

Post-Conviction Access and Testing in Massachusetts: What Will it Cost? David M. Siegel

The direct costs associated with providing post-conviction access and testing in cases of persons who claim factual innocence are a function of the number of persons who might seek such testing and the average cost per test. Although forty-seven states now provide broad postconviction access and testing by statute, there is no national data source on costs. The experience of some states may be illustrative.

Number of Requests

The number of persons who might seek such testing should be a function of the number of defendants convicted and the ease of seeking testing. In New York, for example, one of the first states to authorize postconviction access and testing by statute, one hundred inmates filed petitions seeking postconviction testing in the first *seven years* after adoption of its testing statute.¹

One state – Ohio – provides a useful measure of potential costs, because it initially enacted a postconviction access and testing law with a very short period to file for testing. Inmates in Ohio were thus encouraged to file promptly to preserve their rights. Ohio's experience with the costs of access and testing were such that it eventually eliminated the short period in which to file because it concluded that the costs were not significant.

Ohio provided for post-conviction DNA testing in 2003, and required all inmates convicted before October 29, 2003 to file an application for testing within one year. This period was subsequently extended an additional year.² Given the relatively short filing deadline, Ohio thus presents a rough snapshot of the magnitude of potential applications for testing. Any Ohio inmate convicted before October 29, 2003 originally had until October 29, 2004 to seek postconviction testing.

As of March 7, 2006, there had been 307 applications for testing, 220 had been denied, 15 had been granted and 72 were pending.³ Ohio's total prison population in October 2005 was 44,583,⁴ or nearly four times that of Massachusetts.

In 2006, Ohio removed the sunset period and allowed inmates to file an application for testing at any time.⁵ A detailed fiscal analysis⁶ of the projected cost of future testing concluded that the total cost of testing for the entire state would be less than \$100,000 per year.⁷

¹ Margaret A. Berger, *Lessons from DNA: Restriking the Balance Between Finality and Justice*, in DNA AND THE CRIMINAL JUSTICE SYSTEM, at 109, 115 (David Lazer, ed., 2004).

² Substitute House Bill 525, 125th General Assembly.

³ Ohio Legislative Service Commission, *Fiscal Note & Local Impact Statement*, Sub. Sb. 262, "Detailed Fiscal Analysis" at 3 (available at: <http://www.lbo.state.oh.us/fiscal/fiscalnotes/126ga/SB0262SP.htm>).

⁴ Ohio Department of Rehabilitation and Correction, *October 2005 Facts* (available at: <http://www.drc.ohio.gov/web/Reports/FactSheet/October%202005.pdf>).

⁵ Substitute S.B. 262; Signed by Governor 07/11/2006. See Baldwin's Rev. Code § 2953.21.

⁶ Ohio Legislative Service Commission, *Fiscal Note & Local Impact Statement*, Sub. Sb. 262 (available at: <http://www.lbo.state.oh.us/fiscal/fiscalnotes/126ga/SB0262SP.htm>).

⁷ *Id.*

Cost per Test

The cost per test can vary depending upon the number of items (i.e., evidence that may have biological material) or locations on an item to test. Some items (e.g., a rape kit), provide fewer potential places to test than, for example, clothing collected at a scene. However, there are data concerning the average testing costs per case.

In 2006, North Carolina's Office of State Budget and Management released a *Cost Study of DNA Testing and Analysis*,⁸ which included a detailed time-study of testing costs at both the North Carolina State Bureau of Investigation crime laboratories, as well as cost data for tests sent to private laboratories. The study found the average cost for in-house DNA processing of a criminal case was \$569. It found the average cost for DNA processing a rape kit in which there was no suspect (including both those done in-house and those sent out to private laboratories) of \$729.⁹ A request for proposals from private labs in 2004 to process backlogged cases resulted in per case bids of \$445 to \$1200. The report also provided survey data from other states showing average costs of testing both rape kits and criminal cases ranged from \$425 (in Nebraska) to \$1720 (in Oklahoma).¹⁰ Ohio's original estimate of testing costs was \$1,500 per case.¹¹

Other costs associated with providing post-conviction access and testing in cases of persons who claim factual innocence could include the burden on indigent defender or appointed counsel resources (when counsel is appointed to assist with applications), prosecutorial resources in responding to such applications for access and testing, and on judicial resources in considering and ruling on such requests. Providing postconviction access and testing by statute, however, should provide *cost savings* in these areas, because the absence of a statutory right and a statutorily established procedure mean each such case must be litigated anew.

Obviously there are also cost savings from providing postconviction access and testing to inmates who have been wrongfully convicted including the costs of their incarceration and/or post-release supervision. Most significantly, delays in obtaining access to and testing of evidence in cases of persons who are wrongfully convicted increase damage awards they obtain, because these awards are a function – in part – of the length of the period of wrongful incarceration. These can total millions of dollars in a single case.

⁸ North Carolina Office of State Budget and Management, *Cost Study of DNA Testing and Analysis* As Directed by Session Law 2005-276, Section 15.8, March 1, 2006 (available at: http://www.osbm.state.nc.us/files/pdf_files/3-1-2006FinalDNAREport.pdf).

⁹ *Id.* at 7, Table 4.

¹⁰ *Id.* at 8, Table 7.

¹¹ Ohio Legislative Service Commission, *Fiscal Note & Local Impact Statement*, Sub. Sb. 262, "Detailed Fiscal Analysis" at 3, (available at: <http://www.lbo.state.oh.us/fiscal/fiscalnotes/126ga/SB0262SP.htm>).