48 STATES HAVE DNA-TESTING LAWS THAT FREE THE INNOCENT—WHY DON’T WE?

By Michael Blanding and Lindsay Markel
Massachusetts is one of only two states in the country without a law granting prison inmates the right to test DNA evidence that might prove their innocence. A lingering, long-contested bill may finally change that.

By Michael Blanding and Lindsay Markel

Illustration by Marcos Chin

“Dennis, put on Channel 4. Put on Channel 4!”

The year was 1993, and Dennis Maher was returning to his cellblock after a shift at the Bridgewater Massachusetts Treatment Center staff grill. He was nine years into serving a life sentence for two rapes and a sexual assault. Like many convicts, Maher had long professed his innocence, but something was different this time: His fellow inmates – and even some of the guards – actually believed him. So now they were shouting across the cellblock, telling him he had to turn on Donahue.

Maher switched on the television to see a New York lawyer named Barry Scheck, who was using something called DNA testing to perform miracles – prove convicts innocent of the crimes they were doing time for. Scheck had set up the Innocence Project just the year before, and he’d already helped free several wrongly convicted men. Finally, Maher had something to pin his hopes to. DNA would be his best chance to clear his name. After all, nothing else was working.

Maher wrote to the Innocence Project to say he, too, had been wrongly convicted. He had been a sergeant in the Army in 1983 when police arrested him for marijuana possession outside a Lowell package store. Before long, though, he’d also found himself charged with three brutal sexual assaults.

Among the evidence presented in the two trials that followed, juries heard about a knife and an Army jacket found in Maher’s car. Those weren’t unusual items for a guy in the military to own, but they fit the descriptions one victim had given police. And then, the linchpin: The victims, after some difficulty, identified him as
their attacker, even though he maintained he was elsewhere when the crimes were committed – in one case meeting with his commanding officer 20 miles away. In the end, that didn’t matter to the jurors.

After Maher learned his sentence, Judge Robert Barton asked whether he had anything to say. “Of course I do,” Maher replied. “I say that if you call this justice, I think you and your judicial system is a crock of [expletive].”

He would later regret speaking so angrily. Over the next nine years in prison, he would file a number of motions requesting a new trial. “Everything I ever filed was denied, because Judge Barton was the sitting judge, and he didn’t have to allow it,” Maher says today. “I was lost. I’m thinking: ‘I’m going to die. I’m going to die in prison.’”

But when the Innocence Project agreed to look into his case, Maher figured he had one more shot at reclaiming his life. He didn’t realize then how difficult it would be. At the time, states were just starting to wake up to the power of DNA to prove people innocent and to convict the guilty. In 1994, New York became the first state to grant prisoners the right to test their DNA, and made sure it was in a timely manner. But even today, no such statute exists in Massachusetts. For Maher, “it was a battle for every single step of that process,” says his attorney, Aliza Kaplan.

In 1997, Innocence Project lawyers made a request to inspect the crime-scene evidence but were told they needed a court order. When they filed a request, Barton denied it without a hearing. The stalemate persisted for three more years, until Barton retired from the bench. At that point, Maher got in touch with the newly formed New England Innocence Project, and a new judge granted the organization’s motion.

When the final DNA test results came back, on April Fools’ Day 2003, they proved what Maher had been saying all along: He

HOW WE DID THIS STORY

This article was reported and written for the Globe Magazine by Michael Blanding, a freelance journalist and senior fellow at the Schuster Institute for Investigative Journalism at Brandeis University, and Lindsay Markel, its assistant director. Journalists at the nonprofit Schuster Institute write about wrongful conviction as well as other social justice issues. It is not involved in any of the cases described in this article.
was innocent. He walked out of prison two days later—“10 years, two months, and 29 days” after going in, as he puts it, and nearly six years after he first asked for the DNA test.

It’s difficult to reconcile Massachusetts’s progressive reputation with the reality that its lawmakers have steadfastly refused to enact a post-conviction DNA-access law. A bill pushing for timely testing and for preserving evidence for appeals has failed to pass in the Legislature every year since it was first proposed in 2003. Now Massachusetts has achieved a kind of dubious distinction: It’s one of only two states without such a law. (The other, Oklahoma, passed one that expired in 2005.)

With this year’s version of the bill moving along on Beacon Hill, advocates are hoping Massachusetts will finally live up to its national reputation. In the four years that Gretchen Bennett has been executive director of the New England Innocence Project, part of the nationwide Innocence Network, she has watched the number of holdout states drop from six to two. “Everyone from Florida to Alaska teases me,” she says. “People say to me, ‘Don’t y’all have gay marriage?’ I tell them they’re not equatable, but that’s how it plays.”

One major reason Massachusetts doesn’t already have a DNA-access law, experts say, is a feeling among some prosecutors that such a law would needlessly duplicate an already established judicial process, one rare among states. According to Rule 30 of the Massachusetts criminal code, inmates can receive a new trial at any time if they can show that there is new evidence that justice may not have been done.

The problem, says Bennett, is that Massachusetts inmates tying their hopes to DNA evidence are often snared in a maddening Catch-22. They can’t get a new trial without evidence from DNA testing, but they can’t get access to evidence for testing without a new trial. In practice, then, inmates are forced to negotiate with district attorneys’ offices, which have a variety of policies, or to take their chances with a judge. With the decision left to “the discretion of the individual judge or prosecutor,” says Bennett, “everyone is sort of groping in the dark to figure out how to do this and what’s allowed and what isn’t.”

While Bennett says that in most cases inmates are able to get DNA tested, it’s often only after years of jumping through procedural hoops. That’s what happened to Maher.

“Had this law been in place, Dennis Maher would have been exonerated years earlier than he was,” says J.W. Carney, who prosecuted Maher but later supported his bid for innocence. (Carney is now a high-profile defense attorney.) “This innocent man spent years of his life incarcerated after the criminal justice system had the ability to know with 100 percent certainty that it had incarcerated the wrong man.” Barton, the retired judge, asserts Maher’s trials were fair, yet now sees the power of codifying access to DNA testing. “Don’t you think I wish they had a [testing] statute at the time?” he asks. “Of course. Then there would be no question.”

Without one, however, prisoners are no better off today than Maher was two decades ago: They must often depend on the prosecutors and judges who put them in prison to allow DNA tests to go forward.

Tyronie Dixon spent four years trying to get permission to test evidence from his case. Now 38, Dixon has lived nearly half of his life behind prison walls. Convicted of a 1992 murder in Taunton, he’s always insisted it was a case of mistaken identity. His lawyer, Claudia Leis Bolgen, has collected a number of affidavits supporting that assertion. (Bolgen represents Dixon through the Committee for Public Counsel Services, or CPCS, a state agency that oversees indigent defense and that’s been instrumental in four of the nine DNA exonerations in Massachusetts.) But Bolgen thinks she can present an even stronger case by testing a baseball cap that authorities believe was worn by the shooter.

She filed her request in 2007, asking to test hairs found on the hat. After a long delay, the Bristol County district attorney’s office said the evidence had been lost. When Bolgen asked to test the hat itself, the office refused, saying it wouldn’t be enough to prove Dixon’s innocence. Bolgen took her request to a judge, who overruled the DA’s office in September. The hat was found and sent for testing last week.

Now all Dixon can do is wait. “I see it how it gets to [prisoners], the stress,” he says, sitting in a cherry-red jumpsuit in the visiting room at MCI-Norfolk. “But I never really let it get to me, ‘cause I always knew deep down, one way or another, the truth is going to come out.”

However, because Massachusetts judges and prosecutors are under no legal obligation to approve testing, other prisoners have little cause for optimism. Take Robert Wade, who was denied DNA testing by the Plymouth County DA after his conviction for the 1993 murder of a Lakeville woman. A state judge upheld that decision, so his lawyer took the case to federal court, where, in 2006, then Assistant DAs from Suffolk and Middlesex counties, and Boston Police Commissioner Ed Davis, as well as defense attorneys and prisoner advocates.

In order to break the longstanding impasse over the bill, Siegel sat down with Gregory Massing, general counsel for the Executive Office of Public Safety, to find common ground. Very quickly, they decided to strip language that would have let a judge automatically vacate a conviction. “Nobody can overturn a conviction through this bill,” says Siegel. “All it does is it provides a mechanism for access and testing of evidence.”

Despite that major concession, the state’s 11 district attorneys still appear to be split over the bill. Middlesex DA Gerry Leone and Suffolk DA Dan Conley, who declined interviews, originally wrote legislators generally expressing their support for it. Conley all but took
credit for the bill in remarks to the National District Attorneys Association last month. “We adopted policies for post-conviction DNA analysis that were very open but which many other police and prosecution agencies remain wary of,” he said. “They are now the basis for legislation that would codify Suffolk County’s practices throughout Massachusetts.” Indeed, five of the nine Massachusetts convictions overturned through DNA took place in that county.

After we contacted each of the state’s district attorneys individually for this article, nine of them – including Conley and Leone – met privately to discuss the bill. They chose Sam Sutter, Bristol County DA and outgoing president of the Massachusetts District Attorneys Association, to speak for the group. “We support fervently the concept of DNA testing to both exonerate the innocent and convict the guilty,” Sutter said in an interview. “But we believe there are major flaws with this particular bill. Major flaws.”

The district attorneys who met believe the bill is “fixable,” Sutter says, but they oppose provisions that would allow certain inmates, such as those who originally pleaded guilty, to qualify for testing. More troubling, he adds, is that the bill would make it too easy for inmates to qualify for DNA testing, at least compared with the stricter requirements of Rule 30. He and his colleagues believe lower standards would invite a flood of frivolous requests.

Yet that flood doesn’t seem to have materialized elsewhere. “We haven’t been inundated,” says Ted Staples, manager of forensic biology at the Georgia Bureau of Investigation. “We might not get any [testing requests] for six months, and then we might get two or three.” The state of New York, which has more than five times as many prisoners as Massachusetts, received just 100 requests in the first seven years after its law was enacted. Ohio, with four times more prisoners than this state, received 307 in its first three years with a statute – and more than 200 of those were denied. After determining that the law was costing Ohio $100,000 a year, a minuscule portion of its annual state budget, Ohio actually relaxed its qualifying standards.

While Massachusetts DAs continue to consider the bill, other law enforcement officials have declared their support, including the head of the Massachusetts Chiefs of Police Association and Attorney General Martha Coakley, the state’s top prosecutor. Coakley, who says she’s seen defendants file frivolous claims, suggested several changes to the bill, including minimizing the amount of time the testing process can take, which would help reduce the strain on victims. But none of those suggestions, she says, “would be deal breakers.”

Another of Sutter and his fellow district attorneys’ concerns is that the state can’t foot the bill for DNA tests prisoners can’t afford – which generally run between $1,000 and $4,000 per case – or to preserve evidence for the duration of a prisoner’s sentence, another provision of the bill.

Former prosecutor Wendy Murphy, who teaches classes on sex crimes at New England Law Boston, has spoken out about the cost to taxpayers. “People who are clearly guilty and have been properly convicted and have already had their appeals affirmed by the highest courts will now be able to go back into court,” she says. “It will cost a fortune and [they’ll] have no argument better than there was some DNA that was never tested.”

“If it were only about wasting the public’s money it wouldn’t matter as much,” Murphy elaborated in an e-mail, “but sexual violence is prolific, barely reported, rarely prosecuted, and hardly ever punished.” Allowing another means of throwing convictions into doubt, she wrote, “is irrational in the extreme.”

Recently, the Massachusetts Legislature analyzed the bill and determined that the state could afford additional testing, and without adjusting its current budget. In part, that’s because US Department of Justice grants are available to offset its costs. But those grants, which have totaled $7.4 million so far this year, have only gone to states that have statutes governing testing and preservation.

The promise of funding was enough to influence one high-profile critic of the bill, Chief Justice Barbara Rouse of the state’s Superior Court. In a letter to the Legislature this July, Rouse had said the bill was “unnecessary and would potentially create confusion” with the Rule 30 process. After we contacted her for this article, however, she spoke with bill supporters David Meier and Kathy Weinman. Later, she explained that access to federal money had altered her thinking.

To Rouse, the provision in the state bill that would require law enforcement to preserve evidence for the length of an inmate’s sentence is just as important as the rules regarding testing. Speaking for the nine DAs, Sutter says this would place an undue burden on the Commonwealth to retain all evidence in all convictions for extended periods. But Rouse, in fact, believes evidence should be preserved indefinitely. “Evidence is contained in
many different places in the Commonwealth – in courthouses, police departments, crime labs,” she says. “We are concerned [that] the integrity of the evidence is preserved.”

According to criminal justice experts, in many cases, evidence is lost, destroyed, or never collected in the first place. In a review of cases taken up by the Innocence Project in New York, evidence has been unavailable for testing a quarter of the time. And even if testable evidence does exist, some prisoner advocates say, it’s often stored haphazardly. That’s part of the reason why it took Maher six years and Dixon four years to get their tests done.

The delay has been far longer for Robert Stevens, a Jamaican immigrant sentenced to up to 55 years in prison for a 1990 rape in Springfield. When Stevens requested the rape kit from the court in 2000, he was told it had been lost. Records show the evidence is at the Springfield Police Department, “but to this day there has been no search,” says one of Stevens’s pro bono lawyers, Radhika Bhattacharya. (A Springfield Police Department spokesman was unable to confirm or deny whether a search was done.)

After trying unsuccessfully for nine years to get authorities to find the kit, Stevens’s lawyers at the New England Innocence Project decided to focus on the victim’s clothing, which was available but would likely be more expensive to test. It took two more years of negotiating with the Hampden County district attorney’s office to get it, making the wait 11 years in all. And because the clothing evidence has a slimmer chance of excluding Stevens from the case, “I have to keep expectations in check,” says Bhattacharya. She hopes a new law will compel the police to search for the rape kit.

Kenneth Waters, the Massachusetts inmate at the center of the 2010 film Conviction, went through a similar struggle. Found guilty of robbery and murder in 1983, he spent 18 years in prison while his sister, Betty Anne Waters, got her GED, then put herself through college and law school in order to prove him innocent. She then spent years searching for the evidence, despite being told repeatedly that it didn’t exist, and finally found it in 1999 in the basement of the Middlesex Superior Courthouse (the same place Maher’s evidence would turn up a couple of years later).

“Most of these [exoneration] cases involved some character who didn’t give up,” Bennett says. “The person who literally would go to the clerk’s office every day and say ‘Are you sure? Are you sure?’” Even with the evidence in hand, it took two more years until Betty Anne was allowed to get it tested. Kenneth Waters was finally released in March 2001. He was free for six months before dying in an accidental fall.

Beyond exonerating the innocent, preserving evidence for possible testing provides another critical service. In every case where someone was wrongfully convicted, the real perpetrator got away. Post-conviction DNA tests could identify them. That is the ultimate reason why many in law enforcement support the new bill, says former prosecutor Marty Murphy. “It’s a public safety issue.”

Earlier this year, Boise State University criminal justice professor Greg Hampikian published a study of 194 exoneration cases from around the country. He found that DNA testing not only freed innocent people but also identified the actual perpetrator in nearly half of the cases. Of those, 37 of the real perpetrators were convicted of a total of 77 other violent crimes that took place while the innocent person was in prison.

That phenomenon was dramatically illustrated in the Suffolk County case of Anthony Powell, who was convicted of rape in 1992 and served 12 years in prison before DNA proved him innocent. That same DNA test eventually led police to another man, Jerry Dixon (who is not related to Tyrone Dixon). This July, Jerry Dixon pleaded guilty to the 1992 rape – and to two others committed after Powell was arrested.

Advocates for the bill recognize that it can be painful for victims and their families to see a case reopened years after they thought it was settled. But Meier believes seeing justice done, even belatedly, is what they want. “It’s impossible to describe how raw the emotions of [victims] are, how angry they are,” he says. “But I can tell you one thing – they all say: ‘Get the guy who did this. Get the animal who did this.’ I’ve never heard anyone say, ‘Get the wrong guy!’”

It’s June 8, nearly 10 years after her brother was exonerated, and Betty Anne Waters enters a packed audito- torium at the State House to testify in favor of the latest access bill before the joint Committee on the Judiciary. By her side is Dennis Maher, now out of prison for eight years.

There are some 300 people in the gallery, but most are wearing purple stickers reading “Trans Rights Now,” a reference to the transgender rights bill also on the agenda. It’s more than two hours before Maher and Waters can take their seats in front of the panel of legislators.

“I always said I needed a miracle to save my brother, and lo and behold, along came DNA evidence,” Waters says in a halting voice. And yet, for Kenneth Waters, the miracle would be delayed. “He always said those last few years were worse than all of the others, because we had the DNA and couldn’t get it tested.”

Then Dennis Maher, now in his 50s and barrel-chested with a full beard, takes the microphone. He begins to cry as he tells his story: his arrest, seeing Barry Scheck on Donahue, Barton’s denials, and the time he spent waiting. “I ended up doing an extra six years in prison because there are no DNA laws in Massachu-
settas,” he says. “I ask you to favor this so we are not the last state to pass a DNA bill.”

After Maher finishes, it is clear the previously stone-faced panel of legislators has softened. Committee chairwoman Cynthia Creem, a cosponsor of the bill, even urges everyone in the room to rent the movie Conviction. When Maher and Waters leave the hearing table, several legislators follow them into the hall, temporarily bringing the proceedings to a standstill. When the bill comes up for a vote in the Senate a month later, it passes unanimously.

Despite passage in the Senate, however, its fate remains in doubt in the House, where it has lingered in the Ways and Means Committee for nearly four months. The House has until July to pass it by a majority vote, or next December to pass it unanimously, says the bill’s House cosponsor, Representative John Fernandes.

“There is still plenty of time in this session to pass the bill,” he says. “I am optimistic it will see the light of day.” The Massachusetts inmates now fighting their way through this state’s snarled DNA-testing process are surely hoping the same thing.