

COPY

COMMONWEALTH OF MASSACHUSETTS.

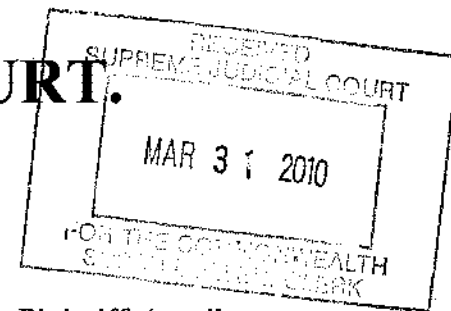
SUPREME JUDICIAL COURT.

S.J.C. No. 10616
SUFFOLK COUNTY

SHAWN DRUMGOLD,

v.

COMMONWEALTH OF MASSACHUSETTS,



Plaintiff-Appellee

Defendant-Appellant.

ON APPEAL FROM AND ON DIRECT APPELLATE REVIEW OF AN ORDER
FROM THE SUPERIOR COURT.

and

S.J.C. No. 10563
SUFFOLK COUNTY

HUMBERTO GUZMAN,

v.

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff-Appellant

Defendant-Appellee.

ON APPEAL FROM AND ON FURTHER APPELLATE REVIEW OF A JUDGMENT
OF THE SUPERIOR COURT.

Brief of Amicus Curiae.

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	v
INTEREST OF THE AMICUS CURIAE	1
SUMMARY OF ARGUMENT	1
ARGUMENT	3
I. CHAPTER 258D, § 1 WAS INTENDED TO PROVIDE A STRAIGHTFORWARD PROCEDURE TO COMPENSATE FACTUALLY INNOCENT PERSONS WHO SUFFER CRIMINAL CONVICTIONS.	3
A. Persons Eligible for Relief under Chapter 258D, §1 are those convicted of crimes they did not commit, nothing more and nothing less.	4
B. Chapter 258D was intended to provide relief for persons whose convictions were in error due to their having been factually innocent.	5
C. The Structure Of Chapter 258D Shows It Was Intended To Provide A Straightforward Method Of Obtaining Compensation But One That Did Not Preclude The Possibility Of Fully Contested Issues Of Fact.	8
II. WHETHER A CLAIMANT FOR COMPENSATION FOR AN ERRONEOUS FELONY CONVICTION WAS GRANTED JUDICIAL RELIEF ON GROUNDS WHICH TEND TO ESTABLISH INNOCENCE WILL FREQUENTLY, BUT NOT INVARIABLY, BE A MATTER OF LAW.	10

A.	This Court Should Not Unnecessarily Restrict the Scope and Operation of a Remedial Statute.	10
III.	JURISDICTIONS WITH SIMILAR COMPENSATION STATUTES HAVE SUCCESSFULLY DEVELOPED JURISPRUDENCE THAT PERMITS MERITORIOUS CLAIMS THAT CAN ONLY BE PROVEN AT TRIAL TO SURVIVE PRETRIAL DISMISSAL.	13
A.	Chapter 258D is Comparatively New, and This Court Should Not Bar its Application in Cases in Which Actual Innocence Cannot Be Established Without an Evidentiary Proceeding.	13
B.	Iowa and New York, with Erroneous Conviction Compensation Statutes Similar to Massachusetts', Have Developed Jurisprudence to Distinguish Claims That Merely Assert Innocence and Rely on the Government's Failure to Prove Guilt from Those That Establish the Actual Innocence of the Claimant.	15
C.	Credibility May Play a Pivotal, and Permissible, Role in a Compensation Claimant's Attempt to Prove Actual Innocence.	17

D.	In Adjudicating Motions For Summary Judgment Against A Claimant, Evidence That Is Equivocal With Respect To Innocence, That Rebutts The Government's Case But Does Not Exonerate The Claimant, Necessarily Presents An Issue Of Fact.	20
CONCLUSION		22

TABLE OF AUTHORITIES

CASES

Don K. Taylor v. State of New York,
24 Misc.3d 931 (N.Y. Ct. Cl. 2009).....21

Dozier v. State,
134 A.D.2d 759, 521 N.Y.S.2d 574 (N.Y. App. Div.3d Dep't. 1987)18

Duncan v. State of Illinois,
28 Ill.Ct.Cl. 112, 1972 WL 16790 (Ill.Ct.Cl.1972)15

Glenn v. Aiken,
409 Mass. 699 (Mass. 1991).....5

Lanza v. State of New York,
130 A.D.2d 872 (N.Y. App. Div.3d Dep't. 1987)21

Lluveras v. State,
136 Misc.2d 171, 518 N.Y.S.2d 548 (N.Y. Ct. Cl.1987).....18

Mike v. State,
11 Misc.3d 384, 808 N.Y.S.2d 537 (N.Y. Ct. Cl. 2005)..... 19-20

Morales v. State,
183 Misc.2d 839 (N.Y. Ct. Cl 2000)19

Reed v. State of New York,
518 N.Y.S.2d 643 (N.Y.Ct.Cl. 1987).....18

Solomon v. State,
541 N.Y.S.2d 384 (N.Y. App. Div.1st Dep't. 1989)21

State v. Dohlman,
725 N.W.2d 428 (Iowa 2006)15, 17

State v. McCoy,
742 N.W.2d 593 (Iowa 2007) 16-17

Stewart v. State of New York,
133 A.D.2d 112 (N.Y. App. Div.2d Dep't. 1987)15

<i>Vasquez v. State of New York</i> , 263 A.D.2d 539 (N.Y. App. Div.2d Dep't. 1999)	15
--	----

STATUTES

705 Ill. Comp. Stat. Ann. 505/8(c) (West Supp. 2009)	13
Ala. Code § 29-2-157 (2004).....	13
Cal. Penal Code § 4900 (West 2007).....	13
Conn. Gen. Stat. Ann. § 54-102uu (West 2009).....	13
Ct. Cl. Act § 8-b (McKinney Supp. 2008).....	14
D.C. Code § 2-422 (1981).....	14
Fla. Stat. Ann. § 961.04 (West 2008)	13
Iowa Code Ann. § 663A.1 (West 1998)	14
Iowa Code Ann. §663A.1(2)(A).....	16
La. Rev. Stat. Ann. § 15:572.8 (2008).....	14
Mass. Gen. Law ch. 258D, § 1.....	3-4, 13
MASS. GEN. LAW ch. 258D, § 1(B)(i).....	4
MASS. GEN. LAW ch. 258D, § 1(B)(ii).....	4
Mass. Gen. Laws Ann. Ch. 258D, §§ 1-9 (2008)	14
Mass. Gen. Laws Ch. 258D, §1(F)	7-8
Mass. Gen. Laws Ch. 258D, §4	9
Mass. Gen. Laws Ch. 258D, §5(D).....	9
Massachusetts General Laws Chapter 258D.....	Passim
Me. Rev. Stat. Ann. Tit. 14, §§ 8241	14

Miss. Code Ann. § 11-44-1	14
Mo. Ann. Stat. § 650.058 (West 2007).....	14
Mont. Code Ann. § 53-1-214 (2003)	14
N.C. Gen. Stat. §§ 148-82.....	14
N.J. Stat. Ann. §§ 52:4C-1	14
Neb. Rev. St. §§ 29-4601.....	14
Ohio Rev. Code Ann. § 2743.48 (West 2002).....	14
Okla. Stat. Ann. Tit. 51, § 154 (West 2008)	14
Stat. § 541-B:14 (West 2007)	14
Tenn. Code Ann. § 9-8-108 (Supp. 2007)	14
Tex. Civ. Prac. & Rem. Code Ann. § 103.001 (Vernon 2005).....	14
Utah Code Ann. § 78B-9-401	14
Va. Code Ann. § 8.01-195.10 (2000).....	14
Vt. Stat. Ann. Tit. 13, § 5574 (2007).....	14
W. Va. Code § 14-2-13a	14
Wis. Stat. Ann. § 775.05 (West 2001).....	14

OTHER AUTHORITIES

Jonathan Saltzman, State Pays \$500K to Estate in Wrongful Conviction Case, BOSTON GLOBE.....	13
July 17, 2008, available at http://www.boston.com/news/local/massachusetts/articles/2008/07/17	13
Samuel R. Gross et al., <i>Exonerations in the United States 1989 Through 2003</i> , 95 J. CRIM. L. & CRIMINOLOGY 523, 527 (2005).....	10

Stanley Z. Fisher, *Eyewitness Identification Reform in Massachusetts* 3
n.10 (Boston University School of Law Working Paper Series, Public
Law and Legal Theory Working Paper No. 07-07, 2007)11

U.S. Constitution.....7

INTEREST OF THE AMICUS CURIAE

Amicus Curiae New England Innocence Project (NEIP) is a charitable trust and a 501(c)(3) tax-exempt organization. NEIP provides pro bono legal services to identify, investigate and exonerate wrongfully convicted individuals in the New England States, where innocence can be established through forensic scientific testing or other investigative leads. NEIP offers this brief in support of neither the claimants in these cases nor the Commonwealth. NEIP's particular interest is to ensure that the Compensation for Certain Erroneous Felony Convictions Law, Massachusetts General Laws Chapter 258D ("Chapter 258D"), performs its essential remedial function and is not unnecessarily restricted.

SUMMARY OF ARGUMENT

The purpose of Chapter 258D is to compensate factually innocent individuals who suffered criminal convictions. The individual seeking compensation on the basis of a judicial determination of erroneous

felony conviction must establish that he obtained relief on "grounds which tend to establish innocence." The legislature anticipated that the process of determining the basis for judicial relief is not always obvious and intended the procedure to reach the truth of the underlying events. To that end, this Court should hold that whether a claimant obtained relief "on grounds which tend to establish innocence" is frequently, but not invariably, a matter of law. The Court should acknowledge that the grant of relief based upon evidence that is equivocal with respect to innocence, that is, evidence which rebuts the government's evidence but does not wholly exonerate a defendant, presents a question of fact as to whether the evidence "tend[s] to establish innocence," and thus should survive a motion for summary judgment.

ARGUMENT

I. CHAPTER 258D, § 1 WAS INTENDED TO PROVIDE A STRAIGHTFORWARD PROCEDURE TO COMPENSATE FACTUALLY INNOCENT PERSONS WHO SUFFER CRIMINAL CONVICTIONS.

The language and structure of the Compensation for Certain Erroneous Felony Convictions Law indicates that its purpose was to provide a streamlined process for obtaining a remedy, compensation, for a particular wrong, the conviction of an innocent person. The relevant provision of the statute creates a narrow question to be adjudicated as a civil matter, that is, whether the claimant was granted relief upon "grounds which tend to establish . . . innocence." While this issue will frequently be one of law, the statute makes clear that in some cases whether relief was granted on "grounds which tend to establish . . . innocence" will be a question of fact. Given the remedial purpose of the statute, and its recent adoption, the Court should not adopt an unnecessarily narrow interpretation of the term "on grounds which tend to establish . . . innocence."

A. Persons Eligible for Relief under Chapter 258D, §1 are those convicted of crimes they did not commit, nothing more and nothing less.

Persons eligible to seek relief under Chapter 258D must have either been granted 1) a full pardon by the governor who has "expressly state[d] in writing his belief in the individual's innocence";¹ or 2) "judicial relief by a state court of competent jurisdiction, on grounds which tend to establish the innocence of the individual as set forth in clause (vi) of Subsection (C)."² Clause (vi) of Subsection (C) of Chapter 258, § 1 provides:

(C) In order for an individual to prevail and recover damages against the commonwealth in a cause of action brought under this chapter, the individual must establish, by clear and convincing evidence, that:

. . .
(vi) he did not commit the crimes or crime charged in the indictment or complaint or any other felony arising out of or reasonably connected to the facts supporting the indictment or complaint, or any lesser included felony.

¹ G.L. c. 258D, § 1(B)(i).

² G.L. c. 258D, § 1(B)(ii).

The successful claimant must thus establish, by clear and convincing evidence, that he received judicial relief on grounds that tend to establish he did not commit the crime of which he or she was originally convicted. The distinction between lack of guilt and innocence is already well-established. *Glenn v. Aiken*, 409 Mass. 699, 704 (Mass. 1991) (criminal defendant who brings legal malpractice action against former lawyer must prove his innocence of the charge by a preponderance of the evidence to prevail).

B. Chapter 258D was intended to provide relief for persons whose convictions were in error due to their having been factually innocent.

The statute identifies several forms of judicial relief that are favorable to a criminal defendant in Chapter 258D, § 1 (B)(ii)(a), but which do not by themselves establish a claimant's entitlement to relief. (Although not at issue here, the statute also requires the effective conclusion of the criminal case, defined in Chapter 258D, § 1 (B)(ii)(b), as a prerequisite to seeking compensation.)

Many forms of relief may be granted that effectively end the criminal case and eliminate the conviction yet in no way tend to establish that the defendant did not, in fact, commit the crime. A conviction vacated, for example, for lack of jurisdiction or on statute of limitations grounds, a reversal due to misconduct in the grand jury process, errors in jury selection or for erroneous admission of unconstitutionally obtained evidence, would not be relief "on grounds which tend to establish innocence."

Finally, the statute provides that to prevail and recover damages, the claimant "must establish, by clear and convincing evidence," that he is a member of the class of persons eligible for relief, namely, that he was granted relief on grounds which tend to establish that he did not commit the crime. While five of the seven prerequisites to relief under the statute

are either questions of law³ or subject to proof through public documents,⁴ the legislature fully expected some such claims to be questions of fact, thus it provided the right to a jury trial for either side. G.L. c. 258D, §1(F). The legislature also intended that truth-finding be the primary goal of the proceeding. It specifically barred exclusion of evidence on the basis that it was obtained in violation of 4th, 5th or 6th Amendments to the U.S. Constitution or Articles 12 or 14, Pt. 1 of the Massachusetts Declaration of Rights. G.L. c. 258D, § 1(F).

³ Questions of law would include that the claimant was convicted of a felony and that he has served the maximum sentence he could have received for any lesser included misdemeanor offense. G.L. c. 258D, §§ (C)(ii), (vii).

⁴ Questions of fact provable by public documents would include that the claimant did not plead guilty or withdrew his plea, was sentenced to at least a year of incarceration and was incarcerated solely on the basis of the alleged erroneous conviction. G.L. c. 258D, §§(C)(iii-v). Chapter 258D, §(D) specifies that the claimant "shall attach to his claim certified copies" of the documents establishing his sentence and grant of relief from the conviction.

C. The Structure Of Chapter 258D Shows It Was Intended To Provide A Straightforward Method Of Obtaining Compensation But One That Did Not Preclude The Possibility Of Fully Contested Issues Of Fact.

Several features of Chapter 258D make clear that the legislature intended the procedure to, as nearly as possible under the circumstances, reach the truth of the underlying event - and that it fully anticipated this would be a contested issue of fact in some cases. First, as noted above, the law prohibits exclusion of much unconstitutionally obtained evidence in the compensation proceeding, thereby making truth-finding the proceeding's principal goal. Second, it takes specific account "in the interest of doing substantial justice" of the evidentiary difficulties of establishing the claim long after many of the facts have occurred. G.L. c. 258D, §1(F). Third, it acknowledges that some questions of fact underlying the original case might, but would not necessarily, be relevant on the issue concerning whether relief had been on "grounds which tend to establish innocence," because the law specifically gives the Attorney

General discretion to determine whether to use any evidence brought forward by the prosecuting district attorney, including the testimony of the victim in the criminal case. G.L. c. 258D, §4. Such evidence would almost certainly relate only to the strength of the claimant's assertion that he did not commit the crime.

While the legislature provided for fully contested issues of fact on the underlying question of whether the defendant committed the crime, it clearly anticipated cases in which calculation of the compensation award, rather than determination of eligibility for compensation, would be the principal contested issue. In addition to the elements of the claim largely susceptible to documentary proof, the damages provision recommends "due consideration to the possible bifurcation of court proceedings to separate the consideration of issues to be resolved by the court, as required by sections 1 and 2, from the determination of reasonable damages and other relief." G.L. c. 258D, §5(D).

**II. WHETHER A CLAIMANT FOR COMPENSATION FOR AN
ERRONEOUS FELONY CONVICTION WAS GRANTED
JUDICIAL RELIEF ON GROUNDS WHICH TEND TO
ESTABLISH INNOCENCE WILL FREQUENTLY, BUT NOT
INVARIABLY, BE A MATTER OF LAW.**

**A. This Court Should Not Unnecessarily Restrict
the Scope and Operation of a Remedial
Statute.**

Just as the evidence in a criminal trial leading to a conviction is inherently fact-specific, so too will be the evidence tending to establish innocence. While it is easy to imagine cases in which the claimant's action alone establishes his innocence by clear and convincing scientific evidence, such as forensic DNA analysis in a single perpetrator case that excludes the claimant as the source of biological evidence, such cases do not represent the universe of erroneous convictions. Between 1989 and 2003 there were 328 exonerations nationwide, with only 145 relying on DNA evidence while the other 183 relied on other evidence.⁵ Two of the five exonerations in

⁵ Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 527 (2005).

Massachusetts between 2003 and 2004 did not involve forensic scientific evidence.⁶

While the number of exonerations increases each year as the science of DNA testing becomes more advanced,⁷ science is not the only means by which the innocence of the wrongfully convicted can be established. In such cases the court should allow the claim to survive the Commonwealth's motion for summary judgment to allow the trial court to conduct a fact specific analysis of the evidence to determine the claimant's actual innocence.

To survive the Commonwealth's motion to dismiss the statute requires claimant state facts in sufficient detail to permit the court to find that he

⁶ Stanley Z. Fisher, *Eyewitness Identification Reform in Massachusetts* 3 n.10 (Boston University School of Law Working Paper Series, Public Law and Legal Theory Working Paper No. 07-07, 2007).

⁷ Gross et al., *supra* note 5, at 527 (finding DNA exonerations averaged 21 a year between 2001 and 2003, up from an average of 6 per year between 1992 and 1995).

is likely to succeed at trial in proving by clear and convincing evidence that his "relief was granted on grounds which tend to establish the innocence" of the individual. This high evidentiary standard (higher even than that required in other cases in which actual innocence may arise, such as legal malpractice claims against a criminal defense lawyer), coupled with the difficulty inherent in proving a negative (that the claimant did not commit a crime), shield the Commonwealth from frivolous claims and warrants a less restrictive approach to assessing petitioner's likelihood of proving innocence at trial.

**III. JURISDICTIONS WITH SIMILAR COMPENSATION
STATUTES HAVE SUCCESSFULLY DEVELOPED
JURISPRUDENCE THAT PERMITS MERITORIOUS CLAIMS
THAT CAN ONLY BE PROVEN AT TRIAL TO SURVIVE
PRETRIAL DISMISSAL.**

**A. Chapter 258D is Comparatively New, and This
Court Should Not Bar its Application in
Cases in Which Actual Innocence Cannot Be
Established Without an Evidentiary
Proceeding.**

Chapter 258D, §1 has been in force for less than six years. As of July 2008, only twenty-five compensation claims had been filed under it.⁸ Other jurisdictions have had similar statutes for more than four times as long and have developed extensive jurisprudence addressing cases in which the claimant's motion alone does not establish innocence by clear and convincing evidence. Twenty-eight states⁹ and the

⁸ Jonathan Saltzman, *State Pays \$500K to Estate in Wrongful Conviction Case*, BOSTON GLOBE, July 17, 2008, available at <http://www.boston.com/news/local/massachusetts/articles/2008/07/17>.

⁹ Alabama: Ala. Code § 29-2-157 (2004); California: Cal. Penal Code § 4900 (West 2007); Connecticut: Conn. Gen. Stat. Ann. § 54-102uu (West 2009); Florida: Fla. Stat. Ann. § 961.04 (West 2008); Illinois: 705 Ill. Comp. Stat. Ann. 505/8(c) (West Supp. 2009); Iowa:

District of Columbia¹⁰ currently have statutes providing compensation for the erroneously convicted. Of those jurisdictions, thirteen,¹¹ including Massachusetts, require that the claimant meet the

Iowa Code Ann. § 663A.1 (West 1998); Louisiana: La. Rev. Stat. Ann. § 15:572.8 (2008); Massachusetts: Mass. Gen. Laws Ann. Ch. 258D, §§ 1-9 (2008); Maine: Me. Rev. Stat. Ann. Tit. 14, §§ 8241 to 8244 (2003); Maryland: Md. Code Ann., State Finance and Procurement § 10-501 (2006); Mississippi: Miss. Code Ann. § 11-44-1 to 15 (West 2009); Missouri: Mo. Ann. Stat. § 650.058 (West 2007); Montana: Mont. Code Ann. § 53-1-214 (2003) (providing educational aid for post conviction DNA exoneration); Nebraska: Neb. Rev. St. §§ 29-4601 to 4608 (2009); New Hampshire: N.H. Rev. Stat. § 541-B:14 (West 2007); New Jersey: N.J. Stat. Ann. §§ 52:4C-1 to 6 (West 2001); New York: NY Ct. Cl. Act § 8-b (McKinney Supp. 2008); North Carolina: N.C. Gen. Stat. §§ 148-82 to 84 (2005); Ohio: Ohio Rev. Code Ann. § 2743.48 (West 2002); Oklahoma: Okla. Stat. Ann. Tit. 51, § 154 (West 2008); Tennessee: Tenn. Code Ann. § 9-8-108 (Supp. 2007); Texas: Tex. Civ. Prac. & Rem. Code Ann. § 103.001 (Vernon 2005); Utah: Utah Code Ann. § 78B-9-401 to 405 (2008); Vermont: Vt. Stat. Ann. Tit. 13, § 5574 (2007); Virginia: Va. Code Ann. § 8.01-195.10 (2000); West Virginia: W. Va. Code § 14-2-13a; Wisconsin: Wis. Stat. Ann. § 775.05 (West 2001).

¹⁰ D.C. Code § 2-422 (1981).

¹¹ These include the District of Columbia, Florida, Iowa, Louisiana, Massachusetts, Maine, New Jersey, New York, Oklahoma, Utah, Virginia, West Virginia, and Wisconsin.

clear and convincing standard when attempting to prove factual innocence. Regardless of the evidentiary standard applied, several procedural outcomes favorable to a defendant - without more - are insufficient evidence of factual innocence. These include reversal of the judgment of conviction on appeal, *State v. Dohlman*, 725 N.W.2d 428 (Iowa 2006), acquittal of claimant on retrial, *Duncan v. State of Illinois*, 28 Ill.Ct.Cl. 112, 1972 WL 16790 (Ill.Ct.Cl.1972), failure of the prosecuting authority to retry claimant for the crime, *Stewart v. State of New York*, 133 A.D.2d 112 (N.Y. App. Div.2d Dep't. 1987) and mere denial of commission of the crime. *Vasquez v. State of New York*, 263 A.D.2d 539 (N.Y. App. Div.2d Dep't. 1999).

B. Iowa and New York, with Erroneous Conviction Compensation Statutes Similar to Massachusetts', Have Developed Jurisprudence to Distinguish Claims That Merely Assert Innocence and Rely on the Government's Failure to Prove Guilt from Those That Establish the Actual Innocence of the Claimant.

Both New York and Iowa have compensation statutes for wrongfully convicted persons that require proof by

clear and convincing evidence that (in New York) the claimant "did not commit any of the acts charged in the accusatory instrument or his acts or omissions charged in the accusatory instrument did not constitute a felony or misdemeanor against the state," N.Y. Ct. of Claims Act, § 8-b, 5.(c) or (in Iowa) "that the offense for which the individual was convicted, sentenced, and imprisoned, including any lesser-included offenses, was not committed by the individual." Iowa Code Ann. §663A.1(2)(A). Iowa's Supreme Court, for example, has explained that a claimant must do more than simply establish a reviewing court found the conviction was not supported by substantial evidence. *State v. McCoy*, 742 N.W.2d 593, 599 (Iowa 2007) (dismissing compensation claim where too many unanswered questions about claimant's role in the crime charged because of his presence at the murder scene when the crime likely occurred). Instead, a claimant must affirmatively answer those doubts and questions to the point that the court will be convinced the claimant did not commit the crime.

Id. at 600. Similarly, in *State v. Dohlman*, 725 N.W.2d 428 (Iowa 2006), that a claimant's vehicular homicide conviction was overturned, when the court determined expert and lay testimony as to intoxication was insufficient, did not establish innocence where questions of intoxication and impairment remained. *Id.* at 434-35.

C. Credibility May Play a Pivotal, and Permissible, Role in a Compensation Claimant's Attempt to Prove Actual Innocence.

Even when the strength of the conviction depended exclusively upon credibility, courts in states applying compensation statutes have held that a reversal, combined with the credibility of the defendant's testimony, can withstand a motion for summary judgment. When the State's sole witness "was either from moral or mental defects, irresponsible," so that the defendant's guilt could not be established beyond a reasonable doubt, the New York Court of Claims allowed the claimant's cause of action to survive where his testimony at trial was consistent with his prior statements to police and where

codefendants testified that he was not present at the time of the murder. *Reed v. State of New York*, 518 N.Y.S.2d 643, 644 (N.Y.Ct.Cl. 1987).

Similarly, in *Dozier v. State*, 134 A.D.2d 759, 521 N.Y.S.2d 574 (N.Y. App. Div.3d Dep't. 1987), the court reversed dismissal of the claim where psychiatric evidence showed that the state's sole witness in a sexual assault case was a pathological liar because "absen[t] . . . serious flaws in a claimant's statement of facts, the weighing of the evidence is more appropriately a function to be exercised at the actual trial, rather than on a motion to dismiss." *Id.* at 761; see also *Lluveras v. State*, 136 Misc.2d 171, 175, n. 7, 518 N.Y.S.2d 548 (N.Y. Ct. Cl.1987) ("On a motion to dismiss claimant's burden under subdivision (4) of the statute is to present sufficient detailed facts to show he is likely to succeed at trial. He is not required to present clear and convincing proof at this point. That is his burden at trial.").

But shortcomings in a trial witness's credibility, without more, are not necessarily sufficient to establish a basis for compensation. Thus when a complaining witness in a rape case recanted her testimony, but died before the claimant could bring his compensation claim, the court dismissed it noting that the claim was based only on the recantation, the defendant's own trial testimony and an alibi witness. *Morales v. State*, 183 Misc.2d 839, 705 (N.Y. Ct. Cl 2000). As the court noted, "[i]nherent in any recantation is that the witness has lied once about what happened [and c]laimant's testimony is weakened by his prior felony conviction, which implicates his credibility, and in view of his demeanor and presentation his testimony is not especially believable." *Id.*

In short, there is not necessarily any inconsistency between reversing and dismissing a criminal conviction for insufficient evidence, and simultaneously rejecting a compensation claim. In *Mike*

v. State, 11 Misc.3d 384, 808 N.Y.S.2d 537 (N.Y. Ct. Cl. 2005), for example, when the claimant's convictions for sale and attempted sale of drugs were reversed and dismissed on insufficiency of the evidence, the court could conclude "as a matter of law that claimant is not likely to succeed at trial in proving by clear and convincing evidence that: he did not commit any of the acts charged in the accusatory instrument . . . because his acts in arranging what could as likely have been a drug transaction as "just playing along with the officers." *Id.* at 392.

D. In Adjudicating Motions For Summary Judgment Against A Claimant, Evidence That Is Equivocal With Respect To Innocence, That Rebuts The Government's Case But Does Not Exonerate The Claimant, Necessarily Presents An Issue Of Fact.

Courts considering compensation cases have held that there may be situations when discredited evidence is so intricately connected with other evidence that the remaining evidence unravels or becomes innocuous. For example, when an eyewitness with an incentive to lie and whose testimony conflicted with descriptions by other trial witnesses later recants his testimony,

this alone has been held sufficient to satisfy the New York compensation statute for erroneous convictions - even though the claimant offered no other evidence apart from that adduced at the original trial. *Don K. Taylor v. State of New York*, 24 Misc.3d 931 (N.Y. Ct. Cl. 2009) (In "murder conviction resting solely on one eye witness without any forensic evidence, the subsequent recantation by such accuser which was credible for a number of reasons . . . together with a highly credible claimant constitute clear and convincing evidence that claimant was innocent."). See also *Solomon v. State*, 541 N.Y.S.2d 384 (N.Y. App. Div.1st Dep't. 1989) (reversing dismissal of a compensation claim where inconsistencies existed between facts and the state's witness's testimony); *Lanza v. State of New York*, 130 A.D.2d 872 (N.Y. App. Div.3d Dep't. 1987) (reversing dismissal when claimant's presence in the parking lot where drugs were sold, along with evidence informant stopped at his vehicle, were innocuous events and insufficient corroboration of conspirator's testimony).

CONCLUSION

Whether a claimant was granted relief "on grounds which tend to establish innocence" is frequently, but not invariably, a matter of law. This court should not unnecessarily restrict the scope and operation of Chapter 258D as a remedial statute and should leave equivocal evidence that supports the claimant's assertion of actual innocence to the sound discretion of the trial court.

Respectfully submitted,



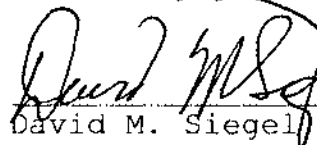
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MASS. R. APP. P. 16(K) CERTIFICATE OF COMPLIANCE

I, David M. Siegel, hereby certify that the foregoing Brief complies with the rules of court that pertain to the filing of briefs, including but not limited to:

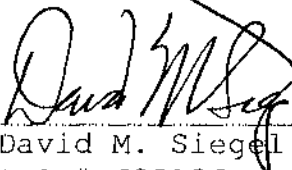
Mass. R. App. P. 16(d) (references in briefs to parties); Mass. R. App. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. App. P. 16(h) (length of briefs); Mass. R. App. P. 17 (brief of an *amicus curiae*); and Mass. R. App. P. 20 (form of briefs, appendices, and other papers).



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BBO # 635136

CERTIFICATE OF SERVICE

Pursuant to Rule 13(d) of the Massachusetts Rules of Appellate Procedure, the undersigned hereby certifies under the penalties of perjury that I mailed two copies each of the brief, first class prepaid postage, to Steven J. Rappaport, Esq., Rappaport & Delaney, 228 Central Street, Lowell, MA 01852, Rosemary Curran Scapicchio, Esq., Four Longfellow Place, Suite 3703, Boston, MA 02114-2838, Michael W. Reilly, Esq., Tommasino & Tommasino, 2 Center Plaza, Boston, MA 02108-1904, and to Catherine E. Sullivan, Assistant Attorney General, Government Bureau/Trial Division, One Ashburton Place, 18th Floor, Boston, MA 02108.



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