

# National Conference of State Legislatures

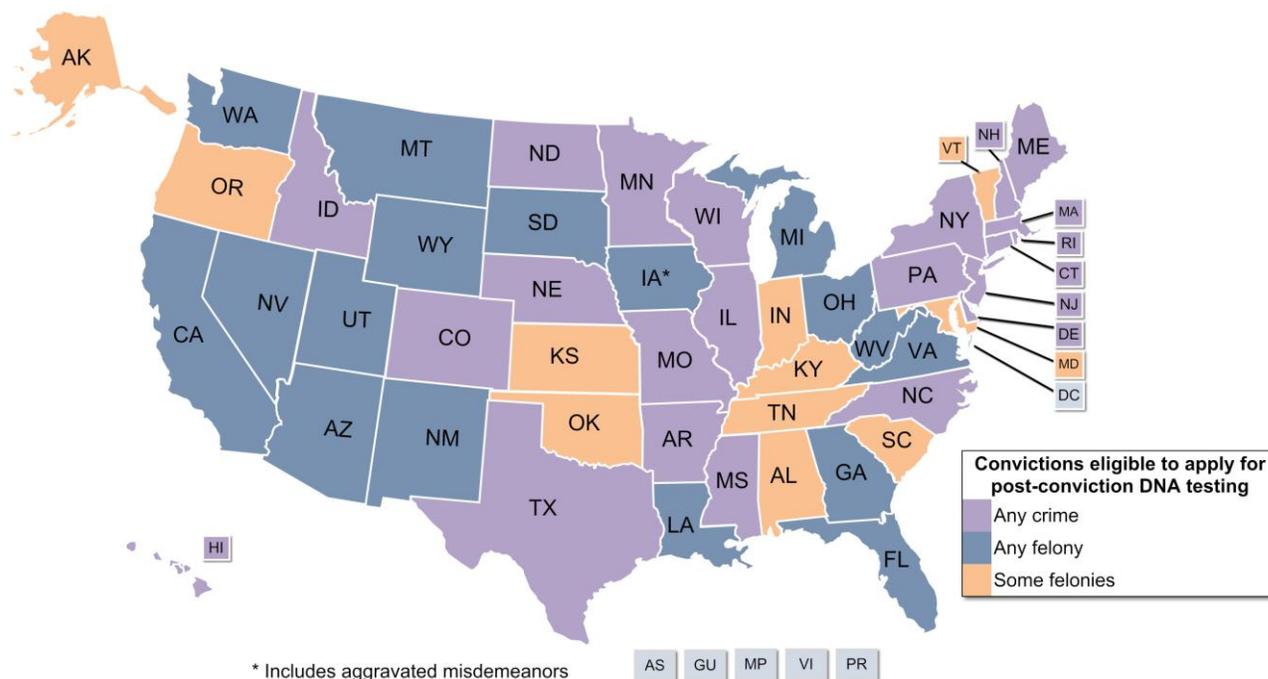
## ~ Post Conviction DNA Testing ~

DNA analysis has proved to be a powerful tool to exonerate individuals wrongfully convicted of crimes. One way states use this ability is through laws enabling post conviction DNA testing. These measures provide a mechanism for certain convicted individuals to apply to a court for DNA testing that may prove their innocence. This process is used outside of the person's regular course of appeals, or after their appeals have been exhausted.

Post conviction DNA laws address which convicts are eligible to apply, the standards for granting their post conviction application and other time or situation based limitations on testing. According to the Innocence Project, DNA has been used to exonerate 311 wrongfully imprisoned people since 1989. From the cases that resulted in their wrongful conviction, 126 of the real perpetrators have been caught. These 126 real perpetrators were known to have committed an additional 131 violent crimes, including 71 sexual assaults and 32 murders, after someone else was wrongfully convicted for one of their crimes.

### Applications for Post Conviction Testing

State post conviction laws enable inmates to apply for testing based largely on the seriousness of the offense they have been convicted of committing, or the length of their prison sentence. For example, 20 states allow *anyone* convicted of a crime to apply for testing, while 17 states allow only felony convicts to apply. Alabama allows challenges only for convictions of capital crimes while Oklahoma only allows challenges from violent felons or from anyone serving a criminal sentence over 25 years. Maine's law applies to those serving a crime with a minimum 1-year sentence.



### Standards for Approving Testing

State law also provides guidance for judicial officials on the standard a convict's application must meet in order to be granted. At least 24 states require that the application, taken as true, provide a "reasonable probability" that the applicant is innocent. New Hampshire and Virginia require an application to show "clear and convincing" evidence that the biologic material should be tested, while Colorado, Massachusetts, New Mexico, South Carolina and Texas set their standard to a "preponderance of the evidence" that actual innocence will be demonstrated.

## **Availability of Testing Based on Plea**

Some states restrict, or specifically authorize, access to post-conviction testing based upon a convicted person's plea at their original trial. Some argue that if a person plead guilty, then it is likely that they committed the original crime and have no need for post-conviction DNA testing. Others believe that post-conviction testing should be available regardless of the original plea because an individual could have been coaxed into pleading guilty to avoid a more severe penalty even if they are innocent. Ten states and the District of Columbia specify that pleading guilty or nolo contendere does not impact a person's access to post-conviction testing. At least 5 states statutorily restrict post-conviction testing access for certain pleas or have additional requirements to grant testing in those circumstances.

## **Evidence Preservation**

As DNA analysis technology advances, samples thought unusable five or 10 years ago may now, or in the future, be able to yield valuable exculpatory evidence. That is why many states use statutes to standardize how biological evidence is preserved. If this evidence is not stored properly, it may deteriorate to the point of being completely unusable. These provisions are also noted in the chart below.

## **North Carolina's Innocence Inquiry Commission**

In North Carolina, the General Assembly created the [Innocence Inquiry Commission](#) "to investigate and evaluate post-conviction claims of factual innocence," and is the only state entity in the nation charged with investigating these claims. The Commission provides an independent forum, separate from the appeals process, for post-conviction claims of innocence in the state. If the Commission declares a person innocent they are free and cannot be retried for the same crime.

## **Federal Post Conviction Funding**

The National Institute Justice (NIJ), through the [post conviction DNA testing funding program](#) provides funds that assist states with the cost of post conviction testing. The funds can be used for the costs of reviewing cases and locating evidence. According to NIJ, these funds have been responsible for 11 exonerations since 2004.

## **Recent Legislation**

In 2013, Oklahoma enacted the "Post Conviction DNA Act" (HB 1068) enabling certain convicts to apply for DNA analysis. Representative Lee Denney, the bill's sponsor, noted the importance of the legislation, stating "If we have people sitting in our state prisons that are innocent we want to move as fast as we can to exonerate them. This law allows a pathway for them to seek reprieve from their sentence if they are truly innocent. New evidence or new technology for DNA that was not around at the time they were incarcerated may be able to give them a new trial. This law offers them that opportunity for a new hearing."

Also in 2013, Iowa (HB 527) expanded the eligibility of their post conviction DNA laws, allowing individuals convicted of an aggravated misdemeanor to apply for testing.

State & Statute	What Convicted Crimes are Eligible to Apply for Testing?	Standards for Reviewing the Application	Limits	Availability of Testing Based on Plea	Preservation of Evidence Statutes
<b>Alabama</b> § 15-18-200	Capital offenses	Facial results should demonstrate actual innocence	Must file within one year of conviction		
<b>Alaska</b> § 12.73.010	Felony offenses against the person	Raises reasonable probability of actual innocence		Must not have pled guilty or nolo contendere, but court can waive this requirement	§ 12.36.200
<b>Arizona</b> § 13-4240	Any felony	Reasonable probability			§ 13-4221
<b>Arkansas</b> §§ 16-112-201 through 208	Any crime	Theory of defense would establish actual innocence	Can't apply when direct appeal is available, must not have waived testing in original proceeding		§ 12-12-104
<b>California</b> Penal Code § 1405	Any felony	Reasonable probability		Specifies that guilty or nolo contendere pleas do not limit availability of testing	Penal Code § 1417.9
<b>Colorado</b> §§ 18-1-411 through 417	Any crime	Preponderance of evidence that DNA testing will demonstrate actual innocence			§§ 18-1-1101 through 1108
<b>Connecticut</b> § 54-102-kk	Any crime	Reasonable probability			§ 54-102jj
<b>Delaware</b> Tit.11, § 4504	Any crime	Analysis will be beneficial Prima facie	Must be filed within three years of final judgment		
<b>District of Columbia</b> § 22-4133	Any crime of violence	Reasonable probability		Specifies that individuals who pled guilty are eligible to apply for testing	§ 22-4134
<b>Florida</b> §§ 925.11, .12	Any felony	Reasonable probability		Guilty plea or nolo contendere prior to July 1, 2006 may apply. Guilty or nolo contendere after July 1, 2006 may apply under limited circumstances	§ 925.11
<b>Georgia</b> § 5-5-41	Any felony	Reasonable probability			§ 17-5-56
<b>Hawaii</b> §§ 844D-121 through 133	Any crime	Reasonable probability		Specifies that guilty or nolo contendere pleas do not limit availability of testing	§ 844D-126
<b>Idaho</b> §§19-4901, 02	Any crime	Result of testing has scientific potential to show that it is more probable than not that the petitioner is innocent			

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<b>Illinois Ch. 725, § 5/116-3</b>	Any crime	Result of testing has scientific potential produce new evidence relevant to defendant's assertion of actual innocence			Ch. 725, § 5/116-4
<b>Indiana §§ 35-38-7-1 through 19</b>	Murder, Class A, B, C felony until July 1, 2014. Expanded to include Level 4 and Level 5 felonies committed after June 30, 2014.	Prima facie showing/reasonable probability			§ 35-38-7-14
<b>Iowa § 81.10</b>	Any felony until July 1, 2014. Expanded to include aggravated misdemeanors after July 1, 2014.	Reasonable probability and material to the issue		Specifies that individuals who pled guilty are eligible to apply for testing	§ 81.10(10)
<b>Kansas § 21-2512</b>	First degree murder and rape	May produce non-cumulative, exculpatory evidence			
<b>Kentucky § 422.285</b>	Capital offense, Class A felony, Class B felony, violent offense	Reasonable probability it will exculpate			§ 524.140
<b>Louisiana Crim. Pro. § 926.1 - prior to August 31, 2014 §§ 930.4, 930.8 - after August 31, 2014</b>	Any felony	Articulable doubt	Any claim for relief which was fully litigated in an appeal will not be considered. Must be filed within two years		Crim. Pro. § 926.1
<b>Maine Tit. 15 §§ 2136-2138</b>	A crime with a minimum 1 year sentence	Prima facie evidence material to conviction	Must be filed within two years of conviction		
<b>Maryland Crim. Proc. Code § 8-201</b>	First degree murder, second degree murder, manslaughter, first degree rape, second degree rape, first degree sexual offense, second degree sexual offense	Reasonable probability it will exculpate			Crim. Proc. Code 8-201
<b>Massachusetts Ch. 278A §§ 2 through 18</b>	Any crime	Preponderance of evidence material to identification			Ch. 278A § 16
<b>Michigan Comp Laws § 770.16</b>	Any felony	Prima facie evidence material to conviction	Must be filed by Jan. 1, 2016		§ 770.16(12)
<b>Minnesota §§ 590.01 through .06</b>	Any crime	Prima facie evidence material to conviction	Must be filed within two years of final judgment		§ 590.10

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<b>Mississippi § 99-39-5</b>	Any crime	Reasonable likelihood of more probative results	Must be filed within three years of final judgment	Specifies that those who pled guilty, nolo contendere, confessed or admitted to a crime may apply for testing	§ 99-49-1
<b>Missouri § 547.035</b>	Any crime	Reasonable probability it will exculpate			§ 650.056
<b>Montana §§ 46-21-110, 53-1-214</b>	Any felony	Prima facie evidence material to conviction			§ 46-21-111
<b>Nebraska §§ 29-2101, 4117 through 4125</b>	Any crime	Relevant noncumulative, exculpatory evidence			§ 29-4125
<b>Nevada § 176.0918</b>	Any felony	Reasonable probability			§ 176.0912
<b>New Hampshire §§ 651-D1 through D:4</b>	Any crime	Clear and convincing evidence that results will constitute new, noncumulative evidence that will exonerate			§ 651-D:3
<b>New Jersey § 2A:84A-32a</b>	Any crime	Prima facie evidence material to conviction			
<b>New Mexico § 31-1A-2</b>	Any felony	Preponderance of the evidence		Specifies that individuals who pled guilty are eligible to apply for testing	§ 31-1A-2
<b>New York Crim. Pro. Law § 440.10</b>	Any crime	Reasonable probability its favorable to defendant		Individuals convicted after a guilty plea must meet additional criteria	
<b>North Carolina § 15A-269</b>	Any crime	Reasonable probability of contradicting prior test results.			§ 15A-268
<b>North Dakota § 29-32.1-15</b>	Any crime	Prima facie evidence material to conviction			
<b>Ohio §§ 2953.71 through .83</b>	Any felony	Discretion of court of common pleas		Individuals who pled guilty or no contest are not eligible to apply for testing	§ 2953.81
<b>Oklahoma Tit. 22 § 1373</b>	Violent felony or sentence for 25 or more years	Reasonable probability of non-conviction		Specifies that individuals convicted on plea of guilty or nolo contendere are eligible to apply for testing	Tit. 22, § 1372
<b>Oregon § 138.690</b>	Aggravated murder, a person felony, murder, a sex crime	Prima facie showing of actual innocence, Reasonable possibility of exculpatory evidence	Court may impose reasonable conditions to protect interests of state in integrity of evidence and testing process		§§ 133.705 through 717

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<b>Pennsylvania Tit. 42, § 9543.1</b>	Any crime	Prima facie showing of actual innocence			
<b>Rhode Island §§ 10-9.1-11, 12</b>	Any crime	Reasonable probability of non-conviction			§ 10-9.1-11
<b>South Carolina §§ 17-28-10 through 120</b>	Enumerated violations, including murder, and spousal sexual assault	Preponderance of evidence that evidence to be tested is material		An individual who pled guilty or nolo contendere may apply no later than 7 years after sentencing	§ 17-28-320
<b>South Dakota § 23-5B-1</b>	Any felony	Testing must show actual innocence	Testing must be reasonable in scope, use scientifically sound methods and be consistent with accepted forensic practices		
<b>Tennessee §§ 40-30-301 through 313</b>	A person convicted of first degree murder, second degree murder, aggravated rape, rape, aggravated sexual battery or rape of a child, attempt of these offenses.	Reasonable probability of non-conviction			§ 40-30-309
<b>Texas Crim. Proc. Code Ann. §§ 64.01 through .05</b>	Any crime	Preponderance of evidence of non-conviction		Specifies that guilty or nolo contendere pleas do not limit availability of testing	Gov. Code Ann. § 411.053 Crim. Proc. Code Ann. § 38.43
<b>Utah §§ 78B-9-301 through 304</b>	Any felony	Potential to produce new, noncumulative evidence of factual innocence			
<b>Vermont §§ 5561 through 5577</b>	Enumerated violations, including arson, murder, sexual assault.	Reasonable probability of non-conviction			
<b>Virginia § 19.2-327.1</b>	Any felony	Clear and convincing evidence that testing is material, necessary, non-cumulative			§ 19.2-270.4:1
<b>Washington § 10.73.170</b>	Any felony	Likelihood to demonstrate innocence			§ 10.73.170
<b>West Virginia § 15-2B-14</b>	Any felony	Prima facie showing that evidence is material and would raise reasonable probability of more favorable sentence		Specifies that guilty or nolo contendere pleas do not limit availability of testing	
<b>Wisconsin § 974. 07</b>	Any crime	Reasonable probability of non-conviction			§ 968.205

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Wyoming §§ 7-12-302 through 315	Any felony	Prima facie case that evidence would establish actual innocence	Individuals convicted after January 1, 2000 must show that failure to request testing during trial was a result of ineffective assistance of counsel	Specifies that guilty or nolo contendere pleas do not limit availability of testing	§ 7-12-304

**Source:** National Conference of State Legislatures, 2013.