defendant in a context that meant that the defendant could not be guilty.”¹³⁵

But even in single-perpetrator rape cases, the significance of exculpatory testing can vary with context. In September 1992, Anthony Powell was convicted of the 1991 kidnapping and rape of an 18-year-old woman.¹³⁶ DNA testing granted in 2002 eliminated Powell but, where the victim had reportedly had sex with her boyfriend before the attack and the perpetrator may not have ejaculated, Powell was only exonerated after additional tests eliminated the boyfriend as well.¹³⁷

There are other, less conclusive situations where post-conviction testing nonetheless directly indicates that the defendant did not commit the crime, at least not in the way the prosecution theorized at trial. For example, in the pre-278A case of *Commonwealth v. DiBenedetto*, testing excluded the shooting-murder victims from a DNA mixture on sneakers that had preliminarily tested positive for the presence of blood and that the prosecution had argued “were in the presence of blood” when the defendant “stood over” the “prone and bleeding body” of one of the victims “and blasted into the body.”¹³⁸ But the jury had also been told that the preliminary phenolphthalein testing was susceptible to false positives, and the trial judge denied the new-trial motion predicated on the DNA results.¹³⁹

The SJC, however, reversed and remanded.¹⁴⁰ The court recognized that the new DNA evidence would “appear” to render inadmissible the earlier phenolphthalein results and that, “without that evidence, the prosecutor’s argument to the jury . . . could not have been made.”¹⁴¹

¹³⁴ Maurice Possley, *Marvin Mitchell*, THE NAT’L REGISTRY OF EXONERATIONS (Feb. 26, 2026), <https://n2t.net/ark:/88112/x2zw38> [<https://perma.cc/6FDT-PC3B>]; see also Fisher, *supra* note 55, at 20 (describing Mitchell as “the first Massachusetts prisoner to win release on the basis of new DNA evidence”).

¹³⁵ GROSS, *supra* note 130, at 1.

¹³⁶ Maurice Possley, *Anthony Powell*, THE NAT’L REGISTRY OF EXONERATIONS (Nov. 8, 2019), <https://n2t.net/ark:/88112/x2g02k> [<https://perma.cc/C59H-FLZV>].

¹³⁷ *Id.*; see also TRAVIS & ASPLEN, *supra* note 32, at 39 (describing complications arising from co-defendants’ exclusion as source of vaginal-swab semen in kidnap/rape where victim later disclosed consensual extramarital intercourse and further testing matched semen to lover).

¹³⁸ 941 N.E.2d 580, 584–85 (Mass. 2011).

¹³⁹ *Id.* at 582–84, 588 n.15.

¹⁴⁰ *Id.* at 583, 592.

¹⁴¹ *Id.* at 587–88.

Yet the court observed that if this were the DNA evidence's only impact, it might be "insufficient" to reject the motion judge's conclusion that it "simply" made marginal evidence even "more marginal."¹⁴² The high court remanded the case not only because the DNA evidence undermined the prosecution's closing argument (akin to the kind of negation of prosecution evidence discussed next) but because it was "independently exculpatory" where there was consistent testimony that both victims "were surrounded by pools of blood" such that the absence of the victims' DNA on the defendant's sneakers could indicate that the defendant was not the Nike-wearing shooter who stood over the victims.¹⁴³

2. Evidence That Eliminates the Defendant's Physical/Forensic Connection to the Crime

Outside of single-perpetrator rape cases, testing will rarely conclusively show that a given defendant could not be guilty. But testing that negates the only physical evidence the prosecution used to link the defendant to the crime can also be powerfully exculpatory.¹⁴⁴ Even though such testing may not be conclusive of innocence, it can

¹⁴² *Id.* at 588.

¹⁴³ *Id.* at 587–91 & nn.16–17.

¹⁴⁴ The case of *House v. Bell*, 547 U.S. 518 (2006), is instructive in this regard. New DNA evidence in *House* was of "central importance" where it contradicted pre-trial testing showing semen on the victim's nightgown and panties was consistent with the defendant, which was the only forensic evidence at the scene linking the defendant to the murder and supplied both motive and an aggravating capital-sentencing factor. *Id.* at 528–29, 540–41. Although the prosecution had also relied on small bloodstains on the defendant's jeans that were consistent with the victim's blood, post-trial evidence showed that this blood could have come from autopsy samples transported in the same box as the jeans, some of which had spilled "at least once during its journey," such that "reasonable jurors" would be prevented "from placing significant reliance on the blood evidence." *Id.* at 529, 547–48. The court concluded that the defendant's "claim of actual innocence" based on this forensic evidence and a third party's reported confession was sufficiently compelling to overcome his state procedural default and allow his federal habeas action to proceed, observing that "the central forensic proof connecting [defendant] to the crime—the blood and the semen—has been called into question." *Id.* at 522, 554. But the Court cautioned that "[t]his is not a case of conclusive exoneration" and that the defendant's showing fell short of the "extraordinarily high" threshold necessary "for any hypothetical freestanding innocence claim." *Id.* at 553, 555.

warrant a new trial,¹⁴⁵ at which point the prosecution must decide whether to retry the defendant on what remains of its case.¹⁴⁶

The best-known example of successful post-conviction DNA testing in Massachusetts is probably the case of Kenneth Waters because it was the subject of a film starring Hilary Swank and Sam Rockwell.¹⁴⁷ Waters was convicted of a 1980 stabbing murder.¹⁴⁸ There were bloodstains throughout the victim's house, and police collected both Type B and Type O blood samples, fingerprints, and hair (including from the victim's fist and the knife supposedly used in the murder).¹⁴⁹ The victim had Type B blood, and so the theory was that the killer was Type O and had bled during the struggle.¹⁵⁰

Waters (along with 48% of the population, including the victim's husband and son) was Type O but had no wounds on his body when he was questioned the day of the murder.¹⁵¹ Waters was also excluded as the source of fingerprints lifted from the scene and hairs in the victim's hand and on the knife.¹⁵² As with other exculpatory evidence that would have corroborated Waters's alibi, the fingerprint report was not produced to the defense prior to trial.¹⁵³ Waters was convicted in 1983 in part based on testimony from two former girlfriends (who both later recanted) that he had confessed to the murder.¹⁵⁴

In 1999, Waters's sister, who went to law school with the goal of exonerating her brother, found the Type O blood evidence from the crime scene and, working with the Innocence Project, reached an agreement with the prosecution to conduct DNA testing that excluded Waters.¹⁵⁵ In March 2001, Waters's unopposed new-trial motion was allowed and, after reinvestigating the case, the prosecution nolle prossed the charges (that is, decided not to proceed with the

¹⁴⁵ See TRAVIS & ASPLEN, *supra* note 32, at 5 (hypothesizing homicide where prosecution argued that blood on shirt in defendant's home came from victim but subsequent DNA testing excluded victim and acknowledging that such testing "might be helpful to petitioner's claims but does not prove that he was not guilty" and that outcome will depend on bloody shirt's role at trial and strength of other evidence).

¹⁴⁶ See Findley et al., *supra* note 41, at 540.

¹⁴⁷ CONVICTION (Omega Entertainment 2010).

¹⁴⁸ Ken Otterbourg, *Kenneth Waters*, THE NAT'L REGISTRY OF EXONERATIONS (Mar. 18, 2020), <https://n2t.net/ark:/88112/x2kc8k> [<https://perma.cc/3MSV-5VEH>].

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

prosecution) in June 2001.¹⁵⁶ This DNA evidence negated a key piece of the prosecution's case, removing any physical/forensic link between Waters and the crime.

Although Waters's testing does not appear to have led to a published decision, a trio of Massachusetts cases subsequently established that a new trial is justified where testing excludes the defendant or the victim from material that had previously appeared to forensically link the defendant to the crime and/or bolster key incriminating witness testimony.¹⁵⁷

In *Commonwealth v. Sullivan*, a cooperating witness testified that Sullivan, wearing a purple jacket, kicked and stomped the victim to death, but a different witness testified without any plea agreement that Sullivan was not present and that it was the cooperating witness who kicked the victim and crushed his skull.¹⁵⁸ The tie-breaker between these accounts was arguably forensic testimony that blood was detected on both cuffs of the purple jacket and that a hair in a jacket pocket was "consistent" with the victim's hair.¹⁵⁹ But, upon post-conviction testing, the jacket cuffs screened negative for blood and, while the cuffs contained a mixture of two DNA profiles, the victim was excluded as the source of either profile.¹⁶⁰ Attempts to compare the hair to the victim were "inconclusive."¹⁶¹ The SJC affirmed the allowance of Sullivan's new-trial motion, reasoning that the blood on the jacket cuffs and the hair "served as the sole pieces of physical evidence indicating" that Sullivan was "in the presence of the victim during the killing" and that the trial evidence "was not otherwise so compelling."¹⁶² The prosecution ultimately nolle prossed the case, citing the passage of 33 years, the unavailability of witnesses (some of whom had died), and the elimination of clothing linking Sullivan to the crime.¹⁶³

¹⁵⁶ *Id.*; Docket Information for *Commonwealth v. Waters*, No. 8281CR04115 (Mass. Super. Ct., Middlesex Cnty.).

¹⁵⁷ See *Commonwealth v. Lessieur*, 175 N.E.3d 372, 379–80 (Mass. 2021) (summarizing the "trifecta" of *Commonwealth v. Cameron*, 39 N.E.3d 723 (Mass. 2015), *Commonwealth v. Cowels*, 24 N.E.3d 1034 (Mass. 2015), and *Commonwealth v. Sullivan*, 14 N.E.3d 205 (Mass. 2014)). The SJC issued these decisions after 278A came online, but they were based on pre-278A testing.

¹⁵⁸ 14 N.E.3d 205, 207–10 & n.4 (Mass. 2014).

¹⁵⁹ *Id.* at 209, 213.

¹⁶⁰ *Id.* at 213.

¹⁶¹ *Id.*

¹⁶² *Id.* at 207, 213–16.

¹⁶³ Nolle Prosequi, *Commonwealth v. Sullivan*, No. 8681CR01299 (Mass. Super. Ct. Feb. 28, 2019), File Ref. No. 134.

In *Commonwealth v. Cowels*, co-defendants Cowels and Mims successfully used pre-278A testing to obtain a new trial.¹⁶⁴ A cooperating witness—whose credibility was “extensively impeached”—testified at trial that the defendants left his apartment with the stabbing-murder victim and returned alone, proceeding immediately to his bathroom and emerging with Cowels in his underwear (carrying his clothes in a plastic bag) and a spot of apparent blood on his sneaker.¹⁶⁵ The new DNA evidence excluded the victim and both defendants as sources of stains on the witness’s bathroom towels that had tested positive for human blood before trial (with a reaction so weak that the blood could have belonged to anybody) and showed that there was in fact no blood on the parts of the sneakers that were tested.¹⁶⁶ The testing therefore removed the “only physical evidence corroborating a key element of an important prosecution witness’s testimony.”¹⁶⁷ Both Cowels and Mims ultimately pled guilty to manslaughter.¹⁶⁸

Finally, in *Commonwealth v. Cameron*, the complainant alleged that Cameron raped her vaginally and rectally in her boyfriend’s apartment where Cameron was staying.¹⁶⁹ The complainant believed that the assailant had ejaculated but was uncertain as to where.¹⁷⁰ The prosecution presented evidence that DNA testing of seminal residue from the crotch of the victim’s underwear indicated the presence of at least two male sources and that, while the primary source excluded Cameron, the secondary source was “inconclusive” and neither included nor excluded him.¹⁷¹ Cameron moved successfully for state-funded DNA testing.¹⁷² A more discerning test than was available at

¹⁶⁴ *Commonwealth v. Cowels*, 24 N.E.3d 1034, 1037, 1041–42 (Mass. 2015).

¹⁶⁵ *Id.* at 1037–39, 1045.

¹⁶⁶ *Id.* at 1041.

¹⁶⁷ *Id.* at 1045 (emphasis added).

¹⁶⁸ Docket Information for *Commonwealth v. Cowels* at 07/01/2020, No. 9384CR11090 (Mass. Super. Ct., Suffolk Cnty.); Docket Information for *Commonwealth v. Mims* at 07/01/2020, No. 9384CR11148 (Mass. Super. Ct., Suffolk Cnty.).

¹⁶⁹ *Commonwealth v. Cameron*, 871 N.E.2d 1096, 1098 (Mass. App. Ct. 2007). The complainant was deaf, *id.*, and, according to the Registry’s case summary, also “partially blind.” Possley, *Ronjon Cameron*, *supra* note 100.

¹⁷⁰ *Commonwealth v. Cameron*, 39 N.E.3d 723, 725, 727 (Mass. 2015).

¹⁷¹ *Id.* at 724, 726; *Cameron*, 871 N.E.2d at 1099. The SJC later concluded that the inconclusive DNA evidence should not have been admitted and that characterizing this evidence as a “nonexclusion” rather than “inconclusive” was also improper. *Cameron*, 39 N.E.3d at 728–29.

¹⁷² Docket Information for *Commonwealth v. Cameron* at 12/8/2011, No. 9976CR00592 (Mass. Super. Ct., Berkshire Cnty.), File Ref. No. 180 (defendant’s motion for order authorizing DNA testing); *id.* at 6/25/2012, File Ref. No. 188 (defendant’s motion for funds

the 2003 trial revealed that the secondary profile that the prosecution had “attributed to a male donor, was in fact female DNA to which the defendant was excluded as a possible contributor.”¹⁷³ Where the jury had been “asked to infer” that the “secondary male sample, although not conclusively attributed to [Cameron],” was Cameron’s semen and that it resulted from a rape, the elimination of “the only physical evidence supporting the key witness’s testimony” warranted a new trial.¹⁷⁴ The prosecution nolle prossed the case.¹⁷⁵

Collectively, the *Sullivan-Cowels-Cameron* trifecta teaches new-trial judges to look for testing that (1) eliminates “a piece of evidence that either did or could have linked the defendant to the crime” and/or (2) “contradict[s]” and “undermine[s]” the prosecution’s “key” witness.¹⁷⁶ Although the post-conviction testing that led to new trials in these three cases was not obtained using the 278A statutory mechanism, the contextual circumstances that made the test results so powerfully exculpatory in each case, along with the lessons from cases with independently exculpatory evidence, should inform the contours of the statute’s materiality standard.

II

STATUTORY POST-CONVICTION TESTING IN MASSACHUSETTS

A. Statutory Purpose

Based on legislative findings, the purpose of 278A was “to remedy the injustice of wrongful convictions of factually innocent persons by allowing access to analyses of biological material with newer forensic and scientific techniques” where such techniques “provide a more reliable basis for establishing a factually correct verdict” as evidenced by the “significant number of exonerations” based on such techniques “in recent years.”¹⁷⁷ The legislative hearing indicated that defendants who sought DNA testing through general post-conviction procedures

to support DNA testing); *id.* at 7/11/2012 (allowing motion for funds (File Ref. No. 188)). Cameron also received BJA grant funding. Possley, *Ronjon Cameron*, *supra* note 100.

¹⁷³ *Cameron*, 39 N.E.3d at 724–25 & n.1.

¹⁷⁴ *Id.* at 725, 729–30.

¹⁷⁵ Docket Information for Commonwealth v. Cameron at 11/25/2015, No. 9976CR00592 (Mass. Super. Ct., Berkshire Cnty.), File Ref. No. 217.

¹⁷⁶ *Cameron*, 39 N.E.3d at 730–31.

¹⁷⁷ Commonwealth v. Wade, 5 N.E.3d 816, 823–24 (Mass. 2014) (quotation omitted) (quoting 2011 S.B. 753, 2011 Gen. Ct. 187th Sess. (Mass. 2011); H.B. 2165, 2011 Gen. Ct. 187th Sess. (Mass. 2011)).

“faced long delays and impediments to access”; new-trial movants also faced a catch-22 in that they were “not entitled to obtain scientific testing of evidence unless” they could make “a prima facie showing that the test results would warrant a new trial.”¹⁷⁸ Chapter 278A was therefore intended to “provide increased and expeditious access” to testing that “subsequently might support a motion for a new trial.”¹⁷⁹

B. Statutory Framework

Chapter 278A contains 18 sub-sections, from section 1’s definitions to section 18’s appellate rights. Section 2 of 278A sets out the prerequisite assertion of “factual innocence”¹⁸⁰ of a conviction currently restraining the movant’s liberty (through incarceration, parole/probation, or otherwise).¹⁸¹ The prosecution is required to notify victims upon the filing of a motion for testing.¹⁸²

Section 3 presents the requirements a movant must meet (supported by “specific references to the record” or affidavits) to survive initial judicial screening.¹⁸³ As an initial matter, the motion must include, *inter alia*, “information demonstrating that the analysis has the potential to result in evidence that is material to the moving party’s identification as the perpetrator of the crime.”¹⁸⁴ The defendant must also aver that they are “factually innocent of the offense” and that the requested analysis “will support the claim of innocence.”¹⁸⁵ Defendants who pled guilty or made incriminating statements may seek

¹⁷⁸ *Id.* at 824 (quotation and citation omitted).

¹⁷⁹ *Id.* at 824, 826–27; *see also* Commonwealth v. Ramos, 198 N.E.3d 437, 443–44 (Mass. 2022) (“[Chapter] 278A was intended to give defendants easier access to scientific or forensic testing . . . without having to prove that the test results will raise doubts about their convictions.”).

¹⁸⁰ The statute defines “[f]actually innocent” to mean “a person convicted of a criminal offense who did not commit that offense.” MASS. GEN. LAWS ch. 278A, § 1 (2025).

¹⁸¹ This restraint-on-liberty requirement likely has the effect of *reducing* demand for testing from defendants convicted of less serious offenses. *See, e.g.*, Justin Murray, *Redress for Wrongful Convictions: A Response to Professor Medwed*, 58 NEW ENG. L. REV. 53, 57, 58 (2023) (“Arrests and prosecutions for murder and rape represent a vanishingly small sliver of the penal system’s output. . . . [I]t is disquieting to think of the potentially vast number of innocent people who have been unjustly convicted of misdemeanor and lesser felony offenses . . . with no meaningful possibility of having their convictions overturned and their names cleared.”).

¹⁸² § 14(a).

¹⁸³ § 3(b), (e). The movant will need to demonstrate many of these same requirements by a preponderance of the evidence after a hearing under § 7(b) to actually obtain testing.

¹⁸⁴ § 3(b)(4). The statute never defines “material.”

¹⁸⁵ § 3(d).

testing, and neither circumstance precludes “identity” from having “been a material issue in the underlying case.”¹⁸⁶

The testing must be allowed if the movant has “demonstrated by a preponderance of the evidence,” *inter alia*, that the evidence “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” and that testing “has the potential to result in evidence that is material” to the identification of the perpetrator.¹⁸⁷ Victims must be notified when testing is allowed and subsequently advised of the results.¹⁸⁸

Where 278A directs judges to review motions “expeditiously”¹⁸⁹ and provides that, “[u]pon allowance,” “analysis shall take place as soon as practicable,”¹⁹⁰ it adds a new, dedicated express lane to the existing post-conviction highway. Indeed, in a nod to the general-purpose lanes of the existing highway that can still accommodate movants seeking testing, the statute clarifies that it is not the exclusive avenue for post-conviction testing by cautioning against construing it “to prohibit the performance of forensic or scientific analysis under any other circumstances.”¹⁹¹

This new lane is not a toll road. The statute imposes few barriers to entry, inviting convicted defendants to drive for free¹⁹² as often as they please.¹⁹³ State funding is an appropriate accommodation for defendants with limited financial resources (not to mention the

¹⁸⁶ *Id.* As interpreted by the SJC, the statute also applies to defendants who assert innocence not based on perpetrator misidentification but because no crime occurred. *See* Commonwealth v. Putnam, 120 N.E.3d 295, 296–97 (Mass. 2019) (fabricated/false reports of crime); Commonwealth v. Williams, 119 N.E.3d 1171, 1178 (Mass. 2019) (conduct not a crime under the circumstances, e.g., justified self-defense).

¹⁸⁷ § 7(b).

¹⁸⁸ § 14(b).

¹⁸⁹ § 3(e). The Legislature likely intended that judges would review motions for testing “expeditiously.”

¹⁹⁰ § 9.

¹⁹¹ § 2. As discussed briefly *infra* in Section IV.B, there may be situations in which testing that is not itself immediately “material” is nonetheless appropriately pursued as part of post-conviction proceedings. Such situations would be governed by preexisting rules addressing post-conviction discovery. *See, e.g.*, MASS. R. CRIM. P. 30(c)(4) (authorizing post-conviction judge “on motion of any party, after notice to the opposing party and an opportunity to be heard” to grant “such discovery as is deemed appropriate”).

¹⁹² The state pays for (or subsidizes) testing for indigent defendants. §§ 10(2)–(3).

¹⁹³ *See* § 3(e) (directing judges to “dismiss, *without prejudice*” motions that fail to “meet the [initial statutory] requirements”) (emphasis added).

perversity of assessing costs against defendants in cases where testing yields an exoneration), but it creates a moral hazard: with financial costs externalized, and in light of several features of the statutory design and judicial implementation discussed below, a defendant serving a lengthy sentence for a serious offense¹⁹⁴ faces little downside by “trying his or her luck”¹⁹⁵ on testing that could muddy the waters by turning up a few stray alleles.

C. Judicial Interpretation: Diluting Materiality

The 278A statute itself includes demand-inducing design elements, and some of the SJC’s interpretive touches can be expected to induce even more demand and increase procedural accretion. For example, the statute’s directive that deficient motions be dismissed *without prejudice*¹⁹⁶ and the SJC’s propagation of this lenient approach¹⁹⁷ encourage successive motions,¹⁹⁸ causing unproductive accretive litigation.¹⁹⁹ While more could be said about procedural inefficiencies

¹⁹⁴ Where testing is limited to defendants who are currently incarcerated, on probation or parole, or otherwise subjected to restraints on their liberty, § 2, many movants will be murder or rape defendants with “the time and incentive to appeal during their long sentences,” Garrett, *supra* note 33, at 94–95; *see also* Jacobi & Carroll, *supra* note 40, at 285.

¹⁹⁵ Jacobi & Carroll, *supra* note 40, at 264.

¹⁹⁶ § 3; *see also* Commonwealth v. Wade, 5 N.E.3d 816, 821 n.7 (Mass. 2014) (noting prosecution’s concession that defendant was “not barred from filing another [278A] motion on the same grounds” and observing that, “indeed, the statute appears to contemplate any number of such filings”).

¹⁹⁷ *See* Commonwealth v. Johnson, 129 N.E.3d 841, 844 & n.6 (Mass. 2019) (recognizing that dismissing without prejudice 278A motions that fail to meet “threshold requirements” enables parties to raise “the same issues . . . raised in an earlier motion” and acknowledging that this “requirement technically applies only to motions that do not satisfy” § 3, but seeing “no reason why” motions that do not satisfy § 2 “should not also be dismissed without prejudice . . . consistent with the purpose . . . to interpret the statute in a manner favorable to moving parties”).

¹⁹⁸ *See, e.g.*, Commonwealth v. Bocchino, No. 15-P-1391, 56 N.E.3d 893, 2016 WL 4268399, at *1 & n.2 (Mass. App. Ct. Aug. 12, 2016) (affirming denial of defendant’s fourth 278A motion, which suffered from some of the same “defects” as third motion); *cf.* Commonwealth v. Donald, 170 N.E.3d 311, 312 (Mass. 2021) (referring to defendant’s “eighth motion for postconviction forensic testing of various evidence from his 1999 trial”) (notation omitted).

¹⁹⁹ *See, e.g.*, Commonwealth v. Fernandez, No. 18-P-472, 113 N.E.3d 934, 2018 WL 5810746, at *1–2 (Mass. App. Ct. Nov. 7, 2018) (defendant filed successive *pro se* testing motions that despite “nominal differences” were the same “in substance” and judge who denied first motion concluded that “defendant has not shown, and the court cannot discern, how DNA testing would have an impact on this case”); Commonwealth v. Sostre, No. 15-P-1716, 86 N.E.3d 510, 2017 WL 2491704, at *1 (Mass. App. Ct. June 9, 2017) (defendant filed “renewed motion” after previous motion denied without prejudice where, “[a]s the

in the statutory scheme,²⁰⁰ this Article focuses on the demand-inducing and accretive effects of the substantive materiality standard.

Both section 3's initial pleading requirements and section 7's evidentiary hearing requirements require that testing be "material" to perpetrator identity. The requested analysis must support the movant's claim of factual innocence,²⁰¹ and movants must first include "information demonstrating," and later actually demonstrate "by a preponderance of the evidence[,] . . . that the requested analysis has the potential to result in evidence that is material to the moving party's identification as the perpetrator" of the underlying crime.²⁰² Yet the statute never defines "material" or explains how the requisite "potential" should be gauged. The courts have therefore had to step in.

In attempting to effectuate a legislative intent "to make postconviction forensic testing easier and faster,"²⁰³ the SJC's operationalization of 'materiality' further lowers the 'cost' of testing. By making testing easier to obtain, the court's watered-down materiality standard both induces more demand for testing and engenders the kind of ripple-effect accretion seen in *Lessieur*²⁰⁴ where predictably immaterial results ride revelation bias to protracted post-conviction litigation.

1. Rejecting Established Conceptions of Post-Conviction Materiality

In its first decision construing 278A, the SJC asserted that the statute did not require a moving party to establish "a reasonable probability of a more favorable result at trial" but only "the more modest threshold" of providing "information demonstrating that the 'analysis has the potential to result in evidence that is material to the moving party's identification [as] the perpetrator.'"²⁰⁵ Despite 278A's emphasis on

motion judge noted, and the defendant acknowledges on appeal, the two items for which testing was sought in the first motion were not relevant").

²⁰⁰ For example, the SJC construes the statute to require all motions not dismissed for threshold deficiencies to advance to evidentiary hearings, *e.g.*, *Commonwealth v. Moffat*, 85 N.E.3d 38, 43 (Mass. 2017), even though the prosecution may not have weighed in at all yet, *compare* § 3(e) (prosecution "may provide a response" at § 3 stage), *with* § 4(b) (if motion "not dismissed" under § 3(e) "prosecuting attorney shall file a response") (emphases added). Where immateriality may not be apparent from the face of a testing motion, this framework can lead to unnecessary, accretive hearings.

²⁰¹ § 3(d).

²⁰² §§ 3(b)(4), 7(b)(4).

²⁰³ *Moffat*, 85 N.E.3d at 46.

²⁰⁴ *See supra* notes 10–19 and accompanying text.

²⁰⁵ *Commonwealth v. Wade*, 5 N.E.3d 816, 826 (Mass. 2014) (quoting § 3(b)(4)).

“factual innocence,”²⁰⁶ the court rejected an interpretation that would “require a moving party to aver specific facts supporting innocence on any conceivable theory of guilt,” including theories not presented by the prosecution at trial.²⁰⁷ The court explained that “it is necessary to consider only whether the test results could be material to the question of the identity of the person who committed the criminal act,”²⁰⁸ but it did not explain what it understood “material” to mean.

The court emphasized that “[a] moving party has no burden to establish that the requested analysis would have had any effect on the underlying conviction” and that judges conducting section 3’s threshold inquiry are “not called upon . . . to consider the relative weight of the evidence or the strength of the case presented against the moving party at trial.”²⁰⁹ In reasoning that “the Legislature elected to include a provision requiring that scientific testing be material to identity, but did not condition access to such testing on some degree of proof that the test results will raise doubt about the conviction,”²¹⁰ the court evidently rejected conceptions of materiality used in related contexts, like *Brady* (where “[u]ndisclosed exculpatory evidence is ‘material’ if, ‘evaluated in the context of the entire record,’ it ‘creates a reasonable doubt that did not otherwise exist’”)²¹¹ and new-trial motions based on newly discovered evidence (where the evidence must cast “real doubt on the justice of the conviction”).²¹²

The following year in *Commonwealth v. Clark*, the SJC established materiality bookends but still did not define “material.”²¹³ Clark was convicted of rape, unarmed robbery, and kidnapping in 1974.²¹⁴ The 23-year-old victim was returning to her apartment building when “an assailant grabbed her from behind, . . . struck her, and demanded her money.”²¹⁵ After forcing the victim to her apartment, the assailant took

²⁰⁶ See §§ 1, 2, 3(d).

²⁰⁷ *Wade*, 5 N.E.3d at 830.

²⁰⁸ *Id.* at 826.

²⁰⁹ *Id.* at 826, 824.

²¹⁰ *Id.* at 827.

²¹¹ *Commonwealth v. Vieira*, 519 N.E.2d 1320, 1323 (Mass. 1988) (quoting *Commonwealth v. Gregory*, 517 N.E.2d 454, 457–58 (Mass. 1988), quoting *United States v. Agurs*, 427 U.S. 97, 112 (1976)) (some internal quotation omitted).

²¹² *Commonwealth v. Cowels*, 24 N.E.3d 1034, 1043 (Mass. 2015) (quotation omitted).

²¹³ 34 N.E.3d 1, 15–17 (Mass. 2015).

²¹⁴ *Id.* at 4–5.

²¹⁵ *Id.* at 8.

a knife from a kitchen drawer, dragged the victim into the bedroom, and “brutally raped her.”²¹⁶

The victim at some point managed to wrest the knife away from the assailant and struck him in the shoulder.²¹⁷ The blade broke off during the struggle.²¹⁸ The assailant ordered the victim to accompany him to a restaurant and raped her again before she was able to break away and seek help at a fire station.²¹⁹ Police recovered the handle of the knife and a pair of men’s socks from the victim’s apartment.²²⁰ Two days later, the victim selected Clark’s photo from a photographic array, as did the restaurant’s proprietor and four firefighters.²²¹ When Clark was arrested, police did not see “any puncture marks or knife wounds on his back.”²²²

In 2013, Clark moved under 278A for DNA testing of the knife handle and discovery concerning, *inter alia*, the men’s socks police recovered.²²³ On appeal from the denial of this motion, the SJC—without defining “material”—reasoned that testing the knife handle “would be material” because it could produce a DNA profile that did not match Clark, elaborating that where the assailant held the knife and the victim believed she had stabbed him in the shoulder, “skin cells and blood may be present.”²²⁴ But the court affirmed the denial of discovery concerning the men’s socks, agreeing with the motion judge that the defendant failed to demonstrate that the socks would provide evidence material to the perpetrator’s identification where “the record did not indicate that the socks once belonged to, or were ever touched by, the victim’s assailant.”²²⁵

There was now a materiality spectrum, with the knife used in the assault at one end and the random socks at the other.²²⁶ Two years later, the SJC provided another example of immateriality, affirming the denial of DNA testing on cigarette butts collected from a public road

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.* at 8–9.

²²⁰ *Id.* at 9.

²²¹ *Id.*

²²² *Id.*

²²³ *Id.* at 5.

²²⁴ *Id.* at 13, 15.

²²⁵ *Id.* at 16–17.

²²⁶ As discussed *infra* in Section IV.B.2, the radical reality is that even testing the knife could not yield materially exculpatory results on *Clark*’s facts.

151 to 239 feet from the embankment where a murder victim's body was found because it was not known "when the cigarette butts might have been deposited on the road" and the defendant never mentioned anyone smoking at the scene in statements to police or trial testimony.²²⁷

These cases began to flesh out a 278A materiality standard uncoupled from familiar outcome-oriented post-conviction standards, but they never defined "material" or wrestled with the practical implications of fast-tracking testing that could not speak to the perpetrator's identity strongly enough to impugn the conviction.

This approach did not go entirely unquestioned. In 2016, a trial-level judge observed that the appellate decisions construing 278A did not "comprehensively engage with the meaning of the term 'material'" but surmised that the cases "indicate that this statutory term should be read . . . to mean something akin to evidentiary relevance."²²⁸ The judge, presciently anticipating the SJC's decision six years later in *Commonwealth v. Ramos*,²²⁹ cited a definition of "material" from *Black's Law Dictionary* meaning "[h]aving some logical connection with the consequential facts."²³⁰ But while "relevant" and "material" are sometimes used interchangeably, alternative definitions of "material" denote information that is "significant" or "essential" such that it "would affect a person's decision-making."²³¹

The proposed testing in *Commonwealth v. Powell* exposes the conceptual daylight between "relevant" and "material." On the day of his murder, the victim in *Powell* had used a baseball bat to vandalize the house where Powell reputedly sold cocaine, but he had also been seen chasing two unidentified males with the bat.²³² The victim was found shot to death in his apartment, lying in a pool of blood near a silver baseball bat.²³³ There was blood throughout the apartment, including on the bat.²³⁴ After his 2005 murder conviction was affirmed and his first new-trial motion denied, Powell moved under 278A to test

²²⁷ *Commonwealth v. Moffat*, 85 N.E.3d 38, 46 (Mass. 2017).

²²⁸ *Commonwealth v. Powell*, No. 2002-11199, 2016 WL 6645967, at *2, *3 (Mass. Super. Ct. Nov. 10, 2016) (citing, *inter alia*, *Clark*, 34 N.E.3d at 11–17).

²²⁹ 198 N.E.3d 437, 443 (Mass. 2022). See *infra* Section II.C.2.

²³⁰ *Powell*, 2016 WL 6645967, at *3.

²³¹ *Material*, BLACK'S LAW DICTIONARY (6th Pocket ed. 2016).

²³² *Powell*, 2016 WL 6645967, at *1.

²³³ *Id.*

²³⁴ *Id.*

the blood-stained bat for third-party DNA that would show that someone the victim had assaulted earlier had a motive to kill him.²³⁵

The motion judge authorized the testing with “misgivings,” explaining that while the appellate decisions instructed against applying a new-trial standard when performing 278A-testing “gatekeeping,” “it seems curious to authorize the costly testing of DNA evidence that would do little to cast real doubt on a defendant’s conviction.”²³⁶ The judge observed that this was not the “paradigmatic case” where the items “to be tested (e.g., a rape kit, murder weapon, etc.) could directly call into question the actual identity of the perpetrator” because even if testing connected blood on the bat to a specific third party, it would still only suggest a possible motive, which “will typically not warrant a new trial, particularly where, as here, the [prosecution] presented a substantial amount of other evidence at trial tying the defendant to the crime.”²³⁷ In other words, the source of the blood on the bat might be *relevant* in that it could have some logical connection to consequential facts, but it would not be independently significant and, so, it would not be *material*.

2. Conflating Materiality and Relevance

Consistent with the *Powell* judge’s analysis, the SJC’s recent 278A jurisprudence confirms its merger of relevance and materiality. In *Commonwealth v. Steadman*,²³⁸ the court suggested that any non-zero relevance score justifies testing. The murder victim in *Steadman* was found in his tent at a ‘homeless encampment’ with forty-six stab

²³⁵ *Id.* at *1–2.

²³⁶ *Id.* at *4.

²³⁷ *Id.* at *4. Powell later reported that this testing was inconclusive but that preliminary (and, as he described it at the time, “inadmissible”) probabilistic genotyping screening indicated that neither he nor the victim was the source of male blood on the bat. Post Conviction Motion for Funds for Complete Cybergeneics TrueAllele Analysis Pursuant to Mass.R.Crim.P 30(c)(4) and G.L. Chapter 278A, § 13 at 2–3, *Commonwealth v. Powell*, No. 0284CR11199 (Mass. Super. Ct. Oct. 1, 2021), File Ref. No. 175. The court allowed funds for the complete probabilistic genotyping report, Docket Information for *Commonwealth v. Powell* at 10/13/21, No. 0284CR11199 (Mass. Super. Ct., Suffolk Cnty.) and, in 2023, Powell indicated his intent to pursue a new-trial motion based on the 278A results, Defendant John Powell’s Post Conviction Motion for Discovery and Order for Release of Ballistics Evidence to Expert for Inspection at 1, No. 0284CR11199 (Mass. Super. Ct. May 30, 2023), File Ref. No. 176. As of early March 2026, the electronic docket did not reflect the filing of this new-trial motion.

²³⁸ 183 N.E.3d 412 (Mass. 2022).

wounds.²³⁹ After he was convicted, Steadman sought to test items collected from the campsite and from an individual there whom the defense proffered as a third-party culprit at trial (and who had been hospitalized for injuries sustained after intervening between Steadman and the victim in an incident *before* the murder).²⁴⁰ Steadman sought DNA testing on clothing and a blood trail leading away from the scene as well as footwear-impression and blood-spatter analyses.²⁴¹

In reversing the dismissal of Steadman's 278A motion, the SJC reasoned that the testing could materially "link someone other than [Steadman] to the murder."²⁴² Although the SJC asserted that the prosecution's arguments against materiality asked it "to improperly weigh the trial evidence against the probable—rather than the possible—results of the testing,"²⁴³ it was the SJC that failed to reckon with the significance of the *possible* presence of third-party DNA given the previous fight and the fact that multiple people had access to the site. The court downplayed the significance of "an independent explanation for the presence of some individuals' blood at the campsite" as going to the weight of the evidence, reasoning that "the semipublic nature of the campsite does not render the requested testing *meaningless*."²⁴⁴

But the court did not wrestle with the inutility of testing that, while maybe not totally "meaningless," is not truly meaningful. The factual context from trial is not a mere proxy for the strength of the case or the probability of the movant obtaining their desired results; it is the backdrop against which new evidence must be assessed.²⁴⁵ So, while the SJC opined that the "undisputed" fact that the alleged third-party culprit bled at the campsite as a result of the earlier incident "does not erase *all possibility*" that testing could be "material to the killer's identity,"²⁴⁶ it did not explain how it could sufficiently undermine the factual picture from trial to be helpful. The court sought to justify its

²³⁹ *Id.* at 418, 426.

²⁴⁰ *Id.* at 419–20, 427.

²⁴¹ Amended Brief of Defendant-Appellant at 11–12, *Commonwealth v. Steadman*, 183 N.E.3d 412, No. SJC-11553 (Mass. 2022) (filed Dec. 29, 2020).

²⁴² *Steadman*, 183 N.E.3d at 418, 430.

²⁴³ *Id.* at 430.

²⁴⁴ *Id.* (emphasis added).

²⁴⁵ *See, e.g.,* Garrett, *supra* note 30, at 1646 (explaining that "all evidence must be evaluated in light of other evidence and the elements of the crime" and suggesting that "any claim of innocence must be evaluated based on . . . how the particular evidence of innocence interacts with the evidence of guilt").

²⁴⁶ *Steadman*, 183 N.E.3d at 430 (emphasis added).

conclusion by contrasting the “low” threshold burden with the “more robust evidentiary analysis” facing 278A movants later at the “hearing stage,”²⁴⁷ but, as discussed in Section IV.B.2 below, materiality can generally be determined at the outset in a thought experiment based on the trial record and the movant’s best-case-scenario results without a time- and resource-consuming evidentiary hearing.²⁴⁸

The SJC provided its most explicit commentary on 278A materiality in 2022 in *Commonwealth v. Ramos* when it equated the alternative meanings of “materiality,” eliding “logical connection” and “significant.”²⁴⁹ The majority asserted that definitions of materiality in other legal contexts and dictionaries “are, by and large, variations on the same theme.”²⁵⁰ It purported to synthesize various formulations in legal and nonlegal dictionaries and hornbooks—including “substantial,” “consequential,” “of real importance or great consequence,” and “significant” as well as the starkly outlying “having some logical connection to consequential facts”—to conclude that “the phrase ‘evidence that is material’” means “evidence that is of significance ‘to the moving party’s identification as the perpetrator.’”²⁵¹ Having apparently hewed its interpretation of the materiality standard to the more demanding end of the semantic spectrum it had surveyed, the court explained that movants must therefore demonstrate “that the requested analysis has the potential to result in evidence that is of significance” to their identification as the perpetrator.²⁵²

Despite having thus defined “material” as “significant,” the court immediately watered the standard back down to “relevant,” observing that testing would be material if, “in combination with other evidence presented at trial, [it] would tend to support” the defendant’s

²⁴⁷ *Id.* at 428, 431–32.

²⁴⁸ As it happened, the defendant’s 278A motion in *Steadman* did not proceed to an evidentiary hearing because the parties instead reached an agreement on testing. Parties’ Joint Motion for Order Regarding Post-Conviction Forensic Testing at 1–2, *Commonwealth v. Steadman*, No. 0982CR00741 (Mass. Super. Ct. Nov. 22, 2023), File Ref. No. 140. Although that joint motion was allowed by agreement, *Steadman*’s electronic docket does not disclose testing results, and it does not appear that a new-trial motion has been filed based on post-conviction testing as of early March 2026. Docket Information for *Commonwealth v. Steadman*, No. 0982CR00741 (Mass. Super. Ct., Norfolk Cnty.).

²⁴⁹ 198 N.E.3d 437, 443 (Mass. 2022).

²⁵⁰ *Id.*

²⁵¹ *Id.* (quoting § 7(b)(4) and various dictionaries and a treatise).

²⁵² *Id.* at 444.

position.²⁵³ To state the obvious, that which merely “tends to support” a position is not *ipso facto* “significant.”

Given that disconnect, it is perhaps understandable that *Ramos* was the SJC’s first non-unanimous 278A decision. The dissenting justice asserted that, even construing the statute generously to address wrongful convictions, the materiality requirement “is not toothless.”²⁵⁴ She wrote that effectuating the legislative intent of increasing access to post-conviction testing “does not mean that every motion . . . should be allowed without scrutiny, abandoning common sense.”²⁵⁵

Ramos involved a deadly fight in a homeless shelter parking lot.²⁵⁶ There was conflicting testimony about the incident, with one witness reporting that Ramos made ten to fifteen “punching gestures toward the victim” as the victim, who had nothing in his hands and did not throw any punches, “attempted to block the blows.”²⁵⁷ A different witness testified that Ramos and the victim went from “yelling and screaming” to pushing and “bumping chest[s]” before the victim pulled out a screwdriver and swung it at Ramos, who backed away to avoid being hit but then pulled out what “looked like a ‘sheetrock edger’ and ‘pok[ed]’ at the victim two or three times.”²⁵⁸ When shelter staff and a police officer came outside, they saw Ramos and the victim “coming apart”; Ramos had a knife in his hand and the victim, who was staggering and bleeding from his torso, fell down.²⁵⁹

Surveillance cameras captured some, but not all, of the interaction between Ramos and the victim. The footage showed Ramos in the parking lot “following several paces behind the victim, until [Ramos] suddenly sped up and contacted the victim from behind with an outstretched arm” before they moved off camera.²⁶⁰ When they came back into view, “the victim circled [Ramos], took off his jersey, and fell to the ground, while [Ramos] walked back toward the shelter.”²⁶¹ Police recovered a knife and a screwdriver that both tested positive for occult blood but from which no fingerprints were detected; the knife blade contained the victim’s DNA but there was insufficient blood to

²⁵³ *Id.* at 445.

²⁵⁴ *Id.* at 449 (Cypher, J., dissenting).

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 440–41.

²⁵⁷ *Id.* at 441.

²⁵⁸ *Id.* (textual alterations in original).

²⁵⁹ *Id.* at 440.

²⁶⁰ *Id.* at 441.

²⁶¹ *Id.*

test the screwdriver further.²⁶² The defense theory at trial was self-defense.²⁶³ While Ramos's direct appeal of his murder conviction was pending, he moved under 278A for DNA testing of the victim's fingernail clippings.²⁶⁴

The majority concluded that testing the victim's fingernails for traces of Ramos's DNA could yield evidence material to Ramos's self-defense claim because the presence of Ramos's DNA on the victim's fingernail clippings would "tend[] to prove that the victim had grabbed or struck" him and could help to "contradict" the prosecution's "contention that [Ramos] suddenly ambushed the victim from behind and stabbed him in the back, without any prior fist fight" and would "counter" testimony that the victim did not "throw any punches."²⁶⁵

But, as Justice Cypher's dissent persuasively explained, testing showing Ramos's DNA on the victim's fingernail clippings "would not lend any weight to his claim of self-defense"²⁶⁶:

[I]t would not show whether the victim was the first aggressor, or whether [Ramos] acted reasonably by using deadly force in self-defense. . . . The presence of [Ramos]'s DNA could not show when the victim contacted [Ramos] or in what manner he did so. It could not show whether he touched [Ramos] in self-defense or, for example, threw a punch in a fist fight. It could not corroborate whether the contact came before, during, or after the altercation on the video footage. . . . [T]he presence of [Ramos]'s DNA under the victim's fingernails . . . at most could demonstrate that the victim touched [Ramos] at some point in time before his death.²⁶⁷

That is, even Ramos's best-case-scenario testing result (his DNA underneath the victim's fingernails) had no potential to move the needle on a new trial.

By allowing testing like this that merely 'tends to support' a movant's position but cannot possibly justify a new trial, the SJC's watered-down materiality jurisprudence induces more demand for unproductive testing, needlessly consuming limited resources and contributing further to procedural accretion.²⁶⁸

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 445.

²⁶⁶ *Id.* at 451 (Cypher, J., dissenting).

²⁶⁷ *Id.* at 451–52, 454 (notation omitted).

²⁶⁸ After the SJC reversed the denial of testing in *Ramos*, testing was ordered. Docket Information for Commonwealth v. Ramos at 05/12/2023, No. 1579CR00321 (Mass. Super. Ct., Hampden Cnty.), File Ref. No. 88. On February 28, 2025, the parties filed a Joint Status

D. Statutory Testing Success Stories

Of course, the SJC's setting of the materiality bar too low will not preclude meritorious testing, and a handful of Massachusetts defendants have successfully utilized statutory testing to vacate their convictions. The significance of the testing in these cases generally tracks the pre-278A trends. That is, as discussed below, testing in the cases of Gary Cifizzari, Ronnie Qualls, and Don Earl Johnson was independently exculpatory, and testing in the cases of Arthur Davis, Elvio Marrero, Thomas Rosa, and Angel Perez negated a key aspect of the prosecution's case. At the same time, although co-defendants Freddie Clay and James Watson obtained new trials after 278A testing, the testing itself (predictably) did not play a significant role in reversing their convictions because it could not independently exculpate or negate key physical evidence.

1. Independently Exculpatory Evidence

Testing directly indicates that the defendant did not commit the crime where it reveals either a third party's biological material where the perpetrator probably deposited it or shows a victim's biological material on a third party where it could have transferred during the perpetrator's criminal activity.²⁶⁹

a. Gary Cifizzari

Gary Cifizzari was convicted of the brutal 1979 murder of his 75-year-old great aunt.²⁷⁰ Investigators were unable to determine the blood group of extracts from the victim's fingernails, clothes, and other

Report Regarding Exhaustive DNA Testing in which they reported that the testing had been completed, they had received the final report from Bode Technology, and "[n]o further testing is required, nor is any further action required with respect to Mr. Ramos's motion for DNA testing pursuant to G.L. c. 278A." Joint Status Report Regarding Exhaustive DNA Testing, Commonwealth v. Ramos, No. 1579CR00321 (Mass. Super. Ct. Feb. 28, 2025), File Ref. No. 95. Several weeks later, Ramos filed a new-trial motion alleging ineffective assistance of trial counsel for failing to introduce the victim's prior convictions to show that he was the first aggressor in the altercation. Defendant's Motion for New Trial and Incorporated Memorandum of Law at 1, 12, Commonwealth v. Ramos, No. 1579CR00321 (Mass. Super. Ct. Mar. 19, 2025), File Ref. No. 96. The motion does not mention the 278A testing of the victim's fingernails. That motion was denied on July 29, 2025. Memorandum of Decision and Order on Defendant's Motion for New Trial, Commonwealth v. Ramos, No. 1579CR00321 (Mass. Super. Ct. July 29, 2025), File Ref. No. 102. Consistent with the scope of the defendant's underlying motion, the motion judge's decision also does not mention the 278A DNA testing. *Id.*

²⁶⁹ Crimes with multiple perpetrators may present somewhat different considerations.

²⁷⁰ Otterbourg, *Gary Cifizzari*, *supra* note 101.

crime-scene evidence and—although she had been penetrated with a mop handle—did not detect sperm on swabs from her body.²⁷¹ Police questioned Michael Giroux, whose family lived next to the victim and whom the victim had previously accused of stealing from her home.²⁷² Giroux's self-reported whereabouts on the night the victim was killed put him near where the victim's pocketbook and keys were found, but police did not pursue him as a suspect despite inconsistencies in his statements.²⁷³

Police focused on Cifizzari after his brother—who had mental health issues and a history of petty, nonviolent crimes—implicated him in one of a series of self-incriminating statements in which he was described as “incoherent” and ready to “agree to anything asked of him.”²⁷⁴ Although the brother was deemed incompetent after being charged with murder (and recanted his confession²⁷⁵), and Cifizzari denied being in the area when the victim died, Cifizzari was convicted in 1984 based largely on forensic odontologist testimony that his teeth were the source of the victim's bitemarks.²⁷⁶

In 2003 and again in 2006, Cifizzari requested DNA testing of evidence from the victim's house, but his requests were denied.²⁷⁷ In 2017, private counsel working with the New England Innocence Project filed a 278A discovery motion that led to a 2018 agreement to test evidence (including a bathrobe, nightgown, and fingernail scrapings) that excluded Cifizzari.²⁷⁸ From sperm on the victim's nightgown that had not been detected in 1984, police in 2019 matched DNA to Giroux, who had since died.²⁷⁹ Based on the DNA results and the unreliability of the since-debunked bitemark testimony, Cifizzari was granted a new trial in 2019.²⁸⁰ Although the prosecution was not immediately persuaded by the DNA evidence (asserting the possibility

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ He was ultimately convicted of second-degree murder and died in prison. *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.*; see also Order Regarding Post-Conviction Forensic Testing, Commonwealth v. Cifizzari, No. 8385CR04051 (Mass. Super. Ct. Aug. 28, 2018), File Ref. No. 53.

²⁷⁹ Otterbourg, *Gary Cifizzari*, *supra* note 101.

²⁸⁰ *Id.*; Cifizzari v. Town of Milford, 721 F. Supp. 3d 120, 123 (D. Mass. 2024).

of multiple perpetrators),²⁸¹ it ultimately assented to the new trial and nolle prossed the charges.²⁸²

b. Don Earl Johnson

In 1994, Don Earl Johnson pled guilty to indecent assault and battery (on indictments that had charged aggravated rape) and assault and battery.²⁸³ The victim, who was intoxicated at the time, had said that two men were involved, and there was equivocal information in the record about whether she believed that her attacker ejaculated.²⁸⁴ Specifically, as the new-trial-motion judge observed, the victim at one point alleged that she had told a man in a bar that she wanted cocaine and went to a parking lot around the corner with him and that he and a bigger man pushed her.²⁸⁵ The victim said that the man from the bar inserted his penis into her mouth and then into her vagina; she said that he did not ejaculate in her mouth but that she was “not sure, no” whether he ejaculated in her vagina.²⁸⁶ In an alley where the victim’s checkbook was found, an officer observed two spots on the ground that he believed to be semen.²⁸⁷ Johnson reportedly admitted to offering to sell the victim “rock” and leaving the bar with her.²⁸⁸

But where the victim said that the man (who evidently matched Johnson’s description) had vaginally raped her with his penis, 278A testing that excluded Johnson from sperm fractions on the victim’s underwear and vaginal swabs was independently exculpatory in that it directly indicated that Johnson had not committed the crime. Based on this testing, Johnson was permitted to withdraw his 1994 guilty pleas

²⁸¹ See Commonwealth’s Memorandum in Opposition to Defendant’s Motion for Stay of Execution of Sentence at 3, *Commonwealth v. Cifizzari*, 8385CR04051 (Mass. Super. Ct. July 2, 2019), File Ref. No. 74 (referring to “the possibility” that Giroux murdered the victim “along with the Cifizzari brothers, particularly in light of the evidence that suggests the murder could not have been accomplished by one individual alone”); Otterbourg, *Gary Cifizzari*, *supra* note 101.

²⁸² Commonwealth’s Assent to Defendant’s Motion for New Trial, *Commonwealth v. Cifizzari*, No. 8385CR04051 (Mass. Super. Ct. Dec. 10, 2019), File Ref. No. 88; Commonwealth’s Nolle Prosequi, *Commonwealth v. Cifizzari*, No. 8385CR04051 (Mass. Super. Ct. Dec. 10, 2019), File Ref. No. 89.

²⁸³ Memorandum of Decision and Order on Defendant’s Motion for New Trial at 1–2, 7–8, *Commonwealth v. Johnson*, No. 9485CR00366 (Mass. Super. Ct. Oct. 21, 2022), File Ref. No. 50 [hereinafter *Johnson M&O*]; Possley, *Don Johnson*, *supra* note 101; see also *Commonwealth v. Johnson*, 129 N.E.3d 841, 841–43 (Mass. 2019).

²⁸⁴ *Johnson*, 129 N.E.3d at 843; *Johnson M&O*, *supra* note 283, at 3–5.

²⁸⁵ *Johnson M&O*, *supra* note 283, at 5.

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 3–4; *Johnson*, 129 N.E.3d at 843;.

²⁸⁸ *Johnson M&O*, *supra* note 283, at 4.

in 2022.²⁸⁹ The victim had died in the interim, and the prosecution nolle prossed the charges.²⁹⁰

c. Ronnie Qualls

In 1998, Ronnie Qualls was convicted of the 1992 shooting murder of brothers Roosevelt “Tony” Price and Ronald “Dallas” Price.²⁹¹ Before the murders, Tony, Dallas, Qualls, and James Earl “Junior” Williams were at the same bar.²⁹² A fight ensued, and Qualls ultimately swung a knife at Tony and caught him beneath his armpit.²⁹³ Qualls and Williams drove off in Williams’s car.²⁹⁴

Shortly thereafter, Tony was in the backseat of a parked Geo Tracker about to be driven to the hospital.²⁹⁵ Tony sat behind the driver, and Dallas sat next to him in the rear passenger-side seat.²⁹⁶ Dallas spotted Williams’s car, and one of his friends saw Williams at the wheel and Qualls in a passenger seat.²⁹⁷ A different friend went towards Williams’s car and reportedly encountered Qualls.²⁹⁸ When he told Qualls to “let it go,” Qualls reportedly “pulled out” a revolver and threatened to “blow” his “head off if he did not get out of the way.”²⁹⁹ Qualls then reportedly fired multiple shots into the Tracker’s rear window before coming to the passenger side and firing into the backseat through the open window.³⁰⁰

Both Price brothers were shot; Dallas died within minutes of arriving at the hospital, but Tony was able to tell police that Junior Williams had shot him (and to describe Williams’s car and whereabouts) before he died.³⁰¹ Dallas had been shot from close range.³⁰²

²⁸⁹ *Id.* at 7–8; Possley, *Don Johnson*, *supra* note 101.

²⁹⁰ Johnson M&O, *supra* note 283, at 7 n.3; Nolle Prosequi, Commonwealth v. Johnson, No. 9485CR00366 (Mass. Super. Ct. Dec. 6, 2022), File Ref. No. 51.

²⁹¹ Commonwealth v. Qualls, 800 N.E.2d 299, 301–02 (Mass. 2003); *see also* Possley, *Ronnie Qualls*, *supra* note 101.

²⁹² *Qualls*, 800 N.E.2d at 302.

²⁹³ *Id.* at 302, 306–08.

²⁹⁴ *Id.* at 302.

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Id.* at 302–03.

³⁰² *Id.* at 303.

Police detained Williams within hours of the shooting and seized his gray sweatshirt, which had “several very small” type B blood stains (the blood type of Williams, Tony, and Dallas) on the front and back.³⁰³ The stains did not penetrate through the sweatshirt and “were consistent with someone getting a paper cut and then wiping a hand on a shirt.”³⁰⁴ The Price brothers were wearing leather coats that “could prevent blood splatter or spurting from a gunshot wound,” and there was no blood on the Tracker’s rear window.³⁰⁵ Type A blood (Qualls’s blood type) was found on the front passenger seat of Williams’s car.³⁰⁶ The prosecution argued at trial that the type B blood on Williams’s sweatshirt could have come from the bar fight or that it was Williams’s own blood.³⁰⁷

Williams gave three separate statements to the police that varied in some details and increasingly inculpated Qualls.³⁰⁸ His third statement indicated that Qualls had wiped blood off his hands and a revolver while in Williams’s car after the shootings.³⁰⁹ Williams would later plead guilty to being an accessory to manslaughter.³¹⁰

In 2014, Qualls moved unsuccessfully for appointment of 278A counsel.³¹¹ Then, in 2019, the Boston College Innocence Program and the prosecution jointly requested DNA testing of Williams’s sweatshirt.³¹² The testing revealed Tony’s blood on Williams’s sweatshirt.³¹³

³⁰³ *Id.*

³⁰⁴ *Id.* An analyst reportedly described the stains as consistent with “coming into contact with someone who had a small amount of blood on their clothing.” Possley, *Ronnie Qualls*, *supra* note 101.

³⁰⁵ *Qualls*, 800 N.E.2d at 303; *see also* Joint Motion for Post-Conviction Forensic Testing at 2, Commonwealth v. Qualls, No. 9284CR11850 (Mass. Super. Ct. Jan. 15, 2019) File Ref. No. 91 (explaining that Tony’s “thick leather jacket” had obscured the “non-fatal wound in the armpit area” that he had sustained earlier that night).

³⁰⁶ *Qualls*, 800 N.E.2d at 303.

³⁰⁷ Defendant’s Supplemental Memorandum of Law in Support of Joint Motion for Postconviction Relief Filed January 8, 2020, at 19–20, Commonwealth v. Qualls, No. 9284CR11850 (Mass. Super. Ct. Jan. 29, 2020), File Ref. No. 104 [hereinafter Qualls Def. Supp. Mem.].

³⁰⁸ Memorandum of Decision and Order on Joint Motion for Postconviction Relief (Paper 100) at 12, Commonwealth v. Qualls, No. 9284CR11850 (Mass. Super. Ct. Feb 2, 2020), File Ref. No. 113 [hereinafter Qualls M&O].

³⁰⁹ Joint Motion for Post-Conviction Forensic Testing, *supra* note 305, at 3; Possley, *Ronnie Qualls*, *supra* note 101.

³¹⁰ Qualls M&O, *supra* note 308, at 13–14.

³¹¹ Docket Information for Commonwealth v. Qualls, No. 9284CR11850, at 04/07/2014 and 04/15/2014; Possley, *Ronnie Qualls*, *supra* note 101.

³¹² Joint Motion for Post-Conviction Forensic Testing, *supra* note 305, at 4–5.

³¹³ Qualls M&O, *supra* note 308, at 3.

Qualls obtained a new trial.³¹⁴ However, the motion judge—having observed that “all three of the witnesses who identified ‘the trigger man’ from photo arrays . . . identified Qualls and no one else”—disagreed with the parties’ contention that the case against Qualls was weak “given the nature of the eyewitness identifications.”³¹⁵ The judge embraced the SJC’s analysis on direct appeal that, despite the lack of documentary or tangible evidence and notwithstanding Tony’s dying declaration, the jury could have accepted the “identification and other evidence . . . to convict.”³¹⁶ The judge stated that the DNA did not “establish innocence.”³¹⁷

Still, the judge was “persuaded by the newly-reported DNA evidence” that Qualls was entitled to a new trial where the jury was told repeatedly that there was only one shooter.³¹⁸ Although Tony’s dying declaration, Williams’s car’s presence moments before the shooting, and Williams’s “seeming to hover” around the area afterwards had already supported the theory that Williams was the shooter, the judge acknowledged the previous absence of supporting “empirical evidence.”³¹⁹ She concluded that “the presence of Tony’s blood on Williams’ sweatshirt could suggest . . . that Williams was much closer to the victims at the time of the shooting than other trial evidence had demonstrated” and that this “would probably have been a real factor in the jury’s deliberations.”³²⁰ The prosecution later nolle prossed Qualls’s murder and firearms-related charges.³²¹

The defense characterized the DNA evidence as the “missing puzzle piece,”³²² and it *did* finally reveal whose blood was on Williams’s sweatshirt. But the testing did not explain how the blood got on the sweatshirt or, crucially, definitively establish who shot the Price brothers, especially given the earlier fight at the bar, the limited blood spatter from the shooting, and the possibility that the blood transferred

³¹⁴ *Id.* at 1.

³¹⁵ *Id.* at 10, 16–17.

³¹⁶ *Id.* at 17 (quoting *Commonwealth v. Qualls*, 800 N.E.2d 299, 305 (Mass. 2003)).

³¹⁷ *Qualls M&O*, *supra* note 308, at 18.

³¹⁸ *Id.* at 18–19.

³¹⁹ *Id.* at 17–19.

³²⁰ *Id.* at 18–19.

³²¹ Docket Information for *Commonwealth v. Qualls* at 09/01/2020, No. 9284CR11850 (Mass. Super. Ct., Suffolk Cnty.). The conviction arising from Tony’s stabbing was not nolle prossed. *Id.*

³²² *Qualls Def. Supp. Mem.*, *supra* note 307, at 24.

to the sweatshirt from contact with something else.³²³ This 278A testing was productive not because it conclusively established Qualls's innocence but because the presence of Tony's blood on Williams's sweatshirt justified a new trial in the specific factual context of the case.

2. Evidence That Eliminates the Defendant's Physical/Forensic Connection to the Crime

While the presence of a shooting victim's blood on a third party's sweatshirt may affirmatively indicate that the third party was present and proximate when the trigger was pulled, 278A testing has also successfully been used to sever the prosecution's forensic connection between the defendant and the crime without directly affirmatively exculpating the defendant.

a. Arthur Davis

In 1986, Arthur Davis was convicted of the 1985 murder of a 23-year-old woman.³²⁴ Her nude body was discovered in a pool of blood in an outdoor stairwell.³²⁵ She had been beaten, including with a "rodlike instrument," and a gash in her forehead could have been caused by crushing against the curbstone.³²⁶

Davis, who was 19 years old and had a history of psychiatric treatment, was reportedly known to frequent the area of the murder and ultimately called police to say that he had been there with "Mark Neal" when they saw a suspicious man and fled.³²⁷ Davis later said he was in the area with John Barnes and saw a suspicious individual (whose description matched his own appearance) carrying a bag and a rod.³²⁸ After Barnes denied being with Davis, Davis gave a Mirandized statement in which he admitted to lying about Barnes and, assertedly telling the truth, acknowledged seeing "a naked, bloody woman" and "accurately diagrammed the scene."³²⁹ When Davis was asked why he, as a licensed practical nurse, had not tried to help the victim, he

³²³ See Possley, *Ronnie Qualls*, *supra* note 101 ("The stains did not penetrate through the sweatshirt and were consistent with someone getting a paper cut and then wiping their hand on their shirt, or coming into contact with someone who had a small amount of blood on their clothing, according to the analyst.") (emphasis added).

³²⁴ *Commonwealth v. Davis*, 531 N.E.2d 577, 578 (Mass. 1988); *Commonwealth v. Davis*, No. MICR85720, 2018 WL 7246976, at *1 (Mass. Super. Ct. Nov. 23, 2018).

³²⁵ *Davis*, 531 N.E.2d at 578.

³²⁶ *Id.*

³²⁷ *Id.* at 578–80.

³²⁸ *Id.* at 579 & n.2.

³²⁹ *Id.* at 579.

changed his story again and reported seeing “a man trying to have sex with a body” who threatened him not to say anything, interrupting the officer to say: “You won’t find my fingerprints on her” and “The hair won’t match mine.”³³⁰

A police lieutenant who knew that Davis had the nickname “Skipper,” asked about what both Davis and “Skipper” had done; Davis replied, sometimes using the first person and sometimes referring to “Skipper,” reportedly saying that “Skipper” had taken off the victim’s clothes and hit her with his bag and “I hit her head against the cement.”³³¹ He said that the victim’s underpants had been white and bloody and that police might find “Skipper’s” fingerprints on her shoulders and neck.³³² Before speaking to police, Davis reportedly told a coworker that police had asked him about a murder and, when asked if he had anything to do with it, laughed, saying “no one would ever know.”³³³

The prosecution asked the jury to infer that apparent blood on a billiard cue, lavender bag, comforter, and pants recovered from Davis’s home—some of which matched the victim’s Group A blood group—was the victim’s blood, proffering the pool cue as a possible murder weapon.³³⁴ The prosecution further sought to link Davis, who was a smoker and Group A secretor, to the crime scene through Group A-secretor saliva on a bloody cigarette butt found beside the victim.³³⁵ The jacket and sneakers Davis was wearing at arrest and his hands and arms all tested positive for the presence of occult blood.³³⁶

Davis testified that he had seen a “jumpy” man who made him “nervous” at the scene but that the blood on his arms was from “roughhousing” with friends weeks earlier and that the blood on the

³³⁰ *Id.* Davis reportedly repeated the latter statement about the “hair,” saying it three times total. *Id.* Barnes would later testify that Davis told him: “I killed her for a red and white polkadotted dress”; Barnes also testified that, like Davis’s initial description of items carried by the “suspicious individual,” Davis himself carried a maroon bag and a purple duffle bag. *Id.* at 579 n.4.

³³¹ *Id.* at 580–81.

³³² *Id.*

³³³ *Id.* at 579 n.5; *Commonwealth v. Davis*, No. MICR85720, 2018 WL 7246976, at *3 (Mass. Super. Ct. Nov. 23, 2018). There was evidence that this conversation took place *prior* to the discovery of the victim’s body and that Davis also said that he knew the victim, but Davis testified that he spoke to the coworker *after* local newspapers reported the murder. *Davis*, 2018 WL 7246976, at *3.

³³⁴ *Davis*, 2018 WL 7246976, at *2.

³³⁵ *Id.*

³³⁶ *Id.* at *3.

comforter could have been from when his sister's water broke.³³⁷ He denied making some of the statements reported by police, attributing others to fatigue after extended interrogation.³³⁸

In 2012, Davis moved for 278A testing.³³⁹ The 2013 testing excluded the victim as a possible contributor to DNA profiles obtained from the pants, comforter, and pool cue; Davis's jacket and the lavender bag both tested negative for the presence of blood.³⁴⁰ Davis was excluded as a possible contributor to the male DNA profile on the cigarette butt near the victim's body.³⁴¹

In 2018, Davis obtained a new trial based on "credible evidence that the victim's DNA profile was not detected on any of the blood samples tested" from items in Davis's home and his belongings and that Davis's DNA "was excluded from the physical evidence recovered from the scene."³⁴² The judge acknowledged that the physical evidence "was not the only inculpatory evidence presented" in light of statements attributed to Davis but explained that this "newly discovered DNA evidence appears to eliminate the entirety of the physical evidence the prosecution relied upon in linking Davis to the victim and the crime scene."³⁴³ Davis later pled guilty to manslaughter and a time-served sentence.³⁴⁴

b. Elvio Marrero

Elvio Marrero was convicted of the 1994 stabbing murder of one of his regular drug customers.³⁴⁵ The victim, who was found bound and gagged in his apartment, was stabbed and beaten with a wooden board.³⁴⁶ From the apartment, police collected blood samples and a knife with human tissue matching the victim.³⁴⁷

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ *Id.* at *1.

³⁴⁰ *Id.* at *1, *4. The new-trial-motion judge acknowledged that the passage of "nearly thirty years" since the trial expert's testing "might cast doubt on the result" and noted that "[n]o DNA profile was obtained from the previously tested side of the lavender bag due to an insufficient amount of DNA." *Id.* at *5, *4.

³⁴¹ *Id.* at *4.

³⁴² *Id.* at *1, *5.

³⁴³ *Id.* at *5–6.

³⁴⁴ Docket Information for Commonwealth v. Davis at 12/20/2022, No. 8581CR00720 (Mass. Super. Ct., Middlesex Cnty.).

³⁴⁵ Commonwealth v. Marrero, 224 N.E.3d 478, 479 (Mass. 2024).

³⁴⁶ *Id.* at 479–80.

³⁴⁷ *Id.* at 480 & n.2.

Marrero was known to carry a knife, had a history of violence, and had been staying at the victim's apartment.³⁴⁸ Witnesses last saw the victim alone in his apartment with Marrero.³⁴⁹ A witness who saw Marrero around the time of the murder said "he had dried blood on his hands and arms."³⁵⁰ Multiple witnesses testified that Marrero was wearing his customary black leather jacket around the time of the murder.³⁵¹ One witness testified that Marrero confessed to killing someone with a knife and planned to fly to the Dominican Republic.³⁵²

Some of the blood testing from the victim's apartment was inconclusive because Marrero and the victim shared certain blood subtypes, but Marrero was "excluded as a source" for most of the samples collected.³⁵³ Fingerprints from a folding chair and a trash/laundry area in the apartment matched Marrero, but a fingerprint from the overturned television whose cord had been used to bind the victim matched a prosecution witness who also sold drugs to—and was owed money by—the victim and had a key to his apartment.³⁵⁴

When Marrero was arrested upon his return from the Dominican Republic nearly four months later, police seized his leather jacket.³⁵⁵ Investigators detected blood on the jacket's inner sleeves and back but could not determine its source.³⁵⁶ At trial, the prosecution connected the blood on the jacket with the testimony that Marrero had dried blood on his hands and arms.³⁵⁷ The defense presented both third-party culprit and alibi theories.³⁵⁸

In 2011, the year before 278A's enactment, Marrero was denied DNA testing.³⁵⁹ However, in 2017 Marrero obtained DNA testing under 278A that excluded him as the source of the blood collected from the victim's apartment and excluded the victim as the source of

³⁴⁸ *Id.* at 479.

³⁴⁹ *Id.* at 479–80.

³⁵⁰ *Id.* at 480. This witness, however, had initially denied seeing Marrero at the critical points before and after the victim's apparent time of death and admitted to drug use and having called the police on Marrero "multiple times." *Id.* at 484.

³⁵¹ *Id.* at 479–80.

³⁵² *Id.* at 480.

³⁵³ *Id.* at 480–81.

³⁵⁴ *Id.* at 481.

³⁵⁵ *Id.* at 481 & n.3.

³⁵⁶ *Id.* at 481.

³⁵⁷ *Id.*

³⁵⁸ *Id.*

³⁵⁹ *Id.* at 482.

blood on his jacket.³⁶⁰ He moved for a new trial, but the motion was denied.³⁶¹

On appeal, however, the SJC reversed the denial of the new-trial motion, vacating the conviction and remanding the case for a new trial.³⁶² The court reasoned that the bloodstains on the jacket were “the most vital piece of physical evidence” in a case where “no other physical evidence directly implicated the defendant” and that the prosecution had used the “bloodstained jacket to buttress” the highly “inculpatory eyewitness testimony” of a credibility-challenged witness.³⁶³ The DNA testing therefore removed the only physical evidence that really connected Marrero to the crime and negated “key” physical evidence used to corroborate critical testimony from an “embattled” witness.³⁶⁴

The court acknowledged that “much of the evidence” against Marrero remained and that the prosecution “may have been able to carry its burden” even without the bloodstained jacket but reiterated that its “inquiry is not whether the verdict may have been different, but whether the evidence in question probably served as a real factor in the jury’s deliberations,” cautioning: “We do not opine on the defendant’s guilt or innocence.”³⁶⁵

c. Thomas Rosa, Jr.

After his first trial ended in a mistrial and convictions from his second trial were reversed on appeal, Thomas Rosa, Jr., was convicted of first-degree murder and kidnapping (but acquitted of aggravated rape) in March 1993 based on evidence that included two eyewitnesses who identified him as the man they had seen with the victim “the last time she was seen alive.”³⁶⁶ One of these witnesses had seen Rosa on several prior occasions because he lived upstairs from her cousin.³⁶⁷ As reported by the decision affirming these convictions in 1996,

³⁶⁰ *Id.* at 482 n.7.

³⁶¹ *Id.* at 482.

³⁶² *Id.* at 479, 485.

³⁶³ *Id.* at 483–84.

³⁶⁴ *Id.* at 483–84 & n.9 (quotation omitted).

³⁶⁵ *Id.* at 484–85 (quotation omitted). As of early March 2026, Marrero’s case was back in an active pre-trial posture. Docket Information for Commonwealth v. Marrero, No. 9478CR00097 (Mass. Super. Ct., Franklin Cnty.).

³⁶⁶ Commonwealth v. Rosa, 661 N.E.2d 56, 57–59 & n.2 (Mass. 1996); Memorandum and Order on Defendant’s Motion for a New Trial at 6, Commonwealth v. Rosa, No. 8684CR57352 (Mass. Super. Ct. Sep. 6, 2023), File Ref. No. 112 [hereinafter Rosa M&O].

³⁶⁷ *Rosa*, 661 N.E.2d at 59.

“[p]hysical evidence corroborated the identification of the two witnesses,” including blood typing of blood samples and a brown coat found at Rosa’s apartment that witnesses identified as the coat the abductor had been wearing.³⁶⁸ Furthermore, the prosecution had apparently claimed at trial that “biological material” on the coat was consistent with the victim’s blood type and that fluid in her vaginal cavity was consistent with Rosa’s blood type.³⁶⁹

In 2001, Rosa obtained DNA testing of the brown coat and the victim’s rectal and vaginal swabs that excluded the victim as a contributor to DNA on the brown jacket but could not exclude Rosa as a source of DNA on the vaginal swabs (the rectal swabs produced no results).³⁷⁰ Rosa’s new-trial motion based on this evidence and a subsequent federal habeas petition were both unsuccessful.³⁷¹

Then, in 2015, Rosa obtained further testing under 278A.³⁷² Based on new testing of the victim’s vaginal, oral, and cervical samples, a new defense expert concluded that, contrary to the 2001 analysis, Rosa was excluded as a potential contributor to the major profile from the vaginal swab.³⁷³ An expert retained by the prosecution opined that there was more than one male contributor to the DNA in the samples taken from the victim and that, while Rosa was excluded from cervical samples taken from the victim, he was not excluded from oral or vaginal samples.³⁷⁴ Despite reserving the right to challenge the methodology of the expert it had retained, the prosecution assented to Rosa’s new-trial motion (which also challenged aspects of the prosecution’s closing argument related to the eyewitness testimony).³⁷⁵

³⁶⁸ *Id.*

³⁶⁹ Rosa M&O, *supra* note 366, at 1, 4.

³⁷⁰ *Id.* at 6. Where the SJC’s 1996 decision in the case noted that the brown coat had been lost after the second trial and so not introduced in evidence at the third trial in 1993, Rosa, 661 N.E.2d at 59 n.5, it would appear that either the coat resurfaced years later or a sample of the relevant material remained available to be tested.

³⁷¹ Rosa M&O, *supra* note 366, at 7; *see also* Rosa v. Maloney, 197 F. App’x 10, 11 (1st Cir. 2006).

³⁷² Docket Information for Commonwealth v. Rosa at 12/24/2014, 3/31/2015 & 5/19/2015, No. 8684CR57353 (Mass. Super. Ct., Suffolk Cnty.), File Ref. Nos. 93, 95.

³⁷³ Rosa M&O, *supra* note 366, at 7.

³⁷⁴ *Id.*

³⁷⁵ *Id.* at 9, 11. A Single Justice of the SJC considering Rosa’s motion for a stay of execution of sentence during the COVID pandemic and pending the outcome of the new-trial motion observed, among other things, that “[t]he existence of at least two male DNA profiles also could lend support to the third-party culprit defense the defendant sought to introduce, which pointed in part to another individual who closely resembled the defendant, and who had prior convictions for having committed aggravated rapes in the area.”

The motion judge granted a new trial, reasoning in part (based on *Cameron* and *Cowels*³⁷⁶) that the DNA testing excluding the victim from the brown coat and Rosa from some of the victim's swabs eliminated evidence that linked Rosa to the crime and could contradict and undermine the testimony of key prosecution witnesses.³⁷⁷ More than two years later, the prosecution nolle prossed the charges against Rosa, stating that "[a]fter a comprehensive reinvestigation of the case," it had "concluded that it no longer can move forward with this prosecution."³⁷⁸ The prosecution pointed specifically to lost evidence, "additional forensic testing," and substantial changes in "case law and jury instructions."³⁷⁹

d. Angel Perez

In September 2019, a jury convicted Angel Perez of aggravated rape of a child based on allegations that he digitally penetrated his 12-year-old daughter.³⁸⁰ The alleged victim testified that Perez scratched her while trying to penetrate her vagina.³⁸¹

A medical resident conducting a sexual assault examination later on the day of the alleged incident observed an abrasion or scratch on the

Commonwealth v. Rosa, No. SJ-2020-0637, 2020 WL 6154334, at *4 (Mass. Oct. 14, 2020) (Gaziano, J.). Indeed, by the time of Rosa's third trial, the defense had identified a third party with a criminal record "with some history of violence" who lived in the neighborhood at the time of the killing and apparently so closely resembled Rosa that Rosa's previous attorney had once mistaken the other man for Rosa on a jail visit. *Rosa*, 661 N.E.2d at 59–60. The exclusion of the look-alike evidence from the third trial was affirmed on appeal. *Id.* at 59–61.

³⁷⁶ See *supra* note 176 and accompanying text.

³⁷⁷ *Rosa* M&O, *supra* note 366, at 10–11, 13.

³⁷⁸ Nolle Prosequi, Commonwealth v. Rosa, No. 8684CR57351 (Mass. Super. Ct. Mar. 18, 2026), File Ref. No. 169.

³⁷⁹ *Id.* Rosa has now been added to the Massachusetts Registry. Ken Otterbourg, *Thomas Rosa Jr.*, THE NAT'L REGISTRY OF EXONERATIONS (Apr. 3, 2026), <https://n2t.net/ark:/88112/x26b3x> (on file with the Oregon Law Review). The Registry's summary contains additional detailed factual information beyond that reflected in the case summary presented here.

³⁸⁰ Docket Information for Commonwealth v. Perez, No. 1781CR00519 (Mass. Super. Ct., Middlesex Cnty.); Finding, Decision, and Order Allowing Defendant's Motion for a New Trial at 1, 2, Commonwealth v. Perez, No. 1781CR00519 (Mass. Super. Ct. Nov. 21, 2024), File Ref. No. 141 [hereinafter Perez F&O]. At the same time, the jury found Perez not guilty of indecent assault and battery despite testimony that he had lifted up the alleged victim's shirt and "used his tongue to flick her nipple." Perez F&O at 1, 6.

³⁸¹ Perez F&O, *supra* note 380, at 1, 3–4.

alleged victim's labia minora.³⁸² As part of the examination, the alleged victim's vaginal, external genital, and perianal areas were swabbed.³⁸³ The external genital swab contained both female DNA and a far smaller amount of male DNA (at a ratio of 70,000 to 1).³⁸⁴ Based on internal Massachusetts State Police Crime Laboratory protocols at the time, the forensic scientist who conducted this testing did not perform further analysis to develop a profile for the small amount of male DNA, stating that she would have been unable to do so.³⁸⁵ No male DNA was detected on the vaginal or perianal swabs.³⁸⁶ Pre-trial testing did not detect sperm cells or seminal fluid on the vaginal swab, external genital swab, or perianal swab.³⁸⁷ There was also evidence that the external genital swab tested positive for amylase, which the jury was later told can be found in both saliva and fecal material.³⁸⁸

The trial prosecutor told the jury in her opening statement that they would hear that there was "amylase, a protein contained in saliva" on the external genital swabs and that there was testing "done on that saliva" but that there was "so little male DNA that they could not develop a profile at all."³⁸⁹ As the trial judge (who also presided over Perez's new-trial motion) saw it, the prosecutor essentially told the jury that "saliva from an identified [sic] male had been found" on the alleged victim's external genital swabs.³⁹⁰

³⁸² *Id.* at 1, 5. A prosecution witness testified at trial that the abrasion "could have been caused by any rough object, including clothing, an object, or a fingernail, and that it could have been self-inflicted." *Id.* at 9.

³⁸³ *Id.* at 5.

³⁸⁴ *Id.*; Commonwealth's Response to Defendant's "Motion for Post Conviction Forensic Testing Pursuant to G.L. c. 278A" at 4, 6, Commonwealth v. Perez, No. 1781CR00519 (Mass. Super. Ct. Sep. 29, 2023), File Ref. No. 115 [hereinafter Commonwealth's Perez Response].

³⁸⁵ Perez F&O, *supra* note 380, at 10. In his decision on the new-trial motion, the judge found that Perez's trial counsel provided ineffective assistance of counsel on multiple grounds, including failing to consult with a DNA expert and, "as a result[,] failing to learn that it might [have] be[en] possible to do Y-STR testing using the very small amount of male DNA found on [the alleged victim]'s genital swabs" to develop a DNA profile. *Id.* at 13–16.

³⁸⁶ Commonwealth's Perez Response, *supra* note 384, at 6.

³⁸⁷ *Id.*; Perez F&O, *supra* note 380, at 10.

³⁸⁸ Perez F&O, *supra* note 380, at 10.

³⁸⁹ *Id.* at 9 (quotation omitted).

³⁹⁰ *Id.* at 1, 9–10. It appears that the reference to an "identified male" should have been to an "unidentified male."

Perez testified at trial and denied ever touching the alleged victim inappropriately.³⁹¹ His theory at trial was that the alleged victim had fabricated the assault.³⁹² Although the trial prosecutor evidently acknowledged in closing argument that the lack of a profile for the male DNA meant that the jury did not know whose DNA was on the swab, the prosecution also acknowledged in the post-conviction litigation that the pre-trial forensic testing “served” to “corroborate” the alleged victim’s “account” in a case that “stood or fell on the victim’s credibility.”³⁹³

In November 2023, prior to the resolution of Perez’s direct appeal, the trial judge allowed Perez’s 278A motion for post-conviction Y-STR DNA testing of the external genital swab to determine whether a profile of the male DNA could be developed.³⁹⁴ That testing “definitively excluded” Perez as a potential contributor to the male DNA detected on the external genital swabs.³⁹⁵

Based in part on the new DNA analysis that excluded Perez as a source of the male DNA on the external genital swab—which would have removed the DNA evidence from the jury’s consideration entirely—the trial judge granted Perez a new trial.³⁹⁶ The judge opined that “[t]he jury could well have reached a different result on the rape charge if they had learned” that Perez was excluded as a possible contributor to the male DNA.³⁹⁷ From the judge’s perspective, “[t]he jury likely inferred that what the prosecutor suggested during her opening statement was supported by the evidence: that the material gathered in [the alleged victim]’s external genital swab contained trace amounts of saliva, and that the small amount of male DNA found in that sample came from that saliva” and that “this corroborated the testimony that Perez used his finger to penetrate [the alleged victim]’s genital opening.”³⁹⁸

³⁹¹ *Id.* at 6.

³⁹² Defendant’s Reply to Commonwealth’s Response to his Motion for Post Conviction Forensic Testing at 2–3, *Commonwealth v. Perez*, No. 1781CR00519 (Mass. Super. Ct. Oct. 26, 2023), File Ref. No. 117 [hereinafter *Perez Reply*].

³⁹³ Commonwealth’s *Perez Response*, *supra* note 384, at 8–9.

³⁹⁴ Memorandum and Order Allowing Defendant’s Motion for Forensic Testing Pursuant to G.L. c. 278A at 1, 4, *Commonwealth v. Perez*, No. 1781CR00519 (Mass. Super. Ct. Nov. 28, 2023), File Ref. No. 120; Docket Information for *Commonwealth v. Perez*, No. 1781CR00519 (Mass. Super. Ct., Middlesex Cnty.).

³⁹⁵ *Perez F&O*, *supra* note 380, at 9, 12–13.

³⁹⁶ *Id.* at 2.

³⁹⁷ *Id.* at 16.

³⁹⁸ *Id.* at 18.

Whether the jury focused on the saliva as the judge theorized or not, the presence of male DNA on the alleged victim's external genitals provided forensic support for the conclusion that the crime had, in fact, occurred. Where, as the prosecution observed, "no view of the evidence suggested that someone other than the defendant got into bed with the victim and put his finger in her vagina,"³⁹⁹ the evidence of male DNA likely tended to confirm in the minds of the jurors not only that *someone* had touched the alleged victim but that it was *Perez specifically* who had done so. Indeed, in seeking the testing, Perez argued that the purpose of the unknown male DNA evidence at trial was "to suggest that the male DNA present on the external swab might belong to Mr. Perez, and that it was consistent with the complaining witness's account that he touched her there."⁴⁰⁰ While the male DNA had never *definitively* forensically linked Perez to the crime,⁴⁰¹ 278A testing that eliminated that evidence nonetheless negated key forensic support for the alleged victim's testimony and, by extension, the conviction.

After the case was placed back in a pre-trial posture, the prosecution ultimately filed a nolle prosequi in the case, explaining that the incident was "alleged to have occurred several years ago" and that the alleged victim, who "had to endure the trauma of testifying in an earlier trial also several years ago," "has decided that she does not want to testify again."⁴⁰² The prosecution stated that it would not "force her to testify" and that "[w]ithout her cooperation and testimony" it was "not able to proceed with prosecution."⁴⁰³

3. Immaterial Testing

While there have been at least seven 278A success stories, post-conviction forensic testing does not always move the needle, even in exonerations. The Conviction Integrity Unit reinvestigating Frederick Clay's conviction for the shooting murder of a cab driver in 1979 tested

³⁹⁹ Commonwealth's Perez Response, *supra* note 384, at 10.

⁴⁰⁰ Perez Reply, *supra* note 392, at 6.

⁴⁰¹ At various points in the litigation, witnesses for both parties acknowledged the possibility that the DNA on the swab could have been deposited indirectly, having been transferred from some intermediary object or item that the source of the DNA had touched. Perez F&O, *supra* note 380, at 5–6; Commonwealth's Perez Response, *supra* note 384, at 9–10 & n.7.

⁴⁰² Nolle Prosequi, Commonwealth v. Perez, No. 1781CR00519 (Mass. Super. Ct. Nov. 24, 2025), File Ref. No. 156.

⁴⁰³ *Id.*

the victim's pockets for DNA, but the testing revealed only the victim's DNA.⁴⁰⁴ Clay's co-defendant, James Watson, sought additional 278A testing, contending (based on trial testimony that the assailants held the victim's arms and searched his pockets) that additional testing of the jacket sleeves and pants pockets could yield material perpetrator-identity evidence.⁴⁰⁵ His new-trial motion alleged that testing of the victim's clothing excluded both him and Clay "in five of the eight areas tested (the other three were inconclusive)" while including DNA from two to three others (aside from the victim).⁴⁰⁶

The prosecution later assented to a new trial without conceding Watson's innocence, pointing explicitly to counsel's ineffectiveness relating to eyewitness identifications.⁴⁰⁷ While the DNA testing was mentioned in Watson's new-trial motion, the gravamen of that motion was Watson's former girlfriend's recantation of the confession she attributed to him and eyewitness issues, including the use of hypnosis.⁴⁰⁸

In Clay and Watson's case, where there is no guarantee that touch DNA will be recovered,⁴⁰⁹ and given possible chain-of-custody issues since 1979, DNA testing the victim's pockets and sleeves offered little *ex ante* exculpatory potential. In these circumstances, neither the absence of the defendants' DNA nor the presence of third-party DNA would have been powerfully exculpatory. But, as the stray allele in *Lessieur* shows,⁴¹⁰ post-conviction revelation of unaccounted-for DNA can still muddy the waters.

⁴⁰⁴ Possley & Otterbourg, *Federick Clay*, *supra* note 101.

⁴⁰⁵ Defendant's Reply Memo, to the Prosecution's Opposition, to His Motion for Supplemental Forensic Testing at 4–5, *Commonwealth v. Watson*, No. 8084CR28954 (Mass. Super. Ct. Dec. 22, 2017), File Ref. No. 67.

⁴⁰⁶ Defendant's Motion for New Trial at 3, *Commonwealth v. Watson*, No. 8084CR28954 (Mass. Super. Ct. Apr. 3, 2020), File Ref. No. 76.

⁴⁰⁷ Commonwealth's Response to Defendant's Motion for New Trial, *Commonwealth v. Watson*, No. 8084CR28954 (Mass. Super. Ct. Nov. 4, 2020), File Ref. No. 104.

⁴⁰⁸ Defendant's Motion for New Trial, *supra* note 406, at 3, 7–10.

⁴⁰⁹ See *Persistence of Touch DNA for Analysis*, NAT'L INST. OF JUST. (June 5, 2023), <https://nij.ojp.gov/topics/articles/persistence-touch-dna-analysis> [https://perma.cc/ZH6W-MCSS] (summarizing "issues" related to "touch DNA," including low quantities of "useable DNA," "high variability in the amount [of touch DNA] that one person leaves, and high variability in the amount left from person to person," and "DNA degradation" "over time").

⁴¹⁰ See *supra* notes 9–22 and accompanying text.

III INDUCED DEMAND, PROCEDURAL ACCRETION, AND REVELATION BIAS

A materiality threshold that does not require real exculpatory potential invites defendants to spin the testing wheel and see what they get. In this way, the low materiality threshold induces demand for testing. But the end result is often simply procedural accretion: adversarial jockeying that yields no real benefit to the defendant or the cause of justice. While we might suspect that it would be easy to shut down litigation based on immaterial testing, the discovery of new forensic data can cause a cognitive distortion. Boosted by this “revelation bias,” immaterial evidence can muddy the factual picture from trial enough to generate more litigation. But, once it is scrutinized dispassionately, such immaterial new evidence is unlikely to justify a new trial. Instead, the litigation seeking, and based on, this immaterial testing will have simply further clogged the post-conviction highway.

A. Induced Demand

The ease with which defendants can pursue 278A testing, including particularly the low materiality standard, invites defendants to try their luck in both obtaining testing and what it might reveal.

Arguably, Massachusetts’s relatively late adoption of statutory testing could have resulted in “latent demand,”⁴¹¹ but the statute is not necessarily inducing demand from new *defendants* so much as inducing *new testing requests*, including from defendants who have already pursued testing.⁴¹² And some 278A movants filed, and continue to file,

⁴¹¹ See Schneider, *supra* note 25 (explaining that “latent demand for new road capacity . . . causes a flood of new drivers to immediately take to the freeway once the new lanes are open, quickly clogging them up again” but that where “these individuals were presumably already living nearby” and had previously “taken alternative modes of transport, traveled at off hours, or not made those trips at all,” “latent demand can be difficult to disentangle from generated demand”).

⁴¹² See, e.g., Barclay v. Early, No. 17-P-372, 104 N.E.3d 683, 2018 WL 3014474 at *1 (Mass. App. Ct. June 18, 2018) (discussing DNA testing “that has already been rejected repeatedly in postconviction rulings” where murder defendant first sought DNA testing of boxer shorts under Mass. R. Crim. P. 30, then sought 278A testing of duct tape used to bind victim, and then sued civilly for testing of the boxer shorts). Likewise, the defendant seeking 278A testing in *Commonwealth v. Bocchino*, No. 14-P-771, 30 N.E.3d 133, 2015 WL 2035463, at *1 (Mass. App. Ct. May 4, 2015), appears to have previously sought DNA testing. Docket Information for *Commonwealth v. Bocchino* at 12/1/2008, No. 0472CR00077 (Mass. Super. Ct., Barnstable Cnty.), File Ref. No. 100.

other post-conviction motions as well.⁴¹³ Because defendants can pursue different forms of post-conviction relief in parallel, 278A movants are akin to aspiring concertgoers who participate in a pre-sale as well as the general-public ticket release.⁴¹⁴ The existence of statutory testing may induce defendants waiting in the general new-trial queue to try their luck in the statutory testing line as well.⁴¹⁵ The statute may beckon as a fast lane to testing, but for most movants so far, it has led only to procedural accretion that further erodes finality in criminal cases.⁴¹⁶

B. Procedural Accretion

Accretion is a process by which layers gradually accumulate.⁴¹⁷ If one imagines a primordial legal system in which the trial of an informal accusation is the only procedural event, then the addition of various pre-trial and post-trial rights and procedures can be seen as an accretive process, adding new layers of legal maneuvering between the commencement of a case and its conclusion. Familiar criminal law processes like grand jury presentments/indictments and suppression motions add pre-trial layers.⁴¹⁸ New-trial motions add a layer of post-trial procedure that postpones the case's ultimate resolution.⁴¹⁹

⁴¹³ See, e.g., *Commonwealth v. Duguay*, 213 N.E.3d 581, 597–98 & 598 n.22 (Mass. 2023) (referring to arguments that defendant seeking new trial based on 278A testing previously raised in *pro se* new-trial motion and federal habeas action).

⁴¹⁴ Cf., e.g., Anne Steele & Alyssa Lukpat, *Taylor Swift Cancels 'Eras Tour' Ticket Sale to General Public After Ticketmaster Glitches*, WALL ST. J. (Nov. 17, 2022, at 15:52 ET), <https://www.wsj.com/articles/ticketmaster-backlash-mounts-after-taylor-swift-ticket-debacle-11668699888> (on file with the Oregon Law Review).

⁴¹⁵ See Jacobi & Carroll, *supra* note 40, at 264 (“A costless chance at freedom through post-conviction DNA testing is attractive to the innocent and the guilty alike.”).

⁴¹⁶ See *Commonwealth v. Grace*, 491 N.E.2d 246, 249 (Mass. 1986) (describing the state’s “interest in finality” as “an interest in ending litigation once a case has been fully and fairly tried”); *Gutierrez v. Saenz*, 606 U.S. 305, 335 (2025) (Thomas, J., dissenting) (“In enacting [its post-conviction testing statute], Texas has voluntarily chosen to prioritize claims of actual innocence at a significant cost to its interest in finality.”).

⁴¹⁷ *Accretion*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/accretion> [<https://perma.cc/F5A5-TPLU>] (last visited Dec. 29, 2025).

⁴¹⁸ See FED. R. CRIM. P. 6–7, 12.

⁴¹⁹ “New trials in criminal cases were not granted in England until the end of the 17th century. And even then, they were available only in misdemeanor cases The American Colonies adopted the English common law on new trials. . . . Over time, many States enacted statutes providing for new trials in all types of cases.” *Herrera v. Collins*, 506 U.S. 390, 408–10 (1993); cf. *Strickland v. Washington*, 466 U.S. 668, 690 (1984) (“The availability of intrusive post-trial inquiry . . . would encourage the proliferation of . . . challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial . . .”).

Likewise, the right of direct appeal to an intermediate appellate court introduces a fresh layer, and discretionary appeals to a court of last resort add yet another.⁴²⁰ These additional layers might also have sublayers. For example, suppression motions may feature both briefing and evidentiary hearings.⁴²¹ Likewise, direct appeals can include both briefing and oral argument.⁴²²

Each new layer of procedure increases a case's lifespan and direct and indirect costs. For example, the grand jury requires increased time from witnesses, prosecutors, court staff, and everyday citizens conscripted into doing their civic duty.⁴²³ Suppression motions require time from prosecutors and defense attorneys, witnesses at evidentiary hearings, and judges and court staff. New procedures can also cause ripple effects. For example, where litigants can appeal pre-trial rulings, new pre-trial procedures can increase the frequency, length, and complexity of appeals.

Procedural accretion is not necessarily a bad thing. Additional processes can yield increased accuracy,⁴²⁴ inspiring confidence that innocent people are not "being condemned"⁴²⁵ and preserving valued norms and ideals. So, while procedural accretion has costs, it also has benefits.

But more procedure is not always better, and "due process does not require that every conceivable step be taken, at whatever cost, to

⁴²⁰ See *Herrera*, 506 U.S. at 412 (observing that "there was no right of appeal until 1907" in England).

⁴²¹ See FED. R. CRIM. P. 12(c)(1).

⁴²² See, e.g., FED. R. APP. P. 28, 34.

⁴²³ See FED. R. CRIM. P. 6(a)(1).

⁴²⁴ See *Commonwealth v. Amirault*, 677 N.E.2d 652, 665 (Mass. 1997) (explaining that "imposition" of the "awesome and devastating" "condemnation and punishments of the criminal justice system" is "hedged" with "presumptions and procedural safeguards that heavily weight the risk of error in favor of the accused and are designed to assure both the appearance and the reality that the accused had every fair opportunity of defense"); see also *Addington v. Texas*, 441 U.S. 418, 425 (1979) (citing, *inter alia*, *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)) ("[W]e must be mindful that the function of legal process is to minimize the risk of erroneous decisions.").

⁴²⁵ *In re Winship*, 397 U.S. 358, 364 (1970). In this regard, the number of new trials granted subsequent to a motion for statutory testing is not a perfect measure of procedural efficiency because testing that confirms guilt will not lead to a new trial but will still inspire confidence in the system. See FORENSICS TTA PROGRAM, *supra* note 36 ("While successful exonerations to correct injustice are notable program outcomes, the careful review, consideration, and closing of cases subjected to postconviction DNA testing that do not ultimately demonstrate innocence also work to advance the public's interest that justice has been fairly applied.").

eliminate the possibility of convicting an innocent person.”⁴²⁶ “A criminal defendant proved guilty after a fair trial does not have the same liberty interests as a free man,” and, after a “valid conviction,” the state “has more flexibility in deciding what procedures are needed in the context of postconviction relief.”⁴²⁷ Even in Massachusetts, where a “motion for a new trial . . . can be made at any time even decades after the initial adjudication,” the SJC has recognized that “we cannot rid ourselves by process alone of the possibility of error and of grave and lingering injustice” and, “once the process has run its course—through pretrial motions, trial, posttrial motions and one or two levels of appeal—the community’s interest in finality comes to the fore.”⁴²⁸

Like other procedural layers, post-conviction testing has both sublayers (motions for testing, briefing and evidentiary hearings thereon, appeals of testing orders/denials)⁴²⁹ and ripple effects (new-trial motions based on testing results and appeals therefrom)⁴³⁰ that prolong criminal cases.

Post-conviction litigation is not new or unique to testing, but the statutory availability of a fast lane for testing adds more procedural layers to a given case. In fact, pursuit of post-conviction testing is sometimes not just a new chapter in the litigation but a sequel.⁴³¹ For example, Damion Linton was convicted of strangling his wife in 2006, and both his conviction and the denial of his 2008 new-trial motion

⁴²⁶ *Addington*, 441 U.S. at 430 (quotation and textual alteration omitted); *see also* *Herrera v. Collins*, 506 U.S. 390, 399 (1993) (“[W]e have . . . observed that due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person. To conclude otherwise would all but paralyze our system for enforcement of the criminal law.”) (quotation, textual alteration, and citation omitted).

⁴²⁷ *Dist. Att’y’s Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 68–69 (2009) (quotation omitted).

⁴²⁸ *Amirault*, 677 N.E.2d at 665.

⁴²⁹ *See, e.g.*, MASS. GEN. LAWS ch. 278A, §§ 3–7, 18.

⁴³⁰ In fairness, some 278A appeals arose from the statute’s newness. *See, e.g.*, *Commonwealth v. Johnson*, 129 N.E.3d 841, 842 (Mass. 2019) (interpreting 278A’s standing requirement).

⁴³¹ *See* *Gutierrez v. Saenz*, 606 U.S. 305, 337 (2025) (Thomas, J., dissenting) (characterizing defendant’s post-conviction claim of actual innocence as a “multiyear front of litigation”); *id.* at 338, 342 (Alito, J., dissenting) (referring to “decades-long litigation campaign” of defendant seeking DNA testing and explaining that “[t]he end of direct appellate review was just the start of a new litigation saga spanning 23 years (and counting)”).

were affirmed in 2010.⁴³² Linton filed his first 278A motion in December 2014.⁴³³ The trial court denied testing in 2016, and the SJC affirmed that denial in 2019.⁴³⁴ In 2022, Linton again moved for 278A testing.⁴³⁵ He supplemented that motion in 2024, and it was only recently denied in September 2025.⁴³⁶ Post-conviction testing litigation in this case has thus spanned more than a decade (so far).

When used effectively, post-conviction testing increases adjudicational accuracy and promotes confidence in the system. Where it helps to identify and remedy wrongful convictions, this testing serves the highest ideals in the legal system.⁴³⁷ It may also help identify the true perpetrator of a serious crime.⁴³⁸ But lowering the bar to permit immaterial testing increases post-conviction litigation without a corresponding boost in accuracy or faith in the system. In addition, the expectation that criminal defense lawyers will try virtually every arrow in their quiver⁴³⁹ means that procedural maneuvering over post-

⁴³² *Commonwealth v. Linton*, 132 N.E.3d 93, 96 (Mass. 2019); *Commonwealth v. Linton*, 924 N.E.2d 722, 727 (Mass. 2010); Docket Information for *Commonwealth v. Linton* at 03/04/2008, No. 0581CR00340 (Mass. Super. Ct., Middlesex Cnty.), File Ref. No. 95.1.

⁴³³ Docket Information for *Commonwealth v. Linton*, *supra* note 432, at 12/24/2014, File Ref. No. 109.

⁴³⁴ *Linton*, 132 N.E.3d at 99, 108.

⁴³⁵ Docket Information for *Commonwealth v. Linton*, *supra* note 432, at 07/8/2022, File Ref. No. 162.

⁴³⁶ Memorandum of Decision and Order on Defendant's Motions for Discovery and for Forensic Testing at 1, *Commonwealth v. Linton*, No. 0581CR00340 (Mass. Super. Ct. Sep. 16, 2025), File Ref. No. 188.

⁴³⁷ *Cf. In re Winship*, 397 U.S. 358, 363 (1970) (praising the "reasonable-doubt standard" as a "prime instrument for reducing the risk of convictions resting on factual error" that provides "concrete substance for the presumption of innocence—that bedrock axiomatic and elementary principle") (quotation omitted).

⁴³⁸ See James R. Acker, *Reliable Justice: Advancing the Twofold Aim of Establishing Guilt and Protecting the Innocent*, 82 ALB. L. REV. 719, 736 (2019) ("[T]he failure to identify the true perpetrators of crimes also is profoundly distressing. New crimes committed and victims claimed by the actual offenders who benefit from erroneous and failed identifications compound the toll of human suffering and the original miscarriage of justice associated with the arrest and conviction of innocents.").

⁴³⁹ *Cf. People v. Clark*, 463 N.Y.S.2d 601, 604 (App. Div. 1983) (rejecting ineffective assistance claim where record suggested "counsel vigorously employed the limited tools at his disposal to defend the case") (memorandum decision); *Harris v. Towers*, 405 F. Supp. 497, 506 (D. Del. 1974) ("A lawyer's performance at any given stage can only be evaluated in the context of his overall performance, the case which he had undertaken to try, and the tools at his disposal.").

conviction testing can become as routinized as certain aspects of trial practice.⁴⁴⁰

The frequency with which defendants pursue post-conviction testing prior to resolution of their direct appeals⁴⁴¹ demonstrates the potential for post-conviction testing to become routine. Some defendants reach for this arrow shortly after verdict.⁴⁴² Every case must be evaluated on its own,⁴⁴³ but requesting post-conviction testing before an appellate court has reviewed claims of trial error is a bit like starting the second installment in an anthology before the ending of the first book has been finalized.⁴⁴⁴

C. Revelation Bias

Post-conviction testing can alter a criminal case's factual universe by augmenting it with new facts or revising the preexisting factual

⁴⁴⁰ See, e.g., *Commonwealth v. Frias*, 712 N.E.2d 1178, 1180 (Mass. App. Ct. 1999) (referring to “routine motions for required findings of not guilty”); *Ray v. Commonwealth*, 611 S.W.3d 250, 265 (Ky. 2020) (“Motions for directed verdict are essentially *pro forma* in criminal trials . . .”).

⁴⁴¹ See, e.g., *Commonwealth v. Camuti*, 226 N.E.3d 868, 873–74 (Mass. 2024) (direct appeal not yet docketed when 278A motion filed); *Commonwealth v. Duke*, 186 N.E.3d 1223, 1230 (Mass. 2022) (appeal stayed to enable defendant to seek 278A testing); *Commonwealth v. Rodrigues Da Silva*, No. 24-P-1445, 270 N.E.3d 1034, 2025 WL 3182696, at *1 n.3 (Mass. App. Ct. 2025), review denied, 273 N.E.3d 859 (Mass. 2026) (“The defendant’s direct appeal has been stayed pending disposition of this appeal [from the denial of post-conviction discovery motions pursuant to G.L. ch. 278A and Mass. R. Crim. P. 30 (c)(4)] and the conclusion of any other posttrial motions.”); see also, e.g., *Commonwealth v. Steadman*, 183 N.E.3d 412, 421 (Mass. 2022); *Commonwealth v. Andrade*, 174 N.E.3d 281, 291, 307 (Mass. 2021); *Commonwealth v. Moffat*, 85 N.E.3d 38, 41 (Mass. 2017); *Commonwealth v. Coutu*, 42 N.E.3d 622, 626–27 (Mass. App. Ct. 2015).

⁴⁴² *Duke*—whose case is discussed *infra* in Section III.D.1—filed a 278A discovery motion less than 20 months after conviction. Docket Information for *Commonwealth v. Duke* at 04/18/2017, No. 1379CR00118 (Mass. Super. Ct., Hampden Cnty.), File Ref. Nos. 141–42. *Ramos*—whose case is discussed in Section II.C.2, *supra*—filed a 278A motion on May 19, 2020, roughly 25 months after his conviction on April 12, 2018. Docket Information for *Commonwealth v. Ramos*, *supra* note 268, at 05/19/2020, File Ref. No. 78; see also *Commonwealth v. Ramos*, 198 N.E.3d 437, 441 (Mass. 2022) (“While his direct appeal was pending, the defendant filed a c. 278A motion in the Superior Court . . .”).

⁴⁴³ For example, first-degree murder defendants in Massachusetts obtain at least a nominally more favorable standard of appellate review of unpreserved claims of error raised in new-trial motions filed *before* resolution of their direct appeal. See, e.g., *Commonwealth v. Smith*, 951 N.E.2d 322, 326–27 & 327 n.2 (Mass. 2011); see also *Commonwealth v. Torres*, 14 N.E.3d 253, 258 (Mass. 2014); *Commonwealth v. Amirault*, 677 N.E.2d 652, 670 n.20 (Mass. 1997).

⁴⁴⁴ This is not to say that it is *always* unproductive or even inefficient for a non-first-degree-murder defendant in Massachusetts to pursue 278A testing prior to the conclusion of their direct appeal. That approach was successful for Angel Perez. See *supra* Section II.D.2.d.

picture. Guilt-confirming testing, while perhaps galling, is not the most powerful contributor to procedural accretion because (though there are exceptions⁴⁴⁵) the incriminating results are likely to be consistent with the existing factual picture from trial and so may forestall additional litigation.⁴⁴⁶ In contrast, the indeterminacy of testing that adds new facts that neither inculcate nor exculpate will practically inevitably prompt further litigation. As *Lessieur* demonstrates,⁴⁴⁷ even where the best-case-scenario results would not impugn the conviction, the revelation of new evidence can still serve as a basis for a new-trial motion. Testing that at best promises “relevant,” as opposed to “material,” evidence⁴⁴⁸ drives such unproductive litigation.

Post-conviction testing promises to reveal new information after the dust has settled on the evidence-sifting enterprise of trial.⁴⁴⁹ Other procedures can expand the factual universe (e.g., evidentiary hearings on suppression motions), but post-conviction testing is relatively unique in that it occurs *after* factual questions were presumably resolved by the jury⁴⁵⁰ (or the defendant’s guilty plea). Appraisal of the resulting evidence is therefore likely influenced by a “revelation bias,” a cognitive distortion⁴⁵¹ caused by a combination of recency bias,⁴⁵² the reverse-CSI effect,⁴⁵³ and acontextual consideration in connection with a claim of innocence. Regardless of their merit, claims of innocence plant seeds of doubt, exerting an emotional pull with which

⁴⁴⁵ See, e.g., *infra* Section III.D.3.

⁴⁴⁶ Garrett, *supra* note 30, at 1708 n.385 (“DNA testing that confirms guilt may terminate otherwise burdensome appeals.”).

⁴⁴⁷ See *supra* notes 10–22 and accompanying text.

⁴⁴⁸ See *supra* Section II.C.2.

⁴⁴⁹ See *Herrera v. Collins*, 506 U.S. 390, 416 (1993) (“[I]n state criminal proceedings the trial is the paramount event for determining the guilt or innocence of the defendant.”).

⁴⁵⁰ *Shannon v. United States*, 512 U.S. 573, 579 (1994) (“The jury’s function is to find the facts . . .”).

⁴⁵¹ See Leonetti, *supra* note 69, at 131 (“The role of cognitive biases in the decision-making of prosecutors and other criminal justice system actors, like confirmation bias, perseverance bias, and cognitive dissonance, has been well canvassed in scholarly literature as well as in official inquiries into wrongful convictions.”).

⁴⁵² See, e.g., *Recency Bias*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/recency-bias> (on file with the Oregon Law Review) (defining “recency bias” as “giving too much attention to events that have just happened” when “forming an opinion about something”).

⁴⁵³ See Godsey & Alou, *supra* note 129, at 483–84 (“[I]n cases where no forensic evidence is introduced by the prosecution, jurors give the lack of such forensic evidence too much weight . . . (the ‘CSI Effect’), and in cases where forensic evidence IS produced by the prosecution, these same jurors give too much weight to this evidence . . . (the ‘Reverse CSI Effect’).”).

cold trial transcripts and boxed-up exhibits cannot compete.⁴⁵⁴ Post-conviction testing data emerges from this haze of uneasy uncertainty as if in a shaft of light, like a revelation.

Revelation bias imbues post-conviction test results with artificial salience. Unconstrained by the trial process that assimilated various evidentiary inputs *en route* to the conviction,⁴⁵⁵ new data points can take on a life of their own. Defendants can therefore use testing to cultivate doubt in a post-conviction vacuum under the pall of a claimed wrongful conviction.⁴⁵⁶ Against this backdrop of possible injustice, forensic data like *Lessieur*'s "stray allele" that would have contributed little at trial⁴⁵⁷ or been excluded altogether⁴⁵⁸ may seem significant. In this way, "revelation bias" is the inverse of a "confirmation bias"⁴⁵⁹ that could predispose prosecutors and judges to uncritically defend the conviction.

Consistent with the characterization of the DNA evidence in *Qualls* as the "missing puzzle piece,"⁴⁶⁰ revelation of new evidence after the conviction induces the sinking feeling that something has been overlooked. Its existence bespeaks a gap in previous knowledge. Even if newly revealed evidence is immaterial, and despite having

⁴⁵⁴ See *Herrera*, 506 U.S. at 404 (referring to the "difficult position of having to weigh the probative value of 'hot' and 'cold' evidence on petitioner's guilt or innocence").

⁴⁵⁵ See *id.* at 418–19 ("Had [post-conviction evidence to show actual innocence] been offered at trial [rather than 10 years later], it could have been weighed by the jury, along with the evidence offered by the State and petitioner, in deliberating upon its verdict.").

⁴⁵⁶ Cf. MASS. GEN. LAWS ch. 278A, § 2 (2025) (permitting the filing of a "motion for forensic or scientific analysis" where, *inter alia*, defendant "asserts factual innocence of the crime for which" they were convicted).

⁴⁵⁷ See *Commonwealth v. Anitus*, 97 N.E.3d 700, 704 (Mass. App. Ct. 2018) (explaining that the "presence" of DNA evidence "on an object alone does not provide sufficient information to determine when the DNA was deposited on the object," particularly in light of the possibility of "secondary transfer"); cf. *United States v. Corso*, 439 F.2d 956, 957 (4th Cir. 1971) (*per curiam*) ("The probative value of an accused's fingerprints upon a readily movable object is highly questionable, unless it can be shown that such prints could have been impressed only during the commission of the crime.").

⁴⁵⁸ See FED. R. EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . confusing the issues . . . [or] wasting time . . ."); cf. *Commonwealth v. Steadman*, 183 N.E.3d 412, 425 (Mass. 2022) (otherwise inadmissible third-party culprit evidence must have "substantial connecting links to the crime" and "cannot be too remote or speculative") (quotation omitted).

⁴⁵⁹ See, e.g., Patrick Healy, *Overcoming Confirmation Bias in the Workplace*, HARV. BUS. SCH. ONLINE (Aug. 26, 2019), <https://online.hbs.edu/blog/post/confirmation-bias-how-it-affects-your-organization-and-how-to-overcome-it> [<https://perma.cc/TL3P-J3PM>] ("Confirmation bias is the human tendency to search for, favor, and use information that confirms one's pre-existing views on a certain topic."); see also Acker, *supra* note 438, at 730.

⁴⁶⁰ See *Qualls* Def. Supp. Mem., *supra* note 307, at 24 and text accompanying note 322.

rebutted the presumption of innocence,⁴⁶¹ the prosecution is essentially obligated to defend the conviction against any new information. It therefore may have to keep ‘winning’ the case long after the guilty verdict.⁴⁶²

But while comparing construction of the factual narrative in a criminal case to fitting puzzle pieces together may be rhetorically effective, the *differences* between jigsaw puzzles and criminal investigations lay bare the misconceptions fueling revelation bias in post-conviction testing. Jigsaw puzzles typically have a fixed number of pieces that fit together in one predetermined way. A missing piece precludes a complete picture. In contrast, there is no set number of evidentiary pieces in a criminal investigation, no one way to assemble them, and little chance of piecing together the ‘complete’ picture of what happened.⁴⁶³

Given the nearly infinite amount of information that could be gathered from the lead-up, commission, and aftermath of a crime, the prosecution will never have every possible ‘puzzle’ piece.⁴⁶⁴ For example, the prosecution in *Lessieur* will not know who may have deposited DNA while walking near the dumpsters *before* the victim’s body fell in the snow or whether (hypothetically) the stray allele came

⁴⁶¹ See, e.g., Dist. Att’y’s Off. for Third Jud. Dist. v. Osborne, 557 U.S. 52, 68–69 (2009) (“At trial, the defendant is presumed innocent and may demand that the government prove its case beyond reasonable doubt. But once a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears.”) (quotation omitted).

⁴⁶² Cf. Gutierrez v. Saenz, 606 U.S. 305, 336 (2025) (Thomas, J., dissenting) (“In addition to trial, direct appeal, and multiple rounds of collateral review in state and federal court, Texas must now prevail in yet another arena—§ 1983 litigation challenging its DNA testing procedures—before it can carry out its lawfully imposed sentences.”).

⁴⁶³ See, e.g., Adam Banner, *Accused Killer Karen Read Stars in Max Docuseries—But Why?*, ABA JOURNAL (May 15, 2025 at 12:13 PM CDT), https://www.abajournal.com/columns/article/accused-killer-karen-read-stars-in-max-docuseries-but-why#google_vignette [<https://perma.cc/YT67-XDUT>] (“We defense attorneys often find ourselves with a client walking into our office and metaphorically dumping out a box of puzzle pieces. As we meticulously put those pieces together, we start to realize this isn’t just one puzzle; it’s actually multiple puzzles, and some of the pieces are missing. You have to assemble what you can, make a picture as coherent as possible, and then legally and ethically guess what the missing pieces are and how, or if, those different puzzles fit together.”); cf. *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring) (“[I]n a judicial proceeding in which there is a dispute about the facts of some earlier event, the factfinder cannot acquire unassailably accurate knowledge of what happened. Instead, all the factfinder can acquire is a belief of what *probably* happened.”).

⁴⁶⁴ See, e.g., Findley, *supra* note 54, at 1184 & n.155 (“[O]bjective truth is quite elusive, perhaps unknowable, and no one has a unique claim of access to such truth.”) (citing RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 217–18 (1990)).

from a first responder working near the victim's head that March night.⁴⁶⁵ Trial narratives are pieced together from the available evidence collected by the time of trial, not all conceivable data. The prosecution must reconstruct enough of the rough picture to establish the *elements of the crime* beyond a reasonable doubt,⁴⁶⁶ but doubts about the full tableau may persist.⁴⁶⁷

Where the trial can only ever address a subset of the universe of relevant information, post-trial discovery of a new 'puzzle' piece is not necessarily meaningful. As demonstrated above, the puzzle pieces obtained through post-conviction testing are most powerful when they expose an entirely new part of the puzzle showing that the defendant did not commit the crime at all (independently exculpatory evidence) or reveal that the prosecution forced a piece into the wrong place (testing that negates key prosecution evidence). Thus, while the prosecution may meet its burden of proof at trial by presenting a portrait of the suspect despite a lack of detail regarding the perpetrator's eyes, the subsequent discovery of puzzle pieces showing piercing blue eyes impugns the conviction of a brown-eyed defendant. But new puzzle pieces that merely round out the periphery do not have the same power.⁴⁶⁸

This is all context specific. For example, if a defendant claimed that he was *misidentified* as the person engaged in a struggle with the victim, DNA testing fingernail scrapings could materially alter the factual universe. But where, as in *Ramos*,⁴⁶⁹ the question is not *who* was involved but who *initiated* deadly force, fingernail DNA is unlikely to be material.⁴⁷⁰ Nevertheless, new DNA evidence could still *feel* like a revelation. If testing revealed a defendant's DNA under the victim's fingernails in a case where there was indisputably a physical altercation but the defendant claimed self-defense, uncertainty about how the defendant's DNA got under the victim's fingernails could spawn more litigation—a circular prospect given that resolving the overall uncertainty of what happened between the victim and the

⁴⁶⁵ See *Commonwealth v. Lessieur*, 175 N.E.3d 372, 375, 380 (Mass. 2021).

⁴⁶⁶ *In re Winship*, 397 U.S. at 361.

⁴⁶⁷ See, e.g., Findley, *supra* note 54, at 1190 (“[E]xpecting certainty is a mistake because our system does not demand a finding of certainty, either for finding guilt or innocence.”).

⁴⁶⁸ See *Commonwealth v. Sullivan*, 14 N.E.3d 205, 214–15 (Mass. 2014) (distinguishing between testing that “negates a key piece of physical evidence that the prosecution relied on” and evidence that “although new, was relevant to only a tangential matter” or “merely impeach[es]”).

⁴⁶⁹ See *supra* notes 249–68 and accompanying text.

⁴⁷⁰ *Commonwealth v. Ramos*, 198 N.E.3d 437, 454 (2022) (Cypher, J., dissenting).

defendant was essentially the trial jury's task, and the fingernail testing furnishes nothing new to aid that endeavor.⁴⁷¹

D. The Afterlife of Immaterial Testing

Beyond the wasteful procedural wrangling over whether to grant a petition for immaterial testing, there are already multiple Massachusetts cases (in addition to *Lessieur*) in which the results of immaterial testing have prompted additional unnecessary post-conviction litigation.

1. The Snowballing Cigarette Butt

In *Commonwealth v. Duke*, Duke's purported accomplice became the prosecution's key witness, testifying that he waited in the car while Duke and a third co-venturer (the felony-murder victim) attempted a robbery.⁴⁷² He also testified that he flicked the butt of his Newport cigarette out the car window, and a witness later alerted police to a discarded Newport butt near where the getaway car was waiting that, despite the rain, did not appear to be wet.⁴⁷³

The prosecution used this cigarette butt to corroborate the cooperating witness, whose credibility was vulnerable to attack based on inconsistencies in prior statements and his cooperation agreement.⁴⁷⁴ The defendant's trial counsel used the prosecution's failure to DNA test the cigarette butt to show that police had simply deferred to the cooperating witness's account without investigating for themselves and to further a third-party culprit theory.⁴⁷⁵

After the August 2015 trial, pre-direct-appeal 278A litigation begun in April 2017 yielded a DNA profile on the cigarette butt that did not match the cooperating witness but did match (through a

⁴⁷¹ See *Williams v. United States*, 401 U.S. 667, 691 (1971) (Harlan, J., concurring in part) ("No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved.").

⁴⁷² 186 N.E.3d 1223, 1227–29 (Mass. 2022).

⁴⁷³ *Id.* at 1228 & n.4, 1235.

⁴⁷⁴ *Id.* at 1229, 1236.

⁴⁷⁵ *Id.* at 1235–36. The reasonableness of a trial counsel's failure to conduct pre-trial testing raises complex issues beyond the scope of this Article. See MASS. GEN. LAWS ch. 278A, § 3(b)(5)(iv) (2025) (permitting 278A motion to survive threshold review where, *inter alia*, "a reasonably effective attorney would have sought the analysis and either the moving party's attorney failed to seek the analysis or the judge denied the request").

government database) an uninvolved third party.⁴⁷⁶ Duke engaged an investigator,⁴⁷⁷ and the prosecution ultimately interviewed the third party.⁴⁷⁸ The third party reported that he smokes Newports and had been in the area to get tattoos and Ford parts but had no knowledge of the incident.⁴⁷⁹

Nonetheless, Duke used the new DNA evidence to seek a new trial, arguing that failure to test the cigarette butt pre-trial deprived both sides of a “potential eyewitness” and deprived him of a third-party culprit defense and that the prosecution had used the cigarette to corroborate its witness.⁴⁸⁰ A trial-level judge denied the motion, concluding that it was “unlikely” that the cigarette butt was central to the jury’s assessment of the cooperating witness’s credibility, and the SJC agreed.⁴⁸¹ The SJC recognized that corroboration of the cooperating witness was a “significant” issue at trial and that the cigarette butt was not “insubstantial” but pointed to the “multiple other” pieces of corroborative evidence (including testimony from the intended robbery victim, telephone records, and ballistics) such that the DNA results “would have made little difference in the jury’s thinking about [the witness’s] credibility.”⁴⁸²

The post-conviction litigation related to this 278A testing was all needless accretion owing to the cigarette butt’s marginal relevance. As in *Lessieur*, the testing should have been denied as immaterial from the outset,⁴⁸³ avoiding additional post-conviction litigation. Duke got his best-case-scenario results: a DNA match to a stranger to the case that disrupted the prosecution’s trial narrative. But the cigarette was just not as central to the case as the towels in *Cowels*, the jacket in *Sullivan*, or

⁴⁷⁶ *Duke*, 186 N.E.3d at 1230, 1235; Docket Information for Commonwealth v. Duke, 186 N.E.3d 1223 (Mass. 2022) (No. SJC-12047).

⁴⁷⁷ Defendant Ashawnee Duke’s Motion for Funds for an Investigator Pursuant to Mass. R. Crim. P. Rule 30(c)(5), Commonwealth v. Duke, No. 1379CR00118 (Mass. Super. Ct. Apr. 26, 2019), File Ref. No. 167; Defendant Ashawnee Duke’s Supplemental Motion for Funds for an Investigator Pursuant to Mass R. Crim. P. Rule 30(c)(5), No. 1379CR00118 (Mass. Super. Ct. June 12, 2019), File Ref. No. 170; Defendant Ashawnee Duke’s Second Supplemental Motion for Funds for an Investigator Pursuant to Mass. R. Crim. P. Rule 30(c)(5), No. 1379CR00118 (Mass. Super. Ct. Sep. 19, 2019), File Ref. No. 174.

⁴⁷⁸ Appendix to Commonwealth’s Memorandum in Opposition to Defendant’s Mass. R. Crim. P. 30(b) Motion for a New Trial, No. 1379CR00118 (Mass. Super. Ct. June 12, 2020), File Ref. No. 187.

⁴⁷⁹ *Id.*

⁴⁸⁰ *Duke*, 186 N.E.3d at 1230, 1235.

⁴⁸¹ *Id.* at 1230, 1237.

⁴⁸² *Id.* at 1237.

⁴⁸³ The prosecution had not opposed the testing. *Id.* at 1235.

the jacket, pants, pool cue, and lavender bag in *Davis* that had connected the defendants to the crimes *and* corroborated key testimony.⁴⁸⁴ The butt had not connected Duke to the crime and, although the DNA testing might have dented the corroboration of the cooperating witness, the prosecution correctly observed that the DNA evidence did not actually *impeach* the witness where police may simply have collected a *different butt* than the one he had flicked.⁴⁸⁵ Nevertheless, the testing snowballed into a mini post-conviction investigation,⁴⁸⁶ a new-trial motion, and an appeal to the court of last resort.

2. More Immaterial Cigarette Butts

The defendant in *Commonwealth v. Kines* obtained his best-case-scenario result when the first round of 278A testing excluded him as a contributor to cigarette butts in the ashtray of the van where the underlying kidnappings and rape were believed to have been perpetrated in 1974.⁴⁸⁷ But the testing was not particularly probative because, as the Appeals Court observed in affirming the denial of follow-up testing on these butts, the van had been stolen the week before the incident, “which could reasonably explain why another male’s DNA was found on the cigarette butts,” and “nothing in the record” suggested “that the perpetrator smoked cigarettes—let alone on the night of the crime—and none of the victims testified that the perpetrator was smoking in the van.”⁴⁸⁸

But if, as the Appeals Court also observed, there was “no factual connection between these cigarette butts and the crime,”⁴⁸⁹ then testing should not have been allowed in the first place. And, where Kines sought further testing of the same cigarettes, that first immaterial round of testing begat more post-conviction litigation.

⁴⁸⁴ See *supra* notes 158–68, 334–43 and accompanying text.

⁴⁸⁵ Commonwealth’s Memorandum in Opposition to the Defendant’s Mass. R. Crim. P. 30(b) Motion for a New Trial at 19–20, *Commonwealth v. Duke*, No. 1379CR00118 (Mass. Super. Ct. June 12, 2020), File Ref. No. 186. Indeed, one might speculate that a dry cigarette butt could have as easily been *covered* by the getaway car as *flicked from* it.

⁴⁸⁶ As discussed *infra* in Section IV.A.2, court-awarded funding for this post-conviction detour amounted to roughly \$19,000.

⁴⁸⁷ 17-P-1531, 113 N.E.3d 933, 2018 WL 5780737, at *1 (Mass. App. Ct. Nov. 5, 2018); *Commonwealth v. Kines*, 367 N.E.2d 861, 862 (Mass. App. Ct. 1977).

⁴⁸⁸ *Kines*, 2018 WL 5780737, at *2.

⁴⁸⁹ *Id.*

3. *Imperfectly Inculpatory Testing*

While guilt-confirming testing is generally less accretive, it can sometimes prompt further fruitless litigation. Because of revelation bias, even new *inculpatory* post-trial data can prompt a defendant to seek a new trial. In *Commonwealth v. Houghton*, a decades-old forcible-child-rape case, Houghton obtained 278A testing of a quilt on which previous chemical analysis had revealed seminal fluid residue and sperm cells.⁴⁹⁰ At his 1982 trial, Houghton had testified that the quilt belonged to the mother of the victim's friend and that any seminal fluid or sperm on it was not his.⁴⁹¹

When two stains from the quilt were tested, Houghton's DNA partially matched the DNA in epithelial cells on one stain and partially matched the major contributor in both sperm and epithelial cells on a second stain.⁴⁹² Houghton nonetheless moved for a new trial, arguing that "the absence of female DNA in that second stain contradicts the victim's testimony that she spat the defendant's ejaculate onto the quilt."⁴⁹³

Although the motion judge denied the motion and the Appeals Court affirmed,⁴⁹⁴ *Houghton* shows how even new *inculpatory* data can spawn more litigation. Despite the prosecution's having prevailed at trial and on direct appeal,⁴⁹⁵ the burden effectively falls on the prosecution to explain why the post-conviction revelation of a new puzzle piece does not upset the factual picture from trial enough to require a do-over.⁴⁹⁶

On its face, *Houghton's* DNA testing of sperm on a quilt onto which the victim had reportedly spat her assailant's ejaculate would appear material because an exclusion could have undermined the prosecution's case. However, a more hard-nosed materiality analysis might have prevented the testing and subsequent litigation. As the Appeals Court noted, the testimony was "arguably ambiguous" as to whether the victim spat onto the quilt or whether she was just

⁴⁹⁰ 175 N.E.3d 1245, 2021 WL 4851979, at *1 (Mass. App. Ct. Oct. 19, 2021).

⁴⁹¹ *Id.* at *2 n.4.

⁴⁹² *Id.* at *1–2. The minor contributor's portion of the second stain was too small to support a conclusion as to its source. *Id.*

⁴⁹³ *Id.*

⁴⁹⁴ *Id.* at *1.

⁴⁹⁵ *Commonwealth v. Houghton*, 654 N.E.2d 932, 937 (Mass. App. Ct. 1995).

⁴⁹⁶ *Cf. Teague v. Lane*, 489 U.S. 288, 310 (1989) (describing "intrusive[ness]" of legal framework that "continually forces the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards").

physically on the quilt when she spat the ejaculate (to wherever it landed),⁴⁹⁷ undermining the significance of a best-case exclusion from stains on a third party's blanket. In addition, the victim knew Houghton from before the incident (he was her friend's mother's boyfriend) and had gone swimming with him and her friend on the day in question.⁴⁹⁸ The real issue therefore was whether the offenses occurred, not the identity of the perpetrator. While evidence establishing that no crime occurred speaks to factual innocence, there was ample evidence corroborating the victim's account of the rapes, including "fresh complaint" testimony, physical evidence recovered from both the scene and the defendant's car, and the victim's "disarray and distraught condition" when she reached help.⁴⁹⁹ In this context, especially where it was not certain that the perpetrator's ejaculate landed on the third party's quilt, an exclusion from its stains would not necessarily have been material to establishing a fabrication defense. An exclusion could have negated *a* connection between the defendant and the crime, but the materiality of the exclusion would depend on the extent to which the prosecution had relied on the seminal fluid and sperm cell evidence to forensically bolster the victim's testimony at trial.

IV

THE COSTS OF ACCRETION AND THE CORRECTIONS

A. How Procedural Accretion Does Harm

So easy access to testing invites long-shot motions that lead to fruitless additional post-conviction litigation, so what? Perhaps this is just the price of progress towards a more just system.

But more testing is not always better. The medical field, too, has grappled with counterproductive "overtesting," which surgeon and writer Atul Gawande describes as a "by-product" of hard-to-resist new technologies.⁵⁰⁰ Just as countless "puzzle pieces" that do not merit further litigation might emerge post-conviction, medical testing can

⁴⁹⁷ *Houghton*, 2021 WL 4851979, at *2 n.5.

⁴⁹⁸ *Houghton*, 654 N.E.2d at 933–34 & 934 n.2 ("After swimming . . . , the defendant and the two girls drove to [the friend]'s home where they discovered that someone had broken into her house. Although [the friend] wanted to go home with the victim, the defendant, according to the testimony of both girls, insisted upon leaving [the friend] at another friend's home and threatened to throw her out of the car if she did not leave.").

⁴⁹⁹ *Id.* at 935.

⁵⁰⁰ Atul Gawande, *Overkill*, THE NEW YORKER, May 11, 2015, at 45 ("Why not take a look and see if anything is abnormal?").

also uncover abnormalities that do not justify intervention. As Gawande writes: “Often, these are fishing expeditions, and since no one is perfectly normal you tend to find a lot of fish. If you look closely and often enough, almost everyone will have a little nodule that can’t be completely explained”⁵⁰¹ Mirroring the relatively low ratio of new trials to testing motions, doctors have seen disappointingly low “reduction in death” from widespread testing.⁵⁰²

The problem in the post-conviction arena could get worse. As testing sensitivity increases,⁵⁰³ the possibility of turning up stray biological material combined with the emotional power of revelation bias could incent defendants with little to lose to seek multiple rounds of testing.⁵⁰⁴ Like the classic New York Lottery motto: “Hey, you never know.”⁵⁰⁵ All it takes is a stray allele and a claim of innocence.⁵⁰⁶ But “[a]t some point in time, the State’s interest in finality must outweigh the prisoner’s interest in yet another round of litigation.”⁵⁰⁷ Like medical over-testing that exposes patients to physical risks, causes them “worry” and missed work, and costs them (and taxpayers) thousands of dollars,⁵⁰⁸ post-conviction over-testing causes multifarious harms. Overarchingly, it further erodes finality.⁵⁰⁹ As the

⁵⁰¹ *Id.*

⁵⁰² *Id.* at 46.

⁵⁰³ See *Commonwealth v. Linton*, 132 N.E.3d 93, 107–08 (Mass. 2019); Brooks & Simpson, *supra* note 31, at 849 (“DNA technology is constantly evolving. Increasingly refined tests are continuously being developed, and evidence previously thought to be ‘untestable’ is now being processed as a matter of course.”); cf. Gawande, *supra* note 500, at 46 (“Our ever more sensitive technologies turn up more and more abnormalities—cancers, clogged arteries, damaged-looking knees and backs—that aren’t actually causing problems and never will.”).

⁵⁰⁴ See Garrett, *supra* note 33, at 72 (observing “strong incentive” death-row inmates whose DNA testing confirmed their guilt had “to pursue every avenue for review, regardless of whether their claims had merit” and theorizing that some guilty defendants who sought testing may “have hoped for an error in the DNA testing”).

⁵⁰⁵ See, e.g., *New York Lottery Has New Ad Agency*, N.Y. TIMES, Aug. 1, 1998, at D14, <https://www.nytimes.com/1998/08/01/business/new-york-lottery-has-new-ad-agency.html> (on file with the Oregon Law Review).

⁵⁰⁶ Cf. Jacobi & Carroll, *supra* note 40, at 270–72 (observing that “guilty prisoners can potentially benefit from post-conviction DNA testing despite their guilt” and explaining possibility of “false negative arising through laboratory error, contamination, human error, or population database error”); cf. also Jay Jochowitz, *Dollar Now Buys Double the Dreams*, ALBANY TIMES UNION, Oct. 6, 2001, at B3 (referring to the lottery slogan “all it takes is a dollar and a dream”).

⁵⁰⁷ *Herrera v. Collins*, 506 U.S. 390, 426 (1993) (O’Connor, J., concurring).

⁵⁰⁸ Gawande, *supra* note 500, at 45.

⁵⁰⁹ See *Dist. Att’y’s Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 72–73 (2009) (explaining that “[t]he elected governments of the States are actively confronting the

Supreme Court has recognized, “[e]very inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice.”⁵¹⁰ Both 278A and the preexisting, non-time-limited post-conviction framework in Massachusetts⁵¹¹ already reflect the understanding that finality must sometimes yield to redress injustice.⁵¹² Still, while this “regular course of justice may be long,” “it must not be endless. When a serious crime has been committed, the victims and survivors, witnesses, and the public have an interest that the guilty not only be punished but that the community express its condemnation with firmness and confidence.”⁵¹³

Easy access to post-conviction testing, however, means that even after the jury’s verdict and the denial of a new-trial motion (and affirmance of both on appeal), criminal cases can still sprout new tendrils, repeatedly and indefinitely. Testing first and asking the hard questions later leads to “[s]erial relitigation”⁵¹⁴ that retraumatizes victims and survivors, consumes limited prosecutorial, judicial, and

challenges DNA technology poses to our criminal justice systems and our traditional notions of finality, as well as the opportunities it affords”); *see also* Garrett, *supra* note 30, at 1635.

⁵¹⁰ Hill v. Lockhart, 474 U.S. 52, 58 (1985) (quotation and citation omitted).

⁵¹¹ *See* MASS. R. CRIM. P. 30(b) (“The trial judge upon motion in writing may grant a new trial *at any time* if it appears that justice may not have been done.”) (emphasis added). In contrast to the open-ended approach in Massachusetts, many states place far greater limitations on the timing of new-trial motions. *See Herrera*, 506 U.S. at 410–11 (summarizing “divergent” state practices with respect to new trials in criminal cases and explaining that seventeen states requires a new trial motion based on newly discovered evidence to be made within sixty days of judgment, one state requires such a motion to be filed during the term in which judgment was rendered, eighteen jurisdictions have time limits ranging between one and three years, and fifteen states allow a new trial motion based on newly discovered evidence to be filed more than three years after conviction).

⁵¹² *See also* House v. Bell, 547 U.S. 518, 536 (2006) (recounting Court’s precedents requiring “principles of comity and finality” to “yield to the imperative of correcting a fundamentally unjust incarceration” in “appropriate cases”) (quotation omitted).

⁵¹³ Commonwealth v. Amirault, 677 N.E.2d 652, 665 (Mass. 1997); *see also, e.g.*, Strickland v. Washington, 466 U.S. 668, 693 (1984) (referring to “the profound importance of finality in criminal proceedings”).

⁵¹⁴ Shinn v. Ramirez, 596 U.S. 366, 391 (2022).

public-defender resources,⁵¹⁵ and diverts attention from remediable wrongful convictions.⁵¹⁶

1. Victim Impact

Reopening criminal cases also reopens wounds for victims and survivors. “[I]t may be extremely traumatic for surviving victims and their families to learn that a person found guilty is now attempting to vacate the conviction,” especially sexual assault survivors whose credibility “is usually attacked in trial” and for whom “a conviction is viewed as a significant validation To face having his or her credibility called into question once again will cause tremendous distress.”⁵¹⁷ Victims not only lose “resolution” and “reliv[e] trauma from the case being reopened,” but they may have to “provide new DNA samples”⁵¹⁸ and (even more invasively) name consensual sexual partners whose DNA may be necessary for elimination purposes.⁵¹⁹

The DOJ recommends assuring victims “that everyone in the system, particularly prosecutors and judges, will make sure that ambiguous results, e.g., results that do not clearly exonerate the perpetrator, will not result in a new trial or weaken the conviction.”⁵²⁰ But incarcerated defendants and their counsel have different incentives, and doubts fueled by revelation bias may indeed erode confidence in the conviction. As the Supreme Court has repeatedly recognized: “[o]nly with real finality can the victims of crime move forward knowing the moral judgment will be carried out.”⁵²¹

⁵¹⁵ See, e.g., *Commonwealth v. Coutu*, 42 N.E.3d 622, 638 (Mass. 2015) (acknowledging “the cost of a DNA analysis and the finite resources of the Commonwealth”); TRAVIS & ASPLEN, *supra* note 32, at 2–3 (“In an era in which courts are hard put to handle their current dockets and judicial budgets are strained, proceedings should be reopened only in the rare instance when justice so demands.”); Jacobi & Carroll, *supra* note 40, at 282 (listing financial and nonfinancial costs of testing, including “victim trauma and prosecutorial time wasted”).

⁵¹⁶ Cf. Jacobi & Carroll, *supra* note 40, at 265 (“[D]eterring the guilty who falsely claim their innocence [will] drastically reduce the expected waiting time for actually innocent prisoners seeking exoneration . . .”).

⁵¹⁷ TRAVIS & ASPLEN, *supra* note 32, at 8, 57.

⁵¹⁸ Jacobi & Carroll, *supra* note 40, at 268–69.

⁵¹⁹ TRAVIS & ASPLEN, *supra* note 32, at 39.

⁵²⁰ *Id.* at 58.

⁵²¹ *Shinn v. Ramirez*, 596 U.S. 366, 376 (2022) (quoting *Calderon v. Thompson*, 523 U.S. 538, 556 (1998)).

2. Resource Drain

Procedural accretion drains resources in various ways. Much of this resource drain is hard to quantify, including the time that prosecutors, defense attorneys and their investigators, judges, court staff, and police and forensic witnesses could be spending on other matters.⁵²² Routine litigation over, and as a result of, immaterial post-conviction testing distracts judges, prosecutors, and defense attorneys from pursuing material testing that could remedy wrongful convictions.⁵²³

The readily quantifiable out-of-pocket expenses associated with this litigation, though just the tip of the iceberg, provide some sense of the cost of this accretion. For example, in *Ramos*, where the dissent persuasively showed that DNA testing of the victim's fingernails had no potential to support a self-defense theory,⁵²⁴ the trial court allowed \$4,910 for testing.⁵²⁵ But testing costs vary (e.g., based on the number of items to be tested), and costs increase when multiple rounds of analysis are pursued. John Powell, who sought to test the murder victim's baseball bat to support a third-party culprit theory,⁵²⁶ obtained

⁵²² See David Crump & Susan Waite Crump, *In Defense of the Felony Murder Doctrine*, 8 HARV. J.L. & PUB. POL'Y 359, 374 (1985) ("The efforts of judges, courtroom time, lawyering on both sides, and support services are all scarce resources. Although . . . few would be willing to put a specific dollar price upon its proper function, the quality of our justice is limited by the scarcity of these resources and by the efficiency with which we allocate them. Decisions about procedure . . . affect these allocations, and therefore the quality of justice, whether we want them to or not."); see also *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) ("Governments . . . quite properly spend vast sums of money to establish machinery to try defendants accused of crime.").

⁵²³ See Jacobi & Carroll, *supra* note 40, at 264 (asserting that "phenomenon" of guilt-confirming testing "has become so widespread that it has overwhelmed state prosecutors' offices, dramatically hampering their ability to process meritorious claims"); *Dist. Att'y's Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 83–84 (2009) (Alito, J., concurring) (explaining that "[t]he resources required to process and analyze" the "hundreds of thousands of [DNA] samples" collected every year "have created severe backlogs in state crime labs across the country").

⁵²⁴ See *supra* notes 256–67 and accompanying text.

⁵²⁵ Defendant's Motion for Funds for Previously Ordered DNA Testing Pursuant to G. L. c. 278A, *Commonwealth v. Ramos*, No. 1579CR00321 (Mass. Super. Ct. Sep. 18, 2023), File Ref. No. 89; Docket Information for *Commonwealth v. Ramos*, *supra* note 268, at 09/19/2023 (allowing motion for funds).

⁵²⁶ See *supra* notes 232–37 and accompanying text.

\$4,280 for testing⁵²⁷ and \$150 for expert review.⁵²⁸ Years later, Powell obtained an additional \$5,000 for a “Complete Cybergenetics Trueallele” analysis.⁵²⁹ Testing costs can also range much higher. For example, Scott Steadman obtained \$46,025 for testing and, as noted above, it does not appear that a new-trial motion was filed based on this testing as of early March 2026.⁵³⁰

While a given defendant may be willing and able to foot the bill for post-conviction DNA testing,⁵³¹ the financial costs associated with post-conviction testing are by no means limited to the testing itself. As in the medical context, the costs increase dramatically when immaterial testing turns up anomalous results because “[r]esolving the uncertainty of non-normal results can lead to procedures that have costs of their own,”⁵³² including the need for expert interpretation. Thus, the estimated testing cost in *Lessieur*⁵³³ was \$6,725,⁵³⁴ but the defendant also requested \$2,700 for a DNA expert.⁵³⁵

Ancillary costs can serve as a useful proxy for measuring ripple-effect accretion. The breakdown of the \$19,000 money trail in the *Duke* case, for example, tracks various aspects of the investigation into the

⁵²⁷ Defendant John Powell’s Motion for Funds for Forensic Testing Ordered Pursuant to M.G.L. CH. 278A, *Commonwealth v. Powell*, No. 0284CR11199 (Mass. Super. Ct. Apr. 6, 2018), File Ref. No. 171; Docket Information for *Commonwealth v. Powell*, *supra* note 237, at 04/19/2018 (allowing motion for funds).

⁵²⁸ Defendant John Powell’s Supplemental Motion for Additional Funds of \$150 for Underlying Discovery Documents and for Funds for Expert Review of Those Documents Pursuant to M.G.L. CH 278A, *Commonwealth v. Powell*, No. 0284CR11199 (Mass. Super. Ct. Aug. 13, 2018), File Ref. No. 173; Docket Information for *Commonwealth v. Powell*, *supra* note 237, at 08/17/2018 (allowing motion for expert funds).

⁵²⁹ Post Conviction Motion for Funds for Complete Cybergenetics Trueallele Analysis Pursuant to Mass.R.Crim.P 30(c)(4) and G.L. Chapter 278A, § 13, *Commonwealth v. Powell*, No. 0284CR11199 (Mass. Super. Ct. Oct. 1, 2021), File Ref. No. 175; Docket Information for *Commonwealth v. Powell*, *supra* note 237, at 10/13/2021 (reporting 10/12/2021 allowance of motion for Cybergenetics Trueallele funds).

⁵³⁰ Defendant’s Motion for Funds, *Commonwealth v. Steadman*, No. 0982CR00741 (Mass. Super. Ct. Nov. 22, 2023), File Ref. No. 139; Docket Information for *Commonwealth v. Steadman*, *supra* note 248, at 11/22/2023 (allowing motion for funds up to \$46,025); see *supra* notes 239–48 and accompanying text.

⁵³¹ See, e.g., *Dist. Att’y’s Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 97 (2009) (Stevens, J., dissenting) (“Because Osborne has offered to pay for the tests, cost is not a factor.”).

⁵³² Gawande, *supra* note 500, at 45.

⁵³³ See *supra* notes 1–19 and accompanying text.

⁵³⁴ Defendant’s Motion for Funds for Forensic Testing Ordered Pursuant to M.G.L. 278A, *Commonwealth v. Lessieur*, No. 0881CR00529 (Mass. Super. Ct. Sep. 14, 2018), File Ref. No. 78.

⁵³⁵ Defendant’s Motion for Post-Conviction Funds for DNA Expert, *Commonwealth v. Lessieur*, No. 0881CR00529 (Mass. Super. Ct. Jan. 10, 2019), File Ref. No. 81.

cigarette butt that culminated in the unsuccessful new-trial motion.⁵³⁶ Duke first obtained funds up to \$2,500 for an expert to assess the viability of testing.⁵³⁷ The trial court then allowed \$6,579 for the testing itself.⁵³⁸ Duke later requested an additional \$150 for the lab's raw data and standard operating procedures.⁵³⁹ Duke then obtained up to \$2,250 more for an expert to review the results and provide an affidavit in support of a motion to upload the DNA profile to CODIS.⁵⁴⁰ Supplemental motions for expert funds followed, first \$2,250⁵⁴¹ and then a final \$317.50,⁵⁴² both of which were allowed.⁵⁴³ Duke also sought funds for an investigator, first up to \$500,⁵⁴⁴ then \$2,000,⁵⁴⁵ and finally an additional \$1,500.⁵⁴⁶ Duke also obtained \$1,200 for translation of parts of the recorded interview with the third party whose DNA was found on the cigarette butt.⁵⁴⁷

⁵³⁶ See *supra* notes 472–86 and accompanying text.

⁵³⁷ Docket Information for Commonwealth v. Duke, *supra* note 442, at 05/16/2017 (allowing motion for funds at File Ref. No. 146).

⁵³⁸ Defendant Ashawnee Duke's Motion for Funds for Forensic Testing Ordered Pursuant to M.G.L. Ch. 278A, Commonwealth v. Duke, No. 1379CR00118 (Mass. Super. Ct. Jan. 16, 2018), File Ref. No. 152.; Docket Information for Commonwealth v. Duke, *supra* note 442, at 01/16/2018 (allowing motion for funds at File Ref. No. 152).

⁵³⁹ Docket Information for Commonwealth v. Duke, *supra* note 442, at 04/27/2018; Affidavit of Counsel, Commonwealth v. Duke, No. 1379CR00118 (Mass. Super. Ct. Apr. 27, 2018), File Ref. No. 153.1.

⁵⁴⁰ Defendant Ashawnee Duke's Supplemental Motion for Funds to Pay his Expert Witness for Work Done Pursuant to M.G.L. Ch. 278A, No. 1379CR00118 (July 27, 2018), File Ref. No. 154; Docket Information for Commonwealth v. Duke, *supra* note 442, at 08/01/2018 (allowing motion for funds at File Ref. No. 154).

⁵⁴¹ Defendant Ashawnee Duke's Second Supplemental Motion for Funds to Pay His Expert Witness for Work Done Pursuant to M.G.L. Ch. 278A, Commonwealth v. Duke, No. 1379CR00118 (Mass. Super. Ct. Feb. 7, 2019), File Ref. No. 160.

⁵⁴² Defendant Ashawnee Duke's Third Supplemental Motion for Funds to Pay His Expert Witness for Work Done Pursuant to M.G.L. Ch. 278A, Commonwealth v. Duke, No. 1379CR00118 (Mass. Super. Ct. June 5, 2019), File Ref. No. 169.

⁵⁴³ Docket Information for Commonwealth v. Duke, *supra* note 442, at 02/08/2019 and 06/05/2019 (allowing motions for funds at File Nos. 160 and 169).

⁵⁴⁴ Defendant Ashawnee Duke's Motion for Funds for an Investigator Pursuant to Mass. R. Crim. P. Rule 30(c)(5), *supra* note 477 (allowed Apr. 29, 2019).

⁵⁴⁵ Defendant Ashawnee Duke's Supplemental Motion for Funds for an Investigator Pursuant to Mass R. Crim. P. Rule 30(c)(5), *supra* note 477 (allowed June 12, 2019).

⁵⁴⁶ Defendant Ashawnee Duke's Second Supplemental Motion for Funds for an Investigator Pursuant to Mass R. Crim. P. Rule 30(c)(5), *supra* note 477 (allowed Sep. 26, 2019).

⁵⁴⁷ Defendant Ashawnee Duke's Request for Funds for Interpreter/Translator Services Pursuant to Mass R. Crim. P. Rule 30(c)(5), Commonwealth v. Duke, No. 1379CR00118 (Mass. Super. Ct. Dec. 18, 2019), File Ref. No. 176; Docket Information for Commonwealth v. Duke, *supra* note 442, at 12/18/2019 (allowing motion for funds at File Ref. No. 176).

These costs do not reflect the hours that attorneys and court staff spend litigating post-conviction testing issues.⁵⁴⁸ Brandon Garrett has argued that 100% state-funded DNA testing “would still cost far less to the state than the litigation of the typical criminal procedure claims prisoners bring, which can demand complex briefing and judicial review during lengthy state and federal appeals that can last for years.”⁵⁴⁹ But as *Lessieur* and *Duke* show, immaterial testing can similarly spawn complex briefing and judicial review during lengthy trial-level and appellate proceedings.

Post-conviction testing can play an invaluable role in exposing the flawed factual foundations of wrongful convictions, but outsourcing these costs to the taxpayers⁵⁵⁰ can create “perverse incentives.”⁵⁵¹ While underwriting testing expenses for indigent defendants is necessary as a matter of fairness, raising the materiality threshold may rebalance the incentives to help deter immaterial testing requests and, even if such testing petitions keep coming, a more robust materiality standard should limit the number of petitions that are granted, reducing the incidence of counterproductive testing.⁵⁵²

3. Alarm Fatigue

The harm of procedural accretion in dollars and attorney hours pales in comparison to the risk of missing a wrongful conviction.⁵⁵³ But given 278A’s requirement that movants assert innocence,⁵⁵⁴ a deluge of testing motions risks compromising efforts to identify wrongful convictions by desensitizing criminal-justice stakeholders to claims of innocence. As multiple Supreme Court justices have cautioned: “It must prejudice the occasional meritorious application to be buried in a

⁵⁴⁸ In explaining why counsel should be appointed to assist defendants in litigating post-conviction DNA motions, Brooks and Simpson, *see supra* note 31, at 833–34, essentially break down the representation into constituent tasks that reflect the time defense counsel would need to invest in such cases (not to mention expert assistance): “In order to achieve success with these motions, a litigant must be able to investigate the evidence, draft the testing motion, litigate the testing motion, negotiate and oversee the lab testing, understand the test results, and then be able to draft and litigate the appropriate motions, petitions, and appeals in light of the results.” The time commitment for prosecutors (and their experts) will largely mirror that of the defense team.

⁵⁴⁹ Garrett, *supra* note 30, at 1708.

⁵⁵⁰ *See* Brooks & Simpson, *supra* note 31, at 866 (suggesting that “the cost of litigating DNA cases” “will always be passed on to the taxpayer, directly or indirectly”).

⁵⁵¹ Jacobi & Carroll, *supra* note 40, at 264.

⁵⁵² *See infra* Section IV.B.

⁵⁵³ Doctors have similar concerns. *See* Gawande, *supra* note 500, at 45.

⁵⁵⁴ MASS. GEN. LAWS ch. 278A § 2(3) (2025).

flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search.”⁵⁵⁵ Again, despite (a likely significant undercount of) seventy 278A movants identified to date,⁵⁵⁶ only seven defendants received new trials on the strength of 278A testing (the testing was not a major factor for four others),⁵⁵⁷ and one of these seven defendants for whom testing was powerfully exculpatory later pled guilty to manslaughter.⁵⁵⁸ Even without complete 278A data, these numbers suggest that far more defendants have asserted innocence to obtain post-conviction testing than have been able to establish entitlement to a new trial on the basis of such testing.

The routinization of claiming innocence⁵⁵⁹ risks harming innocent defendants whose claims get lost in the increasing noise.⁵⁶⁰ The risk of dilution is particularly concerning given indications that guilt not only fails to deter defendants from seeking post-conviction testing but that guilty defendants are, in fact, more litigious.⁵⁶¹ The resulting “alarm fatigue” will leave judges, prosecutors, and defense attorneys less receptive to genuine claims of innocence.⁵⁶² The more immaterial post-conviction testing that is conducted, the more judges and prosecutors will view with skepticism the entire post-conviction testing enterprise.

⁵⁵⁵ *Herrera v. Collins*, 506 U.S. 390, 426 (1993) (O’Connor, J., concurring) (quoting *Brown v. Allen*, 344 U.S. 443, 537 (1953) (Jackson, J., concurring)).

⁵⁵⁶ See *supra* note 116 (summing the 278A cases identified in the research for this Article).

⁵⁵⁷ See *supra* Section I.B.

⁵⁵⁸ See *supra* Section II.D.2.a.

⁵⁵⁹ See *Herrera*, 506 U.S. at 428 (Scalia, J., concurring) (opining that “imposing” on federal habeas courts “the burden of regularly analyzing newly-discovered-evidence-of-innocence claims in capital cases” would, “it can confidently be predicted,” lead to “such federal claims” becoming “routine and even repetitive”).

⁵⁶⁰ Cf. *Jacobi & Carroll*, *supra* note 40, at 269 (“Meritorious claims for post-conviction DNA testing are extremely likely to be lost in the sea of petitions [received by innocence projects].”).

⁵⁶¹ See *Garrett*, *supra* note 33, at 141 & n.293.

⁵⁶² Cf., e.g., Liz Kowalczyk, *Patient Alarms Often Unheard, Unheeded: The Incessant Din of Beeping Monitors Can Numb or Distract Hospital Staff; the Consequences Can Be Deadly*, BOSTON GLOBE, News, Feb. 13, 2011 (reporting on “alarm fatigue” in hospitals where nurses “become desensitized” and “number of alarms can be so overwhelming that they turn into background noise”); see also *Stafford v. Chippewa Valley Elec. R.R. Co.*, 85 N.W. 1036, 1042–43 (Wis. 1901) (“Common sense suggests that instead of operating to protect persons traveling upon the street[, the continuous sounding of a bell on a moving streetcar] would have the opposite effect. It would tend to alarm horses not familiar with it; and persons would naturally become so familiarized with the sound that it would cease to attract attention.”).

If adopting statutory testing is akin to widening the post-conviction highway, then motions for immaterial testing are single-occupant car commuters clogging a lane that should be reserved for emergency vehicles. Immaterial testing makes it harder for factually innocent, wrongfully convicted defendants to race towards justice.⁵⁶³

B. The Corrections

In highway design, induced demand can be mitigated by adding tolls,⁵⁶⁴ and some states do impose financial penalties on, and delay the parole consideration of, defendants who pursue guilt-confirming testing.⁵⁶⁵ But these penalties do not specifically target *immaterial* testing, and they may not deter defendants with nothing to lose.⁵⁶⁶ Rather than resorting to punitive measures, the demand for immaterial testing can be reduced through substantive modifications to the legal regime that raise the barrier to entry.⁵⁶⁷

Massachusetts's 278A statutory regime and its judicial implementation (as well as testing regimes in other jurisdictions) can be modified in numerous ways to limit motions for counterproductive testing, including presumptively prohibiting testing motions until *after* resolution of the direct appeal unless good cause is shown (e.g., glaring ineffective assistance of counsel in failing to request the testing before trial),⁵⁶⁸ requiring the state public defender agency to screen and approve all testing motions before filing,⁵⁶⁹ and presumptively barring

⁵⁶³ Cf. Jacobi & Carroll, *supra* note 40, at 265.

⁵⁶⁴ See Schneider, *supra* note 25.

⁵⁶⁵ See MO. ANN. STAT. §§ 650.058(2), 217.262(1) (West 2025); see also Jacobi & Carroll, *supra* note 40, at 265–66 (proposing “that states make petitioning costly” by “punishing with additional incarceration those petitioners whose guilt is confirmed by DNA tests”).

⁵⁶⁶ See Jacobi & Carroll, *supra* note 40, at 304 (“When prisoners have little to lose, it is difficult to discourage poor behavior.”).

⁵⁶⁷ See Mann, *supra* note 25 (“As long as driving on the roads remains easy and cheap, people have an almost unlimited desire to use them.”).

⁵⁶⁸ In addition to reducing the number of testing motions filed and making it easier to assess their merit, prohibiting pre-direct-appeal testing could obviate some post-conviction testing altogether, as the appellate process can lead to a jeopardy reversal that precludes retrial. See, e.g., *Burks v. United States*, 437 U.S. 1, 18 (1978).

⁵⁶⁹ Like many (if not most) other testing statutes, see Brooks & Simpson, *supra* note 31, at 835, Swedlow, *supra* note 31, at 364 & n.37, Chapter 278A empowers judges to assign/appoint counsel to indigent defendants for “the preparation and presentation” of testing motions, MASS. GEN. LAWS ch. 278A § 5 (2025), and public-defender screening already happens in at least some cases, see, e.g., *Commonwealth v. Monteiro*, 120 N.E.3d 1226, 1227 (Mass. 2019). But the recommendation here transcends appointment of counsel who will advocate zealously for the testing; it envisions careful screening by a resource-

successive testing motions.⁵⁷⁰ Waiting until after the direct appeal⁵⁷¹ should help prevent post-conviction testing from becoming an extension of the pitched battles of trial that zealous defense attorneys are expected to pursue as a matter of routine.⁵⁷² Screening counsel (and judges downstream) can use the record assembled for, and synthesized on, appeal to assess and weed out testing requests that offer no hope of yielding material results when measured against the load-bearing walls of the trial evidence that are not vulnerable to the testing, and the risk of prejudice dismissal of deficient testing petitions should deter fishing expeditions.⁵⁷³

But the most direct corrective to immaterial statutory testing is to require a meaningful *ex ante* showing of materiality. Movants should have to show that, on the existing factual record (or those aspects of it not vulnerable to revision through testing), their best-case-scenario results would directly indicate that they did not commit the crime or negate evidence relied on by the prosecution to prove that they did.⁵⁷⁴

constrained agency. Cf. Sean Cotter, *Judge Dismisses 102 Cases Amid Lawyer Work Stoppage; Charges Range from Shoplifting to Assault and Drug Trafficking*, BOSTON GLOBE, July 23, 2025, at A1 (explaining that hourly rates for “private court-appointed attorneys known as bar advocates” who “represent about 80 percent of indigent defendants” in criminal cases in Massachusetts “have lagged behind neighboring states, leading fewer people to sign up to be appointed to take cases” and that the bar advocates have “significant leverage, as the public defenders’ offices don’t have the staffing to handle [a] massive influx of unrepresented defendants”). Such screening is consistent with recognizing that post-conviction testing and related litigation consume limited public resources that must be stewarded carefully by *all* criminal-justice stakeholders.

⁵⁷⁰ See, e.g., MD. CODE ANN., CRIM. PROC. § 7-103(a) (West 2025) (“For each trial or sentence, a person may file only one petition for relief under this title.”). When combined with public-defender gatekeeper screening for genuine materiality, a rebuttable presumption against successive motions (with exceptions to prevent injustices) should limit congestion in the testing lane without unfairly boxing out unwary, unrepresented defendants.

⁵⁷¹ At least some testing statutes already reflect a preference for delaying testing motions until after resolution of the direct appeal. For example, Maine’s statute essentially establishes a presumption, albeit a rebuttable one, that testing will not proceed before the conclusion of the direct appeal. See ME. REV. STAT. ANN. tit. 15, § 2138(12) (2025) (“Exhaustion. A person who has taken a direct appeal from the judgment of conviction is not precluded from utilizing the remedy of this chapter while the appeal is pending. The resolution of the motion is automatically stayed pending final disposition of the direct appeal unless the Supreme Judicial Court, sitting as the Law Court, on motion otherwise directs.”).

⁵⁷² See *supra* notes 439–44 and accompanying text.

⁵⁷³ See generally *Dist. Att’y’s Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 63 (2009) (recognizing “the need for certain conditions on access to the State’s evidence” for post-conviction DNA testing).

⁵⁷⁴ See Brooks & Simpson, *supra* note 31, at 813 (“The court should determine whether the result of a favorable DNA test *could* produce evidence that, even when considering all the evidence produced at trial, creates a reasonable probability the convicted person’s

Conceptually divorcing post-conviction testing from “innocence” will help lawyers and judges assess such showings dispassionately.

Policy makers and scholars might debate the costs and benefits of other corrective measures, but, if implemented faithfully and fairly,⁵⁷⁵ raising the materiality threshold should limit over-testing without preventing innocent defendants from obtaining the testing that could set them free.⁵⁷⁶ Like high-occupancy vehicle (HOV) restrictions for new lanes on expanded highways (rather than new toll booths/gantries), a robust materiality standard will reduce demand for counterproductive testing and the resulting procedural accretion while keeping the lane open for meritorious motions.⁵⁷⁷

A more demanding materiality threshold should reduce the number of statutory testing motions prosecutors feel compelled to oppose, the number of contested testing-motion hearings, the number of petitions that go forward to testing, and the number of long-shot new-trial motions spawned by revelation of immaterial new evidence. The reduced chance of obtaining testing also should reduce the incentive for defendants to file frivolous testing motions, but even if some low-occupancy vehicles make it onto the HOV lane, the materiality bar will guide them to the nearest exit as quickly as possible.⁵⁷⁸ Fortifying the

verdict or sentence would have been more favorable if the results of the DNA testing had been available at the time of trial. If the court fails to make the presumption of a favorable DNA testing result, the statute can never achieve its purpose.”); *cf.* Garrett, *supra* note 30, at 1633 (proposing “standard of review” for “claims of innocence” “based upon the degree to which new evidence of innocence undercuts the evidence of guilt presented at trial”).

⁵⁷⁵ As with any legal standard, the materiality test proposed here would be subject to misapplication by individual judges. But, as with other legal standards, such misapplication would be subject to appellate review. *See* MASS. GEN. LAWS ch. 278A § 18 (2025) (“An order allowing or denying a motion for forensic or scientific analysis filed under this chapter shall be a final and appealable order.”).

⁵⁷⁶ While immaterial testing (by the definition of “materiality” proposed here) cannot directly set an innocent defendant free, it could theoretically spark a chain reaction that leads to evidence of innocence. For example, if the real smoker of the Newport cigarette butt in *Commonwealth v. Duke*, *see supra* notes 472–86 and accompanying text, had been a previously unknown witness with exculpatory information, immaterial testing of the cigarette butt could have led to an exoneration. While such developments are theoretically possible, granting testing on this basis would be extremely speculative.

⁵⁷⁷ *See* TRAVIS & ASPLEN, *supra* note 32, at 2 (making suggestions that “seek to maximize opportunities for the truly innocent to obtain redress without forfeiting the legal system’s need for finality”).

⁵⁷⁸ *Cf.* Gwendolyn Carroll, *Proven Guilty: An Examination of the Penalty-Free World of Post-Conviction DNA Testing*, 97 J. CRIM. L. & CRIMINOLOGY 665, 669 (2007) (observing that more rigorous screening “would not necessarily reduce the number of applications; instead, it would simply reduce the number of those petitioners who are ultimately granted tests” and criticizing as “misguided” “a proposal that places the onus on the courts and attorneys of reducing the burden on courts and attorneys”).

materiality standard will therefore more efficiently train resources on worthy cases, benefitting all criminal-justice stakeholders.⁵⁷⁹

1. *Bypassing Innocence*

Just as this Article has focused on the materiality of post-conviction testing (what the testing can and cannot show in a given case) and *not* the guilt or innocence of any defendant pursuing such testing,⁵⁸⁰ so should judicial determinations of testing materiality be separated from questions of guilt and innocence. Post-conviction testing statutes often “require a preliminary showing of innocence in order to obtain DNA testing itself.”⁵⁸¹ But post-conviction testing processes will more effectively help exonerate innocent defendants if they skip over the emotionally charged, loaded question of innocence.⁵⁸² The actual factual innocence of a convicted defendant is monumental. It requires nothing short of the defendant’s release as quickly as practicable.⁵⁸³ Perhaps because of the enormity of wrongful conviction, claims of innocence are invidious. They call into question the reliability of the justice system and the competence and/or ethical integrity of those who investigated, prosecuted, defended, and judged the case.

Moreover, the innocence implications of exculpatory evidence will not always be clear.⁵⁸⁴ For example, while Carrie Leonetti has

⁵⁷⁹ Acker, *supra* note 438, at 722 (“[T]he diverse stakeholders in criminal justice—law enforcement, prosecutors, the defense bar, crime victims, the accused, and the public at large . . . [all] stand to benefit from . . . policies that reliably and fairly identify criminal offenders while guarding against the arrest, prosecution, conviction, and punishment of the innocent.”).

⁵⁸⁰ See *supra* note 77 (cautioning that the author has no independent information and expresses no beliefs or opinions as to the factual guilt or innocence of any defendant whose case is discussed herein).

⁵⁸¹ Garrett, *supra* note 30, at 1635; see also Dist. Att’y’s Off. for Third Jud. Dist. v. Osborne, 557 U.S. 52, 63 (2009) (collecting testing statutes that require a “statement that the applicant is innocent”).

⁵⁸² Cf. Leonetti, *supra* note 69, at 104–05 (“There is often disagreement among the parties to criminal cases (police, prosecutors, defense attorneys, judges, victims) about whether subsequent discoveries have truly exonerated a defendant, usually because the putatively exonerating evidence is not as conclusive as DNA.”). Such disagreements can arise in DNA cases as well. See, e.g., *infra* note 584.

⁵⁸³ See TRAVIS & ASPLEN, *supra* note 32, at 2, 41 (referring to “the need for speed when an innocent person may be imprisoned” and admonishing that if testing results “exonerate (are inconsistent with all theories of guilt), the prosecutor should immediately take the necessary steps to have the inmate released.”).

⁵⁸⁴ See ROMAN ET AL., *supra* note 18, at vii (distinguishing different kinds of exculpatory evidence); TRAVIS & ASPLEN, *supra* note 32, at 3–4 (“There . . . are cases in which the prosecutor and defense counsel cannot agree on whether an exclusion would

suggested that if “semen collected in a rape kit contains a DNA profile that excludes the defendant as its source, he has been undeniably exonerated,”⁵⁸⁵ that will not invariably be true (even in single-perpetrator rape cases). The exculpatory power of the exclusion will depend on factual context (e.g., whether the victim had an earlier consensual encounter, whether and where the rapist ejaculated and his use of a condom).⁵⁸⁶ Putting aside the possibility of willfully blind, struthious prosecutors acting in bad faith in hypothesizing an “unindicted co-ejaculator,”⁵⁸⁷ testing data must still be reconciled with inculpatory evidence unaffected by the testing.

Invoking innocence may confuse the issues at the statutory post-conviction testing stage,⁵⁸⁸ engendering unnecessary opposition from the prosecution and fueling revelation bias on the defense side.⁵⁸⁹ Although sometimes demonstrative of innocence, testing is just a tool. Tethering testing to innocence can lead to both over-testing—greenlighting forensic testing with little potential to support an otherwise promising claim of factual innocence—and under-testing—screening out defendants with weak innocence claims where forensic testing could nonetheless expose a conviction’s intolerably rotten factual foundation.

amount to a demonstration of innocence, would establish reasonable doubt of guilt, or would merely constitute helpful evidence.”); Leonetti, *supra* note 69, at 151 (“The truth is, without vastly improved crystal-ball technology, it is usually impossible to be certain whether a particular individual is innocent or guilty.”); Fisher, *supra* note 55, at 25–26 (acknowledging the omission from an article entitled *Convictions of Innocent Persons in Massachusetts* of cases “that other scholars have described as wrongful convictions but which do not meet [Fisher’s] criteria for ‘innocence.’”).

⁵⁸⁵ Leonetti, *supra* note 69, at 102.

⁵⁸⁶ See, e.g., TRAVIS & ASPLEN, *supra* note 32, at 4 (discussing contextual factors, including whether victim was otherwise sexually active and number of alleged perpetrators).

⁵⁸⁷ See, e.g., Findley, *supra* note 54, at 1180 (“Many observers have noted that it is not unusual for prosecutors, when confronted with such compelling evidence as DNA from semen in a rape case that excludes the suspect, to hypothesize what Barry Scheck and Peter Neufeld have called the presence of an ‘unindicted co-ejaculator’—even when such a phantom co-perpetrator was never part of the prosecution’s theory of the case.”) (notations omitted).

⁵⁸⁸ Cf. *id.* at 1160–61 (“[I]t can be a vexing problem to determine when a person previously found ‘guilty’ is entitled to relief from an unsound conviction as opposed to when a person may justifiably claim to be ‘innocent’ and to have been ‘exonerated.’”).

⁵⁸⁹ See Leonetti, *supra* note 69, at 131 (“The roles assigned to parties in an adversarial system, particularly police and prosecutors on the one hand and defense attorneys on the other, give rise to powerful cognitive blinders. These blinders are formally known in psychology as a subset of ‘motivated reasoning’ and [are] colloquially known in the criminal justice system as ‘tunnel vision.’”).

Most U.S. legal systems do not even have an “official mechanism for deciding claims of factual innocence, as opposed to guilt.”⁵⁹⁰ Convicted defendants seeking to clear their names must first obtain a new trial. If they do, the prosecution decides whether to re-prosecute.⁵⁹¹ So, while defendants and prosecutors may ultimately contemplate innocence, the first step is a new trial.

Where “even DNA cases come in varying shades of gray,”⁵⁹² assessing testing’s sheer *potential* to undermine the factual foundation of the conviction⁵⁹³ elevates the discourse above the “subjective judgments or accusations” of prosecutors and defense attorneys.⁵⁹⁴ Such analyses should be less emotionally charged than a debate about innocence but still readily actionable.⁵⁹⁵ Fast-tracking forensic testing that has the potential to materially upset the factual underpinnings of a conviction will catch wrongful convictions as well as righteous convictions predicated on faulty facts, neither of which can be countenanced.⁵⁹⁶ Focusing on whether best-case-scenario results would materially alter the factual picture without worrying about guilt or innocence also obviates contemplation of alternative theories of

⁵⁹⁰ Fisher, *supra* note 55, at 6 (notation omitted). See also *id.* (“[C]ourts virtually never address or rule upon the question of whether the defendant is truly innocent. Instead, judges and juries determine that a defendant is ‘not guilty’ or that a guilty verdict was infected by legal error and must be reversed.”) (quoting Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1322–23 (1997)) (some internal quotation omitted); Findley, *supra* note 54, at 1160, 1190 (observing that the system “generally has no corresponding legal category for clear innocence” and explaining that “[t]he concept of ‘innocence,’ . . . has no real legal meaning in most jurisdictions”).

⁵⁹¹ See Findley, *supra* note 54, at 1191; Garrett, *supra* note 30, at 1712. Thus, an exoneree compensation statute might apply where a conviction is vacated and either the indictment is then dismissed or, if a new trial is conducted, the defendant is found not guilty. See MASS. GEN. LAWS ch. 258D, § 1(B)(ii) (2026). But innocence can still be relevant to eligibility for compensation. See *id.* (limiting claims arising from “erroneous felony conviction” to, *inter alia*, those granted judicial relief “on grounds which tend to establish the innocence of the individual”).

⁵⁹² Findley, *supra* note 54, at 1161.

⁵⁹³ Cf. Garrett, *supra* note 30, at 1633 (advocating standard for reviewing innocence claims “that simply evaluates the probative impact of new evidence”).

⁵⁹⁴ Findley, *supra* note 54, at 1183–84.

⁵⁹⁵ Cf. TRAVIS & ASPLEN, *supra* note 32, at 3 (“In some instances, . . . exclusionary test results will not be determinative of innocence, although they may help an inmate obtain a new trial, a pardon, commutation, or clemency.”).

⁵⁹⁶ See TRAVIS & ASPLEN, *supra* note 32, at 2 (“[W]e cannot tolerate the incarceration of those not guilty”); Garrett, *supra* note 30, at 1707 (“One can argue that a defendant does not receive a valid jury trial if false evidence on a material issue was presented to the jurors.”).

guilt, like the unindicted co-ejaculator or other “flimsy hypothetical scenarios” used to justify denying testing based on the “possibility that DNA testing might not exculpate.”⁵⁹⁷ Relieving movants from the obligation of asserting factual innocence would also reduce “innocence” alarm fatigue.

2. *Re-Fanging Materiality*

The conflation of relevance and materiality induces demand for post-conviction testing by lowering its ‘cost.’ It also engenders procedural accretion because revelation of information that, in the best-case scenario for the defendant, merely tends to support a defendant’s position⁵⁹⁸ virtually guarantees further litigation to flesh out the extent of that support. Rather than invite counterproductive testing, the materiality standard should filter out cases where testing could not support granting a new trial.⁵⁹⁹

Massachusetts defendants seeking a new trial on the basis of newly discovered evidence must establish that the evidence “casts real doubt on the justice of the conviction,” with motion judges charged to decide “not whether the verdict would have been different, but rather whether the new evidence would probably have been a real factor in the jury’s deliberations.”⁶⁰⁰ The cases in which defendants successfully used testing to obtain new trials⁶⁰¹ show that testing that either independently exculpates or negates key physical evidence linking the defendant to the crime casts real doubt on the justice of the conviction. Accordingly, post-conviction testing has the potential to yield “material” evidence when the defendant’s best-case-scenario results would be independently exculpatory or sever the forensic link between the defendant and the crime (or eliminate forensic support for key inculpatory testimony).⁶⁰²

⁵⁹⁷ Garrett, *supra* note 30, at 1677.

⁵⁹⁸ Commonwealth v. Ramos, 198 N.E.3d 437, 445 (Mass. 2022).

⁵⁹⁹ Cf. TRAVIS & ASPLEN, *supra* note 32, at 3 (“State-funded postconviction DNA testing should be granted only when there is a strong probability that the results that can be anticipated from DNA testing would have changed the prior verdict.”).

⁶⁰⁰ Commonwealth v. Grace, 491 N.E.2d 246, 248 (Mass. 1986).

⁶⁰¹ See *supra* Sections I.C and II.D.

⁶⁰² In an appropriate case, testing would also be material if it could negate an aggravating factor that exposed the defendant to enhanced punishment. See Garrett, *supra* note 30, at 1650; see also Gutierrez v. Saenz, 606 U.S. 305, 312–13 (2025) (summarizing defendant’s assertion that, as interpreted, the Texas post-conviction testing statute “violates the Due Process Clause by forbidding DNA testing when its sole purpose is to establish that a defendant is ineligible for the death penalty”).

Ideally, the materiality standard for testing would always synch up with applicable new-trial standards so that the effect of the defendant's best-case-scenario results (should they materialize) would be an essentially preordained new trial. This would both promote testing efficiency and reduce post-testing litigation. But the standards for granting new trials "based on newly discovered evidence vary from jurisdiction to jurisdiction,"⁶⁰³ and the new-trial standards in some states are so onerous⁶⁰⁴ that conditioning testing on a showing that best-case-scenario results that would warrant a new trial could prove unduly restrictive.⁶⁰⁵

But the materiality threshold for testing need not be calibrated at certain victory on a subsequent new-trial motion assuming the defendant's best-case-scenario results. If testing could directly indicate that the defendant did not commit the crime or significantly undermine the prosecution's proof that they did, testing should proceed even if the prosecution might contest a new-trial motion predicated on those best-case results for the defendant.⁶⁰⁶

Despite miscalibrating 278A materiality in its jurisprudence,⁶⁰⁷ the SJC correctly recognized that the *likelihood* of obtaining a favorable result "is not relevant to the analysis," only the testing's "potential to produce a result that is material to [the movant]'s identification as the perpetrator."⁶⁰⁸ Other states, however, have gone down an illogical

⁶⁰³ Findley, *supra* note 54, at 1197; *see also* Garrett, *supra* note 30, at 1671; TRAVIS & ASPLEN, *supra* note 32, at 14.

⁶⁰⁴ *See, e.g.,* Odum v. Commonwealth, 301 S.E.2d 145, 149 (Va. 1983) (explaining that defendants seeking "new trials based on after-discovered evidence" must establish, *inter alia*, that evidence "is material, and such as should produce opposite results on the merits at another trial"). This standard is distinct from Virginia's even more stringent standard in "actual innocence" cases. *See, e.g.,* VA. CODE ANN. § 19.2-327.11(A)(vii) (2025) ("The petitioner shall allege categorically and with specificity, . . . that the previously unknown, unavailable, or untested evidence is material and, when considered with all of the other evidence in the current record, will prove that no rational trier of fact would have found proof of guilt . . . beyond a reasonable doubt.").

⁶⁰⁵ *See* Findley, *supra* note 54, at 1198 (discussing California's requirement that new evidence must "thoroughly undermine the entire structure of the prosecution's case," which it can do "only if it is conclusive and points unerringly to innocence") (quotation and textual alteration omitted).

⁶⁰⁶ *See* Garrett, *supra* note 30, at 1682–83 (surveying jurisdictions—including New York and Pennsylvania—that impose additional requirements for vacatur "[e]ven after DNA testing . . . excludes an individual").

⁶⁰⁷ *See supra* Section II.C.2.

⁶⁰⁸ Commonwealth v. Wade, 5 N.E.3d 816, 826 (Mass. 2014); *see also* Commonwealth v. Clark, 34 N.E.3d 1, 15 (Mass. 2015) ("The Legislature's use of the word 'potential' in § 7(b)(4) suggests an awareness of the fact that the requested forensic analysis may not

path, “plac[ing] courts in the position of predicting the likely probative impact of the DNA testing.”⁶⁰⁹ That approach perpetuates the catch-22 that Massachusetts defendants faced prior to 278A’s enactment where they were “not entitled to obtain scientific testing of evidence” unless they made “a prima facie showing that the test results would warrant a new trial.”⁶¹⁰ Statutory testing under 278A adds value by affording more direct access to testing.⁶¹¹ Despite its flawed approach to materiality, the SJC’s current 278A framework at least correctly deemphasizes the *probability* of obtaining exculpatory results to focus instead on the *potential* for testing to yield exculpatory results.⁶¹² Some, but not all, other states take a similar approach.⁶¹³

Assessing the *probability* of best-case-scenario results invites circular reasoning based on the apparent strength of a case the factual underpinnings of which the testing seeks to undermine.⁶¹⁴ That is, the factual universe *as it existed at trial* may seem to overwhelmingly establish the defendant’s guilt such that exculpatory results seem improbable. But post-conviction testing shakes the snow globe on that factual universe. Towels, jackets, and bags damningly stained with the victims’ blood in the trial universe may not factor into the post-testing universe at all.⁶¹⁵ Speculation about the *likelihood* of a defendant’s obtaining exculpatory results ignores the contingent, variable nature of the trial narrative and its vulnerability to testing. The question is not the likelihood of those variables breaking in the defendant’s favor but the significance for the case if they did (which is the testing’s *potential*).

produce the desired evidence, but such a consequence should not be an impediment to analysis in the first instance.”).

⁶⁰⁹ Garrett, *supra* note 30, at 1676–77 (“Two states, Colorado and Texas, require that it be ‘more probable than not’ that the DNA testing would prove innocence. Moreover, . . . New Hampshire and Virginia, require clear and convincing evidence of or a substantial showing that testing would demonstrate innocence before a petitioner can obtain DNA testing.”) (notations omitted).

⁶¹⁰ *Wade*, 5 N.E.3d at 824 (quotation omitted); *see also* Commonwealth v. Ramos, 198 N.E.3d 437, 448 (Mass. 2022) (Cypher, J., dissenting) (“[A] defendant was in the difficult position of asserting the importance of evidence while simultaneously being unaware of its probity.”).

⁶¹¹ *See Wade*, 5 N.E.3d at 827 (recognizing that “the legislative purpose” would be “thwart[ed]” if 278A movant had “equal or greater burden” than defendant seeking discovery under preexisting framework).

⁶¹² *See Clark*, 34 N.E.3d at 15; *Wade*, 5 N.E.3d at 826.

⁶¹³ *See* Garrett, *supra* note 30, at 1678–79 (contrasting approaches in Ohio and Texas with Illinois and New Jersey).

⁶¹⁴ *See* Brooks & Simpson, *supra* note 31, at 812 (discussing the “futility” of this kind of “approach”).

⁶¹⁵ *See supra* Sections I.C.2, II.D.2.a.

This inquiry can be operationalized as a thought experiment that assumes the most defendant-friendly testing result and asks if that result would be independently exculpatory or negate key evidence that the prosecution used to convict.⁶¹⁶ The SJC majority in *Ramos* flirted with this analytical approach,⁶¹⁷ but the dissenting justice modeled it, considering the “most” that the defendant’s best-case-scenario results “would suggest” and concluding that DNA testing, “regardless of its result, would be immaterial.”⁶¹⁸ This best-case-scenario thought experiment can obviate unproductive testing.

This thought experiment, however, does still require familiarity with the trial record. A thorough appellate decision synthesizing the record⁶¹⁹ and the ongoing involvement of the trial judge (if possible) will therefore be invaluable. While 278A reflects a preference for the “judge who conducted the trial” to conduct any evidentiary hearing,⁶²⁰ this preference should be extended to evaluation of the initial testing motion. When a judge familiar with the trial record conducts the materiality thought experiment at the outset, they can weed out unproductive testing motions.⁶²¹

This thought experiment requires clear-eyed assessments of both the trial record and the state of the physical evidence to be tested. Bucking the test-first-ask-questions-later trend in the case law, 278A itself

⁶¹⁶ This thought experiment is not revolutionary. Courts in multiple states already conduct a best-case-scenario thought experiment. *See, e.g.,* State v. Dupigney, 988 A.2d 851, 861, 864 (Conn. 2010) (explaining that, where testing statute “directs us to analyze reasonable probability [that the defendant would not have been prosecuted or convicted] based on exculpatory results being obtained from DNA testing,” “we consider the effect of the most favorable result possible from DNA testing of the evidence”); Zeigler v. State, 654 So. 2d 1162, 1164 (Fla. 1995) (per curiam) (affirming denial of DNA testing where “even if the DNA results comported with the scenario most favorable to [defendant], he still would not have been able to show that the evidence would have probably produced an acquittal”); TRAVIS & ASPLEN, *supra* note 32, at 37–38 (recommending that prosecutors who receive a request for post-conviction testing evaluate the “potential significance of any further DNA testing” by determining in advance whether “testing would produce only irrelevant results” or “[i]f the results could be material”).

⁶¹⁷ *See* Commonwealth v. Ramos, 198 N.E.3d 437, 445 n.8 (Mass. 2022) (acknowledging “situations where the purported connection between the DNA evidence a defendant *hopes* to recover through testing and the other trial evidence is so attenuated that a request for testing may be appropriately denied”) (emphasis added).

⁶¹⁸ *Id.* at 446, 453 (Cypher, J., dissenting).

⁶¹⁹ *See supra* notes 568–73 and accompanying text.

⁶²⁰ MASS. GEN. LAWS ch. 278A § 6(b) (2025).

⁶²¹ *But see* Brooks & Simpson, *supra* note 31, at 858 (“[C]ertain biases can creep into the process due to perhaps too much exposure to the case. Courts, like prosecutors, can be hesitant to reopen cases that required a great deal of effort in the past.”).

includes safeguards against counterproductive testing that have ramifications for the materiality analysis. In requiring movants to establish *before* testing that the “material 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,”⁶²² the statute seeks to avoid situations where background noise might masquerade as meaningful data. This is important because the presence or absence of DNA that seemingly directly exculpates or eliminates key support for the conviction might actually reflect contamination or deterioration from subsequent handling, storage, or prior testing.

In *Commonwealth v. Linton*, for example, the defendant sought to test, *inter alia*, a drinking glass and cellphone that were introduced in evidence at trial and so could have been “handled by jurors, counsel, or court staff” and then were not stored under ideal conditions.⁶²³ The experts who testified at the 278A hearing addressed the chain-of-custody issues, with the defense expert acknowledging that “the evidence storage had not been ‘ideal’ or ‘optimal’” and “that the profiles might be mixed” but maintaining that the items could still yield “scientifically valid DNA results” and that DNA standards from males who had handled the items could be used for elimination purposes.⁶²⁴ The prosecution’s expert explained that crime lab policy deemed “not suitable” a sample whose testing indicated that three or more people had handled it, precluding further examination because even if testing yielded “a very mixed sample of ‘handler’ DNA,” it would be virtually impossible to determine “when any handler DNA had been placed on the object or by whom.”⁶²⁵ The motion judge concluded that the evidence had “not been subject to a chain of custody or securely stored in a manner likely to yield usable and material DNA results,” and the SJC affirmed.⁶²⁶

Notably, this analysis was conducted *prior* to testing. The parties did not know who had handled the material or when or whether there were multiple DNA profiles. But, consistent with the statutory framework, the judges resisted a test-first approach and, in so doing, protected

⁶²² § 7(b)(2). Many state testing statutes impose chain-of-custody requirements that must be satisfied before testing will be granted. See Swedlow, *supra* note 31, at 370–72 & nn.63, 64 (collecting statutes).

⁶²³ 132 N.E.3d 93, 101 (Mass. 2019).

⁶²⁴ *Id.* at 101–02.

⁶²⁵ *Id.* at 102.

⁶²⁶ *Id.* (quotation omitted).

against the revelation bias that could attach to results from a contaminated sample. This prevented any background noise from snowballing into new-trial momentum.

This realistic, contextualized appraisal of the evidence applies beyond chain-of-custody concerns to other situations where the absence or presence of DNA would not be particularly significant in the circumstances of a given case. Thus, the SJC in *Commonwealth v. Camuti* explained that even if testing did not reveal the defendant's DNA on the shirt of a poisoning victim who was apparently dragged to where his body was found (his shirt having "been pulled up in the areas near [his] shoulders, neck, and armpits"), "the potentially exculpatory value of this evidence would have been marginal at best" because the defendant had purchased latex gloves and, as a crime scene specialist testified, "DNA would not necessarily be present just because someone had touched the shirt" and clothing seldom provides a "pristine" DNA sample.⁶²⁷ Similarly, the presence of third-party DNA that would be significant if it could only have been deposited during commission of the crime⁶²⁸ will be far less probative where innocent contact was possible at other times.⁶²⁹

Revisiting the knife-handle testing in *Commonwealth v. Clark*⁶³⁰ shows the significance of these factual nuances for the materiality thought experiment. The victim in *Clark* testified that the rapist held a kitchen knife from her apartment at her throat but that she grabbed it and, attempting to stab him in the back, struck him in the shoulder, breaking the blade.⁶³¹ The SJC recognized "the possibility that DNA from skin cells, so-called 'touch DNA' or 'trace DNA,'" could be on the handle and that "[w]here the assailant was holding onto the knife for a period of time and the victim believed that she stabbed the assailant in the shoulder, skin cells and blood may be present on the

⁶²⁷ 226 N.E.3d 868, 870, 873, 876–77 (Mass. 2024).

⁶²⁸ See *Randolph v. Commonwealth*, 173 N.E.3d 317, 327 (Mass. 2021) (observing where defendant sought nephew's DNA to test against sample from murder weapon that, *inter alia*, "the record suggests that at no point other than the time of the killing would [the nephew] have had access to the knife").

⁶²⁹ See *Commonwealth v. Anitus*, 97 N.E.3d 700, 704 (Mass. App. Ct. 2018) (explaining that the "presence" of DNA evidence "on an object alone does not provide sufficient information to determine when the DNA was deposited on the object").

⁶³⁰ 34 N.E.3d 1, 5 (Mass. 2015); see *supra* notes 213–26 and accompanying text.

⁶³¹ *Id.* at 15.

handle.”⁶³² Testing the handle for DNA might therefore seem to epitomize “material” post-conviction analysis.

But, while the *presence* of Clark’s fingerprints or DNA or blood would certainly be inculpatory given that he denied knowing the victim,⁶³³ the *absence* of Clark’s biological material or the presence of some other male’s DNA—likely Clark’s best-case-scenario results—would *not* have been materially exculpatory 40 years later.⁶³⁴ First, the victim’s testimony did not establish “that the knife came in contact with” the assailant’s “skin, or that he ever bled as a consequence of the victim’s effort to stab him.”⁶³⁵ In addition, where DNA can be found in even a flake of skin,⁶³⁶ testing to identify a perpetrator who merely touched an item can also reveal genetic material from any number of people who touched that item but have no connection to the crime.

The *Clark* knife was not exclusively handled by the perpetrator. Where the perpetrator appropriated a knife that was already in the victim’s apartment, her houseguests or roommates (if any) could have touched it. The knife handle’s treatment during the subsequent investigation and trial would also be relevant.⁶³⁷ The analysis would be different if a DNA profile could inevitably be extracted for every individual who has ever touched an object, but that is not the state of the science.⁶³⁸ In fact, the immateriality of the absence of Clark’s DNA on the knife handle would obtain even if the assailant had brought the knife to the victim’s apartment and it had been protected against contamination thereafter, as there would still be no guarantee that handler DNA would remain.

⁶³² *Id.* at 13 nn.13, 15.

⁶³³ *Id.* at 12.

⁶³⁴ The crime occurred in 1973; Clark sought testing in 2013. *Id.* at 5, 8.

⁶³⁵ *Id.* at 9.

⁶³⁶ Karen Norrgard, *Forensics, DNA Fingerprinting, and CODIS*, NATURE EDUC. (2008), <https://www.nature.com/scitable/topicpage/forensics-dna-fingerprinting-and-codis-736/> [<https://perma.cc/8CLY-4484>].

⁶³⁷ See, e.g., *Dist. Att’y’s Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 82 (2009) (Alito, J., concurring) (explaining that “modern DNA testing technology is so powerful that it actually increases the risks associated with mishandling evidence” because “[a]ny test that is sensitive enough to pick up such trace amounts of DNA will be able to detect even the slightest, unintentional mishandling of evidence”).

⁶³⁸ See NAT’L INST. OF JUST., *supra* note 409; see also *State v. Bates*, 177 A.3d 621, 625 (Me. 2018) (rejecting defendant’s argument that if he had “touched” sock in rape-murder victim’s mouth “then his DNA would almost certainly have been found on it” by highlighting possibilities that defendant could have “touched but did not leave (‘shed’) his DNA on the sock, that he wore gloves, or that he touched the sock in a location that was not sampled”).

The suggestion that testing a weapon used to facilitate a rape could not yield material results may seem radical,⁶³⁹ but that is basically what the motion judge concluded after Clark secured what were objectively his best-case-scenario results.⁶⁴⁰ Post-conviction testing ultimately yielded a partial male profile from the knife handle that excluded Clark.⁶⁴¹ Clark moved for a new trial, proffering the DNA results on the knife handle as one of multiple bases for relief.⁶⁴² The motion judge was not persuaded. She wrote that the record indicated that at least “three males, the prosecutor, the defense counsel, and the trial court clerk” touched the knife handle at trial, there was “no record of the sorts of procedures for protecting trial evidence with which we are now well familiar having been in place at that time,” and, after trial, the knife was returned to the prosecution and later located “in an unsealed envelope.”⁶⁴³ She added that “it is apparently undisputed that the DNA testing method used in 2019 is ‘prone to contamination,[’]” concluding that “[t]he fact that [Clark’s] DNA is not now to be found on the knife does not mean he didn’t touch it 47 years ago.”⁶⁴⁴

Like the SJC in *Lessieur* and *Duke*, the *Clark* judge rightly concluded that the new DNA results did not justify a new trial.⁶⁴⁵ But, once again, the immateriality of the testing should have been evident even before the testing was conducted. Taking a hard look at materiality *before* testing is a powerful prophylaxis against revelation bias. It is easier to dispassionately demonstrate in advance that testing *could not* be material (because the absence of the defendant’s DNA will not be significant if no perpetrator DNA should be expected or because too many people touched the evidence for the presence of third-party DNA to be exculpatory) than it is to contend with the snowballing

⁶³⁹ The SJC did not order testing in *Clark*, instead remanding for further findings on the statutory requirements, pointing to the parties’ dispute under § 7(b)(2) as to the impact of, *inter alia*, the handling of the handle and possible deterioration. 34 N.E.3d at 16.

⁶⁴⁰ Memorandum of Decision and Order on Defendant’s Motion for Postconviction Relief at 6–11, *Commonwealth v. Clark*, No. 7384CR76049 (Mass. Super. Ct. Dec. 21, 2020), File Ref. No. 93.

⁶⁴¹ *Id.* at 7. There was apparently a possibility that this profile resulted from contamination (a “possible staff match” from someone at the lab). *Id.* at 8.

⁶⁴² *Id.* at 2, 6.

⁶⁴³ *Id.* at 8–9.

⁶⁴⁴ *Id.* at 9.

⁶⁴⁵ *Id.* at 8–11. For reasons beyond the scope of this Article, *see supra* note 106, Clark’s convictions were ultimately vacated and the charges were nolle prossed. Docket Information for *Commonwealth v. Clark* at 11/23/2021, 11/24/2021, 08/24/2023 & 10/18/2023, No. 7384CR76049 (Mass. Super. Ct., Suffolk Cnty.), File Ref. Nos. 118, 119, 129, 130.

momentum of laboratory tests showing seemingly exculpatory exclusions/third-party profiles. Logic suggests that the results are no more probative for the immaterial test having been conducted, but the introduction of new scientific test results in a case where the defendant is claiming innocence leads to a revelation bias that changes things.

A best-case-scenario standard should shut down immaterial testing and the ripple-effect accretion that flows therefrom. If the best-case-scenario result would be independently exculpatory or negate key prosecution evidence, the testing should proceed. If not, the testing should be denied. If the testing yields the movant's best-case-scenario result, its significance will be predetermined, even if some additional litigation is necessary. If the movant does not receive the best-case-scenario result, the significance of the results should be easily assessed against the theory that justified the testing in the first place.

Because it is based on the existing record and hypothesized results, the materiality thought experiment should reduce procedural accretion by obviating evidentiary hearings in many cases. But further inquiry will sometimes be necessary, particularly where the chain of custody or prior testing raises concerns about contamination or futility where the best-case-scenario results would, other things equal, be material. For example, no male DNA was detected on "cuttings" from vaginal, genital, and oral swabs tested pre-trial in *Linton*.⁶⁴⁶ But, post-conviction, Linton's expert testified "that there was a possibility that DNA remained on the untested portions of the swabs that had not been present on the tested portions" because the cellular material may not have been distributed homogeneously on the swabs.⁶⁴⁷ The prosecution's expert said that swabs are "required to be collected homogeneously" and that the crime lab does not test the retained portion of a swab after a negative DNA result on the tested portion.⁶⁴⁸ As the SJC concluded, motion judges must resolve such conflicts in the expert testimony.⁶⁴⁹

Because it only excludes testing that could not directly yield material evidence, the standard proposed here should not make it harder for truly innocent defendants to get testing that could lead to exoneration. Not all innocence claims can be substantiated through testing and, while an innocent defendant might seek testing that eliminates evidence that

⁶⁴⁶ *Commonwealth v. Linton*, 132 N.E.3d 93, 98 (Mass. 2019).

⁶⁴⁷ *Id.* at 104.

⁶⁴⁸ *Id.*

⁶⁴⁹ *Id.* at 105.

corroborated a minor part of an important witness's testimony, that is unlikely to lead to their exoneration.

The materiality thought experiment proposed here also does not contemplate follow-on investigation in which, for example, a third-party DNA profile whose presence is not inconsistent with the evidentiary item's provenance (or the prosecution's trial evidence and theory of the case) is nonetheless entered into CODIS in the hopes of generating a hit to a suspect with a *modus operandi* that matches the crime or a new eyewitness.⁶⁵⁰ Testing that could lead to exculpatory evidence but that cannot itself either directly exculpate or significantly undermine the prosecution's case can still be pursued in conjunction with a proper showing on a new-trial motion on the preexisting post-conviction highway (just not in the fast lane dedicated to "material" statutory testing).⁶⁵¹

CONCLUSION

The addition of statutory post-conviction testing in Massachusetts shows that well-intentioned measures to increase access to testing can have the unintended consequence of inducing demand for immaterial testing that leads to unproductive, accretive litigation. And this problem of post-conviction over-testing is here to stay. As the backlog of pre-DNA-era cases dissipates, courts will more frequently confront testing requests in cases like *Lessieur* and *Duke* and *Ramos* where at least some DNA testing was or could have been performed earlier but the post-conviction defense team seeks new or additional testing. The desire to leave no forensic stone unturned in the pursuit of justice is understandable but incompatible with traditional notions of finality. A balance must be struck.

Where every U.S. jurisdiction has its own testing statute, more robust tracking of, and public access to, post-conviction testing outcomes nationwide should (like the concrete examples explored in this Article) inform best practices to prevent immaterial testing that drives accretive litigation with no real potential to exculpate. The

⁶⁵⁰ See Brooks & Simpson, *supra* note 31, at 855 ("Of all the postconviction DNA testing statutes, only six jurisdictions provide for the DNA results to be run through CODIS."); see, e.g., MD. CODE ANN., CRIM. PROC. § 8-201(d)(2) (2025) ("A court shall order a data base search by a law enforcement agency if the court finds that a reasonable probability exists that the data base search will produce exculpatory or mitigating evidence relevant to a claim of wrongful conviction or sentencing.").

⁶⁵¹ See *supra* note 191 and accompanying text.

materiality thought experiment proposed here is one of multiple approaches that should be implemented to preserve post-conviction testing as an avenue for wrongfully convicted defendants to gain crucial evidence without needlessly further eroding finality, retraumatizing victims and survivors, and diverting attention and resources away from factually innocent defendants.