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# Out of Prison, Out of Luck

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by Christie Thompson • May 27, 2015 • 4 min read • [original](#)

Dion Harrell was released from New Jersey state prison nearly two decades ago, but he still maintains that he was not the man who raped a 17-year-old on her way home from work in 1988. Three days after the assault, the victim saw Harrell in the parking lot of the McDonald's where she worked and called the cops. Police arrested him, and she told police he was the stranger who had attacked her that night. Based largely on the victim's identification, Harrell was convicted of second degree sexual assault in 1992 and given eight years in prison. He was paroled after serving four, but he is sentenced to remain on the sex offender registry and under community supervision for the rest of his life.

In November 2014, the Innocence Project petitioned the Superior Court of New Jersey in Monmouth County to analyze the contents of the rape kit again, using DNA technology that was unavailable at the time of Harrell's trial. But Monmouth County Prosecutor Christopher Gramiccioni initially refused. Under the New Jersey statute, only those who are currently in prison have access to DNA testing. "Defendant's sexual assault conviction is 22 years old," Gramiccioni wrote in January. "The State believes the conviction is entitled to finality."

Thirteen other states have similar laws, declaring that only those still serving time are eligible for post-conviction testing. But cases like Harrell's have spurred defense attorneys and some state lawmakers to

call for a change in policy, claiming that the consequences of a wrongful conviction continue long after a prisoner is set free. In late April, [Montana signed a new law](#) extending DNA testing to those already released. State legislators in [New Jersey](#), [Rhode Island](#), and [Oregon](#) are considering similar measures.

“Because [Harrell] has been released from prison he no longer has the right to demand testing of evidence that might clear his name – and possibly identify the true perpetrator,” said New Jersey state Assemblyman Declan O’Scanlon, one of the bill’s co-sponsors, [in a statement](#). “That is an awful contradiction that our laws present to prosecutors.”

In states with such “incarceration requirements,” it is not impossible for someone already released to obtain DNA testing, but it is far more difficult. Prosecutors can always choose to grant tests; but in states like New Jersey, they can also refuse on the grounds that an already freed offender is ineligible.

In February, Monmouth County Prosecutor Gramiccioni changed his mind and ultimately agreed to test the sperm sample in Harrell’s case, after local media attention and an appeal by Harrell’s lawyers. “While Dion Harrell was released from prison more than a decade ago and is no longer serving a term of imprisonment, it is nonetheless in the interest of justice to consent to Mr. Harrell’s motion for post-conviction DNA testing due to the unique facts and circumstances of his particular conviction,” prosecutor Gramiccioni [said in a statement](#). The Monmouth County Prosecutor’s Office did not respond to a request for comment. Test results are pending.

Those in favor of changing the law say offenders released from prison need to be explicitly granted the right to request a new DNA test. “[The law] has to be clear...You cannot just rely on the goodwill of prosecutors,” said Innocence Project senior staff attorney Vanessa Potkin, who is representing Harrell. “The people who really need DNA testing to prove innocence are people convicted in the 70s, 80s, and early 90s, before the current DNA technology existed.”

Some prosecutors disagree with the proposed change and say that expanding access to testing will overburden the courts. In a [testimony before the Oregon state legislature](#), district attorney Rod Underhill said that the current law was a “reasonable limitation.” In Oregon, only those convicted of aggravated murder or a sex crime may currently request DNA testing after getting out of prison. “The proposed expansion...creates a net result of significantly greater expense, more significant time demands and also represents an unjustified assault upon conviction finality,” he wrote.

In many states, the defendants themselves must pay for DNA testing unless they are indigent. [Roughly 42 percent](#) of the post-conviction DNA tests requested by the Innocence Project confirmed guilt, 43 percent proved the defendant’s innocence, and 15 percent were inconclusive.

The only physical evidence used to convict Harrell in 1992 was the blood type of the semen recovered after the attack, which matched his own. But it also matched the victim’s — information that was not presented to the jury in the original trial. The two kinds of DNA analysis that could identify a perpetrator in the case became available in New Jersey in 1999 and 2006, years after Harrell was released from prison.

Harrell wrote to the Innocence Project in 2002. But because of their backlog (they are currently evaluating 6,000 to 8,000 cases), it was more than a decade before attorneys took on his claim. While he waited, Harrell's lawyer, Potkin, said he struggled to find a job because of his conviction and was temporarily homeless. He is now unemployed. Harrell's attorneys said he was unavailable for comment because of his pending case.

Of the Innocence Project's current 244 cases, 12 involve people who are no longer in prison. And across the country, only 23 people have been exonerated by DNA testing after their release. "We're really talking about a small universe of people, but it's an important group that deserves the opportunity to clear their name," said Rebecca Brown, policy director for the Innocence Project. It is particularly important, she said, for those on the sex offender registry.

Ted Bradford was exonerated of rape and burglary based on DNA evidence in 2010, five years after he was released from prison. Because he was convicted in Washington State — which does not require someone to be in prison to access DNA testing — he was still able to prove his innocence after he completed his sentence.

Bradford said he did not know about the Innocence Project's Northwest Clinic until five years into his 10-year sentence. Even after they took on his case in 2002, it took until 2007 for them to identify available evidence and complete multiple rounds of advanced testing. While there was no physical evidence presented at Bradford's initial trial, lawyers ultimately discovered sweat cells on a mask worn by the attacker that were not Bradford's.

In prison, Bradford maintained his innocence and refused to participate in sex offender therapy. That meant he was released as a level 3 sex offender, the most restrictive tier. Flyers with his name and conviction were posted at every school and daycare center in his hometown of Yakima, Wash., including the schools where his two children were enrolled. The local newspaper ran several stories about the convicted rapist returning to the neighborhood.

“If it wasn’t for my ability to get the testing done after my release... I would still have to register as a sex offender, I would still have to report my address, I would still have this conviction on my record,” Bradford said. “The nightmare would have continued.”

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