Middlesex District Attorney's Office
Guidelines for Responding to Motions for Forensic Testing
Pursuant to G.L. c. 278A

In 2012, the Legislature enacted G.L. c. 278A, "An Act providing access to forensic and scientific analysis," in order to remedy the injustice of wrongful convictions by allowing defendants claiming factual innocence access to forensic and scientific analysis of evidence or biological material, the results of which could support a motion for a new trial. See Commonwealth v. Clark, 472 Mass. 120, 121–122 (2015).

G.L. c. 278A provides for a two-step procedure to determine whether a defendant is entitled to post-conviction access to forensic and scientific analysis. First, the court determines whether the defendant has met the threshold requirements under G.L. c. 278A, § 3. If those requirements are met, the court holds a hearing to determine whether the defendant has established by a preponderance of the evidence the criteria laid out in G.L. c. 278A, § 7(b). See generally Commonwealth v. Wade, 467 Mass. 496, 501 (2013) (Wade II). Motions under c. 278A are "separate from the trial process and any post-conviction proceedings challenging the underlying conviction." Id. at 505.

The Middlesex District Attorney's Office ("MDAO") is committed to identifying potentially wrongful convictions and responding in a fair and expeditious manner. To that end, it is the policy of the MDAO to work cooperatively with the defendant and his or her counsel to resolve motions brought under c. 278A. The guidelines set out below are designed to enable the MDAO to expedite consideration of and action on c. 278A motions by (i) guiding the process by which individual ADAs formulate their responses and (ii) coordinating the efforts of the Conviction Integrity Unit ("CIU") and the Appeals & Training Bureau ("Appeals Bureau") who jointly handle such motions.

Step 1: Processing, Assignment, and Tracking of c. 278A Motions

Requests for forensic testing by defendants claiming factual innocence come in various forms, from counseled motions tracking the statute that have been filed with the court and served on the Commonwealth to hand-written letters sent directly to the MDAO from pro se defendants. All communications that reasonably appear to request post-conviction scientific testing should be forwarded to the Director of the CIU or the Chief of Appeals. The CIU is an independent unit that reports to the First Assistant in collaboration with the Appeals Bureau.

Referrals for Counsel

A defendant may submit a request for post-conviction testing either pro se or through counsel. If a defendant is already represented by counsel, however, all requests for review and post-conviction forensic testing should be directed through that attorney. If a defendant is represented by an attorney, the CIU will only communicate with the defendant through their attorney.

If a pro se defendant submits a request for review or for post-conviction testing, the Director of the CIU may consider referring a case to the Committee for Public Counsel Innocence Program ("CPCS IP"), when appropriate. If CPCS IP declines representation, the defendant can file a motion with the court for appointment of counsel pursuant to G.L. c. 278A, § 5 ("The court may assign or appoint counsel to represent a moving party who meets the definition of indigency under section 2 of chapter 211D in the preparation and presentation of motions filed under this chapter").

Assignment

If a request is submitted by counsel, or a pro se defendant has re-submitted a request after CPCS IP has declined to assign counsel, the Chief of Appeals will assign an ADA to handle the request under the supervision of a senior appellate ADA with c. 278A experience, copying the Director of the CIU on the assignment memo.

Initial Victim Contact

Upon receipt of any motion under c. 278A that has been filed with the trial court, the Director of the CIU will coordinate with a Victim Witness Advocate to ensure that any victim[1] in the case is notified of the pendency of the c. 278A motion. See G.L. c. 278A, § 14(a) ("If a motion is filed under section 3, the prosecuting attorney shall notify the victim of the crime in the underlying case").

Step 2: Initial Review at the Section 3 Stage

The MDAO's policy is to assent to proposed forensic testing whenever the request presents satisfactory and reasonably credible information to meet all of the statutory requirements.

Assertion of Factual Innocence

The ADA should first confirm that the defendant has standing under § 2 of the statute. The defendant must have been convicted of a criminal offense and currently be incarcerated or on parole or probation or otherwise subject to a restraint of liberty. They must also have filed "with

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[1] Under G.L. c. 278A, § 1, the term "victim" includes "the parent, guardian, legal representative or administrator or executor of the estate of such person if that person is a minor, incompetent or deceased."

the motion an affidavit stating that the moving party is factually innocent of the offense of conviction and that the requested forensic or scientific analysis will support the claim of innocence," § 3(d). See Wade II, 467 Mass. at 512 ("[T]o assert factual innocence, a moving party must assert that he did not commit the offense of which he was convicted"). See also Commonwealth v. Williams, 481 Mass. 799, 806 (2019) (a defendant's claim that he acted in self-defense and is therefore factually innocent of manslaughter sufficient for assertion of "factual innocence of the crime for which the person has been convicted").

If the assigned ADA believes that a claim of factual innocence made in connection with a c. 278A motion is not only sufficient to satisfy the statutory filing requirement but is also an independently plausible claim of actual innocence, he or she will immediately refer the matter to the Director of the CIU. The Director of the CIU will also separately review all c. 278A motions for colorable claims of factual innocence that may warrant presentation to the Conviction Integrity Committee ("CIC") even before the results of any requested forensic testing become available.

Satisfaction of Statutory Factors

If the defendant has adequately asserted factual innocence, the ADA should proceed to determine whether the defendant has stated a prima facie case for testing under the statute by alleging facts that meet the statutory criteria. As the SJC has explained, the defendant's burden at this stage is a "modest" one and this stage of the process is "essentially nonadversarial." Wade II, 467 Mass. at 507, 503; see also Clark, 472 Mass. at 132. "At this threshold stage, 'a moving party is required only to point to the existence of specific information that satisfies the statutory requirements.'" Commonwealth v. Wade, 475 Mass. 54, 56 (2016) (Wade III), quoting Commonwealth v. Donald, 468 Mass. 37, 41 (2014). In fact, while the Commonwealth can assist the court at the § 3 stage, it need not make any responsive filing unless and until the judge has made an initial determination that the motion is sufficient. See G.L. c. 278A, § 3(e) ("The court shall expeditiously review all motions filed and shall dismiss, without prejudice, any such motion without a hearing if the court determines, based on the information contained in the motion, that the motion does not meet the requirements set forth in this section. The prosecuting attorney may provide a response to the motion, to assist the court in considering whether the motion meets the requirement under this section"). Wade II, 467 Mass. at 503.

In addition to the statutorily-required assertion of factual innocence, the motion must include the following to satisfy the preliminary requirements of § 3:

(1) the name and a description of the requested forensic or scientific analysis;
(2) information demonstrating that the requested analysis is admissible as evidence in courts of the commonwealth;

(3) a description of the evidence or biological material that the moving party seeks to have analyzed or tested, including its location and chain of custody if known;[2]
(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:

(i) the requested analysis had not yet been developed at the time of the conviction;
(ii) the results of the requested analysis were not admissible in the courts of the commonwealth at the time of the conviction;
(iii) the moving party and the moving party's 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;
(iv) 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, a reasonably effective attorney[3] would have sought the analysis and either the moving party's attorney failed to seek the analysis or the judge denied the request; or

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[2] The moving party does not have any burden to provide the location and chain of custody of the evidence or biological material unless such information is known to him. See Clark, 472 Mass. at 131.

[3] In order to demonstrate that the requested analysis was not conducted because of the trial attorney's failure to seek such analysis, the moving party only needs to provide information demonstrating that "a reasonably effective attorney would have sought the requested analysis, not that every reasonably effective attorney would have done so." Wade II, 467 Mass. at 511 (emphasis in original). The standard for ineffective assistance of counsel is not applicable. Id. at 511-512 & nn.20-21. "Because G.L. c. 278A does not apply the Saferian ineffective assistance of counsel framework to evaluate whether an attorney is reasonably effective, the fact that trial counsel followed one trial strategy where another reasonably effective attorney might have sought DNA testing is enough to satisfy § 3(b)(5)(iv)." Commonwealth v. Coutu, 88 Mass. App. Ct. 686, 703 (2015). See Commonwealth v. Steadman, 489 Mass. 372, 391 (2022) (the fact that testing would have come with some risk to defendant is not dispositive of whether a reasonable effective attorney would have requested testing); Commonwealth v. Ramos, 490 Mass. 818, 828 (2022) ("a reasonably effective attorney would have requested the DNA testing in light of the fact that it potentially could corroborate the testimony of the lone defense witness and contradict the Commonwealth's argument"); Commonwealth v. Jenks, 487 Mass. 1032, 1035 (2021) (defendant presented "sufficient information that his trial attorney failed to seek basic ballistics analysis that a reasonable attorney would have sought"); Commonwealth v. Linton, 483 Mass. 227, 238 (2019) (holding that reasonably effective attorney would not have had hair tested where other DNA not a match for defendant and attorney able to capitalize on lack of testing on hair for Bowden defense).

(v) the evidence or biological material was otherwise unavailable at the time of the conviction.

G.L. c. 278A, § 3(b).

Procedural History and Case Facts

The reviewing ADA should be able to determine whether the defendant has met most of the § 3 pleading requirements from the face of the motion. The materiality determination, however, may require some investigation into the facts of the case to determine the evidentiary significance (or potential significance) of the material to be tested. To gain familiarity with the background of the case sufficient to evaluate the merits of the motion, the assigned ADA should request the MDAO's trial file and, if applicable, appellate file for the case and review any previous appellate decisions and briefs along with trial transcript and police reports as necessary and available. The assigned ADA should promptly prepare a working summary of the procedural history of the case and its underlying facts, drawing from previous appellate briefs and decisions to prevent unnecessary duplication of effort. This summary will facilitate future discussions of the c. 278A motion and can serve as a starting point for any written filings.

Materiality

Unlike most of the other § 3(b) requirements, materiality can be viewed as not simply a matter of fact to be alleged but a legal conclusion. The assertion of materiality should be at least colorable.

It is important to keep in mind that the materiality requirement does not impose a burden on the defendant to establish "a reasonable probability of a more favorable result at trial." Wade II, 467 Mass. at 507. In evaluating materiality, the ADA should not consider the strength of the Commonwealth's underlying case, e.g., id. at 505-506, but, in accordance with the language of the statute, should only consider whether testing of the material in question has the potential to yield information that would identify the perpetrator regardless of whether such evidence is likely to inculpate or exculpate the requesting defendant.[4] This analysis will turn in part on the evidentiary significance of the item/material in the context of the crime (regardless of whether it was introduced at trial[5] or how it might or might not match up with the defense strategy or claims

[4] See Williams, 481 Mass. at 809 (2019) ("a defendant who asserts that the requested testing has the potential to result in evidence that is material to his or her identity as the perpetrator of the crime because no crime in fact occurred satisfies the § 3(b)(4) requirement"). See also, Commonwealth v. Putnam, 481 Mass. 1045, 1046 (2019) (same).

[5] See G.L. c. 278A, § 7(c) ("[T]he court may order discovery 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").

at trial[6]). For example, the ADA should consider whether or not the perpetrator did, or would have, come in contact with the item or whether it otherwise can "establish a direct link to the perpetrator's identity." Commonwealth v. Moffat, 478 Mass. 292, 301 (2017) (citing cases). See Commonwealth v. Steadman, 489 Mass. 372, 389-390 (2022) (testing of blood found on items at campsite had "potential to link someone other than the defendant to the murder"); Commonwealth v. Ramos, 490 Mass. 818, 827 (2022) (testing victim's fingernail clippings to determine whether they contain traces of defendant's DNA has potential to result in evidence material to defendant's claim he acted in self-defense); Commonwealth v. Linton, 483 Mass. 227, 242 (2019) (materiality standard for further DNA testing of swabs taken from victim's neck where expert witness identified potentially exculpatory male DNA at single locus in data derived from samples using lower threshold for detection); Clark, 472 Mass. at 121–122, 131-133, 135 (kitchen knife wielded by assailant and stabbed into his shoulder by victim warranted DNA testing); Donald, 468 Mass. at 42-43 (DNA testing of saliva sample, head hairs, and victim's pubic hairs in rape kit and cutting from rape victim's underwear had "potential to produce a DNA profile that fails to match, or does match, [defendant]'s DNA profile, and is therefore material to identifying him as the perpetrator of the rape"); Wade II, 467 Mass. at 506–508 (DNA testing of samples from rape/murder victim's vagina and clothing could result in DNA profile that excludes defendant as contributor, a result that "clearly would be material to the question of the identity of the individual who raped the victim"); Commonwealth v. Lyons, 89 Mass. App. Ct. 485, 485–486, 495-496 (2016) (defendant convicted of murder sought DNA testing of hairs found clutched in victim's hands to identify perpetrator); Commonwealth v. Coutu, 88 Mass. App. Ct. 686, 687, 702 (2015) (defendant sought DNA testing of finger swabs of victim who testified that she attempted to "pull" and "peel" her attacker's fingers off her face). In addition, as the SJC observed in Moffat, G.L. c. 278A is not limited to "direct evidence" of the perpetrator's identity and, in some cases, "it might be possible, or, indeed, likely, depending on the facts of a particular case, that DNA evidence could be used in conjunction with other evidence to establish the identity of a third party." 478 Mass. at 301.

However, where there is no connection between the material to be tested and the perpetrator, testing is not warranted. For example, in Clark, 472 Mass. at 138 & n.8, the defendant failed to show that a pair of men's socks that were found in the victim's apartment would provide material identification evidence where the record did not indicate that the socks once belonged to, or were ever touched by, the victim's assailant and the socks were never introduced into evidence. See also Commonwealth v. Moffat, 478 Mass. 292, 300-301 (2017) (no abuse of discretion in determination at § 7 stage[7] that DNA testing of cigarette butts found at the side of a public road in the general vicinity of crime scene did not have potential to result in evidence material to identity of perpetrator where nothing showed temporal link with victim's shooting and defendant

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[6] See Commonwealth v. Lyons, 89 Mass. App. Ct. 485, 495 (2016).

[7] Although the appeal came after a § 7 determination, the logic of the court's reasoning would seem to apply with equal force at the § 3 stage.

did not mention that anyone else at scene had smoked cigarettes in either his statements to police or trial testimony).

Mixed Requests
Where a defendant requests that multiple items be tested or multiple tests be conducted of the same item (a mixed request), the ADA may conclude that the statutory requirements have been met with respect to some of the testing requests but not others. The assigned ADA should discuss mixed requests and other questions about whether and to what extent the Commonwealth should take a position at the § 3 stage with the assigned appellate supervisor.

Step 3: Preparing a Recommendation for the Director of the Conviction Integrity Unit

Whether the assigned ADA determines that the § 3 requirements have been met or not, he or she should be prepared to discuss and explain that position with the Director of the CIU and the assigned appellate supervisor, along with consideration of the need for/desirability of a § 7 hearing.

Oppositional Filings and Letters
If the assigned ADA determines that a request by a defendant fails to sufficiently allege the statutory requirements such that it is materially deficient, the ADA should draft a brief opposition that highlights the facial deficiencies to assist the court. If the defendant has communicated with the MDAO about testing but not yet filed a motion with the court, the ADA should contact the defendant and state that the request does not meet the requirements of c. 278A and briefly identify the areas in which it falls short. The Director of the CIU and the assigned appellate supervisor will review any opposition prior to filing/transmitting.

Requests Outside of c. 278A
To the extent a defendant is (formally or effectively) requesting testing outside the parameters of c. 278A, the assigned ADA should refer the matter to the Director of the CIU. See G.L. c. 278A, § 2 ("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").

Assenting to Testing Without a Section 7 Hearing
If the § 3 requirements have been met, the defendant is automatically entitled to a hearing on the motion. See G.L. c. 278A, § 6(a). Thus, whenever the assigned ADA concludes that the defendant has satisfied the requirements of § 3, he or she should further consider whether a § 7 evidentiary hearing is necessary or whether the Commonwealth should assent without a hearing.

Under G.L. c. 278A, § 4, the Commonwealth is required to a file a response after it receives notice that a motion has not been dismissed at the § 3 stage. Specifically, the Commonwealth will have 60 days from the date the court issues notice that the motion is sufficient in which to

file and serve a response that includes any specific legal or factual objections to the requested analysis.[8] G.L. c. 278A, § 4(b), (c).

Consistent with the MDAO's policy of assenting to testing where the statute has been satisfied, the key overarching question for the ADA in formulating the mandatory § 4 responsive filing is whether there is substantial doubt about the factual underpinning of any of the defendant's § 3 allegations, not merely whether the Commonwealth might have defensible legal arguments in opposition. To that end, the ADA, with the assistance of the CIU paralegal, should conduct basic due diligence to determine whether the evidence or biological material exists (§ 7(b)(1)) and, if so, whether there are substantial chain of custody concerns or other issues that need to be addressed at a hearing because of plausible concern that the material has deteriorated, been substituted, tampered with, replaced, handled, or altered such that the results of the requested analysis "would lack "any probative value" (§ 7(b)(2) (emphasis added)). If the proposed testing is novel or there are concerns about exhaustive or destructive testing, the ADA should consider whether a hearing is necessary to ensure that any order allowing the testing is sufficiently narrow and to avoid testing that would not be admissible in court. The assigned ADA should also consider whether any issue of "obstruction of justice or delay" (§ 7(b)(5)) has been raised, for example by a defendant pursuing successive meritless motions.[9] Any substantial doubt about the factual validity of the defendant's allegation(s) under § 3(b)(5)(i)-(v) should also be explored at this time. See, e.g., Donald, 468 Mass. at 45 & n.12 (moving party bears burden at § 7 hearing of establishing that requested testing offers "material improvement" over previously conducted analysis). The CIU Director, or alternatively the Chief of Appeals, will determine if the c. 278A statute has been satisfied and whether the MDAO will assent to the requested post-conviction forensic testing.

Materiality Revisited

To a large extent, where the § 3(b)(4) materiality requirement has been satisfied, it is unlikely that materiality will need to be addressed at an evidentiary hearing under § 7(b)(4). However, there may be situations where the § 3 materiality showing is essentially contingent on factual allegations that were outside the record or otherwise assumed to be true for purposes of the § 3 stage. If the ADA has substantial doubt about the underlying truth of the factual allegations supporting materiality, an evidentiary hearing may be appropriate. At a § 7(b)(4) hearing, the "defendant must demonstrate by a preponderance of the evidence that the requested analysis has the potential to result in evidence that is of significance to the moving party's identification as the perpetrator of the crime in the underlying case." Ramos, 490 Mass. at 825-826.

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[8] The 60-day response period can be enlarged for good cause shown. G.L. c 278A, § 4(b).

[9] The published case law has not yet addressed the meaning of "obstruction of justice or delay" in the context of § 7(b)(5).

Additional Considerations

In cases where the assigned ADA plans to recommend that the Commonwealth assent to testing, the ADA should also consider whether additional input to the court concerning transportation, handling, and return of evidence or biological materials (e.g., to preserve the chain of custody going forward) or selection of the laboratory would be appropriate. See G.L. c. 278A, § 8. The assigned ADA should prepare a draft § 4 filing, consulting with the appellate supervisor as appropriate.

If the defendant's request does not implicate any of the issues with respect to §§ 7 & 8 discussed above, the ADA should recommend that the Commonwealth assent to testing without a hearing.

Step 4: Conference with Appellate Supervisor and Director of Conviction Integrity Unit

Conference Regarding Section 3

Once the assigned ADA has made a preliminary determination about whether and to what extent the § 3 requirements have been met, the recommendation of whether to file any response at the § 3 stage and the proposed written response should be presented to the Director of the CIU, who will discuss it with the assigned ADA and his or her supervisor.

The Director of the CIU will review and request changes as appropriate to any draft response.

Conference Regarding Section 7

Whenever a determination has been made that the defendant has satisfied the § 3 requirements, the assigned ADA will further present the Director of the CIU with the draft § 4 responsive filing. This filing should reflect the ADA's recommendation regarding the extent to which the Commonwealth should assent to the requested testing without the need for a hearing under § 7. To the extent the ADA is recommending that the Commonwealth insist on a hearing, the recommendation should be supported with specific reference to the § 7 requirements the ADA believes should be contested.

Ongoing Victim Contact

The Director of the CIU will coordinate with a Victim Witness Advocate to ensure victim notification of any impending testing and, once they are available, the results of any testing. See G.L. c. 278A, § 14(b) ("The prosecuting attorney shall 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").

Exhaustive Testing

If at any time after testing is allowed (whether by assent or after a hearing) the assigned ADA receives notice that the testing would be exhaustive or destructive, he or she should inform the supervising appellate ADA and the Director of the CIU so that an appropriate response can be formulated. See G.L. c. 278A, § 8(e) ("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 court. Exhaustive testing shall not occur except by specific order of the court. In the event that exhaustive testing is so authorized, upon request of either party, the court 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").

Step 5: Motions for New Trial Supported by the Results of c. 278A Testing

If a defendant receives "test results favorable to his claim," he must file a motion for a new trial pursuant to Mass. R. Crim. P. 30(b) before a court can consider whether he is entitled to a new trial. Wade II, 467 Mass. at 505. All motions for new trial supported by the results of testing conducted pursuant to G.L. c. 278A should be forwarded to the Director of the CIU for possible presentation to the CIC. The ADA who had been assigned to formulate the Commonwealth's response to the c. 278A motion may be called upon to provide input to the Committee.

Effective April 2023