

COMMONWEALTH OF MASSACHUSETTS  
SUPREME JUDICIAL COURT

WORCESTER, ss.

SJC-12673

Commonwealth of Massachusetts

v.

Don Earl Johnson

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ON DIRECT APPELLATE REVIEW

IN SUPPORT OF APPELLANT AND URGING REVERSAL  
OF THE ORDER OF THE WORCESTER SUPERIOR  
COURT DENYING APPELLANT'S MOTION

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**BRIEF OF *AMICUS CURIAE*,**  
**THE BOSTON BAR ASSOCIATION**

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April 17, 2019

**CORPORATE DISCLOSURE STATEMENT OF  
THE BOSTON BAR ASSOCIATION**

Pursuant to Supreme Judicial Court Rule 1:21(b)(i), the Boston Bar Association (“BBA”) is a non-profit corporation organized under the laws of the Commonwealth of Massachusetts. The BBA is a bar association established almost 250 years ago and currently has nearly 13,000 members. There is no parent corporation or publicly-held corporation that owns 10% or more of the BBA’s stock.

### **RULE 17(C)(5) DECLARATION**

Neither party, nor their counsel, authored this brief in part or in whole. Neither party, nor their counsel, contributed money that was intended to fund the preparation or submission of this brief. The BBA has not represented one of the parties to the present appeal in any other proceeding involving similar issues, nor in any proceeding that is at issue in the present appeal.

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## **I. INTEREST OF AMICUS CURIAE**

The Boston Bar Association (“BBA”) was founded in 1761 by John Adams and other prominent Boston lawyers. It is the nation’s oldest bar association. The BBA’s mission is to facilitate access to justice, advance the highest standards of excellence for the legal profession, and serve the community at large. From its early beginnings, the BBA has served as a resource for the judicial, legislative, and executive branches of government. The BBA’s diverse, member-driven leadership draws attorneys from all areas of the legal profession, including both prosecutors and criminal defense attorneys.

The BBA respectfully submits this brief pursuant to Mass. R. App. P. 17 and the Court’s solicitation of amicus briefs to address the following issues:

Where the defendant pleaded guilty in Massachusetts to indecent assault and battery, received a sentence of time served, was required to register as a sex offender as a consequence of the conviction, and was subsequently convicted of failing to register and is currently incarcerated in a Federal prison in Florida for that offense, whether he is eligible to file a motion for

postconviction scientific testing under G. L. c. 278A, § 2 (requiring, among other things, that moving party “has been convicted of a criminal offense in a court of the commonwealth [and] is incarcerated in a state prison, house of correction, is on parole or probation or whose liberty has been otherwise restrained as the result of a conviction”); specifically, (a) whether his current incarceration is “as a result of” the initial conviction of indecent assault and battery for purposes of the statute, and (b) whether the requirement that he register as a sex offender is itself a restraint on his liberty as a result of his conviction within the meaning of the statute.

Commonwealth y. Don Earl Johnson, No. SJC-12673,  
Amicus Announcement (January 2019).

The BBA’s mission is to facilitate access to justice for all individuals who interact with the legal system. More specifically, the BBA has a direct history with G.L. c. 278A. The BBA drafted the initial language for G.L. c. 278A, including the relevant language in § 2, to allow those individuals who claim factual innocence to seek post-conviction relief through forensic testing.

In 2008, the BBA convened a Task Force to examine the prevalence of wrongful convictions and promulgate recommendations designed to remedy and prevent such



convictions. See Boston Bar Association, Getting It Right: Improving the Accuracy and Reliability of the Criminal Justice System in Massachusetts, Final Report (December 2009) (“Getting It Right”) [Amici Addendum (A.A.) 27]. The Task Force was composed of a group of exceptional attorneys from relevant fields, including senior officials from local and state law enforcement, assistant district attorneys, leading attorneys with the New England Innocence Project, Chief Counsel for the Committee for Public Counsel Services, and a former Chief Justice of the Appeals Court. The Task Force fairly reflected all three branches of government and all sides of the criminal adversarial process.

At the outset, the Task Force unanimously concluded that its mission was not only to minimize wrongful convictions but also to improve the integrity of the justice system and protection of all people in Massachusetts. Id. at 4 [A.A. 35]. “[A] wrongful conviction is not only a human tragedy for the defendant and his family, but also a devastating blow to a crime victim and to the administration

of justice itself.” Id. at 3 [A.A. 34]. See also, id. at 16 [A.A. 47] (“[O]ur recommendations are geared towards making the justice **system** work better”) (emphasis in original).

With this goal in mind, the Task Force assigned a sub-committee to focus specifically on recommendations for reform in the area of forensics as a tool for post-conviction relief.<sup>1</sup> They ultimately recommended that the Legislature enact into law a statute providing post-conviction access to testing of forensic evidence. Id. at 58 [A.A. 89]. Their proposed legislation became the draft for the current 278A statute. Id. [A.A. 133-143]. See also Remarks of Rep. Fernandes in support of S. 1987 (Feb. 8, 2012) [A.A. 167] (discussing the BBA’s contribution in pushing for legislation facilitating access to postconviction DNA testing). Professor David M. Siegel, a member of the Task Force, also testified before the Joint Committee on the Judiciary in support of

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<sup>1</sup> The Task Force created two other sub-committees related to wrongful convictions. One committee addressed reform in eyewitness identification and police interviewing techniques. The other created broad recommendations to improve trial court practice, such as promulgating new rules of discovery and examining ineffective assistance of defense counsel.

the bill. See A.A. 171-172.

Consistent with its sustained interest in facilitating access to justice through the implementation of G.L. c. 278A, the BBA submitted an amicus brief in Commonwealth v. Wade, 475 Mass. 54 (2016) (“Wade III”), urging the SJC to reverse the trial court’s order denying the defendant access to forensic testing under G.L. c. 278A. See generally Wade III, Brief of Amicus Curiae, Boston Bar Association (“Wade Amicus”). Specifically, the BBA argued that by erroneously increasing the burden imposed on a defendant seeking to utilize G.L. c. 278A, the trial court contravened both the plain meaning of the statute and the Legislature’s intent. Wade Amicus at 15-18.

This Court agreed with defendant Wade and the BBA, holding that the plain text of G.L. c. 278A requires that a defendant satisfy only one of the threshold requirements under § 3(b)(5). Wade III, 475 Mass. at 55.

As set forth more fully below, and consistent with its ongoing interest in facilitating access to justice and

improving judicial integrity in convictions, the BBA urges this Court to find that a defendant, like Johnson, who is required to register as a sex offender as a consequence of a Massachusetts conviction, satisfies the “restraint on liberty” threshold requirement under G.L. c. 278A, § 2.

## **II. STATEMENT OF THE CASE AND THE FACTS**

The BBA adopts the statement of the case and statement of facts set forth in the brief filed by Defendant/Appellant Johnson (“D. Br.”) to the limited extent the facts relate to the sole question raised by the amicus request and addressed in this brief and to the extent they detail the procedural history of this matter. However, the BBA takes no position as to any other factual issue raised in Johnson’s brief.

## **III. ARGUMENT**

### **A. The Imposition of Sex Offender Registry Requirements on an Individual Constitutes a Restraint on Liberty Within the Plain Meaning of G. L. c. 278A, § 2, Notwithstanding That the Individual May Not Be Currently Incarcerated.**

This Court has not yet directly reached the question of

whether sex offender registration is a restraint on liberty. However, the Court has repeatedly acknowledged that sex offender registration seriously implicates liberty interests, necessitating due process protections. See e.g., Doe v. Attorney General, 426 Mass. 136, 143 (1997) (even plaintiff required to register at lowest level “has sufficient liberty and privacy interests constitutionally protected by art. 12 that he is entitled to procedural due process before he may be required to register”); Doe v. Sex Offender Registry Board, 480 Mass. 212, 219 (2018) (“An individual's ongoing duty to register as a sex offender implicates significant liberty and privacy interests for as long as the individual is required to register as a sex offender.”)

Moreover, in Commonwealth v. Wimer, 480 Mass. 1 (2018), this Court recognized that it was appropriate for someone required to register as a sex offender to pursue a motion for post-conviction relief where their liberty was restrained. The defendant in Wimer pled guilty to two counts of open and gross lewdness and was erroneously

ordered to register as a sex offender per G.L. c. 6, § 178C.<sup>2</sup>

The SJC acknowledged that the defendant appropriately “appealed, and then filed a motion to correct an illegal sentence in the trial court. See Mass. R. Crim. P. 30(a) (‘Any person ... **whose liberty is restrained** pursuant to a criminal conviction may ... file a written motion ...’).” Wimer at 3-4 (emphasis added). Thus, Wimer stands for the proposition that the SJC has already recognized that sex offender registration constitutes a restraint on liberty within the context of establishing standing to pursue a motion for post-conviction relief.<sup>3</sup>

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<sup>2</sup> G.L. c. 6, § 178C requires sex offender registration upon a “second and subsequent adjudication or conviction of open and gross lewdness.” The SJC held that a single guilty plea to two concurrent counts did not trigger registration under the statute. Id. at 2.

<sup>3</sup> At least two members of the Task Force contemplated, as early as 2012, that sex offender registration likely qualifies as a restraint on liberty under § 2. See Boston Bar Journal, A New Tool for Determining Factual Innocence: Massachusetts’ Post-Conviction Access to Forensic and Scientific Analysis (May 16, 2012) [A.A. 156-164] (“Arguably eligibility to file a motion under chapter 278A would also extend to those whose liberty is restricted by being required to register as a sex offender”).

Looking directly at the text of G.L. c. 278A, where the Legislature explicitly included those defendants on parole and probation within § 2, the BBA here submits that sex offender registration presents similar restraints on liberty as contemplated by the statute. When a defendant is released on parole or probation, his or her liberty interest is conditional and depends on that defendant's ongoing compliance with the conditions imposed by the sentencing judge. Commonwealth v. Eldred, 480 Mass. 90, 97 (2018). See also, Commonwealth v. Patton, 458 Mass. 119, 125 (2010) (“[D]ue process rights under the Fourteenth Amendment to the United States Constitution are implicated at such a [probation] hearing because a finding of violation of probation may result in loss of liberty”).

Sex offender registration similarly creates affirmative burdens on a defendant to the point where their liberty is truly conditional upon satisfying these conditions, even though they are not directly monitored by a parole or probation officer. See Commonwealth v. Cory, 454 Mass.

559, 570 (2009) (“[T]he registration requirement presents an importantly distinct kind of constitutional danger, because it forces an action on the person required to register. It is a continuing, intrusive, and humiliating regulation of the person himself”) (internal quotation marks and citation omitted). Failure to comply with these affirmative requirements can mean immediate arrest and significant incarceration.<sup>4</sup> See e.g., G.L. c. 6, § 178P (registered sex offender may be arrested without a warrant “[w]henver a police officer has probable cause to believe that [he or she] has failed to comply with the registration requirements”); Doe v. Sex Offender Registry Bd., 473 Mass. 297, 306 (2015) (discussing enhanced carceral penalties, including mandatory minimum prison sentences, for failure to register offenses).

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<sup>4</sup> Indeed, Johnson’s current out-of-state incarceration arose solely from his duty to register based only on a Massachusetts conviction. His current incarceration, at a minimum, demonstrates precisely how the significant liberty restraints of registration can crescendo into actual, physical restraint such that he should be entitled to seek post-conviction relief under the plain meaning of G.L. c. 278A.



At least one federal jurisdiction has explicitly found sex offender registration to be sufficiently restrictive, constituting “custody” for purposes of standing to pursue habeas corpus relief. Piasecki v. Ct. of Common Pleas, Bucks County, PA, 917 F.3d 161, 166 (3rd Cir. 2019) (“It is now beyond dispute that custody is not limited to ‘actual physical custody.’ Rather, for the purposes of habeas jurisdiction, a petitioner is ‘in custody’ if he or she files while subject to significant restraints on liberty that are not otherwise experienced by the general public) (internal citation omitted). Cf. Jones v. Cunningham, 371 U.S. 236, 242-243 (1963) (“It is not relevant that conditions and restrictions such as these may be desirable and important parts of the rehabilitative process; what matters is that they significantly restrain petitioner's liberty to do those things which in this country free men are entitled to do. Such restraints are enough to invoke the help of the Great Writ [of Habeas Corpus]”).

Finally, individuals required to register as sex

offenders are uniquely subject to some of the most severe collateral consequences of any criminal defendants.

Johnson’s brief succinctly catalogs the many onerous requirements and restrictions imposed upon registered sex offenders in Massachusetts. D. Br. 19-23. This Court has also observed, in extensive detail, the abundance of “exceptionally burdensome” requirements accompanying registration since the passage of significant revisions to the statute after 1999. See Doe, 473 Mass. at 304-308. Beyond the practical burdens accompanying registration, this Court also found that sex offenders are subject to immense discrimination, through both physical restriction and societal ostracization, on a level without parallel for any other type of criminal defendant. See, e.g., id. at 308 (discussing the “profound humiliation and community-wide ostracization” accompanying registry requirements, in addition to “housing and employment discrimination, harassment, and assault”); Doe v. City of Lynn, 472 Mass. 521, 530 (2015) (in striking down an excessively broad

residency restriction targeting sex offenders, “we note the grave societal and constitutional implications of the de jure residential segregation of sex offenders. . . the days are long since past when whole communities of persons, such Native Americans [sic] and Japanese–Americans may be lawfully banished from our midst”).

Sex offender registration is a restraint on liberty within the plain meaning of G.L. c. 278A, § 2. Because Johnson is required to register as a sex offender as a result of his Massachusetts conviction, he has standing to proceed to the next stage of the 278A process to seek forensic testing to support his innocence claim.

**B. The Trial Court’s Erroneous Denial of Johnson’s Petition for Forensic Testing Under G.L. c. 278A Frustrates the Intent and Purpose of the Statute.**

In addition to a plain language reading of G.L. c. 278A, the Legislature’s clear goal in facilitating access to forensic testing to remedy wrongful convictions supports the conclusion that Johnson has standing to pursue testing. To find otherwise would frustrate the intent and purpose of the

statute. This is of deep concern to the BBA where the purpose of the statute complements and was spurred into creation by the BBA's mission to facilitate access to justice.

Johnson adeptly articulates the Legislature's intent and the relevant standards of interpretation well-known to this Court. D. Br. 14-16. The BBA agrees that the Legislature's intent in enacting the testing portion of G.L. c. 278A was not, and is not, only to liberate only incarcerated defendants through forensic exoneration. Cf. *Commonwealth v. Williams*, Supreme Judicial Court, No. 12560, slip op. at 6 (April 9, 2019) (“[A] liberal reading of G. L. c. 278A, § 3 (b) (4), fully comports with the purpose of chapter 278A, i.e., ‘to remedy the injustice of wrongful convictions of factually innocent persons’ . . . our reading also aligns with the oft-stated rule that remedial statutes are to be interpreted broadly”) (internal citation omitted).

The BBA, an early drafter and advocate of G.L. c. 278A, similarly contemplated that the “proposed bill would establish a process by which **all defendants under**

**restriction of liberty due to a Massachusetts conviction** who claim they are factually innocent could file a motion.” Getting It Right at 60 [A.A. 91] (emphasis supplied). The goal in enacting G.L. c. 278A was to rectify the injustice of wrongful convictions for **persons**, not prisoners. See 2011 House Doc. No. 2165 [Defendant’s Addendum (D. Add) at 50] (“[T]he purpose of this chapter is to remedy the injustice of wrongful convictions of factually innocent persons”). Contrast Commonwealth v. Gardner, 480 Mass. 551, 557-558 (2018) (rejecting Commonwealth’s contention that sexually-dangerous person proceedings can be brought against out-of-state, incarcerated defendants because “we discern no legislative intent to commit out-of-State prisoners. To the contrary, the several provisions of G.L. c. 123A that make up the commitment procedure evince a legislative recognition that the Commonwealth may only commit those within its own custody”).

The Commonwealth is not wrong when it suggests that, had the Legislature intended to make G.L. c. 278A

available to **any** persons, it could have explicitly said so.

Commonwealth's Brief at 17. This does not, however, compel the conclusion that Johnson does not have standing. Johnson is not just any person. He is a person who has been convicted of a criminal offense in a court of the Commonwealth whose liberty has been otherwise restrained as a result of his duty to register as a sex offender. Consequently, he has standing to pursue forensic testing under G.L. c. 278A, consistent with the plain language of the statute and the Legislature's intent.

### CONCLUSION

The BBA asks this Court to find that Johnson's liberty is restrained within the meaning of the statute and that he has standing to pursue forensic testing to support his claim of innocence

Respectfully submitted,  
BOSTON BAR ASSOCIATION,  
By its attorney,



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**CERTIFICATE OF SERVICE**

I, Meredith Shih, hereby certify that on this date, I delivered electronic copies of this Brief of *Amicus Curiae*, in the matter of Commonwealth v. Don Earl Johnson, SJC-12673, on behalf of the Boston Bar Association, to the following via the electronic Tyler e-filing service:

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April 17, 2019



## CERTIFICATE OF COMPLIANCE

I, Meredith Shih, hereby certify pursuant to Mass. R. App. P. 16(k) that this brief complies with the rules of court that pertain to the filing of briefs, including those required by Mass. R. App. P. 16(a)(6), 16(e), 16(f), 16(h), 17, 18, & 20. Specifically, this brief complies with Rule 20(a)(3)(E) by using “Century Schoolbook” proportionally-spaced font, size 14, and contains a non-excludable word count of 2029 This brief was drafted using Microsoft Word.



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Meredith Shih

## AMICI ADDENDUM

Boston Bar Association, <u>Getting It Right: Improving the Accuracy and Reliability of the Criminal Justice System in Massachusetts</u> , Final Report (December 2009) . . . . .	27
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**Getting It Right:  
Improving the Accuracy  
and Reliability of the  
Criminal Justice System  
in Massachusetts**

**Boston Bar Association Task Force Report  
December 2009  
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Perkins Fund of the Boston Bar Foundation.**

**FOREWORD**

The exoneration of hundreds of prisoners through DNA testing (and otherwise) in recent years has made clear what criminal lawyers have known all along: Sometimes our system of justice gets it completely wrong. The Commonwealth of Massachusetts is not immune. Recent cases establish that errors occur here--reversed convictions of individuals like Neil Miller, who was innocent of the aggravated rape for which he was convicted and incarcerated for ten years, and Marlon Passley, who was sentenced to life in prison for the murder of a teenager perpetrated by someone else. But the tragedy of convicting the wrong person goes beyond the suffering of the individual who lost his or her liberty and full life as a result. The victim and the victim's survivors suffer; any sense of closure from the conviction is shattered. Public safety is jeopardized because the real criminal is left free to commit more crimes. And trust in the entire system of justice is undermined.

With confidence that more could and should be done to improve criminal justice in this state, at the start of my term as president of the Boston Bar Association I appointed a Task Force To Prevent Wrongful Convictions, which was charged with identifying reforms needed to reduce the risk of convicting innocent people and recommending how those reforms should be implemented. The BBA was the perfect forum for this effort. Its mission is to facilitate access to justice and to serve the community at large. It also is a place where people with diverse expertise, experiences and perspectives can work together to tackle major problems. Accordingly, prosecutors, defense attorneys, public safety officials, leaders of the New England Innocence Project and others were invited and agreed to participate.

The key to any effort like this is leadership. There could be no better co-chairs than Marty Murphy, a criminal defense attorney at Foley Hoag LLP who formerly held leadership positions for the U.S. Attorney and the Middlesex District Attorney, and David Meier, who confronted wrongful convictions as the former chief of

homicide prosecutions at the Suffolk District Attorney's office and now practices law at Todd & Weld LLP. Under their focused and thoughtful guidance, members of the Task Force worked together for nearly a year to bring their experiences, judgment, and energy to the task.

The Task Force's report is an impressive achievement. The report points the way to fixing the flaws in witness identifications, suspect and witness interviews, access to post-conviction relief and forensics, and discovery and defense practices. Although the criminal justice system in Massachusetts will never be perfect--it relies on human beings who are themselves fallible--adopting the report's recommendations would substantially reduce the risk of convicting the innocent while the guilty go free. But it would accomplish even more by enhancing the fairness of the process for everyone and increasing the accuracy of all results. The Task Force's report is a very important beginning. Now it is also up to the rest of us to ensure that the Task Force's recommendations are fully implemented and criminal justice in Massachusetts improved.

--Kathy B. Weinman

President, Boston Bar Association (September 2008-August 2009)

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- B. Proposed Revisions to M.G.L. c. 6, § 184A (Forensic Science Advisory Board)
- C. Best Practices Concerning Prosecution Discovery Obligations in Serious Felony Cases Commonly Prosecuted in Superior Court
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**OTHER MATERIALS AVAILABLE AT BBA WEBSITE**

[http://www.bostonbar.org/prs/reports/TaskForceToImproveCJS\\_Dec09.pdf](http://www.bostonbar.org/prs/reports/TaskForceToImproveCJS_Dec09.pdf).

- E. Sample Rules and Procedures for Eyewitness Identification
- F. Sample Rules and Procedures for Recording Suspect Interviews
- G. Massachusetts State Police Procedures on Evidence Collection and Preservation; General Crime Scene Examination; Trace Recognition, Collection and Preservation
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## I. EXECUTIVE SUMMARY

On October 1, 2008, Boston Bar Association President Kathy B. Weinman announced the formation of a Boston Bar Association Task Force to Prevent Wrongful Convictions. This was not the *first* group assembled by a Bar organization to study the extraordinarily serious problem of wrongful convictions or to make recommendations to reduce the number of wrongful convictions. The BBA's Task Force, however, is the *broadest* group of criminal justice system participants assembled by a Bar organization to address wrongful convictions. The Task Force members are:

Hon. Christopher J. Armstrong	Dwyer & Collora, LLP; former Chief Justice, Massachusetts Appeals Court
Allison D. Burroughs	Nutter, McClennen & Fish LLP
Denise Jefferson Casper	Deputy District Attorney, Middlesex County
Jennifer L. Chunias	Goodwin Procter LLP; Trustee, New England Innocence Project
James M. Connolly	Major, Massachusetts State Police
Edward F. Davis	Commissioner, Boston Police Department
Shannon L. Frison	Frison Law Firm, P.C.
William H. Kettlewell	Dwyer & Collora, LLP
Randy Gioia	Law Office of Randy Gioia
William J. Leahy	Chief Counsel, Committee for Public Counsel Services
Elizabeth A. Lunt	Zalkind, Rodriguez, Lunt & Duncan LLP
Gregory J. Massing	General Counsel, Executive Office of Public Safety



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Mary Kate McGilvray	Acting Director, Massachusetts State Crime Laboratory (Ret.)
David E. Meier	Todd & Weld LLP; Trustee, New England Innocence Project
Robert M. Merner	Deputy Superintendent, Boston Police Department
Martin F. Murphy	Foley Hoag LLP
Sejal H. Patel	Law Office of Sejal H. Patel
Joseph F. Savage, Jr.	Goodwin Procter LLP; Chairman, New England Innocence Project
David M. Siegel	Professor, New England School of Law; Trustee, New England Innocence Project
Joshua I. Wall	First Assistant District Attorney, Suffolk County

As is evident, the BBA's Task Force included senior law enforcement officials: the Commissioner of the Boston Police Department; a commanding officer of the Massachusetts State Police; two senior state prosecutors, each occupying a position of leadership in his and her office; a senior scientist from the Massachusetts State Police Crime Laboratory; and a senior attorney from the Massachusetts Executive Office of Public Safety. The Task Force also included broad representation from the private bar. Three lawyers who have been leaders in the work of the New England Innocence Project (two big-firm partners and one law professor) served on the Task Force. The Chief Counsel for the state's Committee for Public Counsel Service--the state's leader in providing indigent defense--also served on the Task Force, as did a number of other lawyers, from firms large and small, with substantial experience in federal and state criminal defense. The former Chief Justice of the Appeals Court was also a Task Force

member. The Task Force was neither a committee of law enforcement officials nor a group of defense attorneys; its membership was truly divided among the major actors in the criminal justice system.

At the outset, the Task Force asked each of its members to put aside institutional agendas and to focus on practical, achievable means to accomplish a goal that every participant in the criminal justice system shares: maximizing the likelihood that the system produces reliable, accurate, and just results. The Task Force's members were unanimous in agreeing that a wrongful conviction is not only a human tragedy for the defendant and his family, but also a devastating blow to a crime victim and to the administration of justice itself. For every defendant wrongly convicted, a criminal goes free, and society remains unprotected while the individual who has escaped the consequences of his actions is free to commit other crimes against other victims.

The Task Force reached early consensus that it was unnecessary for its members to embark upon a detailed study of "what went wrong" in wrongful conviction cases in Massachusetts or other states. The Task Force believed that, at this juncture, the primary causes of wrongful convictions are well understood. Research shows that the most common sources of wrongful convictions are:

1. Mistaken eyewitness identification;
2. Flawed forensic science;
3. False confessions;
4. Police and prosecution failures to produce required discovery;
5. Inadequate defense counsel performance; and

6. False testimony by jailhouse informants and cooperating witnesses.

In many cases, the research shows, more than one of these elements combined to create a kind of “perfect storm” that led to an innocent man’s conviction.

With this shared understanding, the Task Force sought to develop recommendations it believed would increase the accuracy and reliability of the results the criminal justice system produces. At its first full meeting, a consensus emerged among all of the Task Force members that the Task Force’s name, the Task Force to Prevent Wrongful Convictions, too narrowly described the work that the Task Force sought to accomplish. We gave ourselves the working title of the Boston Bar Association’s “Task Force to Improve the Accuracy and Reliability of the Criminal Justice System.” While less than poetic, that title more fully describes our objectives. As citizens first, the Task Force’s members, whether from the defense bar or from law enforcement, agreed that bringing justice to crime victims by convicting the guilty was as important an objective as undoing convictions of innocent defendants. In fact, the Task Force concluded that the two objectives cannot be separated.

The Task Force divided itself into three committees. One committee focused on recommendations for reform in the area of eyewitness identification and police interviews of suspects and witnesses. A second committee developed recommendations in the areas of post-conviction relief and forensics. The third committee had a broad mandate to make recommendations in the areas of discovery, trial practice and defense counsel performance. Each of the groups met separately on multiple occasions over the course of the past ten months. Members of individual committees consulted with members of other committees on a number of issues. The Task Force also met on a number of occasions as a whole body. The Task Force is pleased to make the following recommendations, each of

which has the unanimous support of the members of the Task Force<sup>1</sup>:

**A. Recommendations Concerning Identification Procedures.**

The Task Force developed 23 specific recommendations concerning the way police should conduct identification procedures. They are spelled out in detail in the body of this Report. The core recommendations are as follows:

1. Before conducting any identification procedure, it is critical the police obtain and document as complete a description of the suspect as possible.
2. Absent compelling countervailing considerations, identification procedures should be conducted by “blind” administrators--that is, officers who do not know which of the individuals in a lineup or photo array is the suspect. Blind administration prevents the officer conducting the lineup from providing even unconscious suggestions that may influence the witness’s identification, or indicating to the witness that he or she selected the “correct” photograph.
3. Police conducting all identification procedures, including lineups, photo arrays, and show-ups, should provide witnesses with a standard set of instructions, including the following:
  - that it is just as important to clear a person from suspicion as to identify a person as the wrongdoer;

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<sup>1</sup> The Task Force’s recommendations focus primarily on state court practice. This is not because the Task Force members believe that the problem of wrongful convictions is limited to state criminal prosecutions or even more prevalent in state court cases than federal cases. Indeed, many of the recommendations outlined in this report could apply with equal force to federal practice. However, given the national scope of the federal criminal justice system and the need for federal criminal justice agencies to follow policies and guidelines developed at the federal level, the Task Force concluded that its recommendations were best addressed to the state legislature, state and local law enforcement officials, state court judges, and prosecutors and defense counsel working in the state criminal justice system. Moreover, the state system handles well over 95 percent of all criminal prosecutions.

## A.A. 37

- that the person who committed the crime may or may not be in the lineup or photo array;
  - in the case of a photo array (or a lineup done some time after the crime), that individuals in the photographs or in the lineup may not appear exactly as they did on the date of the incident because features such as weight, head and facial hair are subject to change; and
  - that regardless of whether an identification is made or not made, the investigation will continue.
4. The individuals in the lineup and the array should be presented to the witness sequentially, rather than simultaneously.
  5. At the conclusion of an identification procedure where the witness has made an identification, the officer should ask the witness to describe his or her level of certainty about the identification.
  6. Careful documentation of every identification procedure, and the witness's statements, are critical.

In the area of eyewitness identification, the Task Force also recommends that:

7. Training programs should be implemented to train law enforcement personnel in the use of the recommended procedures for eyewitness identifications.
8. The Judiciary should receive training on the scientific bases for mistaken identifications, and the reasons why experts believe that identification reforms like those outlined above reduce the risk of misidentifications.

**B. Recommendations Concerning Law Enforcement Interviews of Suspects and Witnesses.**

The Task Force makes the following recommendations concerning law enforcement interviews of suspects and witnesses:

1. All law enforcement agencies should video-record the entirety of all custodial interrogations of suspects in serious felony cases commonly prosecuted in Superior Court unless strong countervailing considerations make such recording impractical or the suspect refuses to be recorded.
2. Law enforcement agencies should, whenever practicable, electronically record interviews of witnesses in serious felony cases commonly prosecuted in Superior Court.
3. The principal participants in the criminal justice system, including police officers, prosecutors, defense lawyers and judges, should receive training about the causes, indicia, and consequences of false confessions.
4. The Massachusetts Legislature should be encouraged to create a fund allowing all state and municipal police departments to apply for grants to purchase video equipment.

**C. Recommendations Concerning Post-Conviction Relief and Forensic Science.**

The Task Force makes the following recommendations concerning post-conviction relief and forensic science:

1. The Legislature should enact and the Governor should sign into law a statute providing for postconviction access to and testing of forensic evidence and biological material by defendants who claim factual innocence and for postconviction retention of biological material. Task Force Members drafted a proposed bill, which is attached to this Report as Exhibit A.

2. Massachusetts should expand the membership of the Commonwealth's Forensic Sciences Advisory Board to include a broader range of scientific and criminal justice system stakeholders by adding three laboratory scientists and three members of the bar. Task Force Members drafted a proposed bill, which is attached to this Report as Exhibit B.
3. Massachusetts should review and enhance law enforcement training and practices for evidence collection, including creation of evidence collection protocols for local police departments and training in best practices for evidence collection, processing and retention.

**D. Recommendations Concerning Discovery, Trial Practice, and Defense Standards.**

The Task Force makes the following recommendations in the area of discovery, trial practice, and defense standards:

1. Prosecutors' offices should provide formal training to new prosecutors on their discovery obligations and conduct periodic training of existing prosecutors.
2. Police departments and prosecutors' offices should provide formal training to police officers concerning their obligations to provide exculpatory evidence, and establish means to assure that exculpatory evidence in the hands of the police is provided to prosecutors.
3. Prosecutors' office should adopt written statements of Best Practices as a guide for obtaining and disclosing exculpatory evidence, particularly in serious felony cases commonly tried in Superior Court. The Task Force prepared a model set of Best Practices, which is attached to this Report as Exhibit C.
4. Defense Counsel representing the accused in serious felony cases commonly tried in Superior Court, whether retained

or appointed by the Court, should consult and comply with the Committee for Public Counsel Services Performance Standards and the statement of Core Expectations for Defense Counsel prepared by the Task Force, which is attached to this Report as Exhibit D.

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The Task Force sought to craft its recommendations in such a manner that they could be readily implemented without running afoul of current day fiscal restrictions. The Task Force recognizes, however, that some of its proposals, such as those involving video-recording devices, post-conviction DNA testing, and crime lab accreditation require direct expenditure of funds, while others, particularly police training, entail substantial indirect economic support. In the Conclusion of this Report, we suggest an approach for implementing these recommendations in the short and long terms.



## II. INTRODUCTION

On a summer night in 1988, an unknown intruder broke into the suburban home of a young couple living in a community just outside of Boston; the intruder violently attacked the husband, sexually assaulted his wife, and robbed them of jewelry, monies, and their new Honda motor vehicle. Within days, both husband and wife had positively identified the same suspect from a photographic array shown to them by police investigators, the suspect had made incriminating statements to the investigators, and crime scene evidence had corroborated his presence within the home. Not surprisingly, given the nature of the crimes, his arrest and subsequent incarceration on high bail while awaiting trial were not only played out on local television and in the newspapers, but were a sense of great relief to the young couple--and to law enforcement. Police and prosecutors had their man. The victims would have their day in court, the defendant would be appropriately punished, and justice would be done. Or so it seemed.

Slowly but surely, as the case progressed through the criminal justice system, police and prosecutors discovered additional facts that caused them to re-evaluate the evidence against the defendant. Ultimately, law enforcement utilized a then cutting-edge scientific procedure called "DNA testing" (that was only being performed at expensive, private laboratories) to conclusively establish that the defendant did not commit the crimes with which he had been charged and for which he had been incarcerated. Despite seemingly compelling eyewitness identifications, incriminating suspect statements, and other corroborative evidence, police and prosecutors did *not* have their man, the victims would *not* have their day in court, and justice would *not* be done.

Indeed, years later, when investigators learned of a positive match between biological evidence recovered at the scene and the known DNA of a convicted serial rapist, the applicable statute of

limitations not only precluded law enforcement from charging the actual assailant, but, as importantly, prevented the victim from achieving any measure of justice. In a very real sense, the criminal justice system had failed--failed the defendant, failed police and prosecutors, and failed the victim.

Tragically, despite the good faith identifications of eyewitnesses, the best intentions of law enforcement, and the genuine commitment of police, prosecutors, and defense counsel, in the 20 or so years since that mistaken arrest the criminal justice system has failed far too often. In essence, the Boston Bar Association Task Force was created to attempt to address some of the leading causes of such failures by developing a series of specific policy and practice recommendations that could readily be implemented within the system. To that end, the composition of the Task Force was designed specifically to include representatives from *all* areas of the criminal justice system; individuals with differing personal, professional, and institutional perspectives and experiences, but individuals who shared the common objective of improving the accuracy of the system, thereby (1) reducing the risk of wrongful arrests and wrongful convictions and, as importantly, (2) increasing the likelihood of apprehending and convicting those responsible for criminal conduct.

From the very outset, Task Force members recognized and agreed that to be most productive, the work of the Task Force would focus on general principles, practices, and procedures within the criminal justice system, not on an analysis or review of specific cases. Likewise, the Task Force recognized that the subject of wrongful convictions has been the focus of many academicians, social scientists, and policy-makers, that many causes are generally well-understood, and that those previous studies have already led to significant reforms within the system. The goal of the BBA Task Force, then, was to attempt to build upon the work of others and, simply stated, to move to the next level in recommending the implementation of additional, important practice reforms among police, prosecutors, and defense counsel.

While the Task Force learned specific lessons from the past, the focus was on developing recommendations for the future, recommendations that would (and did) find broad support among the diverse members of the Task Force, regardless of their professional or institutional backgrounds, and therefore hopefully among all participants in the criminal justice system.

As outlined above, the Task Force divided itself into three working committees; the co-chairs, Martin F. Murphy and David E. Meier (both former prosecutors now practicing criminal defense), monitored the work of the three individual committees and coordinated the work of the Task Force as a whole. In order to ensure that relevant issues and recommendations were evaluated and discussed from all perspectives, the co-chairs purposely sought to balance the composition of each of the three committees among law enforcement (police and prosecutors) and defense attorneys. Such balance not only generated meaningful and thorough discussion, but, in the end, increased the likelihood for consensus, one of the primary goals of the Task Force in formulating its recommendations.

One committee focused upon potential reforms in the areas of **Eyewitness Identifications and Suspect/Witness Interviews**. That committee consisted of Boston Police Commissioner Edward Davis, Suffolk County First Assistant District Attorney Joshua Wall, Massachusetts State Police Major James Connolly, Boston Police Deputy Superintendent Robert Merner, Randy Gioia, Esquire, Allison Burroughs, Esquire, and Shannon Frisson, Esquire. A second committee focused on **Forensics and Post-Conviction Access to Evidence**. Gregory Massing, Esquire (legal counsel to the Commonwealth's Secretary of Public Safety), New England School of Law Professor David Siegel, Mary Kate McGilvray (the former Director of the Massachusetts State Police Crime Laboratory), Jennifer Chunias, Esquire, and Sejal Patel, Esquire served on that committee. A third committee focused upon **Discovery, Defense Standards, and Trial Practice**. That committee had as its members Middlesex County Deputy District Attorney Denise Casper,

William Kettlewell, Esquire, William Leahy, Esquire (Director of the Massachusetts Committee for Public Counsel Services), the Honorable Christopher Armstrong (former Chief Justice of the Massachusetts Appeals Court), Liza Lunt, Esquire, and Joseph Savage, Esquire.

The Task Force as a whole convened in September, 2008; the three committees met regularly on a monthly basis beginning in October. The Task Force reconvened several times throughout the year in order to discuss and review the individual committee recommendations as they evolved. Conference calls among committee members were frequent and e-mail correspondence between Task Force members was ongoing throughout the year. The final few months were devoted to drafting, circulating, and revising the specific recommendations of each committee and the overall Report of the Task Force itself.

With the presentation and publication of the Report, the Task Force now seeks to gather support for its recommendations from additional participants in the criminal justice system, as well as from the public in general. It is the genuine hope of the Task Force that the implementation of its policy and practice recommendations will serve to increase the accuracy of the criminal justice system and to reduce the risk of future wrongful convictions.

### III. CAUSES OF WRONGFUL CONVICTIONS

At the outset, the Task Force recognized that much work has already been done, in Massachusetts and elsewhere, to study the causes of wrongful convictions. A review of the existing research, including the work of the Innocence Project and its local affiliate, the New England Innocence Project; the American Bar Association's Innocence Committee; the New York State Bar Association's Committee on Wrongful Convictions; the Justice Initiative of the Massachusetts Attorney General and Massachusetts District Attorneys' Association; and the study of wrongful convictions in Massachusetts published by Professor Stanley Fischer, points to a core set of common causes of wrongful convictions.<sup>2</sup> In Massachusetts, most of the wrongful conviction cases have resulted from four causes:

1. Erroneous eyewitness identifications;
2. Admission of faulty forensic evidence;
3. Failure of police or prosecutors to produce exculpatory evidence; and
4. Poor defense counsel performance.

In many of the acknowledged Massachusetts wrongful conviction cases, *several* of these factors were present, dramatically increasing the prospect of a wrongful conviction. The case of *Commonwealth v. Hernandez* provides one example of how mistaken

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<sup>2</sup> See, e.g., JIM DWYER, PETER NEUFELD & BARRY SCHECK, ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT (New American, 2003); CRIMINAL JUSTICE SECTION, AM. BAR ASS'N, ACHIEVING JUSTICE: FREEING THE INNOCENT, CONVICTING THE GUILTY (Paul Giannelli & Myrna Raeder eds., 2006) [hereinafter ABA REPORT]; N.Y. STATE BAR ASS'N TASK FORCE ON WRONGFUL CONVICTIONS, FINAL REPORT OF THE N.Y. STATE BAR ASS'N TASK FORCE ON WRONGFUL CONVICTIONS (Apr. 4, 2009), available at <http://www.nysba.org/> ("Search" Wrongful Convictions Task Force") [hereinafter NYBA REPORT]; MASS. DIST. ATTORNEYS ASS'N, REPORT OF THE JUSTICE INITIATIVE: RECOMMENDATIONS OF THE MASSACHUSETTS ATTORNEY GENERAL AND DISTRICT ATTORNEYS TO IMPROVE THE INVESTIGATION AND PROSECUTION OF CASES IN THE CRIMINAL JUSTICE SYSTEM (Sept. 2006), available at <http://www.mass.gov/> ("Search" for "Report of the Justice Initiative") [hereinafter MDAA REPORT]; Stanley Z. Fischer, *Convictions of Innocent Persons in Massachusetts: An Overview*, 12 B.U. PUB. INT. L.J. 1 (2002).

eyewitness identification, unreliable forensic evidence, and the failure of law enforcement to produce exculpatory evidence can combine to produce disastrous results. Hernandez was convicted in 1988 of rape and other crimes and sentenced to a 12-to-18-year state prison term. The victim had identified Hernandez as her rapist in a questionable pre-trial identification procedure and identified him again as her attacker in open court at trial. The forensic testimony “linking” Hernandez to the rape included testimony about hair comparisons overstating the scientific reliability of that discipline. And finally, despite defense counsel’s requests, the police failed to produce exculpatory evidence corroborating Hernandez’ alibi: police documents which showed that Hernandez was in fact being detained by the police for unrelated reasons at the time the rape occurred.<sup>3</sup> In 2002, after DNA testing excluded Hernandez as the source of the semen of the victim’s clothing, and District Attorney obtained from the police a computer printout documenting that Hernandez was with the police at the time of the rape, Hernandez was released. He had served nearly 14 years in prison.

National data suggest that the four factors largely responsible for the conviction of innocent men in Massachusetts--mistaken identifications, unreliable forensic evidence, police and prosecution discovery failures, and poor defense counsel performance--have also contributed to many of the wrongful convictions which have occurred in other parts of the country. In addition to these four factors, national studies have identified two other major causes of wrongful convictions--false confessions and false testimony given by jailhouse informants and cooperating witnesses--as prominent causes of wrongful convictions.<sup>4</sup> The American Bar Association estimates that, nationally, “about one-fourth of cases involving convictions of an innocent defendant include, among other things, false confessions,”<sup>5</sup> and the Task Force

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<sup>3</sup> Fischer, *supra* at 1, at 16.

<sup>4</sup> See, e.g., Dwyer, Sheck and Neufeld, *supra* note 1, at 101-37, 163-203; ABA Report, *supra* note 1, at 63-78; NYBA Report, *supra* note 1, at 104-20.

<sup>5</sup> ABA REPORT, *supra* note 1, at 11.

members agree that Massachusetts must remain vigilant in guarding against the possibility of wrongful convictions based on false confessions. And Massachusetts certainly *has* seen examples of wrongful convictions based on false testimony by government informants, most notably the murder convictions of Joseph Salvati, Peter Limone, Louis Greco, and Henry Tamaleo based on the perjured testimony of FBI informant Joseph Barboza.<sup>6</sup>

This widespread consensus among national experts and among those active in the law enforcement and criminal justice communities in Massachusetts about the causes of wrongful convictions created the baseline for the work of this Task Force. Rather than perform another study about the *causes* of wrongful convictions, the Task Force concluded that it should accept the consensus arising from prior research, and focus instead on developing practical *solutions*, tailored to Massachusetts, that would improve the accuracy of our criminal justice system and increase the likelihood that the right individuals would be convicted in criminal cases here.

Three further points merit mention here.

First, our recommendations are geared toward making the justice *system* work better. The participants in our Task Force began with the common ground that the overwhelming majority of police officers, prosecutors, defense lawyers and judges strive to see that justice is done. Our work on this Task Force has only confirmed that view. We understand, of course, that there have been (and no doubt will continue to be) exceptions to this rule, and some of the most remarkable injustices our state has seen resulted from intentional misconduct, as the conduct of certain FBI agents in the *Salvati* case surely illustrates. But our focus has been on making recommendations that assume good faith on the part of police, prosecutors and defense counsel alike. Our recommendations are intended to *maximize* accurate, reliable results, and *minimize* the likelihood that police, prosecutors and defense counsel, even when

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<sup>6</sup> See *Limone v. U. S.*, 497 F. Supp. 2d 143 (D. Mass. 2007).

acting with the best intentions, will nevertheless takes steps that will lead to the conviction of innocent men and women and leave the guilty free to commit other crimes.

Second, for each of us who works in the criminal justice system, the research we have described should serve as a useful reminder that our criminal justice system is imperfect. When the system fails, innocent men and women will be and, indeed, *have been* sent to prison for crimes they did not commit. Those men and women pay a terrible price for the system's failures, and so does the public, for in each of these cases, the real criminal remains at large, free from punishment for his actions, and also free to commit more crimes. In these cases, the jury system, the appeals process, and post-conviction review failed to ensure that justice was done. For each defendant now acknowledged to have spent years behind bars for a crime he did not commit, there was a jury that unanimously found the defendant guilty beyond a reasonable doubt. Trial and appellate judges, steadfast in their application of procedural and other rules, often failed to detect or correct injustices. Some appellate courts confidently dismissed now-exonerated defendants' efforts to obtain new trials by describing the evidence against them, including eyewitness evidence, as "compelling."<sup>7</sup> Our recommendations, if adopted, will not make our criminal justice system perfect but will, we believe, reduce the likelihood that the innocent will be imprisoned while the guilty go free.

Third, many of our state's exonerations have come as the result of new DNA testing done on evidence from old criminal

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<sup>7</sup> See, e.g., *Commonwealth v. Kent K.*, 427 Mass. 754, 761 (1998) (affirming conviction of Donnell Johnson for the 1995 murder of nine-year-old Jermaine Goffigan). Johnson was exonerated in 2000 after witnesses cooperating with federal prosecutors in another matter identified other individuals as the real killers. Sacha Pfeiffer, *After Serving 4 Years, Man is Exonerated in '95 Slaying*, BOSTON GLOBE, Sept. 14, 2000, at B6. In *Kent K.*, (the pseudonym used by the court for Johnson, who was a juvenile at the time of Goffigan's murder), the Supreme Judicial Court rejected, among other claims, Johnson's arguments that he was entitled to a new trial because the Commonwealth had failed to produce discovery in a timely way, made closing arguments that impermissibly appealed to the jury's sympathy, and because the trial judge excluded expert evidence about problems associated with identification evidence. *Kent K.*, 427 Mass. at 754-63.



cases. DNA analysis was not available when many of the wrongful conviction cases were first tried, and advances in DNA technology have demonstrated extraordinary power to exonerate defendants in cases where biological evidence, like blood or rape kits, was available to be tested using the new methods. It is tempting to think that the widespread use of DNA analysis in criminal cases means that the problem of wrongful convictions will soon be a thing of the past. The Task Force certainly believes that advances in DNA technology will reduce the number of new cases where innocent men and women are convicted. But DNA advances will not eliminate the problem of wrongful convictions. In many cases, including many serious felony cases, there is simply no relevant biological evidence to test. In these cases, jurors will continue to be asked to return verdicts based on more conventional types of evidence, including eyewitness identification testimony, defendants' statements, the testimony of cooperating witnesses, and forms of forensic evidence that lack the kind of scientific basis or precision DNA testing possesses. *Particularly* in these cases, the Task Force believes that the criminal justice system must give a high priority to improvements that will increase the accuracy of the results the system delivers, and not regard advances in DNA testimony as a cure-all for the problem of wrongful convictions.

**IV. THE DOUBLE-EDGED SWORD OF  
EYEWITNESS IDENTIFICATION EVIDENCE  
BACKGROUND.**

Eyewitness identification evidence is highly persuasive in a criminal trial.<sup>8</sup> “[T]here is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says ‘That’s the one!’”<sup>9</sup> It is also evidence that may lead to unreliable results. Mistaken identification is the primary cause of wrongful convictions.<sup>10</sup> By current research, some 242 men, mostly convicted of sex crimes and murder, have been exonerated based on subsequent DNA testing. Of those 242 wrongful convictions, over 75% were convicted based, at least in part, on faulty eyewitness identifications.<sup>11</sup> There are many accounts of people who have been wrongly convicted because of faulty eyewitness identification evidence.<sup>12</sup> Massachusetts is no exception: Eyewitness identification has contributed to most of the acknowledged wrongful convictions in our state over the last decade.<sup>13</sup>

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<sup>8</sup> *Commonwealth v. Austin*, 421 Mass. 357, 362 (1995).

<sup>9</sup> *Watkins v. Sowders*, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting) (internal citation and emphasis omitted); see also *Manson v. Brathwaite*, 432 U.S. 98, 120 (1977) (Marshall, J., dissenting) (stating that “juries unfortunately are often unduly receptive to [identification] evidence”); Henry F. Fradella, *Why Judges Should Admit Expert Testimony on the Unreliability of Eyewitness Testimony*, 2 FED. CTS. L. REV. 1, 2 (“[S]eeing is believing’ is not only ubiquitous common parlance but also appears to be gospel to jurors.”).

<sup>10</sup> *Commonwealth v. Johnson*, 420 Mass. 458, 465 (1995) (“mistaken identification is believed widely to be the primary cause of erroneous convictions”).

<sup>11</sup> The Innocence Project, Understand the Causes—Eyewitness Misidentification, <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php> (last visited Jul. 27, 2009); see also *Commonwealth v. Silva-Santiago*, 453 Mass. 782, 797 n.20 (2009); *Commonwealth v. Martin*, 447 Mass. 274, 293 n.4 (2006) (Cordy, J., dissenting), citing The Innocence Project, Understand the Causes – Eyewitness Misidentification (“[o]f the first 163 exonerations secured through the use of DNA [deoxyribonucleic acid] evidence, for example, we know that seventy-seven per cent of the convictions were the product of mistaken eyewitness identifications.”).

<sup>12</sup> For a remarkable real life account of a case of mistaken identification see generally, *60 Minutes: Leslie Stahl Reports on Flaws in Eyewitness Testimony That Lead to Wrong Convictions* (CBS television broadcast Mar. 8, 2009), available at <http://www.cbsnews.com/stories/2009/03/06/60minutes/main4848039.shtml>; JENNIFER THOMPSON-CANNINO, RONALD COTTON & ERIN TORNEO, *PICKING COTTON: OUR MEMOIR OF INJUSTICE AND REDEMPTION* (1st ed.) (2009).

<sup>13</sup> Fischer, *supra* note 1, at 64; MDAA REPORT, *supra* note 1, at 6 (“[m]any of the [Massachusetts wrongful conviction cases] relied exclusively or principally on erroneous eyewitness identification.”).

Against this backdrop, a recognized body of scientific literature has examined the factors that lead individuals to make mistaken identifications, and outlined steps police departments and courts can take to reduce the likelihood that flawed eyewitness identifications will result in wrongful convictions. Research has shown that a number of factors affect the accuracy and reliability of an eyewitness identification. Much of this research confirms common sense, and teaches, as one would expect, that factors relating directly to the witness, the perpetrator, and the circumstances under which the witness has the opportunity to see the perpetrator all affect the witness's ability to make an accurate identification.<sup>14</sup> For example, "the evidence is now quite clear that people are better able to recognize faces of their own race or ethnic group than faces of another race or ethnic group."<sup>15</sup> The longer a witness has an opportunity to observe a perpetrator, and the more attention he pays to that person's features, the more likely the witness will be able to make an accurate identification.<sup>16</sup> And the presence of a weapon makes it less likely that an eyewitness can accurately identify the holder of the weapon.<sup>17</sup>

These factors are beyond the control of criminal justice policy makers, but other factors that affect a witness's likelihood of making an accurate identification--or, just as important--making *no* identification where a perpetrator is *not* present in a lineup or photo array--are very much within the control of the criminal justice system. These factors include:

- Instructions--what a police officer tells a witness he is about to see when he views a lineup or photo array;

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<sup>14</sup> See generally Gary Wells & Elizabeth A. Olsen, *Eyewitness Testimony*, 54 ANN. REV. PSYCHOL. 277, 277-291 (2003).

<sup>15</sup> *Id.* at 280-81.

<sup>16</sup> *Id.* at 282.

<sup>17</sup> *Id.*

- The *content* of the lineup or photo array itself--that is, how closely the “fillers” resemble the suspect or the witness’s description of a suspect;
- The *method* used to present the lineup or photo array--that is, whether the photographs or individuals are presented simultaneously or one-at-a-time (sequentially); and
- The *knowledge and actions* of the police officer administering the procedure, particularly whether the police officer administering the identification procedure knows the identity of the suspect, and whether the witness is given feedback about whether the person he identifies is the person the police suspect of the crime.<sup>18</sup>

The recognition that changes in the methods of conducting identification procedures could increase the accuracy of witness identifications, and reduce the number of wrongful convictions, has sparked significant action by law enforcement officials. At the national level, driven in part by the recognition that many of the early DNA exonerations involved convictions based on flawed identifications,<sup>19</sup> Attorney General Janet Reno convened a technical working group of law enforcement officers, lawyers, and social scientists to make recommendations concerning how identification procedures should be conducted. That group published its Report, *EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT*, in 1999.

Locally, in March 2004, Suffolk County District Attorney Daniel Conley and Boston Police Commissioner Kathleen O’Toole convened an eight member Task Force, including defense lawyers, senior police officers, Suffolk County First Assistant District

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<sup>18</sup> *Id.* at 285-89.

<sup>19</sup> See generally U.S. DEP’T. OF JUSTICE, NAT’L INST. OF JUSTICE REPORT, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (Edward Connors, Thomas Lundregan, Neal Miller & Tom McEwen eds., 1996).

Attorney Josh Wall (who also served as a member of this Task Force) and two of the nation's leading experts on eyewitness identification issues, Gary Wells, Ph.D., a professor at Iowa State University<sup>20</sup> and James Doyle, a Boston defense attorney who is now the consulting director of The Center for Modern Forensic Practice at the John Jay College of Criminal Justice.<sup>21</sup> The Suffolk County Task Force published its Report, which contained 25 separate recommendations on eyewitness identification procedures, in July 2004. The Suffolk Task Force recognized the significant work that the Department of Justice Working Group had accomplished, but "concluded that there were significant steps that go beyond the DOJ Guide that need to be taken to insure the highest standard for Boston."<sup>22</sup> In the years that followed the Suffolk Task Force Report's recommendations, and similar policies adopted by the Northampton, Massachusetts Police Department, many departments in Massachusetts have made great strides to improve identification procedures. An informal survey of 27 departments conducted by Boston Police Commissioner Edward Davis as part of this Task Force's work indicated that nearly all of the departments surveyed had adopted at least some of the identification policies recommended by the Department of Justice Guidelines and the Suffolk County Task Force Report, often as a result of support and training provided by their local District Attorneys.

On May 19, 2009, the Supreme Judicial Court also weighed in on a number of these identification procedure reforms. In *Commonwealth v. Silva-Santiago*,<sup>23</sup> the Court strongly suggested that

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<sup>20</sup> Professor Wells's website is an outstanding resource for cutting edge issues in the field of eyewitness memory; see <http://www.psychology.iastate.edu/~gwells/>.

<sup>21</sup> See SUFFOLK COUNTY TASK FORCE ON EYEWITNESS EVIDENCE, REPORT OF THE SUFFOLK COUNTY TASK FORCE ON EYEWITNESS EVIDENCE (July 2004).

<sup>22</sup> The Report of the Attorney General and the MDAA Report, published in 2006, adopted the recommendations of the DOJ Guidelines in their entirety and most of the recommendations of the Suffolk County Task Force. See U.S. DEP'T OF JUSTICE, NAT'L INST. OF JUSTICE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT 13-38 (1999) [hereinafter ATTORNEY GENERAL REPORT]; MDAA Report, *supra* note 1, at 10-14.

<sup>23</sup> *Silva-Santiago*, 453 Mass. at 797-98.

police officers should follow the kind of protocol that identification reform proponents have long urged. The Court held:

What is practicable in nearly all circumstances is a protocol to be employed before a photographic array is provided to an eyewitness, making clear to the eyewitness, at a minimum that: he will be asked to view a set of photographs; the alleged wrongdoer may or may not be in the photographs depicted in the array; it is just as important to clear a person from suspicion as to identify a person as the wrongdoer; individuals depicted in the photographs may not appear exactly as they did on the date of the incident because features such as weight, head, and facial hair are subject to change; regardless of whether an identification is made, the investigation will continue; and the procedure requires the administrator to ask the witness to state, in his or her own words, how certain he or she is of any identification. Not only would such a protocol provide important information to the eyewitness that may reduce the risk of a misidentification, but adhering to it would permit the law enforcement officer following the protocol to testify more accurately and with greater precision as to what the witness was told prior to the identification.<sup>24</sup>

While the SJC “decline[d] at this time to hold that the absence of any protocol or comparable warnings to the eyewitnesses requires that the identifications be found inadmissible,” the Court noted that it “expect[ed] such protocols to be used in the future” and, as recently as October 29, 2009, in *Commonwealth v. Watson*, the SJC repeated that expectation.<sup>25</sup>

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<sup>24</sup> *Id.*

<sup>25</sup> *Silva-Santiago*, 453 Mass. at 797-98; *Commonwealth v. Watson*, 455 Mass. 246, 254-55 (2009).

This Task Force believes that the recommendations of the Suffolk County Task Force are sound, and should be adopted. They are derived from rigorous academic research. Given the central role that eyewitness identifications have in the investigation of crimes, the powerful impact that eyewitness identification can have on juries, and the documented instances of mistaken identifications, police should conduct every eyewitness identification procedure with the most appropriate procedural safeguards to prevent mistaken identifications. The recommendations outlined below are designed to significantly reduce the risk of mistaken identifications.

The Task Force believes it is critical that police departments adopt the practices embodied in the recommendations below as formal rules or procedures, as the Boston Police Department and a number of other departments have done, and to use pre-printed forms to implement these procedures.<sup>26</sup> Adopting these practices as formal rules or procedures will serve four important purposes. First, formal adoption of procedures will maximize the likelihood that the department's officers will in fact employ the best identification practices.<sup>27</sup> Second, it ensures consistent application of those best practices among defendants, regardless of age, race, gender, or national origin. Third, the adoption of these best practices as formal rules or procedures sends a message to the officers and the community that maximizing the likelihood of accurate identifications, and minimizing mistaken identifications, is a top priority. Finally, the SJC's language in the *Silva-Santiago* case, quoted above, strongly suggests that the courts may well impose a rule, directly or indirectly, requiring that practices like the ones recommended below be employed in identification procedures.

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<sup>26</sup> Copies of several departmental rules and pre-printed forms are available at [http://www.bostonbar.org/prs/reports/TaskForceToImproveCJS\\_Nov09.pdf](http://www.bostonbar.org/prs/reports/TaskForceToImproveCJS_Nov09.pdf).

<sup>27</sup> While most of the evidence on this point is anecdotal, there is some reason for concern that some departments which may have adopted a policy along the lines we recommend may not have fully implemented that policy. See Stanley Z. Fischer, *Eyewitness Identification Reform in Massachusetts*, 91 Mass. L. Rev. 52, 63-66 (July 2008).

**SPECIFIC RECOMMENDATIONS.**

The Task Force makes the following specific recommendations:

**A. *All Identification Procedures.***

- 1. Before conducting any identification procedure, the police should obtain from the witness and document as complete a description as possible of the suspect, including general characteristics (gender, age, height, weight, and race), unique characteristics (scars, tattoos), and clothing. The police should also obtain from the witness and document as complete a description of the circumstances of his encounter with the suspect as possible, including the amount of time the witness observed the suspect, the lighting conditions and any other relevant circumstances, including whether the suspect possessed or brandished a weapon.**

**B. *Lineups and Photo Arrays.***

- 1. Photo arrays and lineups should be presented to only one witness at a time and, in a case with multiple witnesses, the police should (a) instruct the witnesses not to speak with one another about the identification procedure and (b) take all reasonable steps to separate them from one another until the procedure is complete.**
- 2. Absent compelling countervailing considerations (such as the inability, despite diligent efforts, to obtain a sufficient number of persons or photographs who resemble the suspect or the suspect's description) a live lineup should include no fewer than six individuals and a photo array should include no fewer than eight photographs.**
- 3. Individuals or photographs selected for use as fillers should generally fit the witness's description of the perpetrator. When there is a limited or inadequate description of the perpetrator provided by the witness, or when the description of the perpetrator differs significantly from the appearance of the suspect, fillers should resemble the suspect in significant features. However, no filler should appear nearly identical or indistinguishable from the suspect.**



4. **When conducting live lineups or photo arrays, absent compelling countervailing considerations, departments should use “blind” identification procedures. This means that the law enforcement officer conducting the identification procedure should not know which of the participants in the lineup or photographs in the array is the actual suspect.**
5. **When conducting live lineups or photo arrays, police should present individuals or photographs sequentially, meaning that the witness should see only one participant or photograph at a time and should state immediately whether he recognizes the person in the lineup or the photograph.**
6. **Departments should prepare and require officers conducting live lineups or presenting photo arrays to use a pre-printed form (similar to a Miranda card) containing a set of instructions officers should use in conducting the identification procedure. The officer should read the form in full to the witness before conducting the procedure and document that the witness was given the instructions printed on the form. Using the form, the officer should instruct the witness:**
  - **that it is just as important to clear a person from suspicion as to identify a person as the wrongdoer;**
  - **that the person who committed the crime may or may not be in the lineup or photo array;**
  - **in the case of a photo array (or a lineup done some time after the crime), that individuals in the photographs or in the lineup may not appear exactly as they did on the date of the incident because features such as weight, head and facial hair are subject to change; and**
  - **that regardless of whether an identification is made or not made, the investigation will continue.**
7. **At the conclusion of an identification procedure where the witness has made an identification, the officer should ask the witness to describe his or her level of certainty about that identification, and that statement should be recorded or otherwise documented and preserved.**

8. **Witnesses should not be given feedback confirming the accuracy of their identifications.**
9. **The police should also document all statements made to and by the witness before, during and after the identification procedure.**
10. **When possible, live lineups and photo array procedures should be preserved on videotape or, when videotaping is not practical, by audio recording. If videotaping of a live lineup is not practical, the lineup should be preserved by still photographs.**
11. **If a lineup or photo array procedures are not video or audio recorded, the officer conducting the procedure should note in his report how long it took the witness to make the identification.**

**C. *Show-ups.***

Where a show-up is legally permissible, and the police determine it is in the best interest of the investigation to conduct a show-up, the police should:

1. **Where possible, transport the witness to the suspect's location.**
2. **Take all reasonable steps to avoid creating the appearance that the suspect is in custody.**
3. **In a case with multiple witnesses, (a) present the suspect to only one witness at a time, (b) instruct the witnesses not to speak with one another about the identification procedure and (c) take all reasonable steps to separate them from one another until the procedure is complete.**
4. **Use a pre-printed form (similar to a *Miranda* card) containing a set of instructions officers should use in conducting the show-up. The officer should read the form in full to the witness before conducting the show-up and document that the witness was given the instructions printed on the form. Using the form, the officer should instruct the witness:**

- that it is just as important to clear a person from suspicion as to identify a person as the wrongdoer;
  - that the person who committed the crime may or may not be the person they are about to see; and
  - that regardless of whether an identification is made or not made, the investigation will continue.
5. At the conclusion of an identification procedure, where the witness has made an identification, the officer should ask the witness to describe his or her level of certainty about that identification and that statement should be recorded or otherwise documented and preserved.
  6. Witnesses should not be given feedback confirming the accuracy of their identification.

***D. Identification Evidence at the Grand Jury.***

Prosecutors have a special responsibility to take care that identification evidence developed during an investigation is as reliable as possible. To that end, prosecutors should in connection with the presentation of a case to the grand jury, take care to:

1. Definitively establish the description initially given by the witness or witnesses.
2. Definitively establish every relevant fact concerning the identification procedure.
3. Develop a thorough understanding of the crime scene and physical evidence.
4. Thoroughly develop and investigate all circumstances--inculpatory and exculpatory--relevant to a perpetrator's identity.
5. Establish and document this information as early as possible in the investigation.
6. Use the grand jury to develop and document all the evidence concerning the description, the identification procedure, the

crime scene, and the circumstantial evidence relevant to the identity of the perpetrator, remembering at all stages that the prosecutor is not working to build a case against a particular suspect but to develop facts that identify the actual perpetrator.

*E. Training.*

1. Training programs should be implemented to train law enforcement personnel in the use of the recommended procedures for eyewitness identifications.
2. The Judiciary should receive training on the scientific bases for mistaken identifications, and the reasons why experts believe that identification reforms like those outlined above reduce the risk of misidentifications.

*Commentary on the Recommendations.*

**A1. Documenting a Description.** It is critical for police to obtain as complete a description of the perpetrator as early as possible in the investigation. A witness's memory may fade, particularly if the investigation takes a substantial period of time, and a comprehensive description of the suspect near the time of the crime may well spell the difference between prosecuting the right suspect and the wrong suspect.

**B1. One-Witness-at-a-Time.** This recommendation is premised on the desire to ensure that one witness's identification of a suspect does not infect another's. It is consistent with standard police practice.<sup>28</sup>

**B2. Number of Fillers.** The Department of Justice Guidelines call for no fewer than six photographs to be used in a photo array. While there is no magic to a number greater than six, and there may be on occasion obstacles to creating an array with more than six,<sup>29</sup> the recommendation above is consistent with the recommendation of the Suffolk County Task Force and the Attorney General/MDAA Justice Initiative Report, and will reduce the risk associated with misidentification.

**B3. Selecting Fillers.** This recommendation is drawn from EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT, at 29-30. In addition, no filler should appear nearly identical or indistinguishable from the suspect because a nearly identical filler may focus the witness's attention on the two nearly indistinguishable photographs and cause the witness to give no consideration to other fillers. Under that circumstance, the chances

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<sup>28</sup> See, e.g., BOSTON, MASS., POLICE DEPARTMENT RULES AND PROCEDURES, R. 330, Procedures for Collection and Preservation of Eyewitness Identification Evidence (Nov. 8, 2004) (available at [http://www.bostonbar.org/prs/reports/TaskForceToImproveCJS\\_Nov09.pdf](http://www.bostonbar.org/prs/reports/TaskForceToImproveCJS_Nov09.pdf)); ATTORNEY GENERAL REPORT, *supra* note 21, at 14.

<sup>29</sup> See Gary L. Wells, *Police Lineups Data, Theory, and Policy*, 7 PSYCHOL., PUB. POL'Y & THE LAW 791, 798-99 (2001).

of the witness randomly and incorrectly selecting the suspect soars from one-in-eight to one-in-two.

**B4. *Blind Procedures.*** This is a core principle drawn from the social science. Law enforcement officers acting in complete good faith often become focused on a particular suspect, and their interest in that suspect may, without a word being spoken, send an unconscious signal to the witness unwittingly encouraging the witness to select that suspect based on the officer's feelings rather than the witness's memory.<sup>30</sup>

**B5. *Sequential Presentation.*** Sequential presentation is important because, if used effectively, it "prevents eyewitnesses from selecting the person who looks most like the culprit relative to the other lineup members, a process called relative-judgment decision."<sup>31</sup> The Task Force is aware of the debate about this presentation method, but believes the clear weight of the evidence favors sequential presentation.<sup>32</sup>

**B6. *Instructions.*** These instructions likewise come directly from well established scientific research and have been adopted in the federal guidelines, the Suffolk County Task Force Report and the Justice Initiative Report.<sup>33</sup>

**B7-8. *Confidence Statements/No Feedback Rule.*** By asking a witness his level of confidence at the time the identification is made, the police officer enables the jury, at any subsequent trial, to determine whether the witness's confidence at trial, one of the prime determinants of that witness's credibility, derives from his observations at the time of the crime or from subsequent events (such as the knowledge that the police and prosecutors charged the

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<sup>30</sup> See Wells & Olson, *supra* note 13, at 289; see also *Silva-Santiago*, 453 Mass. at 311 (blind administration "is better practice because it eliminates the risk of conscious or unconscious suggestion").

<sup>31</sup> Wells & Olson, *supra* note, at 288.

<sup>32</sup> See *Silva-Santiago*, 453 Mass. at 799, n.22 (comparing research on the debate between simultaneous and sequential lineup presentations).

<sup>33</sup> See generally Wells & Olson, *supra* note 13, at 286.

person he identified or have other evidence against him.) For the same reason, boosting a witness's confidence by telling the witness that he has correctly identified the perpetrator undermines the truth-seeking process.<sup>34</sup>

**B9-11. Documenting Identification Procedures.** Mass. R. Crim. P. 14(a)(1)(A)(viii) requires the prosecution to provide, as part of automatic discovery, "[a] summary of identification procedures, and all statements made in the presence of or by an identifying witness that are relevant to the issue of identity or to the fairness or accuracy of the identification procedures."<sup>35</sup> A video or audio recording of the procedure would provide the best record, and make motions to suppress identifications less complicated matters for the parties and the court.<sup>36</sup>

**C. Show-ups.** The Task Force failed to reach agreement on some aspects of show-ups. Some members believed that police should not conduct show-ups when there is probable cause to make an arrest, a policy that some departments have adopted.<sup>37</sup> Others believed, however, that show-ups continue to be a useful tool, particularly to clear innocent suspects.<sup>38</sup> All members of the Task Force agreed however, that where show-ups may legally be performed, it is important the safeguards applicable to other identification procedures be used to the largest extent possible.<sup>39</sup>

**D. Grand Jury Practice.** Perhaps the most important aspect of the Suffolk County District Attorney's office's commitment to the

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<sup>34</sup> See generally Gary L. Wells, et, al., *Eyewitness Identification Procedures, Recommendations for Lineups and Photospreads*, 22 L. & Hum. Behav. 1, 28 (1998).

<sup>35</sup> Mass. R. Crim. P. 14(a)(1)(A)(viii).

<sup>36</sup> *Cf. Commonwealth v. DiGiambattista*, 442 Mass. 423,441-442 (2004) (recognizing many benefits that flow from recording custodial interrogations).

<sup>37</sup> See, e.g., Dallas Police Department Roll Call Training Bulletin (No. 2008-27) (November 24, 2008), available at [www.dallasnews.com/sharedcontent/dws/img/12-08/1210showup.pdf](http://www.dallasnews.com/sharedcontent/dws/img/12-08/1210showup.pdf) (last visited July 27, 2009).

<sup>38</sup> See Wells, *supra* note 27 at 795-96.

<sup>39</sup> See *Commonwealth v. Phillips*, 452 Mass. 617, 627-30 (2008) (stating permissible circumstances where police may conduct "show-up").

prevention of wrongful convictions was its emphasis on prosecutors using the grand jury to prevent wrongful misidentification convictions before they happen. The recommendations set forth here are drawn directly from the Suffolk Task Force Report.<sup>40</sup>

**E. *Training.*** Given the clear connection between flawed identification procedures and wrongful convictions, as well as evidence suggesting that certain identification procedures adopted by many departments have yet to be fully implemented, the need for law enforcement training on identification procedures (most importantly, training on the thinking *underlying* recent identification reforms) is critical.<sup>41</sup> The experience of Task Force members also suggests that judges, particularly those who practiced at a time when the reforms recommended here were not widely used, may not have an understanding or working knowledge of the connection between misidentifications and wrongful convictions, the theories behind eyewitness identification reforms, or the potential relevance of expert testimony on the issue, and would therefore benefit from additional information on those subjects.

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<sup>40</sup> At 9, 17-19.

<sup>41</sup> See Fischer, *supra* note 25, at 63-66.



**V. LAW ENFORCEMENT INTERVIEWS  
OF SUSPECTS AND WITNESSES**

**RECOMMENDATIONS.**

Police interviews of suspects and witnesses are critical components of criminal investigations. To improve the accuracy of the criminal justice system and prevent wrongful convictions, the Task Force makes the following recommendations:

1. **All law enforcement agencies should video-record the entirety of all custodial interrogations of suspects in serious felony cases commonly prosecuted in Superior Court, unless strong countervailing considerations make such recording impractical or the suspect refuses to be recorded.**
2. **Law enforcement agencies should, whenever practicable, electronically record interviews of witnesses in serious felony cases commonly prosecuted in Superior Court.**
3. **The principal participants in the criminal justice system, including police officers, prosecutors, defense lawyers and judges, should receive training about the causes, indicia, and consequences of false confessions.**
4. **The Massachusetts Legislature should be encouraged to create a fund allowing all state and municipal police departments to apply for grants to purchase video equipment.**

**BACKGROUND.**

The Task Force's first recommendation--that police make a video record of statements made by suspects in custody--is driven by two related considerations. First, the Task Force has concluded that videotaping<sup>42</sup> confessions will dramatically reduce the likelihood of one of the major sources of wrongful convictions: false confessions by suspects. Second, the evidence is clear that recording defendants' statements and, in particular, videotaping them, produces enormous benefits for the criminal justice system as

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<sup>42</sup> The Task Force uses the term "videotaping" colloquially, since nearly all police video recording is done digitally.

a whole. More frequent use of videotaped witness statements will improve the accuracy of the results the system delivers. Recorded statements, particularly videotaped statements, drastically limit the resources the system must spend on litigating motions to suppress. They likewise make transparent to the jury exactly what the police asked, and exactly what the suspect said in response, eliminating the uncertainty and imprecision that may lead to juror doubt or confusion about whether a defendant in fact confessed, did so voluntarily, or made false exculpatory statements.

**1. *The Importance of Confessions.***

The confession of an accused is powerful evidence at a criminal trial. Historically, a confession has been known as the “Queen of Proofs,” evidence that confirms the guilt and clinches the conviction of the accused.<sup>43</sup> “[P]olice, prosecutors, judges, jurors and the media all tend to view confessions as self-authenticating and see them as dispositive evidence of guilt.”<sup>44</sup>

**2. *The Problem of False Confessions.***

Because of their persuasive power, false confessions (that is, statements made by suspects who confess to crimes they did not commit) have played a prominent role in wrongful conviction cases. Nationally, in more than 20 percent of the cases where criminal defendants convicted of serious offenses have been exonerated by DNA testing, confessions by those defendants to crimes they did not commit were part of the evidence that persuaded juries to convict.<sup>45</sup> Indeed, according to Professor

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<sup>43</sup> PETER BROOKS, *TROUBLING CONFESSIONS: SPEAKING GUILT IN LAW AND LITERATURE* 4 (1st ed., U. Chicago Press) (2000).

<sup>44</sup> *Richard Leo, et. al., Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 *Wisconsin L. Rev.* 479, 485 (2006).

<sup>45</sup> The Innocence Project lists false confessions as having contributed to some 59 of the 242 exoneration cases the Project has documented. *See* The Innocence Project, Know the Cases, <http://www.innocenceproject.org/know/Search-Profiles.php> (Click “False Confessions / Admissions” under the Tab “Contributing Cause”) (last visited July 27, 2009); *see also* Brandon L. Garrett, *Judging Innocence*, 108 *COLUM. L. REV.* 55, 60 (2008) (stating 16 percent of the author’s sample of exonerees falsely confessed).

Richard A. Leo of the University of San Francisco, “[false confessions] are consistently one of the leading--yet misunderstood--causes of error in the American legal system, and thus remain one of the most prejudicial sources of false evidence that lead to wrongful convictions.”<sup>46</sup>

The notion that an innocent person would confess to a crime he did not commit is difficult for some to fathom. But there are in fact many documented cases of false confessions.<sup>47</sup> As long ago as 1660, an English servant, John Perry, was convicted and executed after confessing to killing his employer. Perry’s mother and brother, whom Perry implicated, were also convicted and executed. Years after the executions, Perry’s employer—the “victim” Perry and his family were convicted of killing--returned to England *alive*.<sup>48</sup> More recently, and closer to home, five teenagers from New York City were convicted in the infamous Central Park jogger case based on their false confessions. They were exonerated after a serial rapist named Matias Reyes with no connection to the original five defendants confessed, saying that he attacked the jogger by himself. Reyes’ confession was corroborated by independent scientific evidence: forensic analysis revealed that his DNA matched semen recovered at the crime scene.<sup>49</sup> False confessions like these two and many others can result from a number of causes, including the psychological make-up of the suspect and aggressive police tactics.<sup>50</sup> But even the best-intentioned detectives, employing entirely lawful and appropriate interview methods, can conduct interviews which inadvertently generate false confessions. One

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<sup>46</sup> Richard A. Leo, *False Confessions: Causes, Consequences and Implications*, 1, 4 (2009) (to be published in J. AM. ACAD. PSYCHIATRY & L.), available at <http://works.bepress.com/richardleo/>.

<sup>47</sup> *Id.*

<sup>48</sup> David A. Moran, *In Defense of the Corpus Delecti Rule*, 64 Ohio State L.J. 817, 828 (2003).

<sup>49</sup> Leo, *supra* note 44, at 487.

<sup>50</sup> Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 1114–15 (1997); *Digiambattista*, 442 Mass. at 439 (describing combination of “trickery and implied promises” in interrogations of suspects as “potentially coercive to the point of making innocent people confess to crimes”).

Washington D.C. detective described his own experience in article published last year:

I stepped into the interrogation room believing that we had evidence linking the suspect to the murder of a 34-year-old federal employee in Washington. I used standard, approved interrogation techniques--no screaming or threats, no physical abuse, no 12-hour sessions without food or water. Many hours later, I left with a solid confession. . .

Even the suspect's attorney later told me that she believed her client was guilty, based on the confession. Confident in our evidence and the confession, we charged her with first-degree murder.

Then we discovered that the suspect had an ironclad alibi. We subpoenaed sign-in/sign-out logs from the homeless shelter where she lived, and the records proved that she could not have committed the crime. The case was dismissed . . .<sup>51</sup>

As this account suggests, false confessions, especially those obtained near the beginning of a criminal investigation, have a highly deleterious effect on the criminal justice system. False confessions mislead police, prosecutors, judges, defense attorneys and juries into believing that the confessor must be guilty. Investigations are prematurely closed. Effort and financial resources are diverted away from a more thorough investigation. The real perpetrator remains free, unknown, and able to commit additional offenses. In a particularly tragic example, in the four months after his attack on the Central Park jogger, Matias Reyes attacked five other women, raping four and murdering one.<sup>52</sup>

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<sup>51</sup> Jim Traniun, *Get It On Tape*, L.A. Times, October 24, 2008, at A-23.

<sup>52</sup> Leo, *supra* at note 44, at 489.

Recording suspect interviews in their entirety is widely viewed as the best tool to prevent false confessions in the first place, and to provide means to maximize the likelihood that false confessions that still occur are detected early in an investigation or prosecution. Organizations recommending the recording of suspect interviews as a means to prevent wrongful convictions include the Justice Initiative of the Massachusetts Attorney General and District Attorneys' Association, the American Bar Association's Criminal Justice Section, and the Innocence Project.<sup>53</sup> Recording interviews addresses the problem of false confessions in two ways. First, investigating officers care deeply about obtaining justice for crime victims and often begin interviews with genuinely strong feelings about the guilt of a suspect they are about to interview. Recording interviews will discourage any officer who might be tempted to cut corners or employ unacceptable interrogation techniques to obtain a confession from a suspect whom he strongly believes committed a serious crime. To the extent that recording discourages unacceptable interrogation practices (and the Task Force believes it will), the likelihood that a suspect will make false confessions will be reduced.

Second, in those cases where suspects do make false confessions, a complete recording of the interview will help supervising police officers, prosecutors, defense counsel, judges and juries identify false confessions--even those obtained in good faith and in full compliance with legal rules.

Recording creates an objective, comprehensive, and reviewable record of the interrogation process . . . [Viewers] can determine whether the critical details of the crime contained in the confession originated in the mind of the suspect or were suggested to the suspect by the interrogators, either inadvertently or

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<sup>53</sup> NYBA REPORT, *supra* note 1, at 13–14; MDAA REPORT, *supra* note 1, at 23; ABA REPORT, *supra* note 1, at 11; *see also* The Innocence Project, Understand the Causes – False Confessions, <http://www.innocenceproject.org/understand/False-Confessions.php> (last visited July 28, 2009).

intentionally, only by seeing or hearing what happened during the interrogation.<sup>54</sup>

As an example, the Washington D.C. detective quoted above reported that when he studied the videotape of his interview of the suspect who falsely confessed:

I saw that we had fallen into a classic trap. We ignored evidence that our suspect might not have been guilty, and during the interrogation we inadvertently fed her details of the crime that she repeated back to us in her confession.<sup>55</sup>

### 3. *Systemic Concerns About Unrecorded Statements.*

The concerns that counsel in favor of recording statements as a means of avoiding or detecting false confessions dovetail with concerns about the costs to the criminal justice system of relying on unrecorded statements. Those costs were addressed in detail the Supreme Judicial Court's decision in *Commonwealth v. DiGiambattista*.<sup>56</sup> In *DiGiambattista*, the SJC stopped short of requiring that custodial interrogations be recorded, but held that, when custodial interrogations were not recorded, the jury should be instructed that "the [s]tate's highest court has expressed a preference that such interrogations be recorded whenever practicable, and . . . that, because of the absence of any recording of the interrogation in the case before them, they should weigh evidence of the defendant's alleged statement with great caution and care."<sup>57</sup> The opinion announcing this rule relied heavily on the costs to the criminal justice system of litigating issues surrounding unrecorded confessions:

[T]he present case serves as a useful illustration of

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<sup>54</sup> Leo, *supra* note 44, at 530.

<sup>55</sup> Tranium, *supra* note 51, at A-23.

<sup>56</sup> 442 Mass. 443-45.

<sup>57</sup> *Id.* at 447-448.

the need better to preserve the details of an interrogation that results in a statement or confession by a suspect. As is all too often the case, the lack of any recording has resulted in the expenditure of significant judicial resources (by three courts), all in an attempt to reconstruct what transpired during several hours of interrogation conducted in 1998 and to perform an analysis of the constitutional ramifications of that incomplete reconstruction. . . we will never know whether, if able to hear (or even view) the entirety of the interrogation, the impact of the officers' trickery and implied offers of leniency might have appeared in context sufficiently attenuated to permit the conclusion that DiGiambattista's confession was nevertheless voluntary.<sup>58</sup>

*DiGiambattista* brought a sea change in the way police departments in Massachusetts conducted suspect interviews. While some departments had historically recorded many interviews, most departments had not, and with the training assistance provided by local District Attorneys' offices, many departments adopted new rules, policies and procedures in light of the Court's ruling.

#### **4. *The Benefits of Recording Suspect Interviews.***

The Members of the Task Force concluded that the benefits of recording interrogations vastly outweigh any perceived drawbacks. The taping of the entirety<sup>59</sup> of police interviews of

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<sup>58</sup> *Id.* at 440.

<sup>59</sup> THE NEW JERSEY SUPREME COURT, REPORT OF THE SPECIAL COMMITTEE ON RECORDATION OF CUSTODIAL INTERROGATIONS 37 (Apr. 15, 2005), available at [www.judiciary.state.nj.us/notices/reports/cookreport.pdf](http://www.judiciary.state.nj.us/notices/reports/cookreport.pdf) [hereinafter NJ REPORT ON RECORDATION]. The Special Committee calls this "stem to stern recording and concluded: "[r]equiring stem-to-stern recordation is consistent with what other states have done and is essential if the benefits attendant to electronic recordation are to be fully realized." *Id.* The dangers of less than complete recording of interviews are also highlighted by the Central Park jogger case, where four of the defendants, following long hours of unrecorded interrogation, gave videotaped statements falsely confessing to the attack. Leo, *supra* note 42, at 535.

suspects benefits the prosecution, the defendant and the administration of justice in a criminal case.<sup>60</sup> It is a win-win for all stakeholders in the system. Recording both the audio and video portions of the interview between a police investigator and a suspect creates the best and most durable record of the interview. The full content of recorded interviews with suspects will contain critical evidence in the prosecution of any criminal matter. The electronic recording is certainly the best evidence of the interview.<sup>61</sup> In the “Digital Age,” electronic recording is relatively inexpensive and user-friendly. The end product is easily duplicated and distributed to the interested parties.

The suspect benefits because he is shielded from a coercive or otherwise improper interrogation. Under the Massachusetts Rules of Criminal Procedure, a copy of the entire recorded interview must be automatically disclosed to the defendant.<sup>62</sup> Armed with the fully documented recorded interview, the defendant may review it with his attorney, and, if there are issues concerning voluntariness or waiver of rights, submit it to a judge or jury for review.<sup>63</sup> The prosecution benefits because it obtains a “solid proof” statement made by an accused that may contain a full confession, a partial admission or a provable lie on a material point.<sup>64</sup> Recording interviews of suspects has the potential to develop the strongest evidence possible to convict the guilty. Police benefit because they are protected against false claims of coercion. Police departments can also use the recorded interrogations as training aids.

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<sup>60</sup> The effectiveness of recording requires that the entirety of the interrogation, from delivery of the *Miranda* warnings to the last answer to be recorded.

<sup>61</sup> *Commonwealth v. Lenesi*, 66 Mass.App.Ct. 291, 295 (2006) (digital images copied to a CD are originals and in full compliance with best evidence rule).

<sup>62</sup> Mass. R. Crim. P. Rule 14(a)(1)(A)(i).

<sup>63</sup> Under the Massachusetts “Humane Practice” Doctrine, a judge must first rule on the voluntariness of a defendant’s statement and, if the judge determines the statement was voluntary, the jury must be instructed that they are not to consider it unless they find it is voluntary. *Commonwealth v. Tavares*, 385 Mass. 140, 149-150 (1982).

<sup>64</sup> If a prosecutor can show that the defendant has lied on a material point, such as where he was at the time the crime was committed or why he traveled out-of-state shortly after the crime was committed, the prosecutor can obtain a jury instruction and argue to the jury that the defendant has a “consciousness of guilt.” *Commonwealth v. Robles*, 423 Mass. 62 (1996).



The administration of justice is enhanced because case management is facilitated. Some cases will be resolved more quickly because the objective record of the defendant's statement will reduce challenges to police credibility and often obviate the need for protracted pretrial suppression hearings. With a documented record of the interrogation there will be no need to litigate what transpired during the custodial interrogation.<sup>65</sup> The recorded interrogation creates an objectively verifiable record of a police interview, thus lessening the burden on the fact finder to make difficult judgments about witness credibility and the voluntariness of a suspect's admissions or confession. The result will be fewer suppression hearings, more pleas and fewer trials, creating a potentially significant cost savings to the administration of cases.

In the final analysis, because recordings are a superior source of evidence, they will help to ensure that only the guilty are convicted and the innocent are either not prosecuted or acquitted.

**5. *Law Enforcement Experience with Recording Suspect Interviews.***

Law enforcement agencies that have adopted procedures for the electronic recording of police interviews have overwhelmingly appreciated the significant benefits of recording. The law enforcement members of the Task Force reported that, in their experience, playing a recording of a suspect's interview is a vastly superior means of persuading jurors of a defendant's guilt than simply having a police officer testify about what the defendant told him in an interview. In addition, the law enforcement members of the Task Force reported that, in their experience, the presence of a recording device did not discourage suspects from making statements, a fear many law enforcement officials genuinely held before *DiGiambattista* changed the legal landscape and dramatically increased the number of recorded interviews. The experience of

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<sup>65</sup> *Commonwealth v. Fryar*, 414 Mass 732, 742 n.8 (1993)

other Massachusetts law enforcement officials consulted by the Task Force, including leaders of the Lowell, Brookline, and MBTA police with significant experience in recording suspect interviews, confirmed these views. An informal survey of 27 Massachusetts departments conducted by Commissioner Davis demonstrated that, in large measure due to training provided by Massachusetts District Attorneys, police departments in Massachusetts have moved rapidly to record custodial interviews of suspects.

This is consistent with law enforcement experience across the nation. Research reveals that more than 600 local jurisdictions nationwide regularly record police interrogations, and surveys of police officials show that investigators with experience recording suspect interviews (even those who may have initially resisted recording), find that the recording interviews has not discouraged suspects from making statements, and is a great improvement over prior practice in persuading jurors of defendants' guilt.<sup>66</sup> A survey of 600 departments conducted by Chicago lawyer Thomas P. Sullivan, the former United States Attorney for the Northern District of Illinois, summarized the views "repeatedly expressed by experienced law enforcement personnel throughout the country . . . as to why they support the practice of making electronic recordings of custodial interviews of felony suspects."<sup>67</sup>

- Recordings make law enforcement officers more efficient and more effective while questioning suspects.<sup>68</sup>
- [P]olice become more aware of how their words and actions will later appear to listeners and viewers, and as a result,

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<sup>66</sup>Thomas P. Sullivan, *Recording Federal Custodial Interviews*, 45 Am. Crim. L. Rev. 1297, 1299 (2008); *see also* Thomas P. Sullivan, POLICE EXPERIENCES WITH RECORDING CUSTODIAL INTERROGATIONS (Northwestern University School of Law Center on Wrongful Convictions, 2004). The Supreme Judicial Court relied on Mr. Sullivan's work in its *DiGiambattista* decision. 442 Mass. at 444 n. 20. The MDAA Justice Report also cited Mr. Sullivan's work with approval. MDAA Note 1, at 23.

<sup>67</sup> Sullivan, *supra* note 66, at 1306

<sup>68</sup> *Id.*

they are more cautious about their actions and language and conduct themselves in a more professional manner.<sup>69</sup>

- Other police, listening to audio or watching video by remote hookups in nearby rooms, are often able to suggest questions or lines of inquiry to the officers conducting the interviews.<sup>70</sup>
- Full custodial recordings make it unnecessary for police to struggle to recall details when later writing reports and testifying about what occurred during the interviews.<sup>71</sup>
- Later reviews of recordings often reveal previously overlooked statements by suspects that yield leads, inconsistencies and evasive conduct, details that appeared irrelevant initially, but which were later found to link the suspect or others to crimes, and responses indicating suspects' innocence of the crimes under investigation.<sup>72</sup>
- Recordings are also useful tools for self-evaluation by those who conduct interviews, for teaching newly recruited detectives about successful interrogation practices, and for cold case investigations.<sup>73</sup>

This survey also addressed the concern that witnesses who might otherwise make statements would decline to do so if their statements were recorded:

We are told that in the vast majority of cases in all fifty states, including those in which suspects' knowledge and/or consent of recording is required, suspects who realize their interviews are to be

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 1306-07.

<sup>71</sup> *Id.* at 1307.

<sup>72</sup> Sullivan, *supra* note 66, at 1307.

<sup>73</sup> *Id.* at 1308.

recorded do not object. Most suspects pay no attention to the recording equipment once the interview begins, just as witnesses in courtrooms ignore court reporters. Indeed, electronic recordings have become so prevalent nowadays that many suspects expect their interviews to be recorded, and we have been told that some express a preference for recording so the interviews are memorialized accurately and completely.<sup>74</sup>

#### 6. *The National Trend Towards Recording.*

The national trend is clearly towards the adoption of standards requiring the electronic recording of custodial police interviews. The Supreme Courts of Alaska and Minnesota have declared that, under their state constitutions, defendants are entitled to have their custodial interrogations recorded.<sup>75</sup> Like Massachusetts, courts in Iowa and New Jersey have decided cases or adopted rules that have dramatically increased the use of recordings.<sup>76</sup> In 2003, Illinois became the first state to require by statute that all police interrogations of suspects in homicide cases must be recorded.<sup>77</sup> Since Illinois, at least six states and the District of Columbia have followed with legislation requiring all custodial interrogations be recorded in their entirety.<sup>78</sup> Maine law requires

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<sup>74</sup> *Id.* at 1322.

<sup>75</sup> *Stephan v. State*, 711 P.2d. 1156, 1163 (Alaska 1985) (stating “[t]he rule that we adopt today requires that custodial interrogations in a place of detention, including the giving of the accused’s Miranda rights, must be electronically recorded ... [t]o satisfy this due process requirement, the recording must clearly indicate that it recounts the entire interview”); *State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994) (declining to rule on whether right to recordation of custodial interrogation is found in Due Process Clause of Minnesota Constitution, but announcing rule that any “statements the suspect makes in response to [an unrecorded] interrogation may be suppressed at trial,” unless the statements are *not* “substantial”) (emphasis supplied).

<sup>76</sup> See Supreme Court of N.J., Administrative Determination Re: Report of the Special Committee on Recordation of Custodial Interrogations (2005), available at <http://www.judiciary.state.nj.us/notices/reports/recordation.pdf>.

<sup>77</sup> 25 ILL. COMP. STAT. ANN. 5/103-2.1 (West 2003); 705 ILL. COMP. STAT. ANN. 405/5-401.5 (West 2003).

<sup>78</sup> The Innocence Project, News and Information – False Confessions & Recording of Custodial Interrogations, <http://www.innocenceproject.org/Content/314.php> (last visited July 28, 2009). These

that the Board of Trustees of the Maine Criminal Justice Academy establish minimum standards for a law enforcement policy of electronically recording interrogations and that Maine law enforcement agencies certify that they have adopted policies and provided training.<sup>79</sup> The New Hampshire Supreme Court has ruled that an electronically recorded final statement offered into evidence by the State is admissible only if the entire post-Miranda interrogation session was recorded.<sup>80</sup> And on September 15, 2009, the Indiana Supreme Court amended that state's Rules of Evidence to forbid the admission of unrecorded statements in felony cases beginning in 2011.<sup>81</sup> With the exception of federal law enforcement agencies, particularly the FBI, which actively discourages the recording of suspect interviews by requiring field agents to obtain special approval from the Special Agent in Charge or his designee before recording suspect interviews--a practice the Task Force thinks runs counter to the best aims of the justice system--the nation's legal and law enforcement leaders have come to recognize the wisdom of recording statements.<sup>82</sup>

#### 7. *Why Videotaping Is Better.*

The Task Force, including its law enforcement members, unanimously recommends that police department recordings of suspect interviews be video-recorded from start to finish. The experience of the law enforcement members of the Task Force with videotaped suspect interviews establishes that videotaped interviews are far superior to audio interviews in relating the suspect's condition, attitude, and demeanor and ultimately do a far

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are: District of Columbia (2005), New Mexico (2006); Maine (2007), Wisconsin (2007), Maryland (2008), Nebraska (2008), and North Carolina (2008).

<sup>79</sup> ME. REV. STAT. ANN. tit. 25 § 2803-B(I)(K) (2005).

<sup>80</sup> *State v. Barnett*, 147 N.H. 334, 338 (N.H. 2001).

<sup>81</sup> Indiana Supreme Court Order 94800-0909-MA-4 (September 15, 2009).

<sup>82</sup> The John E. Reid Company, a nationally-recognized leader in the field of police interrogation techniques ("The Reid Technique™"), has recognized the existence of false confessions and the concomitant value of recording interrogations. Relying on scientific research in this area, Reid has developed guidelines designed to reduce the risk of false confessions, including the recording of suspect interrogations. See <http://tinyurl.com/ljpl4> and [http://www.reid.com/educational\\_info/r\\_updates.html](http://www.reid.com/educational_info/r_updates.html) - vri

better job of communicating the suspect's statements than audio alone. One Task Force member related an experience where two suspects were interviewed on the same day about the same crime in separate rooms of a police station. Both interviews were recorded. Because only one video-recorder was available, one interview was video-recorded, the other recorded in audio format only. While both methods accurately captured the words of the suspect, the videotaped interview's ability to capture the suspect's expressions and gestures made it far more powerful evidence than the audio recording alone.

A Task Force Committee also met with leaders of the Lowell, Brookline and the MBTA police departments. Each of these departments has recently implemented digital video-recording of custodial police interviews. All three departments were enthusiastic about their experience with video-recording custodial interviews. The Boston Police have recently installed digital video equipment in their homicide department interview rooms to electronically capture police interviews of suspects and witnesses in homicide cases. These local insights reinforce the views expressed by departments in the survey conducted by former United States Attorney Thomas P. Sullivan, who reported the consensus of the 600 departments he surveyed:

Audio is good, but video is better. That is because videos illustrate the gestures, facial and body movements of the participants that cannot be fully and precisely reproduced orally, in written summaries, or by audio recordings.

[V]ideo recordings also allow law enforcement to obtain visual pictures of suspects, which are helpful in evaluating their credibility. For example, videos graphically illustrate whether or not suspects have bodily markings indicating physical contact, as well as their demeanor, attitudes, appearance and dress. They show the suspects' body language, eye

movements and other non-verbal conduct, as well as their emotional and physical condition and sobriety. Some suspects have been recorded engaging in incriminating conduct when left alone in the interview room, which could not have been revealed without the recordings.<sup>83</sup>

The most sophisticated video-recording systems, like the ones established by the Boston Police Department Homicide Unit and the Brookline, Lowell and MBTA police departments, are hard-wired into a particular interview room or rooms, and connected to a computer that automatically captures and stores the video-image and sound recording, and provides a range of other features. These systems are marketed commercially and, to date, have been purchased by approximately 35 Massachusetts departments.<sup>84</sup> Given the benefits they provide, their costs (generally less than \$10,000 per department) are modest.

These represent the gold standard in video-recording and the Task Force recommends that all departments in the state investigate the cost and feasibility of purchasing and installing them. Hard-wired digital video camera systems (without the associated computer management components) may be purchased and installed for approximately \$3,000, and reliable, hand-held video-recorders are very inexpensive and widely available. Every detective in every department charged with investigating serious crimes should have access to a video-recorder for use when conducting a suspect interview in the investigation of a felony commonly prosecuted in Superior Court. The Task Force believes it is particularly important that State Police detectives conducting homicide investigations, who typically work closely with local detectives in the city or town where the homicide occurred, have access to video-recorders so that they are not solely dependent on

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<sup>83</sup> Sullivan, *supra* note 64, at 1306-07.

<sup>84</sup> Interview of Stanley Goldberg, Hunt Camera Law Enforcement Division, concerning installation of Cardinal Peak recording systems, July 13, 2009.

the resources available at local police stations.

**8. *Procedural Recommendations for Suspect Interviews.***

Any law enforcement agency that implements an electronic recording policy should aim for maximum efficiency. Because an electronic recording policy will improve the accuracy of criminal prosecutions, law enforcement agencies and prosecutors' offices should adopt the techniques that best achieve this goal. The Task Force recommends the following techniques and practices to obtain the fairest and most accurate result from an electronic recording system.

- The interviewer should advise the suspect or witness that the interview will be electronically recorded.<sup>85</sup>
- The recording should begin at the outset of the interview, including oral notice to the suspect of Miranda rights and continue uninterrupted until the conclusion of the interview.<sup>86</sup>
- The camera should be focused on both the interrogator and the suspect.<sup>87</sup>

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<sup>85</sup> Under Massachusetts law, the interviewer does not have to affirmatively ask for consent to record. Only secret recordings of conversations are illegal. The interviewer need only inform the suspect or witness that the interview is being recorded.

<sup>86</sup> The full benefits of recording police interviews can only be obtained by recording the entirety of the interview. The practice of recording only a final statement or confession after an unrecorded interview has been criticized and is not conducive to promoting accuracy and fairness. See Sullivan, *supra* note 66, at 1322–23. Omitting any portion of the interview from the recording reduces the effectiveness of the recording as evidence. *Id.* In *Commonwealth v. Fernette*, the SJC criticized the practice of turning the recorder off during the interview: “[t]he better practice is to leave the tape recorder on during the entire interview, including silences of the defendant, emotional displays by the defendant, or casual conversation among the participants in the interview, so that the fact finders, whether judge or jury, are better able to assess the totality of circumstances.” 398 Mass. 658, 665 (1986).

<sup>87</sup> Studies show that electronic recordings of police interrogations can have certain biases if not conducted properly. Brian Parsi Boetig, David M. Vinson & Brad R. Weidel, *Revealing Incommunicado: Electronic Recording of Police Interrogations*, 75 FBI LAW ENFORCEMENT BULLETIN 12, 1–8 (Dec. 2006). The point-of-view bias, the most prominent one, suggests that the positioning of the camera can adversely affect the objectivity of the interrogation. *Id.* For example, a video camera that records only the suspect would not preclude the defense from making a claim that officers outside the lens of the camera pointed weapons at him, thus coercing a statement. *Id.* When



- If the suspect declines to be electronically recorded, the interviewer should record the suspect's refusal.
- Police Departments should also adopt procedures for the proper collection, storage and retention of the electronic recordings until all appeals have been exhausted or the statute of limitations has expired.

Examples of the forms the Task Force has collected to address these procedural issues are available at the following website address: [http://www.bostonbar.org/prs/reports/TaskForceToImproveCJS\\_Nov09.pdf](http://www.bostonbar.org/prs/reports/TaskForceToImproveCJS_Nov09.pdf).

**9. *Police Interrogation Techniques and the Problem of False Confessions.***

Under Massachusetts law, an alleged confession--whether a "true" or "false" confession--cannot be admitted against a defendant at trial unless the prosecution proves, beyond a reasonable doubt, that the defendant (a) knowingly and intelligently waived his Miranda rights and (b) made his confession voluntarily.<sup>88</sup> Indeed, Massachusetts courts adhere to that which has been described as the "Humane Practice Rule," which requires that the prosecution persuade *both* the judge (before the statements are admitted) and the jury (before the statements may be considered by them as evidence against the defendant) that the statements were made voluntarily.<sup>89</sup>

The Supreme Judicial Court's *DiGiambattista* decision contained an extensive discussion about the connections that social scientists have drawn between certain police interrogation techniques--in particular, police misstatements about the strength of the evidence against a suspect and promises of leniency to a

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the camera focuses solely on the suspect, the amount of pressure placed on him cannot be underestimated. *Id.*

<sup>88</sup> *Commonwealth v. Watkins*, 425 Mass. 830, 834-836 (1997).

<sup>89</sup> *Id.*

suspect--and a suspect's decision to confess.<sup>90</sup> In *DiGiambattista*, "in an effort to obtain his confession, the interrogating officers resorted to trickery, falsely suggesting to DiGiambattista that his presence at the scene of the fire had been captured on videotape, while simultaneously expressing sympathy for his actions and opining that he needed counseling for his alcoholism."<sup>91</sup> The Supreme Judicial Court noted that:

Twenty-five years ago, this court stated that 'we expressly disapprove of the tactics of making deliberate and intentionally false statements to suspects in an effort to obtain a statement,' as 'such tactics cast doubt' on both the validity of a suspect's waiver of rights and the voluntariness of any subsequent confession.<sup>92</sup>

The Supreme Judicial Court also observed, however, that "while the use of false statements during interrogation is a relevant factor on both waiver and voluntariness, such trickery does not necessarily compel suppression of the statement. Rather, the interrogator's use of trickery is to be considered as part of the totality of the circumstances, the test that is used to determine the validity of a waiver and the voluntariness of any statement."<sup>93</sup>

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<sup>90</sup> 442 Mass. at 434, citing Comment, False Confessions and Fundamental Fairness: The Need for Electronic Recording of Custodial Interrogations, 6 B.U. Pub. Int. L.J.719, 732-733 (1997); White, False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions, 32 Harv. C.R.-C.L. L.Rev. 105, 145-149 (1997); Ofshe, The Decision to Confess Falsely: Rational Choice and Irrational Action, 74 Denv. U. L.Rev. 979, 1008-1013 (1997); Roppe, True Blue? Whether Police Should Be Allowed to Use Trickery and Deception to Extract Confessions, 31 San Diego L.Rev.729 (1994); Kassir, The Psychology of Confession Evidence, 52 Am. Psychologist 221 (1997).

<sup>91</sup> *Id.* at 423.

<sup>92</sup> *Id.* at 432, citing *Commonwealth v. Jackson*, 377 Mass. 319, 328 n. 8, (1979); *Commonwealth v. Edwards*, 420 Mass. 666, 671 (1995) (use of false statements to obtain suspect's waiver is "disapproved of and may indicate that any subsequent waiver was made involuntarily; *Commonwealth v. Nero*, 14 Mass.App.Ct. 714, 716 (1982) ("use of false information as a tactical device is strongly disapproved and casts instant doubt on whether a defendant's statement is voluntary").

<sup>93</sup> *Id.* at 432, citing *Commonwealth v. Scoggins*, 439 Mass. 571, 576; *Commonwealth v. Colby*, 422 Mass. 414, 416-417 (1996); *Commonwealth v. Edwards*, *supra*; *Commonwealth v. Selby*, 420 Mass. 656, 664 (1995); *Commonwealth v. Forde*, 392 Mass. 453, 455-456 (1984); *Commonwealth v. Meehan*, 377 Mass. 552, 563-564 (1979), *cert. dismissed*, 445 U.S. 39 (1980); *Commonwealth v.*

The *DiGiambattista* Court also raised questions about the interrogating officers' suggestion to the suspect that "counseling" would be an appropriate resolution for the case:

We have recognized that false statements concerning ostensibly irrefutable evidence against a suspect are particularly troublesome when combined with suggestions of leniency in exchange for a confession. '[A] false statement concerning the strength of the Commonwealth's case, coupled with an implied promise that the defendant will benefit if he makes a confession, may undermine "the defendant's ability to make a free choice."' *Commonwealth v. Scoggins*, 439 Mass. 571, 576 (2003), quoting *Commonwealth v. Meehan*, 377 Mass. 552, 563 (1979). 'The specter of coercion arises in these circumstances from the possibility that an innocent defendant, confronted with apparently irrefutable (but false) evidence of his guilt, might rationally conclude that he was about to be convicted wrongfully and give a false confession in an effort to salvage the situation.'<sup>94</sup>

In *DiGiambattista*, the Court did not address directly whether the defendant's confession in the case was actually false; the Court did note, however, that the defendant's "version of how and where he started the fire was completely contrary to the forensic evidence, and other details of his confession were ultimately shown to be impossible." And, as noted, the Supreme Judicial Court has not gone so far as to *forbid* officers from engaging in trickery when questioning suspects.

The Task Force cautions, however, that police use of trickery, particularly when coupled with explicit or implicit

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*Jackson, supra*; see also *Commonwealth v. Nero, supra* at 716-718; *Commonwealth v. Edwards, supra* at 672; *Commonwealth v. Forde, supra*.

<sup>94</sup> *Id.* at 436, citing *Commonwealth v. Scoggins, supra* at 576-577, citing Ofshe, The Decision to Confess Falsely: Rational Choice and Irrational Action, 74 *Denv. U. L.Rev.* 979 (1997).

promises of leniency, creates two significant risks impacting the accuracy and reliability of the criminal justice system. First, as the social science research cited by the SJC in *DiGiambattista* suggests, police questioning that misstates the evidence against a suspect increases the risk of false confessions: as the SJC itself noted, "if a suspect is told that he appears on a surveillance tape, or that his fingerprints or DNA have been found, even an innocent person would perceive that he or she is in grave danger of wrongful prosecution and erroneous conviction."<sup>95</sup> Second, providing misleading information to a suspect who is in fact guilty could lead to the suppression of that suspect's true confession, thereby undermining the principle recognized by the United States Supreme Court that "admissions of guilt are more than merely 'desirable,' they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law."<sup>96</sup>

#### **10. Recording Witness Interviews.**

As described above, statements made by defendants are critically important in criminal cases. They are not the only important statements, however; statements of other witnesses are also of real importance in the investigation, prosecution, and defense of criminal cases. Unlike statements made by a person charged with a crime, a witness's out-of-court statement is not generally admissible against the defendant. Instead, the witness himself must be called to the stand and testify in person. But statements taken by the police in the early part of an investigation are commonly used at criminal trials to refresh a witness's recollection about critical details of events the witness may not remember by the time a case comes to trial, and they are also important tools for defense counsel to use to cross-examine witnesses at trial.

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<sup>95</sup> *Id.* at 434-35.

<sup>96</sup> *Schneekloth v. Bustamonte*, 412 U.S. 218, 225 (1973), quoting *United States v. Washington*, 431 U.S. 181, 186 (1977).

At present, Massachusetts police departments do not follow a standard practice concerning the recording of statements of witnesses, rather than criminal suspects. Some departments, or some officers within departments, frequently record statements of witnesses. Others do so rarely, or not at all. The Task Force recommends that police departments conducting witness interviews in the most serious cases--felony cases commonly prosecuted in Superior Court--record witness interviews when it is practicable for them to do so. The Task Force certainly recognizes that there will be many occasions when it will not be practical. For example, one would hardly expect the first responding officer to a homicide scene to focus on tape recording the statements of a witness who has just seen a family member murdered or discovered a family member's dead body. In most investigations of serious felonies, however, detectives will conduct a formal interview with important witnesses within days of the crime. The Task Force believes that, as a general rule, these investigative interviews, and other investigative interviews that follow, particularly in lengthy investigations, should be recorded, either by audio or video means. Many of the reasons described above favoring the recording of suspect interviews also recommend recording witness interviews. Recording such interviews will make "law enforcement officers more efficient and more effective while questioning" witnesses.<sup>97</sup> Recording witness interviews "will make it unnecessary for police to struggle to recall details when later writing reports and testifying about what occurred during the interviews."<sup>98</sup> Indeed, it largely obviates the need for police to write lengthy interview reports.<sup>99</sup> "Later reviews of recordings often reveal previously overlooked statements by [witnesses] that yield leads, inconsistencies and evasive conduct, details that

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<sup>97</sup> See Sullivan, *supra* note 64, at 23-24.

<sup>98</sup> See *id.* at 1307.

<sup>99</sup> See *Id.*

appeared irrelevant initially, but which were later” found to be important.<sup>100</sup>

Recording witness statements connects to the prevention of wrongful conviction and increases the accuracy of the criminal justice system in three ways. First, Task Force members recognize that, particularly early in investigations, investigators develop leads and theories that cause them to focus on particular individuals as likely suspects. Investigators working together on a case may even develop *different* “favorite” suspects. When interviewing witnesses, it is human nature for even the best-intentioned investigators to focus more closely on a witness’s statement about that investigator’s “favorite” suspect than the witness’s statements about other individuals. Information about the prime suspect may be recorded, in notes or a report, in more detail, or with more emphasis, than information (which may well seem irrelevant to the investigator at the time) about other persons. If, however, the investigation ultimately points to facts which make the first suspect an unlikely suspect (he or she may have a strong alibi, for example), recorded witness interviews will permit an investigator to go back to the witness’s first investigative interview to see whether the investigator’s focus on the prime suspect caused the investigator to overlook information that may provide important leads in connection with the investigation of other suspects.

Second, recording investigative interviews would dramatically simplify the state’s obligation to comply with its obligations under *Brady v. Maryland*<sup>101</sup> and *Giglio v United States*<sup>102</sup> to produce exculpatory evidence. Those obligations, and their connection to the avoidance of wrongful convictions, are discussed more extensively elsewhere in this Report. However, the Task Force believes that the recording of witness statements, and their production as part of routine discovery, will dramatically reduce

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<sup>100</sup> *See Id.*

<sup>101</sup> *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

<sup>102</sup> *Giglio v. U.S.*, 405 U.S. 150, 154-55 (1972).

disputes about the prosecution's disclosure of potentially exculpatory impeachment material. If a recorded witness statement is produced, there will be no doubt about what the witness said or when he said it.

Third, recording witness statements will enhance the truth-seeking function that is at the heart of this Task Force's work. As noted, it is human nature for investigators to pay attention to and write down more about the parts of what a witness says that *reinforce* the investigator's theory of the case, and pay less attention to the parts of a witness's statement that seem irrelevant to that theory. This information (whether "missing" or simply described in less detail) may be critical to a defendant's ability to assert a meaningful defense, however. The prosecution obviously cannot produce information its investigators did not put in their report or notes. Having a complete record--the kind that only comes from a recording--of important witness interviews would remove nearly all question about what a witness said at the outset of an investigation, and permit the trial of the matter to focus on the witnesses' testimony and prior statements, not on whether the investigators fully or accurately described the witnesses' statements in reports or notes.

## ***II. Training.***

As noted above, the notion that a person could confess to a crime he did not commit is counterintuitive. Nevertheless, the fact that some people confess to crimes they did not commit is a reality of the criminal justice system. Training of police, prosecutors, defense counsel and judges about the existence of false confessions, and their causes, will help all participants in the criminal justice system be, as they should, open-minded about the possibility that a person may in fact be actually innocent, despite his confession. The Task Force applauds the fact that the District Attorneys arranged for Professor Saul Kassin, one of the nation's leading experts on false confessions, to speak at a statewide prosecutors' conference and recommends that similar training sessions, including the

police, prosecutors, the defense bar, and the Judiciary be undertaken on a periodic basis in the future.

**12. A Final Note.**

The Task Force's recommendations are intended to describe best practices that we suggest police departments adopt in order to improve the accuracy of the criminal justice system, reduce the number of false confessions, and minimize the risk of wrongful convictions. We recognize, however, that there will be situations where police will not be able to record a suspect or witness interview. The interview may take place on the street under urgent conditions. The suspect or witness may decline to be recorded. The recording equipment may malfunction. Nevertheless, the Task Force recommends that the practices described above should always be the "default mode" for police conducting investigations in serious felony cases commonly tried in Superior Court and should be overridden only in situations where it is truly not practicable to use them.



## VI. FORENSIC SCIENCE

### RECOMMENDATIONS.

In the area of forensic science, the Task Force makes the following recommendations:

1. **The Legislature should enact and the Governor should sign into law a statute providing for postconviction access to and testing of forensic evidence and biological material by defendants who claim factual innocence and for postconviction retention of biological material. A proposed bill is attached as Exhibit A.**
2. **Massachusetts should expand the membership of the Commonwealth's Forensic Sciences Advisory Board to include a broader range of scientific and criminal justice system stakeholders by adding three laboratory scientists and three members of the bar. A proposed bill is attached as Exhibit B.**
3. **Massachusetts should review and enhance law enforcement training and practices for evidence collection, including creation of evidence collection protocols for local police departments and training in best practices for evidence collection, processing and retention.**

### BACKGROUND.

#### 1. *Forensic Science and Wrongful Convictions.*

Forensic science, and in particular, advances in DNA analysis and technology, have been the driving force, nationally and in Massachusetts, in exonerating wrongly convicted defendants. As the United States Supreme Court has held: "DNA testing has an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty. It has the potential to significantly improve both the criminal justice system and police investigative practices."<sup>103</sup> At least nine Massachusetts exonerations have resulted from DNA analysis of biological evidence retained by the police or the courts. In each of these instances, DNA testing

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<sup>103</sup> *Dist. Attorney's Office v. Osborne*, 129 S.Ct. 2308, 2312 (2009)

was not available at the time of the defendant's original trial. Justice was done only when new scientific methods permitted forensic scientists to examine or reexamine old evidence with the power that DNA provides.

DNA exonerations teach several lessons about forensic science's place in the criminal justice system. First, the exonerations show the critical importance of providing a means to preserve forensic evidence and to permit defendants convicted of crimes they did not commit to obtain access to the forensic evidence in their cases. At present, Massachusetts is one of only four states that do not have a statute providing for post-conviction DNA access. Second, the DNA exonerations have increased the criminal justice system's focus on the quality of the forensic work conducted in disciplines less exacting than DNA; indeed, in a number of the Massachusetts DNA exoneration cases, forensic testimony in fact contributed to wrongful convictions. The Innocence Project estimates that forensic errors contributed to the convictions of 142 of the 242 criminal defendants exonerated by DNA.<sup>104</sup> These facts show the need for the criminal justice system to demand that criminal investigations employ the best and most reliable forensic science methods.

The Task Force's Postconviction and Forensics Committee examined the operation of forensic science in the Commonwealth from collection of evidence, through its forensic analysis and its use in investigation and prosecution, to its retention thereafter. The Task Force recognized that this is a period of considerable transition in forensic science both nationally and in the Commonwealth. Its recommendations reflect both national trends in improvement of forensic science and specific conditions in Massachusetts. Its three principal recommendations arise from this examination. These recommendations address gaps the Committee identified in the Commonwealth's forensic science system. Remedying these gaps will enhance the system's overall accuracy

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<sup>104</sup> See The Innocence Project, Know the Cases, <http://www.innocenceproject.org/know/Search-Profiles.php> (Click "Unvalidated or Improper Forensic Science" under the Tab "Contributing Cause").

and provide a framework for ensuring the highest possible quality system in the future.

2. ***Postconviction access to and testing of forensic evidence and bio-logical material by defendants who claim factual innocence, and postconviction retention of biological material.***

Massachusetts is one of only four states that lack a postconviction access and testing statute for defendants who claim factual innocence.<sup>105</sup> The United States Supreme Court's recent decision in the *Osborne* case, rejecting an Alaskan defendant's claim to have a federal constitutional right to DNA testing, strongly reinforces the need for a Massachusetts statute to provide a comprehensive method to obtain evidence for testing. Under the Supreme Court's reasoning in *Osborne*, "harness[ing] DNA's power to prove innocence without unnecessarily overthrowing the established system of criminal justice [is a task that] belongs primarily to the legislature."<sup>106</sup> Despite the readiness of some prosecutors in the Commonwealth to accede to such requests, the absence of a clear statutory mechanism for identifying and testing evidence consumes scarce judicial and prosecutorial resources and can produce unnecessary litigation and delay. The Task Force's proposed bill would establish a process by which all defendants under restriction of liberty due to a Massachusetts conviction who claim they are factually innocent could file a motion to identify the evidence in their case and obtain its postconviction testing. The bill would not provide for any legal effect on the underlying conviction from the outcome of such testing, nor would it create a cause of action, and it would not preclude parties from agreeing to a procedure for postconviction testing. Results of testing would be provided to the parties and the court, and costs for indigent defendants would be borne by public monies designated for indigent defense.

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<sup>105</sup> *Osborne*, 129 S.Ct. at 2326, n.2 ("[t]he only States that do not have DNA-testing statutes are Alabama, Alaska, Massachusetts, and Oklahoma; and at least three of those States have addressed the issue through judicial decisions.").

<sup>106</sup> *Id.* at 2310.

As important as postconviction access and testing may be for defendants who claim wrongful conviction, the bill would also establish for the first time a statewide obligation to maintain biological material from criminal cases, and it would provide authority for a reconstituted Forensic Sciences Advisory Board (“FSAB”) to promulgate regulations to implement this obligation. Evidence retention ensures that any subsequent claim of innocence can be reliably tested, and that a future prosecution following such a determination would be possible. The absence of a postconviction testing and retention statute also puts the Commonwealth at a disadvantage when seeking certain federal criminal justice grant funds, and has been noted as a shortcoming in the Commonwealth’s forensic system by outside examiners.<sup>107</sup>

**3. *Expanding the membership of the Commonwealth’s Forensic Sciences Advisory Board to reflect a broader range of criminal justice system stakeholders, including three laboratory scientists and three members of the bar.***

Since 2004, Massachusetts has had a Forensic Sciences Advisory Board (FSAB) by statute, but its activity has been sporadic.<sup>108</sup> After a period of inactivity, the FSAB has been meeting regularly only since 2008. Seven of its eight statutorily-specified members are law enforcement personnel.<sup>109</sup> Although the substance of the FSAB’s work involves science, it has no members who are scientists. While law enforcement is undoubtedly a very significant user of and advocate for expenditures on the state’s forensic services, the justice system as a whole relies on forensic

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<sup>107</sup> MASSACHUSETTS OFFICE OF THE INSPECTOR GEN., REVIEW OF THE DNA TESTING OPERATIONS AND THE ASSOCIATED MANAGEMENT STRUCTURE OF THE EXECUTIVE OFFICE OF PUBLIC SAFETY AND SECURITY’S FORENSIC SERVICES GROUP 22–23 (Jan. 2009).

<sup>108</sup> Mass. Gen. Laws. ch. 6, § 184A (2004).

<sup>109</sup> FSAB members are: the undersecretary of public safety for forensic sciences, the attorney general, the state police colonel, the president of the Massachusetts Chiefs of Police Association, the president of the Massachusetts Urban Chiefs Association, the president of the Massachusetts District Attorney’s Association, a district attorney designated by the Massachusetts District Attorney’s Association and the commissioner of the department of public health, or their designees.

analyses. Issues involving forensic services affect the judiciary, the defense bar and the public at large. Ensuring the highest quality scientific practices in the Commonwealth's forensic science system benefits everyone, both to reduce the risk of wrongful convictions and to increase the ability to secure accurate ones. Input from a broad range of stakeholders can aid this goal, by reducing risks of bias and increasing transparency, which can also ensure greater credibility for the FSAB's actions. Although the FSAB's meetings are public, and the present administration has invited a range of outside attendees, adding official members will make this approach permanent.

The Committee recommends that the following scientists be added to the FSAB: one forensic scientist with practical experience in an accredited crime laboratory, one scientist with specialty in the natural or biological sciences, and one scientist with experience in the physical sciences. It is preferable that at least the latter two scientists are of the Ph.D. level and are not employed by the Commonwealth's forensic science system. These members would provide critical expertise for assessing technical and scientific issues, and for helping the FSAB evaluate the impact on scientific practices of organizational and structural changes. The addition of a scientific subcommittee for the FSAB was recommended by an outside entity that reviewed the state's forensic system in 2007.<sup>110</sup>

The Committee also recommends that three members of the bar, with experience in criminal practice and forensic science issues, be added as members of the FSAB. The addition of these members, like the scientific members, would not be to "balance" the FSAB but rather to provide a range of perspectives that more fully reflects those who depend upon the state's forensic science system. The Committee recommends that one of these members be the Chief Counsel of the Committee for Public Counsel Services or his designee, and that one each be appointed on recommendation by

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<sup>110</sup> Robert N. Sikellis, *Final Report and Recommendations Regarding Vance's Comprehensive Operational Assessment of the Massachusetts State Police Crime Laboratory System* 39-41 (June 29, 2007).

the Massachusetts Bar Association and the Boston Bar Association. The Task Force expects that Massachusetts will have no difficulty in recruiting the new members of the Board to serve without pay.

As noted, this is a period of considerable transition in forensic science nationally and in Massachusetts. The well-developed scientific foundation of DNA analysis provides a high standard of empirically-demonstrated processes by which to measure the rest of forensic science. As recently documented by a National Research Council study, this standard of scientific validity is largely unmet for the rest of forensic science,<sup>111</sup> and the absence of a comprehensive and coordinated approach to forensic science has often produced inadequate training, funding and organizational structure in many jurisdictions.<sup>112</sup>

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<sup>111</sup> NAT'L RESEARCH COUNCIL OF THE NAT'L ACAD., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD S-16-17 (National Academies Press, 2009) [hereinafter STRENGTHENING FORENSIC SCIENCE]. Recommendation 3 provides:

Research is needed to address issues of accuracy, reliability, and validity in the forensic science disciplines. The National Institute of Forensic Science (NIFS) should competitively fund peer-reviewed research in the following areas:

- (a) Studies establishing the scientific bases demonstrating the validity of forensic methods.
- (b) The development and establishment of quantifiable measures of the reliability and accuracy of forensic analyses. Studies of the reliability and accuracy of forensic techniques should reflect actual practice on realistic case scenarios, averaged across a representative sample of forensic scientists and laboratories. Studies also should establish the limits of reliability and accuracy that analytic methods can be expected to achieve as the conditions of forensic evidence vary. The research by which measures of reliability and accuracy are determined should be peer reviewed and published in respected scientific journals.
- (c) The development of quantifiable measures of uncertainty in the conclusions of forensic analyses.
- (d) Automated techniques capable of enhancing forensic technologies.

*Id.*

<sup>112</sup> *Ibid.*, S-10. As the NRC report states:

The forensic science disciplines currently are an assortment of methods and practices used in both the public and private arenas. Forensic science facilities exhibit wide variability in capacity, oversight, staffing, certification, and accreditation across federal and state jurisdictions. Too often they have inadequate educational programs, and they typically lack mandatory and enforceable standards, founded on rigorous research and testing, certification requirements, and accreditation programs. Additionally, forensic science and forensic pathology research, education, and training, lack strong ties to our research universities and national science assets. In addition to the problems emanating from the fragmentation of the forensic science community, the most

Many parts of the state's forensic science system have been improved in the past two years, as measured by reduced case backlogs, securing accreditation and opening of new facilities. Both of the principal units of the state's forensic services, the State Police Crime Laboratory and the Office of the State Medical Examiner, are now seeking permanent directors. This transitional period is also an opportunity for improvement, and the Task Force believes that a reconstituted FSAB will give Massachusetts the best opportunity to overcome current challenges and become, as it should, a forensic science leader.

**4. *Review and enhance law enforcement training and practices for evidence collection, including creation of evidence collection protocols for local police departments and training in best practices for evidence collection, processing and retention.***

The Massachusetts State Police Crime Laboratory recently achieved accreditation by the American Society of Crime Lab Directors-Laboratory Accreditation Board ("ASCLD/LAB") for all its forensic units, including its evidence collection unit, which is a major institutional achievement. The Massachusetts State Police Crime Laboratory examines, tests, and reports on biological and other evidence in most of the serious felony cases commonly prosecuted in Superior Court outside of Suffolk County. In Suffolk County, the Boston Police Department Crime Laboratory and latent print unit are accredited (the latent print unit having obtained accreditation on October 15, 2009) and other units including are in the process of seeking accreditation.

However, much evidence collection in the Commonwealth is done by local police departments. A requirement of ASCLD/LAB

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recently published Census of Crime Laboratories conducted by BJS describes unacceptable case backlogs in state and local crime laboratories and estimates the level of additional resources needed to handle these backlogs and prevent their recurrence. Unfortunately, the backlogs, even in DNA case processing, have grown dramatically in recent years and are now staggering in some jurisdictions. The most recently published BJS Special Report of Medical Examiners and Coroners' Offices also depicts a system with disparate and often inadequate educational and training requirements, resources, and capacities--in short, a system in need of significant improvement. *Id.*

accreditation is having written policies for each unit, including evidence collection, which provide a benchmark for quality and a framework for training. An informal survey done by the Task Force suggests that some, but not all, departments have such written policies on evidence collection.<sup>113</sup> In addition, evidence collection is not a significant part of routine police recruit or in-service training. The quality of the evidence collection process can affect all subsequent forensic analyses. The Task Force recommends that a first step toward enhancing the process would be for the FSAB to provide a model written policy for evidence collection, and that all local departments adopt the model policy or their own policy consistent with the model policy. The Massachusetts State Police Crime Lab's policy and certain of its protocols are useful models. They may be found at the following address on the BBA's website: [http://www.bostonbar.org/prs/reports/TaskForceToImproveCJS\\_Nov09.pdf](http://www.bostonbar.org/prs/reports/TaskForceToImproveCJS_Nov09.pdf).

In addition, the Task Force recommends a thorough review of the quality and availability of training provided to law enforcement for evidence collection, to ensure that best practices are being taught and adequately made available to recruits, veteran officers, and detectives.

##### **5. *Forensic Comparisons Without ASCLD/LAB Accreditation.***

The survey also suggested that a significant proportion of local departments conduct some forensic analyses of physical evidence, primarily latent fingerprints.<sup>114</sup> These local departments are not, however, ASCLD/LAB accredited. This is not desirable. The Task Force recommends that departments which conduct forensic comparisons without ASCLD/LAB accreditation nonetheless review and implement the principles that guide

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<sup>113</sup> Twenty out of 27 departments responding to a 12-item survey distributed by the Boston Police Commissioner indicated that they had written procedures or rules that governed the collection of physical evidence.

<sup>114</sup> Eleven of the 27 departments responded to this survey that their officers did some comparisons of physical evidence; in all eleven cases fingerprints were described as the method of comparison.



ASCLD/LAB accredited labs. In particular, the Task Force recommends that all departments conducting forensic comparisons develop operational, technical and quality manuals, a training program, contract for external proficiency testing of examiners, and ensure that examiners' conclusions are subject to a technical review by a qualified reviewer.

In addition, local police department whose officers conduct forensic fingerprint comparisons should support the certification of their fingerprint examiners. Certification is achieved by the individual rather than by the agency; however, agencies that opt to conduct such forensic comparisons can cultivate an environment that values certified fingerprint examiners, to better ensure accurate, quality results. The professional organization called the International Association of Identification (IAI) offers certification programs for fingerprint examiners. Examiners who have achieved such a certification have demonstrated their competency in this forensic discipline.

Individual certification and any agency's accreditation are both formal means of demonstrating competency and quality, and both serve as safeguards against erroneous fingerprint identifications and wrongful convictions. The Task Force recommends that agencies implement policies and practices to ensure the quality of their work, even if the agencies do not have sufficient resources to attain formal accreditation.

**VII. DISCOVERY, TRIAL PRACTICE AND DEFENSE STANDARDS****BACKGROUND.**

In Massachusetts and elsewhere in the country, wrongful convictions have resulted as a consequence of failures by lawyers--both prosecutors and defense counsel. When prosecutors fail to obtain potentially exculpatory evidence from police investigators, or fail to provide that evidence to the defense, defendants (and their lawyers) are deprived of the opportunity to mount an effective defense. When defense counsel fail to investigate potential defenses, the risk of an innocent defendant being convicted of a crime he or she did not commit increase exponentially. The Innocence Project estimates that failures by prosecutors or defense counsel contributed to more than ten percent of the 245 wrongful convictions of individuals exonerated by DNA testing.<sup>115</sup> As academic research and the work of the Justice Initiative of the Massachusetts District Attorneys' Association and the Attorney General have concluded, the Massachusetts experience replicates what has happened nationally: the failure of prosecutors and defense counsel to live up to their obligations has led to a number of wrongful convictions in our state.<sup>116</sup>

**RECOMMENDATIONS.**

Bringing exculpatory evidence to light and improving defense counsel performance are necessary components of any effort to avoid wrongful convictions. The Task Force examined a number of ways in which both the process for disclosing exculpatory evidence and the performance of defense counsel could be improved. The Task Force makes the following recommendations:

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<sup>115</sup>The Innocence Project, Know the Cases, <http://www.innocenceproject.org/Content/351.php> (Click "Fact Sheets", then Tab "Facts on Post-Conviction DNA Exonerations") (last visited Dec. 3, 2009).

<sup>116</sup> See ABA REPORT, *supra* note 2, at 6; Fischer, *supra* note 2, at 66.

1. **Prosecutors' offices should provide formal training to new prosecutors on their discovery obligations and conduct periodic training of existing prosecutors.**
2. **Police departments and prosecutors' offices should provide formal training to police officers concerning their obligations to provide exculpatory evidence, and establish means to assure that exculpatory evidence in the hands of the police is provided to prosecutors.**
3. **Prosecutors' offices should adopt written statements of Best Practices, as described in detail below, as a guide for obtaining and disclosing exculpatory evidence, particularly in serious felony cases commonly tried in Superior Court.**
4. **Defense Counsel representing the accused in serious felony cases commonly tried in Superior Court, whether retained or appointed by the Court, should consult and comply with the Committee on Public Counsel Services Performance Standards and the statement of Core Expectations for Defense Counsel described in detail below.**

**DISCUSSION.**

**1. Training.**

A number of the Task Force's discussions about the ways in which the criminal justice community can ensure that sound discovery practice can decrease the risk of wrongful convictions focused on the need for the training of all of the involved parties, namely law enforcement, prosecutors, defense counsel and the Court. This section is addressed to training of law enforcement officers and prosecutors; section 4, *infra*, addresses the recommended training of defense counsel.

**A. *ADA Training Regarding Brady Obligations.***

Given that each criminal case has unique facts and different challenges, it is critical that a prosecutor have a solid understanding of the nature of his or her obligations to produce exculpatory evidence under *Brady v. Maryland*, and its progeny, and the

requirements of Mass. R. Crim. P. 14 (“Rule 14”) to be able to discharge them in every case.<sup>117</sup> Training of new prosecutors regarding these matters is important as they embark on the representation of the Commonwealth and production of discovery in their cases. *Brady* and discovery obligations should be a routine and central agenda item for the training of new prosecutors. The Massachusetts District Attorneys’ Association and the Massachusetts Attorney General have recognized this need.<sup>118</sup> In the District of Massachusetts, the Chief Judge has recently asked United States District Judge Douglas P. Woodlock to work with the United States Attorney’s Office and the defense bar to design a formal training program for federal prosecutors, which is scheduled to take place this fall.

Periodic training for all prosecutors on this topic is also critical. As prosecutors become more senior, the complexity and sophistication of their caseloads grow as does the complexity of the discovery issues and the challenges to the execution of their discovery obligations. Periodic training on evolving case law regarding the execution of those obligations will serve as a refresher for prosecutors. Ideally, such training would be taught by experienced prosecutors and would involve some discussion of practice tips and best practices. It should also be conducted in an environment in which prosecutors will suffer no consequences for asking questions or posing hypothetical situations about the discharge of their discovery obligations. One District Attorney’s Office now requires each of its prosecutors to attend an annual ethics and professional responsibility training. For the past two years, this training has focused on small group discussions involving hypothetical case scenarios implicating discovery obligations with a lecture component involving review of the applicable law and rules. The Task Force commends this approach and urges other prosecutors’ offices to follow suit.

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<sup>117</sup> 373 U.S. at 87; *see* Mass R. Crim. P. Rule 14.

<sup>118</sup> MDAA Report of the Justice Initiative (Sept. 2006) at 18-20 (Recommendations Regarding Training of Police and Prosecutors)

**B. Law Enforcement Training re: Brady Obligations.**

Although it falls to prosecutors to discharge the duties under Rule 14 and *Brady* and its progeny, much of the information required to be produced to comply with these discovery obligations exists in the tangible possession or intangible knowledge of the law enforcement officers who have investigated the cases that ADAs prosecute. Accordingly, it is important that police officers understand the Commonwealth's duty to produce discovery, particularly exculpatory evidence under *Brady*. Communication of the nature and scope of this duty to law enforcement officers occurs most often on a case-by-case basis as an ADA works with officers to prepare a case for trial. Training on the nature and scope of discovery requirements at a departmental level at periodic intervals will ensure that new law enforcement officers are aware of the importance of discovery obligations and that more experienced officers are kept abreast of developments in the law.<sup>119</sup> Similarly, training for police officers regarding discovery obligations by the prosecutors who work with them serves a similar purpose and allows for discussion about discovery practice.

Such training would address the scope of discovery, including evidence of an exculpatory nature, and the required timing of such discovery under Rule 14. It would also address the Commonwealth's continuing duty to produce discovery under Rule 14(a)(4) (and the implications of same for law enforcement officers) and Rule 14(a)(1)(A) (Commonwealth responsible for relevant and discoverable information in the "possession custody or control of prosecutor, persons under the prosecutor's direction and control, or persons who have participated in investigating or evaluating the case and either regularly report to the prosecutor's office or have done so in the case"). Officers must fully understand and appreciate that there is no distinction between discoverable evidence and information in their possession and discoverable

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<sup>119</sup> See, e.g., MASS. DIST. CT. R. 116.8 (1998) (requiring notification to law enforcement officers and agents regarding discovery obligations).

evidence and information in the prosecutor's possession.<sup>120</sup> Such training should also address the consequences of failing to produce or delaying the disclosure of discoverable evidence, which may include the need for a new trial<sup>121</sup> or dismissal of the charges. United States Attorney General Eric Holder's recent decision to dismiss the federal case against Senator Ted Stevens due to the government's failure to produce exculpatory evidence is one of a number of cases that serve as useful examples to police and prosecutors of the consequences of failing to disclose exculpatory evidence.<sup>122</sup>

One challenge may be the forum in which to gather law enforcement officers for such training. There are a number of organizations of police chiefs, such as the Massachusetts Chiefs of Police Association and the Massachusetts Major City Chiefs, as well as police chiefs' organizations organized by county, that gather periodically. These periodic meetings may provide District Attorneys' Offices with a convenient forum to remind departments about the scope of discovery obligations, update departments about recent court decisions regarding the scope of discovery or provide more formal training. We also recommend that District Attorneys' Offices consider the training or distribution of training materials through detective bureaus and/or police prosecutors in their counties.

## **2. Adoption of Brady Best Practices.**

Discovery practice in criminal cases is necessarily governed by rules and case law that, at base, arise from a defendant's constitutional right to a fair trial.<sup>123</sup> Criminal attorneys must exercise sound judgment and discretion in the execution of their

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<sup>120</sup> See *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

<sup>121</sup> See *Commonwealth v. Merry*, 453 Mass. 653, 664 (2009) (affirming trial judge's order for new trial where prosecutor failed to disclose material and exculpatory evidence).

<sup>122</sup> See Press Release, Statement of Attorney General Eric Holder Regarding United States v. Theodore F. Stevens (Apr. 1, 2009), available at <http://www.usdoj.gov/opa/pr/2009/April/09-ag-288.html>.

<sup>123</sup> *Brady*, 373 U.S. at 87.

discovery obligations. Since every case is unique, the following recommendations are intended only as a guide for consideration by practitioners. Following discussions among law enforcement officers, prosecutors and defense bar members, however, some general principles about approaches to discovery production and best practices emerged and are proposed here. This Section of the Report is addressed primarily to prosecutors, but to the extent that many of the discovery obligations discussed are reciprocal, the recommendations are also applicable to defense attorneys. This section should be read in conjunction with Section 4, *infra*, that addresses best practices and expectations for defense attorneys.

**A. *Prosecutors Must Have a Complete Understanding of Their Obligations under Rule 14 and Brady.***

Every case requires discovery as well as a determination of whether there is *Brady* evidence which must be disclosed to defense counsel. Accordingly, a prosecutor should not just read and review Rule 14 and the seminal cases like *Brady*, but must be conversant with their requirements and principles. A prosecutor must review and understand the requirements and scope of automatic discovery under Rule 14 and should plan case management so that he or she is prepared to file the certificate of compliance under Rule 14(a)(3) promptly. An ADA must understand that his or her duty to produce discovery under Rule 14 continues even after the ADA has completed the discovery collection and production to defense counsel, if further discoverable information comes to the prosecution's attention in the course of preparation for trial, as discussed further below.

Rule 14 addresses a prosecutor's obligation to produce *Brady* material in Rule 14(a)(1)(A)(iii), which requires production of "[a]ny facts of an exculpatory nature." The Reporter's Notes to Rule 14 make clear that this portion of the Rule derives from the Supreme Court's decision in *Brady*.<sup>124</sup> *Brady* established that "the

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<sup>124</sup> Reporter's Note, MASS. R. CRIM. P. Rule 14 (2005). The incorporation of *Brady* obligations in Rule 14 is consistent with the rules of the other 49 states, the District of Columbia and some of the local rules of federal district courts (including the U.S. District Court for the District of Massachusetts)

suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”<sup>125</sup> Subsequent rulings have made clear that the Commonwealth bears this *Brady* duty regardless of whether such evidence has been requested by the defendant<sup>126</sup> and extended the duty to disclose such evidence to certain impeachment evidence.<sup>127</sup> *Brady* production is not just constitutionally required, but is part of the ethical obligation of prosecutors working on behalf of the Commonwealth under Prof. Conduct R. 3.8(d), which requires that a prosecutor “make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.” A recent opinion from the American Bar Association’s Standing Committee on Ethics and Professional Responsibility explains that Rule 3.8(d) imposes an obligation on prosecutors that extends beyond the strict requirements of *Brady*. “Rule 3.8(d) is more demanding than the constitutional case law, in that it requires the disclosure of evidence or information favorable to the defense without regard to the anticipated impact of the evidence or information on a trial’s outcome.”<sup>128</sup>

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which address the obligation to produce exculpatory evidence. See LAURAL L. HOOPER, JENNIFER E. MARSH & BRIAN YEH, REPORT TO THE ADVISORY COMM. ON CRIMINAL RULES OF THE JUDICIAL CONFERENCE OF THE U.S., THE TREATMENT OF *BRADY V. MARYLAND* MATERIAL IN UNITED STATES DISTRICT COURT AND STATE COURTS’ RULES, ORDERS AND POLICIES 4–5, 8 at Tbl. 1, 18 at Tbl. 3 (Fed. Judicial Ctr., Oct. 2004).

<sup>125</sup> *Brady*, 373 U.S. at 87.

<sup>126</sup> *United States v. Agurs*, 427 U.S. 97, 106-07 (1976); *Commonwealth v. Tucceri*, 412 Mass. 401, 405 (1992).

<sup>127</sup> *U.S. v. Bagley*, 473 U.S. 667, 676 (1985); *Giglio*, 405 U.S. at 153-54; see *Commonwealth v. Daniels*, 445 Mass. 392, 401-02 (2005) quoting *Commonwealth v. Ellison*, 376 Mass. 1, 22 (1978); see also *Commonwealth v. St. Germain*, 381 Mass. 256, 262 n. 10 (1980) (urging prosecutors to err on the side of disclosure where material is possibly exculpatory).

<sup>128</sup> ABA Formal Opinion 09-454 (July 8, 2009) at 4 (footnotes omitted).



**Best practice: Complete understanding of Rule 14 and Brady obligations necessarily requires fluency in the categories of *potentially* exculpatory evidence.**

This fluency and understanding will allow prosecutors to be prepared to ask the right questions as they review police reports and evidence and as they speak to investigators, so that they may discharge their discovery obligations regardless of the unique facts and circumstances that each criminal case inevitably presents.

***B. Earlier Production of Discovery (or Planning for Production of Discovery) is Preferable.***

Rule 14 requires the production of automatic discovery, including exculpatory evidence, “at or prior to the pretrial conference.”<sup>129</sup> Production of discovery by the pretrial conference, typically 30 days (or 21 days if the defendant is in custody) after arraignment in Superior Court, allows the parties to assess their respective cases, as well as the need for any suppression motions, dispositive motions or additional discovery early in the life of the case. There is no bar to the prosecution producing available discovery earlier than required under the timeframe under Rule 14 and it is better practice to produce all available discovery as early as possible. Superior Court Standing Order No. 2-86 (Amended) (“Standing Order No. 2-86”) provides that automatic discovery under Rule 14 “shall be provided, or notice thereof given, at arraignment if possible, or thereafter at the earliest time possible, in the exercise of due diligence, in order to permit the Commonwealth and the Defendant sufficient time in advance of the pretrial conference to evaluate the case and meaningfully participate in a pretrial conference.”<sup>130</sup> Since Standing Order No. 2-86 applies to all Superior Courts cases indicted after September 7, 2004, Superior

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<sup>129</sup> Mass. R. Crim. P. R. 14(a)(1)(A).

<sup>130</sup> SUPERIOR. CT. STANDING ORDER No. 2-86 (re: Criminal Case Management) [hereinafter SUPERIOR CT. STANDING ORDER].

Court ADAs should be well into the practice of producing all available discovery by arraignment.<sup>131</sup>

In addition to serving the purposes of facilitating early case evaluation and management as identified in the Standing Order, the early production of discovery, particularly *Brady* evidence, will serve the goal of reducing the risk of wrongful conviction by putting the parties on early notice of any evidence that casts doubt on guilt. Of course, all evidence may not be available to be produced by the time of arraignment (particularly, for example, forensic testing results). However, the unavailability of some discovery should not delay the production of available discovery at an earlier time. Although the timing of forensic testing and analysis is largely beyond the control of the ADA, he or she should request all testing in advance of the pretrial date to ensure as prompt production of the testing results as is possible.

***C. Take Proactive Steps to Ensure that Discovery is Complete.***

Ensuring that the Commonwealth's discovery is produced and complete is a process that requires due diligence. When at the end of the automatic discovery process, the Commonwealth files its certificate of compliance under Rule 14(a)(3), the prosecutor is certifying to the court that it has completed discovery "to the best of its knowledge and *after reasonable inquiry*" (emphasis added).

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<sup>131</sup> This Task Force has focused its attention largely on Superior Court discovery practices. Aiming to complete discovery by arraignment in Superior Court is possible since arraignment in that court is on the heels of a grand jury investigation in which prosecutors have had a chance to gather the bulk of discovery. The same is not true in District Court where there is no such grand jury stage and, therefore, completion of discovery by arraignment is not necessarily possible. The District/Municipal Courts Rules of Criminal Procedure contemplate and provide for, if appropriate, additional time for discovery completion following the arraignment and the initial pretrial hearing in a district court criminal case, specifically, a compliance and election date. See DIST./MUN. CTS. R. CRIM. P. 4 (Pretrial Hearing) & 5 (Hearing Date for Discovery Compliance and Jury Waiver Election) (Jan. 1, 1996), available at <http://www.lawlib.state.ma.us/source/mass/rules/district/discrim.html>. In practice, a compliance and election date, if held, typically occurs 30-60 days after arraignment in a district court case as opposed to the timing of the pretrial conference in Superior Court referenced above.

Although “reasonable inquiry” is not defined, at a minimum it requires contact and inquiry of the prosecution team.<sup>132</sup>

**Best practice: Make early inquiry of the police prosecutor, arresting officer(s), and/or any investigating officer(s) for discovery and exculpatory materials.**

A prosecutor should make these inquiries even if he or she has been presented with a discovery packet from the police prosecutor, department or other investigatory agency that is presented as the “complete” discovery at the beginning of a prosecution. A prosecutor has a duty to inquire about the existence of any automatic or responsive discovery, including witness statements and exculpatory information, in the possession of individuals and agencies who have “participated in the investigation or evaluation of the case and have reported to the prosecutor’s office.”<sup>133</sup> Even if a discovery packet is substantially complete, it may not include all written materials (e.g., police

<sup>132</sup> See MASS. R. CRIM. P. Rule 14(a)(1)(A) (prosecution shall disclose enumerated categories of discovery that are “in the possession, custody or control of the prosecutor, persons under the prosecutor’s direction and control, or persons who have participated in investigating or evaluating the case and either regularly report to the prosecutor’s office or have done so in the case”).

<sup>133</sup> *Commonwealth v. Martin*, 427 Mass. 816, 823–24 (1998) (applying duty to inquire of Commonwealth’s crime lab); see *Kyles*, 514 U.S. at 437 (“the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police”); *Commonwealth v. Bing Sial Liang*, 434 Mass. 131, 135–38 (2001) (applying duty to inquire of victim witness advocates); see also MASS. R. PROF. C. Rule 3.8(j) (prosecutor shall “not intentionally avoid pursuit of evidence because the prosecutor believes it will damage the prosecution’s case or aid the accused”); *Commonwealth v. Lykus*, 451 Mass. 310, 326–30 (2008) (imputing the failure to produce a FBI lab report to the Commonwealth where the FBI had been involved in the joint state/federal investigation even where the FBI had denied the Commonwealth’s request for the report, but finding no prejudice to the defendant from the nondisclosure); *Commonwealth v. Beal*, 429 Mass. 530, 535 n. 4 (1999) (citing MASS. R. PROF. C. 3.8(j) to note that prosecutors are ethically bound not to be willfully ignorant of potentially exculpatory evidence). Conversely, it is well settled that any duty does not extend beyond the prosecution team to third parties. See *Commonwealth v. Clemente*, 452 Mass. 295, 311 (2008) (information sought by defense was “not prepared by anyone within the control of the prosecution and there was no obligation by prosecutor to obtain or disclose the report”); *Commonwealth v. Ira I.*, 439 Mass. 805, 809–11 (2003) (assistant principal, who took written statements from a complainant and the juvenile defendants for purposes of “school disciplinary purposes, and not ... for any potential law enforcement or court action,” was not an agent of the “prosecution team”); *Beal*, 429 Mass. at 533 (1999) (duty to inquire about exculpatory information limited to prosecution team and not to the complainant or an independent witness); *Commonwealth v. Daye*, 411 Mass. 719, 733–34 (1992) (duty not applicable to Boston Police Department reports when Boston Police Department was not participating in the investigation and presentation of an Essex County District Attorney’s Office case).

reports of non-lead officers on the case that may contain exculpatory evidence) and it certainly will not include any non-written, oral statements of a defendant (if made) as required to be produced under Rule 14(a)(1)(A)(i). Inquiries of this nature, particularly in a longer term investigation involving many officers, may not make it possible to have discovery completed early. However, prosecutors should make their inquiries early enough in the case so that any additional discovery revealed as a result of these inquiries is produced before the pretrial conference deadline under Rule 14.

**Best practice: If there is additional outstanding discovery, an ADA should request a further pretrial conference date from the Court and defense counsel so that discovery can be completed by that date. He or she should indicate on the record—and in writing, if possible—what steps have been taken to obtain the outstanding discovery and identify, if possible, what additional discovery is still outstanding.**

The Task Force fully recognizes the importance of adherence to time standards and case track designations (as provided in Standing Order No. 2-86) in Superior Court, not only as a mechanism of appropriate court management but as an effort to ensure a defendant's right to a speedy trial. However, the Task Force also believes that there are certain instances--for example, when despite best efforts and circumstances beyond the control of the prosecutor, discovery is not complete by the pretrial conference--in which these standards must yield to the necessity of getting a further date for conference so that discovery can be completed or counsel can complete review of discovery. This is particularly true where counsel for both parties are in agreement about the need for such a continuance. The Superior Court has recently amended Standing Order No. 2-86 so as to permit the Court explicitly to consider requests for deadline extensions or continuances to ensure "a defendant's right to fair trial and the effective assistance of counsel, as well as the protection of public safety" and to give "special consideration" to trial continuance requests "jointly made

by the prosecutor and defense attorney” and supported by “good cause.”<sup>134</sup> The Task Force applauds these changes. If, however, the court will not agree to a further date, counsel for the parties should discuss the matter and agree to a further out-of-court completion date.

Automatic discovery under Rule 14 is reciprocal and, therefore, discovery from the defendant to Commonwealth is mandated once the Commonwealth has made its discovery disclosures.

**Best practice: A prosecutor should file a Motion for Reciprocal Discovery, with a deadline for the defendant to provide his or her discovery to the Commonwealth to ensure that the deadline for a defendant’s certificate of compliance is sufficiently in advance of the trial date or alternatively, to allow for time to advance the case to have the Court address the defendant’s discovery obligations.**

Cooperating witnesses<sup>135</sup> present special challenges for prosecutors discharging their discovery obligations.<sup>136</sup> There may likely be information in the possession of law enforcement and the prosecution team about such witnesses that is required to be disclosed. This may be particularly true in regard to items that would be considered promises, rewards or inducements (e.g., payment to or on behalf of cooperating witnesses by law enforcement agency, assistance with housing, immigration, plea agreements, etc.).

**Best practice: Make specific and early inquiry about exculpatory information in cases involving cooperating witnesses, particularly in regard to promises, rewards,**

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<sup>134</sup> Superior Ct. Standing Order, *supra* note 130.

<sup>135</sup> The Task Force uses the term “cooperating witness” to refer to a witness, whom the government intends to call at trial and whose identity is disclosed and who entered into a cooperation agreement and/or plea agreement or was granted immunity as opposed to a confidential informant who will not be called at trial.

<sup>136</sup> See, e.g., Judge Stephen S. Trott, *Words of Warning for Prosecutors Using Criminal as Witnesses*, 47 *Hastings L.J.* 1381, 1391 (July/August 1996).

**inducements and matters that bear upon the witnesses' credibility.*****D. Ensure Compliance with Brady and Rule 14 During Pretrial Preparation.***

Rule 14 requires a prosecutor to produce discovery including *Brady* evidence at the beginning of a case. By necessity, such production only includes discovery that exists and is known to the prosecutor after reasonable inquiry at that time.<sup>137</sup> A prosecutor's duty to produce discovery, including exculpatory evidence, does not end with the distribution of discovery at the beginning of a case or the filing of the Rule 14 certificate of compliance. A prosecutor has a continuing duty to produce discoverable evidence and information if he or she subsequently learns of additional material.<sup>138</sup> For this reason, trial preparation can be a major pitfall if the prosecutor does not recognize that his or her discovery obligations exist and continue with equal force during this and all stages of the case.

In some criminal cases, trial preparation and trial can be years after discovery was otherwise completed in the case. Under these circumstances, it is more likely than not that careful trial preparation, including the review of planned trial exhibits and meetings with the Commonwealth's intended trial witnesses, will produce additional information and evidence that is required to be disclosed by *Brady* and Rule 14. This is true because trial preparation necessarily involves a heightened focus on the Commonwealth's case, as well as on the potential defenses, that even the most conscientious ADA may not have had at the beginning of the case. Because trial preparation involves meetings with witnesses who may, for example, make statements that are inconsistent with statements made earlier in the investigation, in

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<sup>137</sup> Mass. R. Crim. P. Rule 14(a)(3).

<sup>138</sup> *Id.* at 14(a)(4). This "continuing duty" under Rule 14 is another reciprocal duty that applies to defense counsel as well. *Id.*

the trial preparation phase of a case with a significant number of witnesses, it may not be unusual for a prosecutor to send supplemental discovery notices to defense counsel as he or she completes each day of trial preparation. Such supplemental discovery production is consistent, not inconsistent, with diligent and thorough work and the dictates of Rule 14 and *Brady*.

**Best practice: If in the course of trial preparation, a prosecutor receives or becomes aware of other discoverable evidence (including exculpatory evidence), he or she must make prompt, written disclosure of same to defense counsel.**

The form of the disclosure to defense counsel matters less than ensuring the promptness of the disclosure. A formal letter to counsel may be preferable, but an e-mail containing the material information about the supplemental discovery will serve the same function of putting defense counsel on notice of the new information.

*E. Retention and Review of Officer Notes.*

Some members of the Task Force raised a concern that officer notes that may contain exculpatory information were not routinely produced by the Commonwealth unless sought by defense motion or ordered by the Court. The concern was expressed even when an officer, in reliance upon their notes and memory, had subsequently documented the substance of the notes in a police report. The balance struck by Rule 14 in regard to officer notes is in the rule's definition of a "statement" as "a writing made by a person having percipient knowledge of relevant facts and which contains such facts, other than drafts or notes that have been incorporated into a subsequent draft or final report."<sup>139</sup> The Reporter's Notes to this section of Rule 14(d) states that the definition of statement "does not extend to 'drafts or notes that have been incorporated into a subsequent draft or final report.' It would be unnecessary and burdensome to require that every rough

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<sup>139</sup> *Id.* at 14(d).

draft of a police report or other statement to be turned over in addition to the final one.”<sup>140</sup>

There was some disagreement among the Task Force’s members regarding how often exculpatory information contained in an officer’s notes is not *also* contained and formally documented in a subsequent written police report by that officer. The Task Force did endeavor to conduct an informal survey of a number of police departments in the Commonwealth regarding their practices and procedures for the retention of investigative “field notes” (i.e., those notes that a law enforcement officer takes contemporaneously, or close to contemporaneously, with his or her investigation, including witness interviews and observations at a crime scene).

This informal survey and a discussion of the practices of the departments represented on the Task Force--the Massachusetts State Police and the Boston Police Department--revealed a divergence of practices. Some departments observed that their officers typically do not retain their notes once they use them to complete their official report; one department required officers to retain their notebooks for a number of years, but such retention is not tied to the life of any particular case or discovery practice. As a matter of practice (as opposed to formal policy), some departments reported that it is more often the case with detectives than patrol officers that notes are retained. Although Massachusetts State Police officers are not required to take field notes (as they are to complete investigative reports), they “are strongly encouraged” to do so and a State Police Order requires that “[a]ll field notes shall be preserved by the individual member and shall be made available upon request of a supervisor.”<sup>141</sup>

The Boston Police Department reports that it has advised all of its detectives to preserve their notes--a policy its homicide unit

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<sup>140</sup> Reporter’s Note, Mass. R. Crim. P. Rule 14(d).

<sup>141</sup> DEP’T OF MASSACHUSETTS STATE POLICE GEN. ORDER Inv-01 (revised Apr. 23, 2009) [hereinafter STATE POLICE GEN. ORDER].



adopted in 2007. These notes are maintained in the case file along with any subsequent report the officer produces. Although the sample of departments surveyed was too small to observe any significant trends, there is some suggestion that police practice may be developing in such a way that law enforcement personnel involved in the investigation of the most serious crimes (e.g., detectives investigating homicides) are more likely to retain their notes.

At least one jurisdiction in the Commonwealth has adopted a rule requiring the retention of officer notes. In 1998, the U.S. District Court for the District of Massachusetts adopted Local Rule 116.9 that provides that “[a]ll contemporaneous notes, memoranda, statements, reports, surveillance logs, tape recordings, and other documents memorializing matters relevant to the charges contained in the indictment made by or in the custody of any law enforcement officer whose agency at the time was formally participating in an investigation intended, in whole or in part, to result in a federal indictment shall be preserved until the entry of judgment unless otherwise ordered by the Court.”<sup>142</sup> This rule makes a distinction between the contemporaneous notes that must be retained and the rough drafts of a police report that do not once the final report is drafted.<sup>143</sup> The number of federal investigations (and the number of local departments that may participate in such investigations) is far fewer than the total number of state criminal investigations that are conducted day in and day out by patrol officers and detectives throughout the Commonwealth. The Task Force was, therefore, cognizant of the burden that a similar state rule might create. However, given the Task Force’s particular focus on the most serious crimes, the Task Force believes that some suggested best practices emerge.

**Best practice: Law enforcement officers should retain field notes in serious felony cases typically charged and prosecuted in Superior Court.**

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<sup>142</sup> MASS. DIST. CT. R. 116.9(A) (1998).

<sup>143</sup> *Id.* at 116.9(B).

Although the Task Force has only anecdotal reports from some experienced counsel to suggest that notes contain discoverable *Brady* information not contained in subsequent police reports produced in discovery, the more prudent practice is retention of these notes to ensure that if they contain such information, it is subsequently reviewed and, if necessary, produced by the Commonwealth to defense counsel. (See discussion below). Such review and production is obviously not possible if such notes are not retained.

**Best practice: Law enforcement officers should continue to take field notes, to the extent feasible or otherwise encouraged by their departments and should endeavor to include all material and relevant information from those field notes in any subsequently generated report.**

There was some concern by the Task Force that the adoption of any widespread rule about the retention of field notes might chill creation of them. All interested entities including the police departments and the parties have an interest in having field notes taken as, at a minimum, they may serve as a memory trigger for the officer when he or she composes the final report. Although the notes may be incomplete or indecipherable to anyone but the author, they are contemporaneous or more contemporaneous than any final report. Along these lines, the Massachusetts State Police policy cited above also contains a section requiring that “[a]ll relevant facts and information in an investigator’s field notes shall be included in the investigative report”<sup>144</sup> and the Task Force encourages other departments to require the same practice.

Retention of notes by officers also has implications for best practices by prosecutors. As discussed above, although the obligation to produce *Brady* evidence concerns both the attorneys and law enforcement officers, the discharge of this obligation falls

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<sup>144</sup> STATE POLICE GEN. ORDER, *supra* note 141.

on the prosecutor.<sup>145</sup> The Supreme Judicial Court has recognized that prosecutors are better positioned to determine what is *Brady* material and what is not, even though, as discussed above, it is critical that law enforcement officers understand what production *Brady* requires. What the SJC has said about victim-witness advocates applies with equal force to police officers:

Although [victim witness] advocates may have acquired extensive knowledge of the legal system, they generally are not attorneys and may be unable to determine whether their notes contain exculpatory evidence. Further, they may be unaware whether a victim or witness has communicated a different version of events to the police, grand jury, prosecutor, or others. ... Although the primary burden in this area rests on prosecutors, advocates themselves have a duty to relay to the prosecutor any information they obtain that they believe is exculpatory.<sup>146</sup>

**Best practice: Prosecutors should review notes retained by officers in felony cases typically charged and prosecuted in Superior Court to determine if they contain *Brady* exculpatory material.**

Where police notes contain *Brady* exculpatory material, the prosecutor is obligated to disclose the exculpatory information contained in the notes. The form of the disclosure may vary from case to case. For example, the production of redacted notes may be appropriate where such notes include personal information

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<sup>145</sup> *Kyles*, 514 U.S. at 438 (“the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police”); see *Commonwealth v. Garrey*, 436 Mass. 422, 441, 442 n.12 (2002) (affirming denial of defendant’s motion for new trial where defendant had failed to show that his right to a fair trial was jeopardized by the Commonwealth’s failure to preserve and disclose the officers’ notes, but noting that “[t]he prosecutor has an affirmative obligation diligently to search for and preserve materials that are discoverable in every criminal case”); see also *Commonwealth v. Daniels*, 445 Mass. 392, 402 (2005) (concluding that “once the Commonwealth has notice that the defendant seeks specific favorable information in ... its possession, it must examine the material and furnish that information to the defense if it is favorable”).

<sup>146</sup> *Commonwealth v. Liang*, 434 Mass. 131, 136 (2001).

regarding witnesses (e.g., social security numbers; phone numbers, etc. of civilians) or other information that is not otherwise required to be disclosed. The Task Force notes that this suggested best practice concerns the discovery of exculpatory information in notes and not the admissibility of any such field notes at trial, particularly where a subsequent police report was generated. Ultimately, the use or admissibility of such notes at trial should be left to counsel's advocacy and the ruling of the court.

*F. Court Inquiry to Prosecutors and Defense Counsel about Discovery Obligations at the Final Pretrial Conference.*

Rule 14 requires that the parties file a certificate of compliance when they have completed discovery. This certificate of compliance is most often filed in connection with the pretrial conference or, at any rate, before the parties have conducted trial preparation in the lead up to trial. According to anecdotal accounts, some Superior Court judges, particularly those sitting in Suffolk County, routinely inquire about the completion of discovery at the final pretrial conference, which in many cases may be long after the parties have filed their certificates of compliance.

**Best practice: The judge at the final pretrial conference should inquire of counsel for both parties about whether discovery has been completed.**

Although some members of the Task Force were initially concerned that such inquiry would be redundant of both parties' obligation under Rule 14 to file certificates of compliance regarding the completion of discovery, the timing of such inquiry at the final pretrial conference is consistent with the parties' continuing obligation to produce discovery particularly as it may relate to supplemental discovery obtained during the course of trial preparation (as discussed above) which would likely be under way at the time of the final pretrial conference.

#### 4. Core Defense Attorney Responsibilities.

##### *Introduction.*

A principal protection against wrongful convictions in our system of criminal justice is a vibrant, skillful and zealous criminal defense bar. The Task Force recognizes that criminal defense attorneys must always rely on their independent professional judgment in their representation of clients.<sup>147</sup> Nonetheless, shortcomings in defense counsel performance can contribute to the risk of a wrongful conviction, and therefore the Task Force concluded that it should establish a set of core expectations for attorneys who undertake the serious responsibility of representing the accused in criminal prosecutions.

These core expectations have been distilled from a number of sources and from the experience of members of the Task Force. They are not intended to supplant the more detailed standards and guidelines available elsewhere to assist criminal defense lawyers in representing clients. For example, the Massachusetts Committee for Public Counsel Services (“CPCS”) Performance Guidelines Governing the Representation of Indigent Persons in Criminal Cases (“CPCS Performance Guidelines”) addressed to lawyers who represent indigent persons in criminal cases, also provide valuable information for retained counsel.<sup>148</sup> The American Bar Association Criminal Justice Section Defense Standards<sup>149</sup> provide additional assistance and guidance to lawyers who represent criminal defendants.

Moreover, every criminal defense attorney should be familiar with the specific factors which increase the risk of a

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<sup>147</sup> *Commonwealth v. Morgan*, 453 Mass. 54, 59-60 (2009).

<sup>148</sup> MASSACHUSETTS COMMITTEE FOR PUBLIC COUNSEL SERVICES, PERFORMANCE GUIDELINES GOVERNING REPRESENTATION OF INDIGENT PERSONS IN CRIMINAL CASES, [hereinafter CPCS PERFORMANCE GUIDELINES]. A full set of the Guidelines is available at the following address on the BBA’s website: [http://www.bostonbar.org/prs/reports/TaskForceToImproveCJS\\_Nov09.pdf](http://www.bostonbar.org/prs/reports/TaskForceToImproveCJS_Nov09.pdf).

<sup>149</sup> AM. BAR ASS’N, ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION 119–178 (3rd ed., 1993).

wrongful conviction. Many of those factors are described in detail in the book *Actual Innocence*.<sup>150</sup> Defense lawyers should also be vigilant to ensure that new adversarial procedures designed to address evolving issues in the criminal justice system, such as those restricting the dissemination of certain discovery materials or expanding reciprocal discovery obligations, do not have the unintended consequence of enhancing the risk of wrongful convictions.<sup>151</sup>

Based on the publicly available standards and the experience of its members, the Task Force has identified the following core responsibilities that every criminal defense lawyer representing a defendant accused of a serious felony commonly tried in Superior Court should fulfill in order to maximize the likelihood that wrongful convictions are avoided:

**A. *Competence, Experience, and Knowledge of Criminal Law and Procedure.***

- **Before undertaking the defense of a person accused of a crime, an attorney should possess sufficient experience and expertise to provide fully competent representation to the client**

“Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.”<sup>152</sup> Furthermore, counsel should carefully consider whether he or she is the right lawyer for the client and the nature of the case. For example, an attorney who is not well versed in current criminal law or whose experience is insufficient to defend a case as severe or complex as the one at hand should not agree to provide representation to the client. Attorneys may wish to consult the

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<sup>150</sup> DWYER, NEUFELD & SCHECK, *supra* note 1, at app. 1 (“A Short List of Reforms to Protect the Innocent”), app. 2 (“DNA Exonerations at a Glance”).

<sup>151</sup> *See, e.g., Commonwealth v. Holliday*, 450 Mass. 794, 803 (2008); *Commonwealth v. Durham*, 446 Mass. 212, 217-21 (2006).

<sup>152</sup> MASS. R. PROF. C. Rule 1.1; *see also* CPCS PERFORMANCE GUIDELINES at 1.2 (“Counsel should accept the more serious and complex criminal cases only after having had experience and/or training in less complex criminal matters.”).

relevant CPCS certification requirements<sup>153</sup> for additional guidance in this self-assessment.

- **Counsel should be knowledgeable about Massachusetts criminal law and procedure and remain current with changes in criminal statutes, rules and case law.**
- **Attorneys who represent persons in criminal cases should participate in at least eight hours per year of continuing legal education on criminal law topics.**

***B. Actions to Preserve Evidence and Officers' Notes.***

- **At the first court appearance, counsel should file motions asking the court to order the police and prosecution to preserve all evidence within their possession or control, including "911" and turret recordings, any biological, forensic and identification evidence, any police reports and witness statements, and any police notes documenting the investigation.**

Among the cases which counsel should review and consider citing are *Brady v. Maryland*, *Kyles v. Whitley*, *Commonwealth v. Garrey*, *Commonwealth v. Bing Sial Liang*, *Commonwealth v. Kater*, *Commonwealth v. Simmarano*, *Commonwealth v. Martin*, *Commonwealth v. Tanner*, *Commonwealth v. Cameron*, and *Commonwealth v. St. Germain*.<sup>154</sup>

***C. Fact Investigation.***

Absent strong countervailing considerations, counsel should take the following steps:

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<sup>153</sup> The CPCS Certification Requirements are available at [http://www.publiccounsel.net/certification\\_requirements/criminal\\_cases/criminal\\_cases\\_index.html](http://www.publiccounsel.net/certification_requirements/criminal_cases/criminal_cases_index.html).

<sup>154</sup> See 514 U.S. at 437; 373 U.S. at 87; 436 Mass. at 442 n.12; 434 Mass. at 136–37; 432 Mass. 404, 418 (2000); 427 Mass. at 823–24; 381 Mass. at 261 n. 8; 50 Mass. App. Ct. 312, 317, 318 n. 6 (2000); 25 Mass. App. Ct. 576, 583 (1998); 25 Mass. App. Ct. 538, 545–46 (1988); see also CPCS PERFORMANCE GUIDELINES at 2.1 (discussing preliminary discovery issues).

- **Promptly investigate the circumstances of the case and explore all known and discoverable facts;**
- **Visit the crime scene and evaluate whether to have photographs taken and other descriptive documentation (e.g. measurements, maps) prepared;**
- **Interview or arrange for the interview of every witness the Commonwealth's discovery identifies as possessing relevant information;**
- **Interview or arrange for the interview of every witness the defendant or his supporters identifies as possessing relevant information. In appropriate circumstances, counsel or investigator might canvass the area near the crime scene to determine whether there are additional witnesses who are as yet unknown;**
- **Inspect all physical evidence in the Commonwealth's possession.**

*D. Pre-Trial Discovery.*

Counsel should:

- **Promptly review automatic discovery provided by the Commonwealth pursuant to Rule 14 and be vigilant to ensure that the prosecution has complied fully with its obligation to provide all discovery required by that rule.**

In particular, counsel should review any automatic discovery provided pursuant to Rule 14(a)(1)(A)(viii), which requires production of "a summary of identification procedures, all statements made in the presence of or by an identifying witness that are relevant to the issue of identity or the fairness or accuracy of the identification procedures;" and Rule 14(a)(1)(A)(ix), which requires disclosure of "all promises, rewards or inducements made to witnesses the party intends to present at trial."<sup>155</sup>

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<sup>155</sup> MASS. R. CRIM. P. Rule 14(a)(1)(A)(viii), (ix).



- **File a motion seeking “[a]ny facts of an exculpatory nature[,]” under Rule 14 (a) (1) (A) (iii).**

While this category of discovery is, by rule, “automatic,” counsel should nevertheless make early and insistent demand for exculpatory evidence and should do so in as specific terms as possible. Counsel should pay careful heed to the Reporter’s Notes, revised in 2004, which accompany the Rule, and should read and cite the cases described therein. In particular, counsel should specifically request items that may be exculpatory, as doing so will “provide the Commonwealth with notice of the defendant[']s interest in a particular piece of evidence”.<sup>156</sup> Moreover, the specificity of the request increases the burden placed upon the prosecution to produce the requested item or suffer a serious consequence for failing to do so.<sup>157</sup>

- **Carefully review efforts by the prosecution to obtain “protective orders” under Rule 14 (a) (6), and consider requesting that the Court limit the reach of any such orders which the Court seems prepared to approve.**

Defense counsel should take care to ensure that any protective orders the prosecution seeks are not broader than the law permits. As the Reporter’s Notes state, these orders should be reserved for “the unusual case in which the granting of the discovery will work to the injury of the person whose material is to be discovered or to the injury of some third person.”<sup>158</sup> Counsel should emphasize the limited nature of the order as actually implemented in *Commonwealth v. Holliday*, 450 Mass. 794 (2008) to restrict any limitations that the prosecution asks the court to impose, and utilize the 2006 enactment of G.L. c. 268 § 13D (d), which requires a showing of “specific and articulable facts including, but not limited to, the defendant’s past history of violence and the nature of the

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<sup>156</sup> See *Commonwealth v. Molina*, 454 Mass. 232, 237 n.5 (2009), quoting *Commonwealth v. Wilson*, 381 Mass. 90, 108–09 (1981).

<sup>157</sup> *Commonwealth v. Caillot*, 454 Mass. 245, 262 n. 11 (2009), quoting *Commonwealth v. Gallarelli*, 399 Mass. 17, 20 (1987).

<sup>158</sup> Reporter’s Note, Mass. R. Crim. P. Rule 14(a).

charges against the defendant, that the defendant poses a threat to a witness or victim” in order to justify non-disclosure of grand jury minutes by defense counsel to the defendant.”<sup>159</sup>

- **Consider whether to file motions seeking additional discovery, including discovery of notes of investigating officers and notes and underlying data prepared or relied upon by the Commonwealth’s experts or persons who prepared reports of physical examinations, scientific tests or experiments.**<sup>160</sup>

***E. Substantive Pre-Trial Motions.***

Counsel should:

- **Evaluate whether it is in the client’s interest to file motions to dismiss and/or to suppress evidence such as identifications or evidence seized by the police.**<sup>161</sup> Where appropriate, counsel should request the court to conduct an evidentiary hearing on such motions.
- **In appropriate cases, consider filing a motion for production of records held by a third party, pursuant to Mass. R. Crim P. 17 (a) (2), *Commonwealth v. Lampron*, and *Commonwealth v. Dwyer*.**<sup>162</sup>

***F. Reciprocal Discovery.***

- **Counsel should carefully review any motion filed by the prosecution which seeks to compel reciprocal discovery under the decision in *Commonwealth v. Durham*.**<sup>163</sup>

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<sup>159</sup> MASS. GEN. LAWS. ch. 268, § 13D(d); *Holliday*, 450 Mass. at 804 n.12 (expressing “no view on how this statute might affect the issuance of protective orders similar to the one entered in these cases”).

<sup>160</sup> See MASS. R. CRIM. P. Rule 14(a)(1)(vi)–(vii); CPCS PERFORMANCE GUIDELINES at 2.1 (discussing discovery motions); see also AM. BAR ASS’N, ABA STANDARDS FOR CRIMINAL JUSTICE DNA EVIDENCE 81–90 (3rd ed., 2007).

<sup>161</sup> See CPCS PERFORMANCE GUIDELINES at 4.7(a)–(i) (non-exhaustive list of substantive motions).

<sup>162</sup> MASS. R. CRIM. P. Rule 17(a)(2); 448 Mass. 122, 139–48 (2006); 441 Mass. 265, 267–70 (2004).

<sup>163</sup> 446 Mass. at 217-21.

Counsel should be aware of the argument that *Durham* does not apply to cases initiated on or after September 7, 2004 and should be prepared, in appropriate cases, to advance and preserve that argument.<sup>164</sup>

**G. *Expert Investigation.***

- **For each category of expert evidence that the Commonwealth expects to offer or defense counsel perceives to be possibly relevant to a material issue in the case, counsel should consider whether to retain or seek funds to retain expert assistance. Absent strong countervailing considerations, defense counsel should engage (or seek funds to engage) a consulting expert to review the prosecution’s expert evidence whenever the Commonwealth’s expert evidence purports to connect the defendant to inculpatory physical evidence.**<sup>165</sup>

For example, absent strong countervailing considerations, counsel should retain or seek funds to retain a defense consulting expert to review the Commonwealth’s proposed DNA evidence, fingerprint evidence, and similar kinds of evidence which may be introduced against the defendant. In cases of significant forensic complexity, counsel should consider retaining or seeking the assignment of co-counsel or associate counsel who is more experienced or more learned in the specific forensic evidence field at issue in the case.

- **In appropriate cases, counsel should file a motion contesting the admissibility of scientific or forensic evidence which the prosecution proposes to introduce, utilizing the legal standards set forth in *Daubert v. Merrell Dow Pharmaceuticals* and *Commonwealth v. Lanigan*, and the 2009 National Academy of**

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<sup>164</sup> *Id.* at 213 n.1, 244 n.10 (Cordy, J., dissenting) (“[t]he rule the court interprets today is the former version, and the current version, Mass. R. Crim. P. 14, as appearing in 442 Mass. 1518 (2004), does not include the language the court relies on in this case.”). Counsel should further argue that allowance of a *Durham* motion would violate the defendant’s constitutional right of confrontation under Article 12 of the Declaration of Rights, and that, at a minimum, any prosecutorial request for *Durham*-type discovery must be based upon “a showing of particular hardship or special circumstance” under the Rule. *Id.* at 230–32 (Marshall, C.J., dissenting), 244 n.10 (Cordy, J., dissenting).

<sup>165</sup> See CPCS PERFORMANCE GUIDELINES at 4.7(h) (“[c]ounsel should consider retaining experts as consultants to aid in trial preparation, not only as witnesses.”).

Sciences Report, *Strengthening Forensic Science in the United States: A Path Forward*.<sup>166</sup>

**H. Vigorous Trial Representation.**

- **Before the trial begins, counsel should be completely prepared, and should have accomplished all the steps described in CPCS Performance Guidelines (criminal) 6.1 (a) through (e), General Trial Preparation, including the research, preparation and filing of such motions [*in limine*] as may advance the client's cause.**
- **Counsel should be vigilant in guarding against being forced prematurely to trial due to rigid application of the Judicial Time Standards.**

"The right to counsel means the right to effective assistance of counsel."<sup>167</sup> Unprepared counsel cannot meet this constitutionally required benchmark. Therefore, counsel who is not fully prepared to represent his or her client should contest any order to proceed to trial, utilizing all appropriate measures, including consideration of filing a petition for a writ of general superintendence under G.L. ch. 211, § 3.<sup>168</sup>

- **Counsel should represent the defendant's interests throughout the jury selection process, keeping in mind the considerations enumerated in CPCS Performance Guideline 6.4;**
- **Absent extraordinary circumstances, counsel should present an opening statement for the defense, keeping in mind the objectives described in CPCS Performance Guideline 6.5 (c);**
- **Counsel should confront the prosecution's case vigorously, with full preparedness and a coherent theory of defense, see CPCS Performance Guideline 6.6. In particular, counsel should object to the introduction of possibly irrelevant,**

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<sup>166</sup> 509 U.S. 579, 592–95 (1993); 419 Mass. 15, 25–27 (1994); see generally STRENGTHENING FORENSIC SCIENCE, *supra* note 102.

<sup>167</sup> *Lavallee v. Justices in the Hampden Superior Court*, 442 Mass. 228, 235 (2004).

<sup>168</sup> M.G.L. c. 211 § 3.

prejudicial or otherwise inadmissible evidence sought to be introduced by the prosecutor and should take all appropriate steps to protect the record, so that trial errors might be fully preserved for appellate review;

- Counsel should be prepared to present the defense case through the Commonwealth's witnesses and should be prepared to submit proof of facts which he or she knows to be true, but which the prosecution witnesses deny or fail to confirm; in such circumstances, counsel must summons the witnesses and/or records which are essential to proving the relevant facts;<sup>169</sup>
- In consultation with the client, counsel should prepare and, if appropriate, present the defense case, bearing in mind the considerations set forth in CPCS Performance Guideline 6.7;
- Counsel should present requests for jury instructions in accordance with legal precedent and the theory of the defense, and should present a carefully prepared and persuasive closing argument setting forth the defense theory of the case;<sup>170</sup>
- In the event of a conviction, counsel should prepare carefully for the sentencing hearing and should consider all possible alternatives to incarceration for the client.<sup>171</sup> If a sentence of incarceration is imposed, counsel should consider filing a Motion for Stay of Sentence.<sup>172</sup>
- Absent extraordinary circumstances and after consultation with appellate counsel, a Motion to Stay Sentence Pending Appeal should be filed on behalf of a client who may have been wrongfully convicted.

Such Motion for Stay of Sentence should include a strong argument that the appeal raises "an issue which is worthy of presentation to an appellate court, one which offers some reasonable possibility of

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<sup>169</sup> See *Commonwealth v. Ly*, 454 Mass. 223, 229-30 (2009).

<sup>170</sup> See *Commonwealth v. Ly*, 454 Mass. 223, 229-30 (2009).

<sup>171</sup> See *id.* at 7.1-7.5.

<sup>172</sup> See *id.* at 8.1(c).

a successful decision in the appeal,"<sup>173</sup> and might include reference to the "customary and long-standing practice" of Massachusetts courts to grant stays of sentence, absent security concerns, lest the universal right of appeal "be made nugatory in the case of a short sentence, and be impaired in the case of a larger sentence: the conviction may be reversible, but the time spent in prison is not."<sup>174</sup>

- **Counsel should file a Notice of Appeal in every case, unless specifically instructed not to do so by the client.**

*I. Post-Trial Responsibilities.*

- **Before undertaking to represent a convicted defendant on appeal, counsel should read carefully the CPCS Performance Standards Governing the Representation of Clients on Criminal Appeals and Post-Conviction Matters.**
- **Appellate counsel should not confine his or her representation exclusively to direct appellate issues, but should also consider and investigate grounds for a motion for a new trial.**
- **Appellate counsel should take care to present constitutional arguments under the pertinent provisions of both the Massachusetts Constitution and Declaration of Rights, as well as the Constitution of the United States.**

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<sup>173</sup> *Commonwealth v. Allen*, 378 Mass. 489, 498 (1979), quoting *Commonwealth v. Levin*, 7 Mass. App. Ct. 501, 504 (1979).

<sup>174</sup> *Levin*, 7 Mass. App. Ct. at 512-13.

**VIII. CONCLUSION AND NEXT STEPS**

From the outset, the members of the Task Force believed that their work would have little purpose if the Task Force produced a Report that simply sat on a shelf and did not prompt meaningful reform within the criminal justice system. Now more than ever, the Task Force believes that sustained and concerted action will be required to fully implement the various reforms that it has proposed. Accordingly, the Task Force recommends that the Boston Bar Association create a Standing Committee on Criminal Justice Improvements that will carry forward the work of the Task Force.

A Standing Committee would have a variety of objectives. First, the Standing Committee could work on behalf of the legislation that this Task Force Report proposes in the areas of post-conviction access to forensic evidence, preservation of biological evidence, and revising the composition of the Forensic Sciences Advisory Board. A Standing Committee could work with the Boston Bar Association's legislative liaison to maximize the likelihood that the proposed bills are enacted into law.

Second, a Standing Committee could monitor and periodically report on the extent to which police departments, prosecutors' offices, and defense counsel have adopted the recommendations made in this Report. The law firms in which a number of the members of the Task Force work could provide support to the Standing Committee's efforts to survey and periodically report on the adoption of the best practices recommended by the Task Force. In this regard, the Standing Committee would be ideally suited to facilitate and monitor the implementation of the Task Force's several police training recommendations.

In the short term, the Standing Committee could help identify measures that can be instituted without a substantial investment of time or personnel hours. For example, several of the Task Force's recommendations simply require the adoption of

model protocols and policies that are readily available--some of which appear in the Appendix to this Report. Similarly, the Standing Committee could help police departments prioritize the recommendations in the Report and suggest subject matter that could be conveyed through informal training opportunities that occur throughout the calendar year. For example, a number of organizations of police chiefs, such as the Massachusetts Chiefs of Police Associations and Massachusetts Major City Chiefs, as well as police chiefs' organizations organized by county, gather regularly. These periodic meetings may provide a convenient forum to provide training on several of the areas discussed in this Report. The Standing Committee could work with police organizations and the District Attorneys' offices to help coordinate these efforts and to ensure that they continue in the future.

Individually and cumulatively, the recommendations in this Report suggest a need for a thorough review of the quality and availability of the training provided to law enforcement in order to ensure fair and accurate investigations and prosecutions, and to ensure that best practices are being taught and adequately made available to recruits, veteran officers, and detectives. The Task Force recognizes that in the current fiscal environment, even such a review, let alone the enhancement or increased availability of training for law enforcement, may not be feasible. The Standing Committee could coordinate with the state's Municipal Police Training Committee in efforts to update the curriculum and at the same time lobby for sufficient revenues to be made available to permit the improvements in law enforcement training that the Task Force recommends.

Third, to the extent that any new wrongful convictions come to light, a Standing Committee could objectively and independently review those cases in order to determine whether they reveal new or different systemic flaws that warrant additional recommendations or "best practices."

\* \* \* \* \*



Like any system that depends on the actions of inherently fallible men and women, our criminal justice system is imperfect. But recognizing the system is imperfect is no excuse for failing to take the steps necessary to make it as fair, just, and reliable as humanly possible. The torment of an innocent man wrongly imprisoned, the trauma experienced by a victim of a dangerous criminal who should be in custody but is not--these are the human costs we pay when the system fails. For every innocent defendant convicted of a crime he did not commit, a truly guilty perpetrator remains free to commit other crimes, and the expectation of the victim and the public that justice will be done goes unrealized.

Recognizing the fault lines in the criminal justice system--the dangers associated with mistaken eyewitness identification, flawed forensic evidence, false confessions, discovery failures, and inadequate defense performance--is a first step, but only a first step. The Task Force believes that adopting the recommendations set out in this Report will make it more likely that our system will deliver just, reliable and accurate results. In short, we believe that our recommendations, if adopted, will help police, prosecutors, defense lawyers and judges do justice. We urge the legal and law enforcement communities, legislators, and other policy makers to give these recommendations their full support.

David E. Meier, Co-Chair  
Martin F. Murphy, Co-Chair  
Hon. Christopher J. Armstrong  
Allison D. Burroughs  
Denise Jefferson Casper  
Jennifer L. Chunias  
James M. Connolly  
Edward F. Davis  
Shannon L. Frison  
William H. Kettlewell  
Randy Gioia  
William J. Leahy

Elizabeth A. Lunt  
Gregory J. Massing  
Mary Kate McGilvray  
Robert M. Merner  
Sejal H. Patel  
Joseph F. Savage, Jr.  
David M. Siegel

## Appendix of Exhibits

# Exhibit A

AN ACT TO PROVIDE ACCESS TO SCIENTIFIC AND  
FORENSIC ANALYSIS.

*Be it enacted by the Senate and House of  
Representatives in General Court assembled, and  
by the authority of the same, as follows:*

SECTION 1. Legislative Findings

The general court hereby finds that (1) forensic and scientific techniques are often used to analyze evidence or biological material obtained during the investigation of a crime, and, as these techniques become more accurate, their use can, in some cases, conclusively establish a person's guilt or innocence, or otherwise provide significant probative evidence; (2) as these techniques have improved, they have allowed analyses of earlier obtained evidence or biological materials; (3) in some circumstances, modern techniques can be used to demonstrate that a conviction that predates the development of such techniques was based on incorrect factual findings, and these forensic and scientific techniques provide a more reliable basis for establishing a factually correct verdict than the evidence available at the time of the original conviction; (4) in recent years, there have been a significant number of exonerations based on the results of newly developed forensic and scientific techniques; (5) the purpose of this chapter is 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.

SECTION 2. The General Laws are hereby amended by adding  
the following new chapter:—

Chapter 278A. Post Conviction Access to Forensic  
and Scientific Analysis.

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### § 1. Definitions.

As used in this chapter, the following words shall have the following meanings, unless the context clearly requires otherwise:—

“Analysis” shall mean the process by which a forensic or scientific technique is applied to evidence or biological material to identify the perpetrator of a crime.

“Conviction” shall mean any verdict or finding of guilty, a plea of guilty, or a plea of nolo contendere, entered by the trial court.

“Criminal offender databases” shall include: the State DNA Database, G. L. c. 22E; the Sex Offender Registry, G. L. c. 6, §§ 178C-N; and the Criminal Offender Record Information System, G. L. c. 6, § 168-178A.

“Factually innocent” shall describe a person convicted of a criminal offense who did not commit that offense.

“Governmental entity” shall mean any official body of the commonwealth, or of any county, city, or town within the commonwealth.

“Inventory” shall mean a detailed listing, including a particularized description of each listed item.

“Moving party” shall mean a person who files a motion pursuant to this Chapter. “Post conviction” shall indicate any time after which a conviction has been entered.

“Prosecuting attorney” shall mean the District Attorney for the district in which the moving party was convicted, or the Attorney General of the commonwealth.

“Replicate analysis” shall mean the duplication of an analysis performed on a particular item of evidence or biological material.

“Underlying case” shall mean the trial court proceedings that resulted in the conviction of the moving party.

“Victim” shall mean any natural person who suffered direct or threatened physical, emotional, or financial harm as the result of the commission or attempted commission of the crime that is the

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subject of the underlying case, and shall also include the parent, guardian, legal representative, or administrator or executor of the estate of such person if that person is a minor, incompetent, or deceased.

"Victim and witness assistance board" shall mean the entity established by G. L. c. 258B, § 4.

### § 2. Applicability.

Any person who has been convicted of a criminal offense in a court of the commonwealth, and is in custody or whose liberty is restrained as the result of that conviction, and asserts that he is factually innocent of that criminal offense, may file a motion for forensic or scientific analysis pursuant to this Chapter. The procedures set forth in this chapter shall not be construed to prohibit the performance of forensic or scientific analysis under any other circumstances, including by agreement between the person convicted of a criminal offense and the prosecuting attorney.

### § 3. Requirements and procedures for filing.

(a) A person seeking relief pursuant to this Chapter shall file a motion in the court in which the conviction was entered, using the same caption and docket number as identified the underlying case.

(b) The motion shall include the following information, and when relevant, shall include specific references to the record in the underlying case, or to affidavits that are filed in support of the motion that are signed by a person with personal knowledge of the factual basis of the motion:

- (1) The name and a description of the requested forensic or scientific analysis; and
- (2) Information demonstrating that the requested analysis is admissible as evidence in courts of the commonwealth; and
- (3) A description of the evidence or biological material on which the analysis may be conducted, including its location and chain of custody if known, and

(4) 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 in the underlying case; and

(5) Information demonstrating that the evidence or biological material has not been subjected to the requested analysis because:

1. The requested analysis had not yet been developed at the time of the conviction; or

2. The results of the requested analysis were not admissible in courts of the commonwealth at the time of the conviction; or

3. The moving party and his attorney were not aware of and did not have reason to be aware of the existence of the evidence or biological material at the time of the underlying case and conviction; or

4. The moving party's attorney in the underlying case was aware at the time of the conviction of the existence of the evidence or biological material, the results of the requested analysis were admissible as evidence in courts of the commonwealth, and a reasonably effective attorney would have sought the analysis; or

5. The evidence or biological material was otherwise unavailable at the time of the conviction.

(c) If the moving party is unable to include for filing with the motion any of the items or information described in subsection (b), or if the moving party lacks items or information necessary to establish any of the factors listed in section 7(b), the moving party shall include a description of efforts made to obtain such items and information and may move for discovery of such items or information from the prosecuting attorney or any third party



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(d) The moving party shall file with the motion an affidavit stating that he or she is factually innocent of the offense of conviction and that the requested forensic or scientific analysis will support the claim of innocence. A person who pleaded guilty or nolo contendere in the underlying case may file a motion under this Chapter. A judge shall not find that identity was not or could not have been a material issue in the underlying case because of the plea. A person who is alleged to have, or admits to having, made a statement that is or could be incriminating may file a motion under this Chapter. A judge shall not find that identity was not or should not have been a material issue in the underlying case because the moving party made, or is alleged to have made, an incriminating statement. If the moving party entered a plea of guilty or nolo contendere to the offense of conviction or made an incriminating statement, the moving party shall state in the affidavit that the claim of actual innocence is not made notwithstanding the plea or incriminating statement.

(e) The court may deny, without prejudice, any motion which fails to include all the information required by this Section.

### § 4. Service of process and response to motion.

(a) The moving party shall file the motion with the court which adjudicated the underlying case and shall serve a copy of the motion on the prosecuting attorney.

(b) The prosecuting attorney shall have 60 days to file a response with the court and shall simultaneously serve the response on the moving party. The prosecuting attorney may request enlargements of time in which to file the response, which the court may allow for good cause shown.

(c) The prosecuting attorney's response shall include any specific legal or factual objections that the prosecuting attorney has to the requested analysis.

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### § 5. Appointment of counsel.

The judge in his discretion may assign or appoint counsel to represent a moving party in the preparation and presentation of motions filed under this Chapter.

### § 6. Hearing.

(a) The court shall order a hearing on the motion if it conforms with the requirements of §3.

(b) The judge who conducted the trial or accepted the moving party's plea of guilty or nolo contendere in the underlying case shall conduct the hearing if possible.

(c) The moving party may file a motion requesting that he be present at the hearing on the motion. If the judge allows such a motion, the judge shall order the commonwealth to produce the moving party at the hearing.

### § 7. Ruling on the Motion.

(a) The judge shall state findings of fact and conclusions of law on the record, or shall make written findings of fact and conclusions of law, that support the decision to allow or deny a motion brought under this Chapter.

(b) The judge shall allow the requested forensic or scientific analysis if each of the following has been demonstrated by a preponderance of the evidence:

(1) that the evidence or biological material exists;

(2) that the evidence or biological 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;

(3) that the evidence or biological material has not been subjected to the requested analysis;

(4) 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 crime in the underlying case;

(5) that the purpose of the motion is not the obstruction of justice or delay; and

(6) that the results of the particular type of analysis being requested have been found to be admissible in courts of the commonwealth.

(c) The judge on motion of any party, after notice to the opposing party and an opportunity to be heard, may authorize such discovery from the prosecuting attorney or any third party as is deemed appropriate, subject to appropriate protective orders or an order to the moving party to produce reciprocal discovery. If, in response to a motion made under section 3(c), the court finds good cause for the moving party's inability to obtain items or information required under sections 3(b) and 7(b), the court may order discovery, consistent with Rules 14 and 17 of the Massachusetts Rules of Criminal Procedure, to assist the moving party in identifying the location and condition of evidence or biological material that was obtained in relation to the underlying case, regardless of whether it was introduced at trial or would be admissible.

§ 8. Laboratory.

(a) In allowing a motion under this Chapter, the judge shall specify conditions on the analysis, including, but not limited to, the transportation, handling, and return of evidence or biological materials, to protect the integrity of the evidence or biological material and the analysis.

(b) The prosecuting attorney and the moving party shall agree on a forensic services provider to conduct the analysis, which may include the department of state police or city of Boston forensic services units.

(c) If the prosecuting attorney and the moving party are unable to agree on a forensic services provider, the judge shall designate a provider that is accredited by the American Society of Crime Laboratory Directors Laboratory

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Accreditation Board and has the capability to perform the requested analysis. For purposes of this section, "laboratory" shall refer to the forensic services provider selected under paragraph (b) or (c).

(e) The laboratory shall give equal access to its personnel, opinions, conclusions, reports, and other documentation to the prosecuting attorney and the moving party.

(f) The laboratory shall endeavor to retain and maintain the integrity of a sufficient portion of the evidence or biological material for replicate analysis. If, after initial examination of the evidence or biological material, but before the actual analysis, the laboratory determines that there is insufficient material for replicate analysis, it shall simultaneously notify in writing the prosecuting attorney, the moving party, and the judge. Exhaustive testing shall not occur without written authorization by both the moving party and the prosecuting attorney. In the event that exhaustive testing is so authorized, upon request of either party, the judge shall make such orders to ensure that representatives of the moving party and the prosecuting attorney have the opportunity to observe the analysis, unless such observation is inconsistent with the practices or protocols of the laboratory conducting the analysis.

(g) The moving party shall cooperate with the laboratory. At the laboratory's or the prosecuting attorney's request and upon court order, the moving party shall provide biological samples to the laboratory or to law enforcement personnel. If the moving party unreasonably fails to cooperate with such orders, the judge may deny the motion with prejudice.

§ 9. Timeliness of analysis.

Upon allowance of a motion under this Chapter, analysis shall take place as soon as practicable.

§ 10. Costs.

The costs of the analysis shall be paid:

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(a) by the moving party if the moving party is not indigent and has sufficient means to make such payment; or (b) if the moving party is indigent, as an extra fee or cost under the provisions of sections 27A through 27G of chapter 261; or (c) by the moving party and as an extra fee or cost in shares as the court deems equitable.

### § 11. Effect on other proceedings.

(a) If an appeal of the conviction or other post-conviction proceedings in the underlying case are pending, the moving party shall file a motion to stay such proceedings and for leave to file a motion under this chapter, which shall be liberally granted.

(b) Proceedings pursuant to this chapter shall not stay or otherwise interfere with a term of incarceration, parole, probation, or other sentence imposed.

### § 12. Disclosure of results of analysis.

(a) The results of the analysis shall be simultaneously disclosed to the moving party, the prosecuting attorney, and the judge.

(b) At the request of any party, or on its own initiative, the judge shall order production of the underlying laboratory data, documents, and notes.

### § 13. Further proceedings following analysis.

If the analysis is inconclusive, the court may order any additional analysis requested if the court concludes that the requirements of section 7(b) are met.

### §14. Notice to victims.

(a) If a motion is filed under this Chapter, the prosecuting attorney may notify the victim of the crime in the underlying case.

(b) The prosecuting attorney may, in his or her discretion, notify the victim if the court allows a motion for forensic or scientific analysis and, if the victim is notified of the allowance of the

motion, shall promptly notify the victim of the result of the analysis.

§ 15. Waiver of rights.

The right to file a motion pursuant to this Chapter shall not be waived. This prohibition of any waiver includes, but is not limited to, any stated or unstated waiver that is or is alleged to be part of any agreement or understanding related to any plea of guilty or of nolo contendere or to any sentencing or appellate proceeding or to any correctional placement or conditions.

§ 16. Preservation of evidence and biological material.

(a) Any governmental entity that is in possession of biological evidence that is collected for its potential evidentiary value during the investigation of a crime, the prosecution of which results in a conviction, shall retain such biological evidence for the period of time that any person remains in the custody of the commonwealth or under parole or probation supervision in connection with that crime, without regard to whether the biological evidence was introduced at trial. Each governmental entity shall retain all such biological evidence in a manner that is reasonably designed to preserve the evidence and biological material and to prevent its destruction or deterioration. Such biological evidence need not be preserved if it must be returned to a third party or if it is of such a size, bulk, or physical character as to render retention impracticable.

(b) The Secretary of Public Safety and Security, in consultation with the Forensic Sciences Advisory Board, shall promulgate regulations governing the retention and preservation of biological evidence by any governmental entity, which regulations shall include standards for maintaining the integrity of the materials over time, the designation of officials at each governmental entity with custodial responsibility, and requirements of contemporaneously recorded

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documentation of individuals having and obtaining custody of any biological evidence.

(c) For the purposes of this section, the term "biological evidence" means a sexual assault forensic examination kit or semen, blood, saliva, hair, skin tissue, or other identified biological material.

### § 17. Liability.

(a) Governmental officials and employees acting in good faith shall not be liable in a civil or criminal proceeding for any act or pursuant to the provisions of this chapter.

(b) If a governmental entity responsible for the preservation of evidence or biological material engages in willful or wanton misconduct or gross negligence which results in the deterioration or destruction of evidence or biological material so that a laboratory is unable to perform adequate or proper analysis, that entity shall be subject to proceedings for contempt.

(c) Nothing in this chapter shall create any cause of action for damages against the commonwealth or any of its subdivisions or officers, employees, agents, or subdivisions, except as provided in this Section.

### § 18. Appeal.

An order allowing or denying a motion for forensic or scientific analysis filed under this Chapter is a final and appealable order. Any appeal from such an order shall be claimed by filing a notice of appeal within 30 days of the court's entry of the written order upon the docket.

## Exhibit B



**Present Revised Ma. Gen. Law Ch. 6, §184A:**

There shall be in the executive office of public safety and security a forensic sciences advisory board, hereinafter called the board, which shall advise the secretary on all aspects of the administration and delivery of criminal forensic sciences in the commonwealth. The board shall consist of the undersecretary for forensic sciences, who shall also serve as chairperson of the board, the attorney general, the colonel of the state police, the president of the Massachusetts Chiefs of Police Association, the president of the Massachusetts Urban Chiefs Association, the president of the Massachusetts District Attorney's Association, a district attorney designated by the Massachusetts District Attorney's Association, the commissioner of the department of public health and the Chief Counsel of the Committee for Public Counsel Services, or their respective designees, three scientists, experienced in delivery, management or oversight of scientific services, one of whom shall be a forensic scientist with practical experience in an accredited crime lab, one of whom shall have a specialty in the natural or biological sciences and one of whom shall have a specialty in the physical sciences, and two members of the bar with experience in criminal practice and forensic science issues, one each to be appointed on recommendation of the Massachusetts Bar Association and Boston Bar Association. The members shall serve without compensation, except that, with respect to the three scientists, reasonable travel expenses may be paid for the purpose of attending meetings. Each appointed member shall serve for a term of three years or until a successor is appointed and qualified, whichever is longer. The board shall meet no less than quarterly and as otherwise convened by the undersecretary. The board shall coordinate its responsibilities with the medico-legal investigation commission and shall not infringe upon the commission's authority as established in

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section 184 of this chapter.

At the direction of the board, the undersecretary for forensic sciences shall advise the board on the administration and delivery of forensic services in the commonwealth. The undersecretary shall include in his report information as the board requests, including but not limited to the volume of forensic services required for each county, including costs and the length of time from submission for testing or procedures and return of results; the capacity of the commonwealth's forensic services and funding requirements; the accreditation of forensic facilities and training of personnel; facilities expansion, including location and funding for a new state police crime lab; and partnerships with other public and private forensic services. The undersecretary shall make recommendations for the allocation of resources and expansion of services, and on an annual basis, submit budget recommendations to the secretary of public safety and security and the board.

## Exhibit C

**BOSTON BAR ASSOCIATION TASK FORCE STATEMENT OF  
BEST PRACTICES CONCERNING PROSECUTION DISCOVERY  
OBLIGATIONS IN SERIOUS FELONY CASES COMMONLY  
PROSECUTED IN SUPERIOR COURT**

1. Complete understanding of Rule 14 and Brady obligations necessarily requires fluency in the categories of *potentially* exculpatory evidence.
2. Make early inquiry of the police prosecutor, arresting officer(s), and/or any investigating officer(s) for discovery and exculpatory materials.
3. If there is additional outstanding discovery, an ADA should request a further pretrial conference date from the Court and defense counsel so that discovery can be completed by that date. He or she should indicate on the record—and in writing, if possible—what steps have been taken to obtain that outstanding discovery and identify, if possible, what additional discovery is still outstanding.
4. A prosecutor should file a Motion for Reciprocal Discovery, with a deadline for the defendant to provide his or her discovery to the Commonwealth. Doing so will ensure that the deadline for a defendant's certificate of compliance is sufficiently in advance of the trial date or, alternatively, will allow for time to advance the case to have the Court address the defendant's discovery obligations.
5. Make specific and early inquiry about exculpatory information in cases involving cooperating witnesses, particularly in regard to promises, awards, inducements and matters that bear upon the witnesses' credibility.
6. If in the course of trial preparation, a prosecutor receives or becomes aware of other discoverable evidence (including exculpatory evidence), he or she must make prompt, written disclosure of same to defense counsel.
7. Law enforcement officers should retain field notes in serious felony cases typically charged and prosecuted in Superior Court.

8. Law enforcement officers should continue to take field notes, to the extent feasible or otherwise encouraged by their departments, and should endeavor to include all material and relevant information from those field notes in any subsequently generated report.
9. Prosecutors should review notes retained by officers in felony cases typically charged and prosecuted in Superior Court to determine if they contain *Brady* exculpatory material.
10. The judge at the final pretrial conference should inquire of counsel for both parties about whether discovery has been completed.

## Exhibit D

**CORE EXPECTATIONS FOR DEFENSE COUNSEL  
IN SERIOUS FELONY CASES COMMONLY  
PROSECUTED IN SUPERIOR COURT**

**COMPETENCE, EXPERIENCE, AND KNOWLEDGE OF CRIMINAL LAW  
AND PROCEDURE**

- Before undertaking the defense of a person accused of a crime, an attorney should possess sufficient experience and expertise to provide fully competent representation to the client.
- Counsel should be knowledgeable about Massachusetts criminal law and procedure and remain current with changes in criminal statutes, rules and case law.
- Attorneys who represent persons in criminal cases should participate in at least eight hours per year of continuing legal education on criminal law topics.

**ACTIONS TO PRESERVE EVIDENCE AND OFFICERS' NOTES**

At the first court appearance, Counsel should:

- File motions asking the court to order the police and prosecution to preserve all evidence within their possession or control, including “911” and turret recordings, any biological, forensic and identification evidence, any police reports and witness statements, and any police notes documenting the investigation.
- Promptly investigate the circumstances of the case and explore all known and discoverable facts.
- Visit the crime scene and evaluate whether to have photographs taken and other descriptive documentation (e.g. measurements, maps) prepared.
- Interview or arrange for the interview of every witness the Commonwealth’s discovery identifies as possessing relevant information.
- Interview or arrange for the interview of every witness the defendant or his supporters identifies as possessing relevant information. In appropriate circumstances, counsel or investigator might canvass the

area near the crime scene to determine whether there are additional witnesses who are as yet unknown.

**PRE-TRIAL DISCOVERY**

Counsel should:

- Promptly review automatic discovery provided by the Commonwealth pursuant to Mass. R. Crim. P. 14 and be vigilant to ensure that the prosecution has complied fully with its obligation to provide all discovery required by that rule.
- File a motion seeking “[a]ny facts of an exculpatory nature[,]” under Rule 14 (a) (1) (A) (iii). Carefully review effort by the prosecution to obtain “protective orders” under Rule 14 (a) (6), and consider requesting that the Court limit the reach of any such orders which the Court seems prepared to approve.
- Consider whether to file motions seeking additional discovery, including discovery of notes of investigating officers and notes and underlying data prepared or relied upon by the Commonwealth’s experts or persons who prepared reports of physical examinations, scientific tests or experiments. Substantive Pre-Trial Motions.

Counsel should:

- Evaluate whether it is in the client’s interest to file motions to dismiss and/or to suppress evidence such as identifications or evidence seized by the police. For a non-exhaustive list of potential substantive motions, see CPCS Performance Guidelines in Criminal Cases 4.7 (a) – (i), Substantive Pretrial Motions. Where appropriate, counsel should request the court to conduct an evidentiary hearing on such motions.



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- In appropriate cases, consider filing a motion for production of records held by a third party, pursuant to Mass. R. Crim P. 17 (a) (2), *Commonwealth v. Lampron*, 441 Mass. 265 (2004) and *Commonwealth v. Dwyer*, 448 Mass. 122, 139-148 (2006).

### **RECIPROCAL DISCOVERY**

- Counsel should in appropriate cases contest any motion filed by the prosecution which seeks to compel reciprocal discovery under the decision in *Commonwealth v. Durham*, 446 Mass. 212 (2006).

### **EXPERT INVESTIGATION**

- For each category of expert evidence the Commonwealth expects to offer or defense counsel perceives to be possibly relevant to a material issue in the case, counsel should consider whether to retain or seek funds to retain expert assistance. Absent strong countervailing considerations, counsel should engage or seek funds to engage a defense consulting expert to review the prosecution's expert evidence whenever the Commonwealth's expert evidence purports to connect the defendant to inculpatory physical evidence.
- In appropriate cases, counsel should file a motion contesting the admissibility of scientific or forensic evidence which the prosecution proposes to introduce, utilizing the legal standards set forth in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993) and *Commonwealth v. Lanigan*, 419 Mass. 15 (1994), and the 2009 National Academy of Sciences Report, *Strengthening Forensic Science in the United States: A Path Forward* (pre-publication release, February, 2009).

### **VIGOROUS TRIAL REPRESENTATION**

- Before the trial begins, counsel should be completely prepared, and should have accomplished all the steps described in CPCS Performance Guidelines (criminal) 6.1 (a) through (e), *General Trial Preparation*, including the research, preparation and filing of such motions in limine as may advance the client's cause.
- Counsel should be vigilant in guarding against being forced prematurely to trial due to rigid application of the judicial Time Standards.

## A.A. 154

- Counsel should represent the defendant's interests throughout the jury selection process, keeping in mind the considerations enumerated in CPCS Performance Guidelines (criminal) 6.4;
- Absent extraordinary circumstances, counsel should present an opening statement for the defense, keeping in mind the objectives described in CPCS Performance Guideline 6.5 (c);
- Counsel should confront the prosecution's case vigorously, with full preparedness and a coherent theory of defense, see CPCS Performance Guideline 6.6. In particular, counsel should object to the introduction of possibly irrelevant, prejudicial or otherwise inadmissible evidence sought to be introduced by the prosecutor, and should take all appropriate steps to protect the record, such that trial errors might be fully preserved for appellate review;
- Counsel should be prepared to present the defense case through the Commonwealth's witnesses; and should be prepared to submit proof of facts which he or she knows to be true, but which the prosecution witnesses deny or fail to confirm; in such circumstances, counsel must summons the witnesses and/or records which are essential to proving the relevant facts; see, e.g., *Commonwealth v. Ly*, 454 Mass. 223, 229-30 (2009);
- In consultation with the client, counsel should prepare and, if appropriate, present the defense case, bearing in mind the considerations set forth in CPCS Performance Guideline 6.7;
- Counsel should present requests for jury instructions in accordance with legal precedent and the theory of the defense, and should present a carefully prepared and persuasive closing argument setting forth the defense theory of the case. See CPCS Performance Guidelines 6.8 and 6.9;
- In the event of a conviction, counsel should prepare carefully for the sentencing hearing, and should consider all possible alternatives to incarceration for the client. See, CPCS Performance Guidelines 7.1-7.5. If a sentence of incarceration is imposed, counsel should consider filing a Motion for Stay of Sentence, CPCS Performance Guideline 8.1 (c).

## A.A. 155

- Absent extraordinary circumstances and after consultation with appellate counsel, a Motion to Stay Sentence Pending Appeal should be filed on behalf of a client who may have been wrongfully convicted.
- Counsel should file a Notice of Appeal in every case, unless specifically instructed not to do so by the client.

### **POST-TRIAL RESPONSIBILITIES**

- Before undertaking to represent a convicted defendant on appeal, counsel should read carefully the CPCS Performance Standards Governing the Representation of Clients on Criminal Appeals and Post-Conviction Matters.
- Appellate counsel should not confine his or her representation to direct appellate issues exclusively, but should also consider and investigate grounds for a motion for a new trial.
- Appellate counsel should take care to present constitutional arguments under the pertinent provisions of both the Massachusetts Constitution and Declaration of Rights, and also under the Constitution of the United States.

# Boston Bar Journal

A Peer Reviewed Publication of the Boston Bar Association

## A New Tool for Determining Factual Innocence: Massachusetts' Post-Conviction Access to Forensic and Scientific Analysis

**Posted:** May 16, 2012 | **Author:** bbabarjournal | **Filed under:** Legal Analysis, Summer 2012, Vol. 56, #3 | **Tags:** Boston Bar Journal, conviction, DNA, exonerate, forensic analysis, innocence, post-conviction, wrongful conviction | 3 Comments

by David M. Siegel and Gregory I. Massing

### Legal Analysis



Angel Hernandez spent thirteen years in Massachusetts prisons for a rape he did not commit. He spent a decade of that time seeking DNA testing of evidence he was told was lost or unavailable, or was not subject to discovery through the procedure he was using, or that he had no right to test, or that he had waived the right to test.[1] He ultimately obtained access to the evidence, and DNA testing fully exonerated him. The ability of a wrongfully convicted criminal defendant to access evidence to prove it, and the obligation of the Commonwealth to keep that evidence, may seem utterly common sense – but they are now the law of the Commonwealth too. On February 17, 2012, Governor Patrick signed the **Post-**

**Conviction Access to Forensic and Scientific Analysis Act**, 2012 Mass. Acts, c. 38, which provides a statutory right for wrongfully convicted defendants to obtain access scientific and forensic analysis of evidence in their cases. The Act, which becomes effective May 17, 2012, creates a comprehensive framework by which criminal defendants who have been found guilty may gain access to evidence and testing to support a claim that they are factually innocent. The Act also requires for the first time in Massachusetts state-wide retention and preservation of evidence in criminal cases and provides for regulations in this area. Although virtually every other state already provided this type of access, testing, and retention, the Act is among the most comprehensive in the country. The saga of Angel Hernandez should not have to be repeated.

## I. Background – the 2008-2009 BBA Task Force on Wrongful Convictions

In December 2009, a Boston Bar Association Task Force to Prevent Wrongful Convictions, composed of twenty-two members drawn from state and local police, prosecutors, public defenders, defense lawyers, forensic scientists and the judiciary released *Getting it Right: Improving the Accuracy and Reliability of the Criminal Justice System in Massachusetts*. Among the Task Force's specific recommendations was the following: "The legislature should enact and the Governor should sign into law a statute providing for post-conviction access to and testing of forensic evidence and biological material by defendants who claim factual innocence and for post-conviction retention of biological material." *Id.* at 7. The report included a proposed bill as an appendix.

Bills providing for post-conviction forensic testing had been filed in the Massachusetts legislature almost every session following the **1999 Report of the U.S. Attorney General's National Commission on the Future of DNA Evidence**, but had languished in committee. The Task Force's recommended bill addressed what its members believed had prevented the prior bills' passage: it provided a simpler, more streamlined procedure that did not attach the outcome of the testing to any legal effect on the underlying conviction. Instead, it allowed only for access and testing. The weight and significance to be attached to the results of the testing would be determined in separate proceedings, alleviating the need for the parties to argue about hypothetical results.

## II. Eligibility and Motion

### A. Who May Seek Access to Scientific and Forensic Analysis

Anyone convicted of a crime or adjudicated a delinquent in a Massachusetts court may seek access to analysis, § 2(1), whether the conviction or adjudication was by trial, guilty plea or plea of nolo contendere, § 1 (definition of “conviction”), so long as the person is incarcerated in a prison or house of correction, on parole or probation, or has his liberty otherwise restrained due to such conviction, § 2(2), and he asserts that he is factually innocent of the offense. § 2(3). (Citations refer to sections of chapter 278A of the Massachusetts General Laws, added by the Act.) Arguably eligibility to file a motion under chapter 278A would also extend to those whose liberty is restricted by being required to register as a sex offender. See *Doe v. Sex Offender Registry Bd.*, 447 Mass.768, 775 (2006) (“In the context of sex offender registration, an offender’s liberty and privacy interests are constitutionally protected, and deprivation of these interests generally requires procedural due process.”). The right afforded by the Act to seek analysis may not be waived under any conditions, whether in a plea agreement, sentencing, appeal or any correctional status, § 15, but the person seeking access and the Commonwealth are free to agree on other procedures. § 2.

## B. How Do Persons Seek Access to Scientific and Forensic Analysis?

A person seeks analysis by filing a motion, in the trial court of the original conviction, with the same case name and docket number as the conviction, § 3(a), a copy of which must also be served on the prosecutor. § 4(a). The Act does not specify what types of forensic or scientific analysis may be available, except that the requested analysis must produce evidence that is admissible in courts of the Commonwealth. § 3(b)(2). It is not limited, for example, to DNA testing.

### 1. Requirements for Motion for Access to Analysis

Requirements for a motion for access to analysis are in Section 3 of Chapter 278A. The movant must set forth, § 3(b)(1)-(5):

- the type of scientific or forensic analysis sought,
- that the results of such testing or analysis are admissible in Massachusetts courts,
- a description of the evidence to be tested, including its location if known and chain of custody,
- information “demonstrating that the analysis has the potential to result in information that is material to the movant’s identification as the perpetrator of the crime,” and
- information showing that the evidence has not been subjected to the analysis for some reason beyond the movant’s control.

Although the Act does not explicitly state this, the items to be tested need not have been formally offered into, or admitted as, evidence in the case, as the Act specifically provides for access to analysis in cases for which *no evidence* will have been admitted (guilty or nolo contendere pleas) and of items that are in the possession of third parties, including specifically “items and biological materials.” § 7(c).

### 2. Required Evidentiary Significance of the Analysis Sought

The probative value of the analysis sought must simply be that it “has the potential to result in information that is material to the movant’s identification as the perpetrator of the crime.” To grant the motion, the Court must find this potential by a preponderance of the evidence. § 7(b)(4). This is a less-demanding standard than the standard for discovery under **Rule 30 of the Massachusetts Rules of Criminal Procedure**, although it applies only in the limited context of the perpetrator’s identification. Rule 30(c)(4) provides a judge may authorize discovery “where affidavits filed by the moving party establish a prima facie case for relief.” The Supreme Judicial Court has explained, in *Commonwealth v. Daniels*, 445 Mass. 392, 407 (2005), that the “prima facie case” in this context means a case sufficiently strong to go to the jury:

In requesting such discovery, the defendant must make a sufficient showing that the discovery is reasonably likely to uncover evidence that might warrant granting a new trial. *See* Reporter’s Notes, *supra* (“Discovery is appropriate where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he or she is entitled to relief”).

Unlike the standard for discovery under **Rule 30(c)(4)**, a motion under the Act need not show that it is “reasonably likely” to result in information but only that it “has the potential” to do so. The focus of this information, however, must be narrower than that it “might warrant grant of a new trial”; instead it must be “material to the movant’s identification as the perpetrator.”

### 3. Cause for Seeking Post-Conviction Analysis

A movant must set forth cause for not having previously sought or obtained the requested forensic or scientific analysis. The Act offers six possible grounds (§§ 3(b)(5)(i)-(v)):

- the analysis had not been developed at the time of the conviction,
- results of the analysis were not yet admissible in Massachusetts courts,
- the defense was not aware of the material and had no reason to be aware of it at the time,
- the movant’s lawyer had been ineffective by not seeking analysis,
- the movant had been denied the analysis by the trial court, or
- the “catch-all” that the material was otherwise unavailable to the movant at the time.

To the extent that a movant cannot include any of the information necessary to satisfy the requirements of the Act, the movant must include a description of efforts to obtain the information and can then seek discovery. § 3(c).

The Act makes clear that an otherwise eligible movant may not be denied analysis because he plead guilty or nolo contendere, or because he made or is alleged to have made an incriminating statement. § 3(d). This provision was included in recognition of the fact that in a significant proportion of exonerations, defendants have falsely confessed to crimes they did not commit.<sup>[2]</sup> A movant must file an affidavit that he is seeking the requested testing because he is factually innocent, that the

testing or analysis will support this claim and, if he pled guilty or made an incriminating statement, that his motion is made notwithstanding his having entered the guilty plea and/or made the incriminating statement. *Id.*

### III. Procedure

#### A. Threshold Determination

The Act provides that the trial court shall “expeditiously review” motions to determine whether the movant has satisfied the initial requirements for access to analysis. § 3(e). This threshold determination is not intended to be dispositive but to ensure that sufficient information is provided for the Commonwealth to assess the motion and for the Court to conduct a meaningful hearing. Motions that do not satisfy the initial requirements of Section 3 may be dismissed without prejudice (and without a hearing). *Id.* At this point, the Court’s determination is simply “whether the motion is sufficient to proceed under this chapter or is dismissed.” *Id.* The Court must notify the movant and the prosecutor of its threshold decision. *Id.*

#### B. Response by Commonwealth

The prosecutor may, but need not, respond to the motion to “assist the court in considering whether the motion meets the requirement under this section.” If the Court finds that the motion satisfies the threshold requirements of Section 3, the prosecutor then has sixty days to respond, which may be enlarged for good cause. § 4(b). This is also an opportunity for the prosecutor to raise “any specific legal or factual objections” to the analysis sought. § 4(c). The prosecutor is required to notify the victim of the filing of a motion for analysis. § 14(a).

#### C. Appointment of Counsel and Costs

The court may appoint counsel to represent indigent movants in preparing and presenting motions for access. § 5. If analysis is ordered, the costs of analysis are to be paid by the movant if he or she is not indigent (as defined for appointment of counsel purposes), as an extra fee or cost if the movant is indigent, and to the “maximum feasible amount” given the financial resources of the movant “as the court deems equitable” if the movant is indigent but has the ability to pay a reduced fee. § 10(1)-(3).

#### D. Discovery

The Act provides that the Court may authorize discovery, as provided in Rule 30(c)(4) of the **Massachusetts Rules of Criminal Procedure**, at the request of either party, from either party or any third party. § 7(c). Discovery may be necessary, for example, because the movant lacks information concerning the location, existence or chain of custody of items sought to be analyzed. The prosecutor



might seek biological material from the movant (i.e., the defendant's DNA sample for comparison) or from the victim of the crime – for example, test results that exclude the defendant may not be probative of his innocence if the biological material belongs to the victim. The movant is specifically obligated to cooperate with analysis ordered, including by providing biological samples, and unreasonable failure to do so may result in dismissal of the motion with prejudice. § 8(f).

Note that discovery under the Act, although it uses the mechanism of Rule 30(c)(4), may *not* be conditioned upon “establishment of a prima facie case.” § 7(c). In other words, substantial, even overwhelming, evidence of guilt, should not impede the movant's ability to discover information needed for the requested analysis if the analysis has the potential to result in evidence that is material to the moving party's identification as the perpetrator.

### E. Hearing

If the movant satisfies the threshold requirements for filing, a hearing is mandatory. § 6(a). The movant must be present for this hearing unless he waives his presence. *Id.* Contrast this with **Rule 30(c)(3) & (6), Massachusetts Rules of Criminal Procedure**, which permit a judge to rule on post-conviction motions on affidavits without a hearing or at a hearing without the movant's presence.

The judge who conducted the trial or accepted the movant's pleas “shall conduct the hearing if possible.” § 6(b). This parallels the practice under Rule 30 of having the trial judge hear the post-conviction motion in the first instance for reasons of efficiency given familiarity with the case. However, this very familiarity could introduce bias, and thus the Reporter's Notes to Rule 30 provide that “[r]ecusal of the trial judge should be liberally exercised, particularly where it is requested by the moving party.”[3] A similar risk may exist with motions for access under the Act.

### F. Judicial Determination

The judge must permit the requested analysis if he or she concludes that each of the threshold requirements in section 3 has been established by a preponderance of the evidence. § 7(b). That is, the Court must find, under §§ 7(b)(1)-(6):

- the evidence or biological material exists,
- it 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,”
- it has not been subject to the requested analysis for any of the reasons identified as permissible cause,
- the requested analysis has the potential to result in evidence that is material to the moving party's identification as the perpetrator,”
- the motion's purpose is not obstruction of justice or delay, and
- the results of the requested analysis are admissible in Massachusetts courts.

The court must state its findings of fact and conclusions of law on the record or issue written findings. § 7(a). An order allowing or denying a motion for analysis is a final appealable order, and the party appealing must do so within thirty days of the order's entry. § 18. (The appeal provision states that a notice of appeal shall be filed "within 30 days after the entry of the judgment," although presumably "judgment" refers to the order denying the requested analysis.) If a court allows a motion for analysis, the prosecutor must notify the victims, including anyone who suffered direct or threatened physical, emotional or financial harm, as well as the parent, guardian or representative of such a person if the victim was a minor or has died. § 14(b), § 1 (definition of "victim").

### G. Procedure for Forensic or Scientific Analysis

The judge who allows a motion for analysis also specifies the conditions under which it occurs, including transportation and handling of the evidence or biological material to protect its integrity. § 8(a). The parties may agree on any accredited testing facility, which may be the Massachusetts State Police Crime Laboratory or the Boston Police Crime Laboratory (unless the analysis will exhaust the material and prevent replicate testing). § 8(b). If the parties are unable to agree, the Act sets forth a procedure by which each side provides a list of up to three facilities, from which the court selects one. § 8(c).

Exhaustive testing may not be done except upon a "specific order of the court." Upon request, the court may order that representatives be permitted to observe exhaustive testing procedures, unless this conflicts with laboratory practices. § 8(e).

The process for obtaining forensic or scientific analysis is intended to illuminate the state of the evidence rather than afford either side adversarial advantage; thus, each side is given equal access to all personnel, documents and reports of the testing facility. § 8(d). Similarly, all results of analyses are simultaneously disclosed to the movant, the prosecutor and the court. § 12(a). If the results are inconclusive, the court may order additional analysis if it concludes the original requirements for testing are still met. § 13. Presumably this will most often turn on whether the additional analysis has the potential to result in evidence material to the movant's identification as the perpetrator.

## IV. Conclusion

The Act improves the accuracy of the criminal justice system in two ways. By establishing a process for defendants who claim wrongful conviction to get testing that can show error in their cases, it enables efficient examination of claims of factual error. This helps ensure past cases have been solved correctly. By creating an obligation for the Commonwealth to retain and preserve material from criminal investigations, it provides a tool to help solve future cases, and prevent future potential errors, as techniques of forensic and scientific analysis improve. This helps ensure future cases will

be solved and increases the likelihood they will be solved correctly. In the Fall 2012 edition of the *Boston Bar Journal*, we will review the state's retention and preservation obligations, and suggest how policies to implement these obligations might be developed.

[1] *Commonwealth v. Hernandez*, 50 Mass.App.Ct. 1109, 738 N.E.2d 1166 (2000) (unpublished opinion).

[2] Samuel R. Gross et. al., *Exonerations in the United States 1989 Through 2003*, 95 J. Crim. L. & Criminol. 523, 544 (2005) (15% of exonerations between 1989 and 2003, 51 out of 340, involved false confessions).

[3] Par. 2, Reporter's Notes to Rule 30, Massachusetts Rules of Criminal Procedure.

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*(The authors were members of the Boston Bar Association's 2008-2009 Task Force to Prevent Wrongful Convictions. The opinions expressed here are those of the authors and do not represent those of the Task Force, its members or the BBA.)*

## 3 Comments on "A New Tool for Determining Factual Innocence: Massachusetts' Post-Conviction Access to Forensic and Scientific Analysis"

1. *State House Happenings | Issue Spot* says:

**May 17, 2012 at 3:52 pm**

[...] to forensic and scientific evidence in their case. To read more about the new law check out this article by Professor David Siegel of New England Law | Boston and Gregory Massing, Executive Director of [...]

### Reply

2. *Greg Massing's Article in Boston Bar Journal « Faculty Awareness Blog* says:

**May 18, 2012 at 7:50 pm**

[...] Greg's article — A New Tool for Determining Factual Innocence: Massachusetts' Post-Conviction Access to Forensic and Scientific Analysis — was published on May 16, 2012. To read the full article, go here. [...]

### Reply

3. *Preserving Evidence To Convict the Guilty and Protect the Innocent: Massachusetts' Post-Conviction Access to Forensic and Scientific Analysis Act* « *Boston Bar Journal* says:

**September 12, 2012 at 3:05 pm**

[...] to evidence and forensic testing to support a claim of factual innocence. In our article in the Summer 2012 edition of the BBJ, we outlined the new procedure for defendants to seek this access and for judges to evaluate these [...]

### Reply

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Transcription performed by Elly Kalfus, CPCS Innocence  
Program Support Specialist, on August 26, 2013.

I hereby swear that this transcription is an accurate  
account of the video recording of the Formal House  
Session that occurred Feb. 8, 2012, to the best of my  
abilities.

  
Elly Kalfus 10/25/13  
EK



**Testimony of the Boston Bar Association  
Before the Joint Committee on the Judiciary  
In Support of S 753 and H 2165  
*An Act Relative to Providing Access to Scientific and Forensic Analysis*  
June 8, 2011**

**Presented by David M. Siegel, Professor, New England Law | Boston**

I am a member of the Boston Bar Association's Task Force to Improve the Accuracy and Reliability of the Criminal Justice System and a member of the committee responsible for drafting the legislation. I am also Chair of the New England Innocence Project's Policy Committee and I urge the Judiciary Committee to pass S 753 and H 2165, the Post-Conviction Access to Forensic and Scientific Analysis Act.<sup>1</sup> This legislation creates a straightforward procedure for obtaining post-conviction forensic and scientific testing of evidence in cases of possible wrongful conviction, eliminates unnecessary legal and procedural uncertainty concerning the proper response to these requests, and should dramatically reduce the time and complexity for handling them. In so doing, it would bring the Commonwealth into line with 48 states, the District of Columbia and the federal government, all of which guarantee post-conviction access and testing by statute.

This legislation establishes a critically-needed process for persons who claim they were wrongfully convicted to seek post-conviction testing of evidence, for prosecutors to ensure the reliability and materiality of this evidence in identifying the perpetrator, and for judges to conduct a focused and discrete inquiry, using a familiar legal standard, to assess these requests. By narrowing the issues, requiring full disclosure of underlying documents and the results of all tests, this legislation creates a transparent, largely non-adversarial mechanism for determining what evidence exists for testing, establishing its provenance, assessing its significance, and, if appropriate, overseeing testing. The legislation also relies on a best practices approach to establish a uniform obligation on governmental entities in the Commonwealth to preserve evidence.

Under current law, an inmate claiming he or she was wrongfully convicted can spend years seeking access to evidence for testing that could dispositively establish factual innocence. Each such effort can require multiple court appearances and hearings, wasting scarce judicial and prosecutorial resources addressing what, in substance, are relatively narrow questions. This unnecessarily delays finality in the criminal justice system, prevents justice from being done and, if testing ultimately exonerates a defendant, simply adds to the cost of their compensation and damages, plus the unnecessary expense of their wrongful incarceration, supervision or both.

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<sup>1</sup> The provisions of these bills are identical.

A brief summary of the Act follows. I have also enclosed a brief analysis of the project cost, which has proven minimal throughout the country. I strongly encourage you to enact this balanced, comprehensive and evenhanded approach to addressing this problem.