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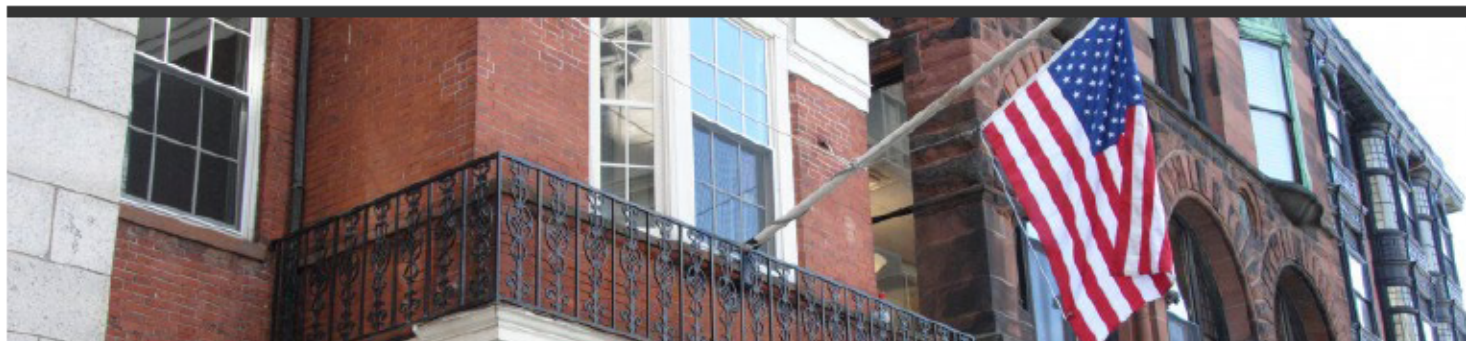


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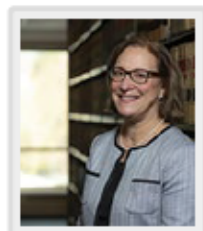
# Boston Bar Journal

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## Learning from Omar: The Case for Public Funding of Postconviction Innocence Defense

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by Sharon L. Beckman

### Viewpoint

*In 2020, the [Boston College Innocence Program](#) secured the exoneration of clients [Frances Choy](#) and [Ronnie Qualls](#) and the [release of a third client pending further litigation](#). The program has also made significant contributions*

*to law and practice reform efforts. The Boston Bar Journal asked BCIP's Director, Boston College Law Professor Sharon Beckman, to comment on what is behind the program's success and to share a lesson learned in her clinic.*

### About the Boston College Innocence Program

BCIP is an academic and clinical legal educational program at Boston College Law School that allows students and faculty to study the problem of wrongful convictions and work to remedy and prevent these injustices. We investigate and litigate on behalf of wrongfully convicted clients, and we engage in research and advocacy in support of law and policy reform initiatives. Our primary goals are to educate reflective practitioners who use their legal skills to help victims of injustice, and to generate ideas for making the legal system more just. BCIP students work with academics across the university and with a wide range of legal professionals, but they learn the most from our clients: men and women wrongfully convicted in Massachusetts for crimes they did not commit who give us the privilege of being their legal advocates. It is in accompanying them on their quest for justice that we gain insight into how the system has failed them and how it could be reformed. This started with our very first client, Christopher "Omar" Martinez.

## Omar's Ordeal

In 1999, when Omar was 19 years old, his friend Eddy Reynoso was shot to death just inside the door of his Springfield apartment. The prosecution alleged that Omar, who had never been involved with any crime, murdered Eddy because Eddy teased him about a girl. No physical evidence connected Omar with the crime, and witnesses testified that someone else had threatened Eddy just two days before he was killed. Nevertheless, after seven hours of custodial police interrogation, Omar, a Spanish speaker, signed an inculpatory statement typed in English by the police. Several aspects of the statement did not add up, a red flag for false confessions. Notably, the statement set forth a purported conversation between Omar and Eddy right before the shooting that was inconsistent with the earwitness accounts of Eddy's neighbors who heard the killer speak to Eddy before shooting him to death. The neighbors heard the killer ask "Are you Eddy?," a question that Omar, who knew Eddy, would not have asked. Defense counsel's opening statement promised jurors that they would hear from a neighbor who knew Omar and would tell them that the voice he heard at Eddy's door was not Omar's; but that man, Wilbert Diaz, did not testify at Omar's trial. On October 2, 2002, Omar was convicted of second-degree murder and sentenced to life in prison.

In 2004, Omar's appointed appellate counsel, Chauncey Wood, filed a motion for postconviction relief, along with a motion for funds for an investigator to locate and interview Diaz. The prosecution opposed both motions. The judge who had presided over the trial denied these motions, and the Massachusetts Appeals Court affirmed, deferring to the trial judge's finding that "the defendant failed to make a prima facie showing that Diaz would provide exculpatory evidence and that there was no reason to believe that Diaz's testimony would likely have influenced the jury's conclusion." *Commonwealth v. Ortiz*, 67 Mass. App. 349, 354 (2006). Wood argued that, since Diaz told the police he knew Omar, it could be inferred that Diaz would be able to testify that the killer's voice was not Omar's. The Appeals Court disagreed, speculating that it was "equally inferable that Diaz, based upon his friendship with the defendant, chose not to tell the police that he recognized the voice as being that of the defendant." *Id.* The SJC denied Omar's application for further appellate review in 2006.

A decade later, after Omar had served 16 years in prison, BCIP joined Wood as *pro bono* counsel for Omar. Over the next three years, BCIP Supervising Staff Attorney Charlotte Whitmore led a BCIP team that included three law professors, eight law students, two graduate social work students, and several undergraduates who collectively committed thousands of *pro bono* hours to Omar's case. Wood and the BCIP legal team investigated, researched, drafted, and litigated a successful motion for postconviction relief for Omar. Lauren Rossman, BC Law '19 and now a BCIP Staff Attorney, was awarded the SJC's 2019 Adams Pro Bono Publico Award for her investigative work on Omar's case. The investigation was aided by funds from a federal grant to the Committee for Public Counsel Services, BCIP, and the New England Innocence Project. It also relied on a grant from "Running for Innocence," a nonprofit fundraiser established by CPCS Innocence Program Director Lisa Kavanaugh in honor of her client Victor Rosario, who ran long distances on a dirt track at MCI Norfolk before his wrongful convictions were vacated. When Rosario was exonerated after 32 years of imprisonment, he and Kavanaugh ran the 2016 New York Marathon together to raise funds to help other prisoners seeking to prove their innocence.

By 2019, the trial judge had retired, and Omar's new motion for postconviction relief was assigned to Judge John Ferrara. *Commonwealth v. Ortiz*, Hampden Superior Court, No. 9979CR02546, slip. op. (May 9, 2019). During an evidentiary hearing that spanned four days, Wilbert Diaz testified that he knew Eddy and Omar from the mini-mart where they all worked part-time. He was very familiar with Omar's voice. Diaz testified that he did not recognize the voice of the man he heard speaking with Eddy before he was shot, but he was positive it was not Omar's voice. When he learned Omar had been arrested for Eddy's murder, Diaz was "shocked."

Diaz testified that he moved out of his Springfield apartment shortly after the shooting and settled in Worcester. He met with the trial prosecutor over a year before Omar's trial, in response to a summons the prosecution sent to his Worcester address. After meeting with Diaz and going over his statement



with him, the prosecutor told Diaz he likely would not have to appear as a witness. Although the Commonwealth was under court order to provide defense counsel with the current addresses of those on its witness list, the prosecution listed Diaz as living at his old Springfield address. The prosecutor never provided defense counsel with Diaz's Worcester address. This nondisclosure explained why Omar's trial attorney failed to deliver on his promise to the jury: he could not locate Diaz, because he was looking for him in the wrong place.

In vacating Omar's convictions, Judge Ferrara found that the "most compelling evidence presented" was the "highly credible" testimony of Wilbert Diaz. Contrary to the original trial judge's assessment that "the absence of Diaz's testimony did no 'real harm to the overall defense' and 'no real potential tactical disadvantage . . . could have arisen from the failure' to call Diaz," 67 Mass. App. Ct at 361, Judge Ferrara found that Diaz's testimony was "exculpatory and important," casting real doubt on the justice of Omar's convictions. On April 23, 2019, Omar, then 39 years old, was released into the arms of his family members, after having served nearly two decades in prison for a crime he did not commit.

### **The Human Toll of Wrongful Convictions**

Rarely is there a single cause of a wrongful conviction. More often, the misconduct or errors of multiple actors interact and cascade into an erroneous result. In Omar's case, Judge Ferrara found that prosecutorial misconduct and ineffective assistance of defense counsel prevented the jury from hearing Diaz's exculpatory testimony. He also found that the police had engaged in interrogation techniques known to produce false confessions. Omar's case is not exceptional: according to the National Registry of Exonerations (NRE), 85% of those wrongfully convicted of murder and exonerated in Massachusetts since 1989 were victims of official misconduct by prosecutors or police. 33% received an inadequate defense. Five Massachusetts exonerees had signed incriminating statements or were alleged by police to have confessed to crimes they did not commit. Some of BCIP's research and policy work addresses the known causes of wrongful convictions in an effort to prevent them before they occur. Here, however, my focus is on what happened to Omar *after* his wrongful conviction: we now know that as a result of the denial of Omar's 2004 motion for investigative funds to find Diaz, Omar spent an extra 15 years in prison for a crime he did not commit.

Omar has the support of a loving family and a social work team headed by Claire Donohue, BC Law's Director of Interdisciplinary Practice; yet the tragedy of his decades of wrongful imprisonment can never be made right. Imagine if you were wrongfully imprisoned from age 19 to age 39. What would you have suffered? What important relationships and life experiences would you have missed? Now multiply that suffering and loss by 75 — the number of Massachusetts prisoners exonerated since 1989. Collectively, they served over 950 years in prison — an average of almost 13 years each — for crimes they did not commit. While more research is necessary to understand all of the reasons it takes our legal system so long to remedy a wrongful conviction, it is clear that inadequate funding for postconviction indigent defense plays a significant role.

### **Judicial Discretion Regarding Postconviction Indigent Defense Funding**

Mass. R. Crim. P. 30(c)(5) authorizes courts to "exercise discretion" to appoint counsel and "to allow the defendant costs associated with the preparation and presentation of a motion" for postconviction relief. So what went wrong in Omar's case?

In affirming the trial judge's denial of investigative funds to Omar, the Appeals Court cited the Reporter's Notes to Rule 30(c)(5). The Notes advise judges to "take into account the likelihood that the expenditures will result in the defendant's being able to present a meritorious ground for a new trial." Omar's case illustrates the problem with that predictive enterprise. His motion was denied because he could not prove in advance the very thing he sought funds to investigate: whether Diaz's testimony could help prove his innocence. Conditioning defense funding on *already* showing "a meritorious ground for a new trial" creates an untenable "Catch-22" for indigent people, who need public funding for investigation and assistance from experts to *discover* the facts and science corroborating their innocence claims. In cases like Omar's, where funds are sought to discover exculpatory information

that is not already in the trial record, the suggestion in the Reporter's Notes that judges should "take into account their familiarity with the original record . . . in declining to appoint counsel" seems more likely to invite confirmation bias than to promote justice.

In Omar's case, the courts may have also relied to Omar's detriment on the comments in the Reporter's Notes that, "unlike a request for costs prior to trial, in the context of a new trial motion there is no reason to deny the Commonwealth an opportunity to participate in a hearing on this type of request to avoid [] prejudice" to the defense, and that "the Commonwealth's participation in this process will result in a better informed decision." While opposing Omar's postconviction motion for funds to locate Diaz, the prosecution never informed the trial judge or the Appeals Court that it knew Diaz's location, let alone that it had known Diaz's location before trial and had violated the discovery order to produce it to defense counsel. The prosecution actively impeded Omar's efforts to secure funds to locate Diaz, while continuing to conceal its own ongoing misconduct. Tragically, the Commonwealth's participation in Omar's postconviction funds litigation led to a *less* informed decision, prolonging the incarceration of an innocent man.

As the source of its guidance on Rule 30(c)(5) motions for funds, the Reporter cites *Commonwealth v. Conceicao*, 388 Mass. 255 (1983), holding that indigent prisoners have no right to counsel in postconviction proceedings, and *dicta* in a footnote in *Commonwealth v. Davis*, 410 Mass. 680, 684 & n. 7 (1991), reasoning that if there is no right to postconviction counsel, then "surely" the Constitution does not require the Commonwealth "to fund postconviction investigations that may reveal exculpatory evidence." *Conceicao* denied postconviction counsel to an indigent prisoner convicted solely on the basis of eyewitness identification testimony under circumstances that would not be allowed today. Today, we know that 75% of Massachusetts DNA exonerees were victims of eyewitness misidentification. Social science research about the fallibility of human perception and memory has changed the law, as well as police and trial practices, relating to eyewitness identification testimony. The SJC's decisions granting postconviction relief under Rule 30(b) now recognize the importance of newly discovered evidence, including forensic and scientific advances, in determining whether "it appears that justice may not have been done." *Conceicao* emphasized the "direct costs and serious collateral disadvantages" of appointing counsel in cases where the trial court sees no "need or the likelihood . . . for a constructive contribution by counsel," without even mentioning that *Conceicao* had denied any involvement in the crime. Clearly, in 1983, the SJC did not anticipate the important role that factual investigation and scientific expertise would come to play in the Innocence Movement that was yet to come.

#### Toward Public Funding of Postconviction Innocence Defense

In the context of motions for DNA testing or other forensic or scientific testing of physical evidence, Rule 30(c)'s long delays and impediments led to the enactment of G. L. c. 278A, which authorizes courts to order postconviction forensic or scientific analysis testing for individuals who assert factual innocence of the crimes for which they were convicted. To obtain testing, a person must show, among other elements, that the requested analysis "has the potential to result in evidence that is material to" factual innocence. The SJC has construed G. L. c. 278A liberally in order to achieve its goal of providing increased, expeditious access to scientific or forensic testing that is potentially material to a claim of factual innocence. *See, e.g., Commonwealth v. Wade*, 467 Mass. 496, 509 (2014).

G. L. c. 278A provides an important investigative path to justice in cases where DNA or other scientific testing of physical evidence could be material to the question of factual innocence, but only 20% of Massachusetts exonerations have been achieved through DNA testing. In the other 80% of Massachusetts exonerations, the convictions were vacated on other grounds, including newly discovered evidence and expert testimony. Omar's case illustrates why a similar recalibration of the cost-benefit analysis is required for Rule 30(c)(5) motions for postconviction indigent defense funds.

BCIP student Nat Carney, BC Law '21, wrote an excellent paper last year in my Wrongful Convictions seminar calling for legislation similar to G. L. c. 278A for motions for postconviction defense funds. My former student Samuel Jockel published a paper urging the SJC to reverse *Conceicao* and recognize

a Massachusetts constitutional right to postconviction counsel for prisoners asserting factual innocence. *Fulfilling the Promise of Gideon in Massachusetts: Providing a Post-Conviction Right to Counsel for Prisoners Asserting Innocence*, 26 B.U. Pub. Int. L. J. 205 (2017). Their ideas are compelling. Another approach would be for the SJC Standing Advisory Committee on the Rules of Criminal Procedure to undertake a review of Rule 30(c)(5), and the corresponding Reporter's Notes, in light of lessons learned from the Innocence Movement and Massachusetts exonerations. Whether by legislative or judicial action, Massachusetts must find a way to afford all indigent prisoners who maintain they were wrongfully convicted meaningful access to postconviction legal representation, including funding for investigation and expert consultation. This is a moral duty of the Commonwealth, not something that should depend on private charity or the *pro bono* efforts of students.

In the meantime, courts ruling on postconviction motions for defense funds should exercise their discretion to grant these motions more liberally, as they do now in the pretrial context and as the text of Rule 30(c)(5) permits them to do. They should allow such motions whenever the investigation or expert consultation has sufficient potential to produce information material to a claim of wrongful conviction such that a similarly situated person with financial resources would expend the funds to pursue it. In considering the cost of such motions, judges should also consider the human and systemic costs of denying indigent persons who maintain their factual innocence the funds necessary to investigate and prove their claims. No one should suffer as Omar did, serving time in prison for a crime they did not commit, merely because they lack the resources to defend themselves.

*Sharon L. Beckman is Associate Clinical Professor of Law at Boston College Law School and the Director of the Boston College Innocence Program. She serves on the SJC Standing Committee on Eyewitness Identification, the Massachusetts Conviction Integrity Working Group, and the CJA Panel of the U.S. Court of Appeals for the First Circuit. She was a law clerk for (ret.) U.S. Supreme Court Justice Sandra Day O'Connor and for the Hon. Frank Coffin on the U.S. Court of Appeals for the First Circuit.*

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