

Committee Report

CONSENT CALENDAR

February 26, 2021

HOUSE OF REPRESENTATIVES

REPORT OF COMMITTEE

**The Committee on Criminal Justice and Public Safety
to which was referred HB 270-FN,**

AN ACT relative to post-conviction DNA testing.

**Having considered the same, report the same with the
recommendation that the bill OUGHT TO PASS.**

Rep. Casey Conley

FOR THE COMMITTEE

COMMITTEE REPORT

Committee:	Criminal Justice and Public Safety
Bill Number:	HB 270-FN
Title:	relative to post-conviction DNA testing.
Date:	February 26, 2021
Consent Calendar:	CONSENT
Recommendation:	OUGHT TO PASS

STATEMENT OF INTENT

This bill cleans up and modernizes New Hampshire's existing statute relating to post-conviction DNA testing. Specifically, the bill outlines which court someone would petition for this type of relief, provides for legal counsel for indigent petitioners and clarifies the evidentiary standard petitioners must meet. The bill lowers the burden of proof a petitioner must satisfy to obtain this potentially exculpatory evidence. It does not change the existing standards for overturning a conviction. DNA evidence is relatively rare in New Hampshire criminal cases, and rarer yet when it could be successfully used to exonerate someone already convicted. The fiscal note indicates it would not lead to a large increase in petitions for testing, or court hearings, and as such would not have a fiscal impact.

Vote 20-0.

Rep. Casey Conley
FOR THE COMMITTEE

Original: House Clerk
Cc: Committee Bill File

CONSENT CALENDAR

Criminal Justice and Public Safety

HB 270-FN, relative to post-conviction DNA testing. **OUGHT TO PASS.**

Rep. Casey Conley for Criminal Justice and Public Safety. HB 270 cleans up and modernizes New Hampshire's existing statute relating to post-conviction DNA testing. Specifically, the bill outlines which court someone would petition for this type of relief, provides for legal counsel for indigent petitioners and clarifies the evidentiary standard petitioners must meet. The bill lowers the burden of proof a petitioner must satisfy to obtain this potentially exculpatory evidence. It does not change the existing standards for overturning a conviction. DNA evidence is relatively rare in New Hampshire criminal cases, and rarer yet when it could be successfully used to exonerate someone already convicted. The fiscal note indicates it would not lead to a large increase in petitions for testing, or court hearings, and as such would not have a fiscal impact.

Vote 20-0.

Original: House Clerk
Cc: Committee Bill File

Voting Sheets

HOUSE COMMITTEE ON CRIMINAL JUSTICE AND PUBLIC SAFETY

EXECUTIVE SESSION on HB 270-FN

BILL TITLE: relative to post-conviction DNA testing.

DATE: February 26, 2021

LOB ROOM: 204

MOTIONS: OUGHT TO PASS

Moved by Rep. Conley

Seconded by Rep. Marston

Vote: 20-0

CONSENT CALENDAR: YES

Statement of Intent: Refer to Committee Report

Respectfully submitted,

Rep Jennifer Rhodes, Clerk



2021 SESSION

Criminal Justice and Public Safety

Bill #: ~~360~~
370 Motion: OTP AM #: _____ Exec Session Date: 2/26/2021

<u>Members</u>	<u>YEAS</u>	<u>Nays</u>	<u>NV</u>
Abbas, Daryl A. Chairman	20		
Welch, David A. Vice Chairman	✓ 1		
Burt, John A.	2		
Hopper, Gary S.	3		
Green, Dennis E.	4		
Wallace, Scott	5		
Testerman, Dave	6		
True, Chris	7		
Pratt, Kevin M.	8		
Marston, Dick	9		
Rhodes, Jennifer M. Clerk	10		
Harriott-Gathright, Linda C.	11		
Pantelakos, Laura C.	12		
O'Hearne, Andrew S.			
Bordenet, John	13		
Meuse, David	14		
Newman, Ray E.	15		
Bouldin, Amanda C.	16		
Conley, Casey M.	17		
Klein-Knight, Nicole	18		
Bradley, Amy	19		



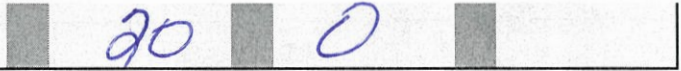
1/22/2021 9:56:15 AM
Roll Call Committee Registers
Report

2021 SESSION

Criminal Justice and Public Safety

Bill #: _____ Motion: _____ AM #: _____ Exec Session Date: _____

TOTAL VOTE:



Public Hearing

HOUSE COMMITTEE ON CRIMINAL JUSTICE AND PUBLIC SAFETY

PUBLIC HEARING ON HB 270-FN

BILL TITLE: relative to post-conviction DNA testing.

DATE: February 26, 2021

LOB ROOM: 306 **Time Public Hearing Called to Order:** 10:00 AM

Time Adjourned: 10:25 AM

Committee Members: Reps. Abbas, Welch, Rhodes, Burt, Hopper, Green, Wallace, Testerman, True, Pratt, Marston, Harriott-Gathright, Pantelakos, O'Hearne, Bordenet, Meuse, R. Newman, Amanda Bouldin, Conley, Klein-Knight and Bradley

Bill Sponsors:

Rep. Conley

Rep. Schapiro

Rep. Moran

Rep. Cushing

TESTIMONY

* Use asterisk if written testimony and/or amendments are submitted.

Rep. Conley – Support

- Introduced bill
- Bill is necessary for biological proof
- Wrongly convicted can have path to innocence

Q: Rep. Pratt – Is there any new material introduced from last year – when died due to “covid”?

A: Bill is the same from before

Elizabeth Powers - Innocence Project – Support

- This will create a more clear path for people wrongly convicted

Q: Rep. Abbas – How difficult is it to provide the DNA?

A: Depends on the state

Q: Rep. Testerman – Could this put someone who is innocent for 1 crime, found guilty of another?

A: If you are innocent, you may not be concerned

Albert Scherr – Support

- This will be helpful in the most severe crimes – murder, rape, etc.

Q: Rep. Abbas – Potential cost for DNA test

A: Minimal if state has lab

Q: Rep. True – Do you know of anyone requesting the DNA test (defendant) and was denied?

A: A few. Pre-trial is the key

Cynthia Mousse – Innocence Project – Support

- This isn't anything negative time can come from this

Respectfully submitted,

Rep. Jennifer Rhodes

House Remote Testify

Criminal Justice and Public Safety Committee Testify List for Bill HB270 on 2021-02-26


Support: 27 Oppose: 2 Neutral: 0 Total to Testify: 3

[Export to Excel](#)

<u>Name</u>	<u>City, State</u> <u>Email Address</u>	<u>Title</u>	<u>Representing</u>	<u>Position</u>	<u>Testifying</u>	<u>Non-Germane</u>	<u>Signed Up</u>
Powers, Elizabeth	epowers@innocenceproject.org	A Member of the Public	Innocence Project	Support	Yes (5m)	No	2/16/2021 5:09 PM
Scherr, Albert (Buzz)	Portsmouth, NH albert.scherr@law.unh.edu	A Member of the Public	Myself	Support	Yes (2m)	No	2/24/2021 5:52 PM
Mousseau, Cynthia	cmousseau@newenglandinnocence.org	A Member of the Public	New England Innocence Project	Support	Yes (2m)	No	2/16/2021 4:03 PM
Mennella, Alexandra	Hooksett, NH amennella1@protonmail.com	A Member of the Public	Myself	Support	No	No	2/25/2021 6:27 PM
Groetzinger, Tonda	Farmington, NH groetzinger6@aol.com	A Member of the Public	Myself	Oppose	No	No	2/25/2021 1:48 PM
Abramson, Max	Seabrook, NH Max.Abramson@leg.state.nh.us	An Elected Official	Myself	Support	No	No	2/25/2021 5:42 PM
Cushing, Renny	Hampton, NH reprennycushing@gmail.com	An Elected Official	Myself	Support	No	No	2/26/2021 8:43 AM
Cooper, Katherine	Epping, NH katherine@NHACDL.org	A Lobbyist	NH Association of Criminal Defense Lawyers	Support	No	No	2/25/2021 8:03 PM
Fordey, Nicole	Litchfield, NH nikkif610@gmail.com	A Member of the Public	Myself	Support	No	No	2/20/2021 1:52 PM
Bates, David	Warner, NH dbates3@yahoo.com	A Member of the Public	Myself	Support	No	No	2/21/2021 10:29 AM
Johnson, Sara	Warner, NH nhchicagocubfan@gmail.com	A Member of the Public	Myself	Support	No	No	2/21/2021 4:03 PM
DeMark, Richard	Meredith, NH demarknh114@gmail.com	A Member of the Public	Myself	Support	No	No	2/21/2021 2:47 PM
Pospychala, Erin	WILMOT, NH erinmvp@gmail.com	A Member of the Public	Myself	Support	No	No	2/21/2021 7:03 PM
Howland, Curt		A Member of the Public	Myself	Support	No	No	2/21/2021 7:52 PM

	Manchester, NH howland@priss.com	Public					
Wells, Ken	Andover, NH kenwells3@gmail.com	A Member of the Public	Myself	Support	No	No	2/21/2021 10:15 PM
Wells, Lee	Andover, NH leewells.locustfarm@gmail.com	A Member of the Public	Myself	Support	No	No	2/21/2021 10:21 PM
Larson, Ruth	Alton, NH ruthlarson@msn.com	A Member of the Public	Myself	Support	No	No	2/21/2021 10:40 PM
McKevitt, Susan	Bradford, NH mewil@tds.net	A Member of the Public	Myself	Support	No	No	2/22/2021 9:00 AM
Courser, Rebecca	Warner, NH rcourser@hotmail.com	A Member of the Public	Myself	Support	No	No	2/22/2021 9:29 AM
Hayden, Sam	Hopkinton, NH hayden.sam@gmail.com	A Member of the Public	Myself	Support	No	No	2/22/2021 2:59 PM
Paschell, Susan	Bow, NH spaschell@dupontgroup.com	A Lobbyist	The Innocence Project	Support	No	No	2/22/2021 3:40 PM
Vogt, Robin	Portsmouth, NH robin.w.vogt@gmail.com	A Member of the Public	Myself	Support	No	No	2/23/2021 9:36 AM
Ingram, April	Warner, NH aandk@tds.net	A Member of the Public	Myself	Support	No	No	2/23/2021 12:44 PM
Cook, Richard	Warner, NH r_cook@mcttelecom.com	A Member of the Public	Myself	Oppose	No	No	2/23/2021 3:51 PM
Hruska, Jeanne	Concord, NH Jeanne@aclu-nh.org	A Lobbyist	ACLU-NH	Support	No	No	2/24/2021 9:14 AM
Warren, Joan	Warner, NH joanbcwarren@gmail.com	A Member of the Public	Myself	Support	No	No	2/23/2021 5:00 PM
Chase, Valerie	GILFORD, NH valerieachase@gmail.com	A Member of the Public	Myself	Support	No	No	2/25/2021 3:44 PM
Enos, Liz	Hudson, NH Pwrmine@aol.com	A Member of the Public	Myself	Support	No	No	2/25/2021 1:59 PM
Thomas, Nicholas	Manchester, NH nicholas.w.thomas@uconn.edu	A Member of the Public	Myself	Support	No	No	2/25/2021 10:28 PM

Testimony

Archived: Friday, March 5, 2021 9:57:27 AM
From: [Cynthia Mousseau](#)
Sent: Thursday, February 25, 2021 3:24:56 PM
To: ~House Criminal Justice and Public Safety
Subject: NH House Remote Testify: 9:45 am - HB270 in House Criminal Justice and Public Safety
Importance: Normal
Attachments:
[DNA Testimony.docx](#) 

Hello,




Enclosed, please find written comments on HB 270 for your consideration.

Thank you,
Cynthia

--

Cynthia Mousseau
Staff Attorney
Pronouns: she/her/hers
New England Innocence Project



 [617-945-0762](tel:617-945-0762)
 www.newenglandinnocence.org
 1035 Cambridge Street, Suite 28A, Cambridge, MA 02141

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Archived: Friday, March 5, 2021 9:57:27 AM

From: [Scherr, Albert](#)

Sent: Wednesday, February 24, 2021 5:55:11 PM

To: [~House Criminal Justice and Public Safety](#)

Subject: NH House Remote Testify: 9:45 am - HB270 in House Criminal Justice and Public Safety

Importance: Normal


Attachments: [Statement by Albert Scherr on HB 270.docx](#);

To the Committee:

Attached is my written testimony in support of HB 270

Best,

Albert (Buzz) Scherr
UNH School of Law
Concord, NH 03301
603-828-6515

Archived: Friday, March 5, 2021 9:57:27 AM
From: Elizabeth Powers
Sent: Thursday, February 25, 2021 11:02:11 AM
To: ~House Criminal Justice and Public Safety
Subject: [CAUTION: SUSPECT SENDER] NH House Remote Testify: 9:45 am - HB270 in House Criminal Justice and Public Safety
Importance: Normal
Attachments:
NH Criminal Justice Hearing testimony on HB 270 Feb 2021.docx.pdf 

Please find attached written comments in support of HB 270 on behalf of the Innocence Project.

Thank you,

Beth Powers

--

Beth Powers
State Campaign Director
Innocence Project
40 Worth Street, Suite 701 | New York, NY 10013
212-364-5988 | epowers@innocenceproject.org
www.innocenceproject.org

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Bill as
Introduced

HB 270-FN - AS INTRODUCED

2021 SESSION

21-0075

04/05

HOUSE BILL ***270-FN***

AN ACT relative to post-conviction DNA testing.

SPONSORS: Rep. Conley, Straf. 13; Rep. Schapiro, Ches. 16; Rep. Moran, Hills. 34; Rep.
Cushing, Rock. 21

COMMITTEE: Criminal Justice and Public Safety

ANALYSIS

This bill amends the statute governing post-conviction DNA testing procedures.

.....

Explanation: Matter added to current law appears in ***bold italics***.
Matter removed from current law appears ~~[in brackets and struckthrough.]~~
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Twenty One

AN ACT relative to post-conviction DNA testing.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 1 Post-Conviction DNA Testing of Biological Material. Amend RSA 651-D:2 to read as follows:

2 651-D:2 Post-Conviction DNA Testing of Biological Material.

3 I. A person in custody, ***on probation or parole, or whose liberty is otherwise***
4 ***restrained as a result of a conviction or adjudication as a delinquent*** pursuant to the
5 judgment of the court may, ***notwithstanding RSA 526:4***, at any time after conviction or
6 adjudication as a delinquent, petition the ***superior*** court ***in the county of conviction*** for forensic
7 DNA testing of any biological material. The petition shall, under penalty of perjury:

8 (a) Explain why the identity of the petitioner was or should have been a significant issue
9 during court proceedings notwithstanding the fact that the petitioner may have pled guilty or nolo
10 contendere, or made or is alleged to have made an incriminating statement or admission as to
11 identity.

12 (b) Explain why, in light of all the circumstances, the requested DNA testing will
13 exonerate the petitioner and demonstrate his or her innocence by proving that the petitioner has
14 been misidentified as the perpetrator of, or accomplice to, the crime for which the petitioner was
15 convicted.

16 (c) Make every reasonable attempt to identify ~~both~~ the evidence that should be tested
17 ~~[and the specific type of DNA testing which is sought].~~

18 (d) Explain why the evidence sought to be tested by the petitioner was not previously
19 subjected to DNA testing, or explain how the evidence can be subjected to retesting with different
20 DNA techniques that provide a reasonable probability of reliable and probative results.

21 ***I-a. If the superior court determines that an indigent petitioner has met the***
22 ***requirements of paragraph I, it shall appoint counsel to represent such petitioner in any***
23 ***further proceedings under this section.***

24 II. The court shall notify the office of the attorney general, or the county attorney who
25 prosecuted the case, of a petition made under this section and shall afford an opportunity to respond.
26 Upon receiving notice of a petition made under this section, the attorney general, or county attorney
27 who prosecuted the case, shall take such steps as are necessary to ensure that any remaining
28 biological material obtained in connection with the case or investigation is preserved pending the
29 completion of proceedings under this section ***and shall inform the petitioner regarding the***
30 ***location and condition of evidence in their possession that was obtained in relation to the***
31 ***underlying case, regardless of whether it was introduced at trial. Items discoverable at***

1 *trial under the New Hampshire rules of criminal procedure shall be made available to the*
2 *petitioner.*

3 III. *After a hearing*, the court ~~[may]~~ **shall** order DNA testing pursuant to an application
4 made under this section upon finding that the petitioner has established each of the following factors
5 by ~~[clear and convincing]~~ **a preponderance of the** evidence:

6 (a) The evidence to be tested was secured in relation to the investigation or prosecution
7 that resulted in the petitioner's conviction or sentence, and is available and in a condition that would
8 permit the DNA testing that is requested in the motion.

9 (b) The evidence to be tested has been subject to a chain of custody sufficient to establish
10 it has not been substituted, tampered with, replaced, or altered in any material aspect.

11 (c) The evidence sought to be tested is material to the issue of the petitioner's identity as
12 the perpetrator of, or accomplice to, the crime.

13 (d) DNA results of the evidence sought to be tested would be material to the issue of the
14 petitioner's identity as the perpetrator of, or accomplice to, the crime that resulted in his or her
15 conviction or sentence.

16 (e) If the requested DNA testing produces exculpatory results, the testing will constitute
17 new, noncumulative material evidence that ~~[will exonerate the petitioner by establishing that he or~~
18 ~~she was misidentified as the perpetrator or accomplice to the crime]~~ **there is a reasonable**
19 **probability the petitioner would not have been convicted.**

20 (f) The evidence sought to be tested was not previously tested using DNA technology or
21 the ~~[technology requested was not available at the time of trial]~~ **type of testing sought is capable**
22 **of producing new or more informative results.**

23 (g) If DNA or other forensic testing previously was done in connection with the case, the
24 requested DNA test would provide results that are **new or** ~~[significantly]~~ more ~~[discriminating]~~
25 **informative** and probative on a material issue of identity, and would have a reasonable probability
26 of contradicting prior test results.

27 (h) The testing requested employs a method generally accepted within the relevant
28 scientific community.

29 ~~[(i) The motion is timely and not unreasonably delayed.]~~

30 IV. If the court grants the motion for DNA testing, the court's order shall:

31 (a) Identify the specific evidence to be tested and the DNA technology to be used.

32 (b) If the court ordered different testing than requested by the petitioner, the court shall
33 explain why the different test was ordered.

34 (c) Designate the New Hampshire state police forensic laboratory to conduct the test.
35 However, the court, upon a showing of good cause, may order testing by another laboratory or agency
36 ~~[accredited by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board~~
37 ~~(ASCLD/LAB) or the National Forensic Science Training Center]~~ **that conforms to the current**

1 *version of ISO/IEC 17025 requirements, the appropriate quality assurance standards*
2 *required by the Federal Bureau of Investigation, and to forensic-specific requirements, and*
3 *accredited by an organization that is a signatory to the International Laboratory*
4 *Accreditation Cooperation Mutual Recognition Arrangements for Testing Laboratories, if*
5 *requested by the petitioner. The laboratory shall give equal access to its personnel, opinions,*
6 *conclusions, reports, and other documentation to the prosecuting attorney and the*
7 *petitioner. Consumptive testing shall not occur except upon written permission by both the*
8 *prosecutor and petitioner or by a specific order of the court.*

9 (d) [Repealed.]

10 V. The cost of DNA testing ordered under this section shall be paid by the petitioner, or by
11 the state, if the petitioner is indigent as determined by the court. ~~[The court may appoint counsel for~~
12 ~~an indigent petitioner under this section.]~~

13 VI.(a) If the results of DNA testing conducted under this section are unfavorable to the
14 petitioner, the court shall dismiss the application and in cases where the petitioner was convicted of
15 a sexual offense, the court shall forward the test results to the New Hampshire state prison, sex
16 offender program.

17 (b) In addition to any other substantive or procedural remedies provided by applicable
18 law, if the results of DNA testing conducted under this section are favorable to the petitioner, **and**
19 **notwithstanding RSA 526:4**, the court shall order a hearing and shall enter any order that serves
20 the interests of justice, including an order vacating and setting aside the judgment, discharging the
21 petitioner if the petitioner is in custody, resentencing the petitioner, or granting a new trial.

22 VII. Nothing in this chapter shall be construed to limit the circumstances under which a
23 person may obtain DNA testing or other post-conviction relief under any other provision of state or
24 federal law.

25 2 Effective Date. This act shall take effect 60 days after its passage.

**HB 270-FN- FISCAL NOTE
AS INTRODUCED**

AN ACT relative to post-conviction DNA testing.

FISCAL IMPACT: State County Local None

STATE:	Estimated Increase / (Decrease)			
	FY 2021	FY 2022	FY 2023	FY 2024
Appropriation	\$0	\$0	\$0	\$0
Revenue	\$0	\$0	\$0	\$0
Expenditures	\$0	Indeterminable Increase	Indeterminable Increase	Indeterminable Increase
Funding Source:	<input checked="" type="checkbox"/> General	<input type="checkbox"/> Education	<input type="checkbox"/> Highway	<input type="checkbox"/> Other

METHODOLOGY:

This bill amends the statute governing post-conviction DNA testing procedures. The Judicial Council indicates post-conviction DNA testing currently applies to individuals who are in custody. The bill expands availability of DNA testing to individuals on probation, parole, or anyone whose liberty is otherwise restrained. The bill would guarantee the right to court appointed counsel if the superior court grants a petition for forensic DNA testing of biological material and the petitioner is indigent. The Council is unable to predict either the number of additional cases or the associated cost. However, based on information from the Department of Safety, only a small number of the annual DNA test performed are for post-conviction matters. While the cost is indeterminable, the Council anticipates an insignificant increase in expenditures.

The Department of Safety indicates the fiscal impact of the bill on state expenditures is indeterminable and will depend on the number of petitions that will meet the criteria in proposed RSA 651-D:2, III. Frequently, DNA testing cannot be performed by the State Police Forensic Laboratory and must be sent to a private laboratory at an additional cost to the requestor or the State.

The Judicial Branch makes the following assumptions concerning the fiscal impact of this bill:

- The bill broadens the eligibility requirements to petition the Superior Court for authorization to proceed with DNA testing of evidence related to a conviction or adjudication.
- The bill eliminates any potential argument that there are time limits related to petitions for authorization to proceed with DNA testing of evidence related to a conviction or adjudication.

- The bill changes the appointment-of-counsel terms of the law from discretionary to mandatory if certain basic conditions are met by a petitioner. This is likely to result in the involvement of more appointed counsel in these proceedings and will likely increase the length of time the proceedings take to get to a final disposition and will likely to increase the in-court time for these proceedings.
- Because the bill changes the standard of review for petitions for post-conviction DNA testing in two important ways that are more favorable to the petitioner, it is reasonable to assume that anyone who has filed a previous petition for post-conviction DNA testing and who has had their petition denied by the court would file a new petition under the new law.
- The bill would change the procedure in the courts to require the court to hold a hearing on a petition. Under existing law the decision as to whether a hearing will be held is left to the discretion of the trial court. This will increase the number of hearings held in connection with petitions for post-conviction DNA testing.

The Judicial Branch does not have available statistics on the annual number motions for post-conviction DNA testing. Without manually going through each file, the Branch cannot determine how many motions for post-conviction DNA testing are filed each year. However anecdotally, court staff indicate that these petitions are exceedingly rare, likely because the identity of an offender is not regularly the issue in a sexual assault case in New Hampshire. However, the bill would make these petitions more likely to occur, lowers the standard of proof required to prevail, and requires that the court appoint counsel and hold in-court proceedings to address the petitions. The Branch indicates these petitions are rare, the bill is likely to increase the number petitions filed and a few more hearings would not be enough to have a fiscal impact. The Branch assumes this increase in workload would likely be adsorbed by the Judicial Branch within existing resources.

There would be no impact on state, county or local revenue or county and local expenditures.

It is assumed the fiscal impact of this bill will not occur until FY 2022.

AGENCIES CONTACTED:

Judicial Council, Department of Safety and Judicial Branch