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Blood Sugar Sex Magik: A Review of Postconviction DNA Testing Statutes and Legislative Recommendations

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BLOOD SUGAR SEX MAGIK:[†] A REVIEW OF POSTCONVICTION DNA TESTING STATUTES AND LEGISLATIVE RECOMMENDATIONS

*Justin Brooks**

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† RED HOT CHILI PEPPERS, BLOOD SUGAR SEX MAGIK (Warner Bros. Records 1991).

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I. INTRODUCTION

On August 10, 1993, Pamela Richards was severely beaten with a cinder block, manually strangled, and had her skull crushed with a concrete steppingstone.¹ At the time of her death, Pamela was living with her husband, William Richards, in a remote desert community in the San Bernardino, California area.² They were temporarily living in a trailer and receiving their electricity from a gasoline-powered generator.³

William Richards had a typical day on August 10, 1993; a coworker reported William worked a normal shift and did not seem agitated in any way.⁴ Neighbors reported he was seen walking with Pamela, holding hands. He clocked out from work at his usual time and filled his ice chest with ice from a machine at work because he did not have refrigeration at his property. He drove home, arriving just after midnight, and was surprised to find there were no lights on inside his motor home or on his property.⁵ He went to his shed, restarted his generator, and then walked toward the motor home to find Pamela and ask why the generator had not been restarted.⁶ Walking across the yard he experienced the horrific act of tripping over Pamela's half-naked body, his hands discovering her head had been bashed in and her brain exposed.⁷

William immediately called 911 and called two more times over the next half-hour.⁸ An officer finally arrived at 12:32 a.m., but a homicide

1. *See In re Richards*, No. E049135, 2010 WL 4681260, at *1–9 (Cal. Ct. App. Nov. 19, 2010), review granted S189275 (Cal. Feb. 23, 2011).

2. *Id.* at *1.

3. *Id.*

4. *Id.* at *8.

5. *See id.* at *1 (noting the defendant told the officer it was dark when he arrived).

6. *See id.* at *1–2.

7. *See id.* at *3, *7.

8. *Id.* at *7.

detective did not arrive until 3:15 a.m.⁹ Because it was dark, the detectives decided not to process the scene until first light, which was almost three hours later.¹⁰

During the time the officers waited, the area was not secured.¹¹ Dogs were allowed to roam in and out, obscuring footprints and blood evidence, contaminating the scene, and partially burying the victim.¹²

With the police unable to place anyone else at the crime scene, William was put on trial for the murder of his wife.¹³ Defense counsel argued there were no defensive injuries, no confession, and no reason he would have called the police to bring them to his remote desert home had he been the killer. His conviction was based largely upon the prosecution's repeated assertion, through testimony and argument, that no one other than William could have committed the murder because no evidence existed to show anyone other than William and his wife were present at the crime scene.¹⁴ A blue thread was introduced that allegedly came from William's shirt and was allegedly found under Pamela's fingernail.¹⁵ It was argued there was what appeared to be a human bite mark on Pamela's body that allegedly matched William's dental configuration.¹⁶ After three trials and no other suspects, a jury finally convicted William, and he was sentenced to an indeterminate prison term of twenty-five years to life.¹⁷

Had a proper and timely investigation been conducted in the early morning hours of August 11, 1993, it is likely evidence would have been gathered to exonerate William.¹⁸ The police had a clear timeline of when he clocked out of work, and how long it took him to drive home could be

9. *Id.* at *1–2.

10. *Id.* at *3.

11. Jan Stiglitz, *View From the Trenches: The Struggle to Free William Richards*, 73 ALB. L. REV. 1357, 1358 (2010).

12. *Id.*

13. *In re Richards*, 2010 WL 4681260, at *3.

14. Reporter's Transcript of Oral Proceedings at 473–74, *In re Richards*, No. SWHSS 700444 (Cal. Super. Ct. 2009); *see also* Stiglitz, *supra* note 11, at 1358.

15. *In re Richards*, 2010 WL 4681260, at *4.

16. *Id.* at *7 (providing the bite mark was consistent with an abnormality of the defendant's teeth).

17. *Id.* at *1; *see also* Stiglitz, *supra* note 11, at 1358–59 (describing how the first two trials ended in hung juries, with the third jury convicting the defendant).

18. Reporter's Transcript of Oral Proceedings, *supra* note 14, at 466; *see also* Stiglitz, *supra* note 11, at 1358 (noting a few pieces of evidence would have, if collected, substantially helped William's case).

established.¹⁹ Simple time-of-death tests could have been conducted to determine when Pamela died.²⁰ Fingerprinting and testing the home, shed, cars, and two rocks used to beat Pamela, as well as swabbing the bite-sized mark on Pamela's body for saliva for DNA tests, could possibly have led to additional suspects, but none of this was done.²¹ While there was some DNA testing performed on some of the material from the crime scene, using testing available in the early 1990s, the testing was inconclusive and not enough to help William avoid a life in prison.²²

After being contacted in 2001, the California Innocence Project filed a postconviction DNA testing motion on Richards's behalf.²³ In addition to reevaluating the bite mark, the items sought to be tested for DNA included the stones used as murder weapons, several items at the house that were covered in blood, and the hairs found under Pamela's fingernails.²⁴ The testing revealed the DNA on the weapons and the hairs under Pamela's fingernails matched neither William nor Pamela.²⁵ New experts evaluated the bite mark and determined it may not have even been a bite mark; instead, it could have been a mark from a piece of metal at the crime scene.²⁶ Experts further concluded it may have been a dog bite; further, if it was a human bite mark, it did not match William Richards's teeth.²⁷ In addition, it was argued the thread wedged in Pamela's nail was nowhere to be seen on early crime scene photos and may have been planted.²⁸

Beginning in January 2009, Judge Brian McCarville of the San

19. *In re Richards*, 2010 WL 4681260, at *4, *8.

20. Reporter's Transcript of Oral Proceedings, *supra* note 14, at 453–55 (noting observations were done, but no testing was completed); *see also* Stiglitz, *supra* note 11, at 1358.

21. *See* Stiglitz, *supra* note 11, at 1359–60.

22. *See* Reporter's Transcript of Oral Proceedings, *supra* note 14, at 466; *see also* Stiglitz, *supra* note 11, at 1359–62.

23. Stiglitz, *supra* note 11, at 1359–60.

24. *See* Reporter's Transcript of Oral Proceedings, *supra* note 14, at 408–15; *see also* Stiglitz, *supra* note 11, at 1359.

25. *See* Reporter's Transcript of Oral Proceedings, *supra* note 14, at 408–15; *see also* Stiglitz, *supra* note 11, at 1359.

26. *See In re Richards*, No. E049135, 2010 WL 4681260, at *10 (Cal. Ct. App. Nov. 19, 2010), *review granted* S189275 (Cal. Feb. 23, 2011); *see also* Stiglitz, *supra* note 11, at 1362.

27. *See In re Richards*, 2010 WL 4681260, at *9–10; *see also* Stiglitz, *supra* note 11, at 1362.

28. *See* Reporter's Transcript of Oral Proceedings, *supra* note 14, at 255–59, 314–16, 461–62; *see also* Stiglitz, *supra* note 11, at 1362–63.

Bernardino Superior Court granted Richards an evidentiary hearing to present his evidence.²⁹ The hearing took place over several days in the spring and summer months of that year. At the hearing, Richards challenged the evidence presented against him at his trial in 1997.³⁰ Two bite-mark experts, who had previously testified against Richards in 1997, testified as to how today's science excluded Richards as the contributor of the bite mark found on Pamela.³¹ Additionally, it helped that the blue fiber matching the shirt Richards was wearing that night and was allegedly found under the victim's fingernail was missing from the autopsy photographs of the victim's fingers.³²

At the conclusion of the hearing, Judge McCarville determined the totality of the evidence presented required reversal of the conviction:

Taking the evidence as to the tuft fiber . . . and the DNA and the bite mark evidence, the Court finds that the entire prosecution case has been undermined, and that the petitioner has established his burden of proof to show that the evidence before me presents or points unerringly to innocence.

Not only does the bite mark evidence appear to be now questionable, it puts the petitioner has [sic] being excluded. And . . . the DNA evidence establishes that someone other than petitioner and the victim was present at the crime scene.³³

DNA may be the most significant forensic advancement of the past century. The reliability of its accuracy is unparalleled when biological materials are gathered and tested absent contamination.³⁴ Thousands of

29. See Reporter's Transcript of Oral Proceedings, *supra* note 14; see also Stiglitz, *supra* note 11, at 1363.

30. See *In re Richards*, 2010 WL 4681260, at *9-10 (providing an outline of the defense's case at the evidentiary hearing).

31. *Id.*

32. *Id.* at *10.

33. *Id.* at *11. The celebration was short-lived, as the district attorney appealed Judge McCarville's decision, arguing the defense did not meet the burden of "showing that newly discovered evidence undermined the entire structure of the case presented" at the lower court proceeding. *Id.* The district attorney petitioned to have the superior court grant a stay of the reversal pending its appeal, and on November 19, 2010, the California Court of Appeal, Fourth Appellate District, reversed Judge McCarville's decision. *Id.* at *16. The California Innocence Project continues to pursue William Richards's freedom.

34. See OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, THE FBI DNA LABORATORY: A REVIEW OF PROTOCOL AND PRACTICE VULNERABILITIES, at i

defendants have been convicted using DNA technology.³⁵ Hundreds have been exonerated by way of postconviction testing.³⁶ DNA testing has brought unprecedented scrutiny to the mistakes of the criminal justice system.³⁷ Death row inmates have been exonerated before execution.³⁸ Others are unable to benefit from the testing, such as Frank Lee Smith, who died an agonizing death due to cancer while awaiting execution on Florida's death row, only to later be exonerated by DNA testing.³⁹

Even with all of its benefits to the forensic community, the Supreme Court determined in 2009 that inmates have no substantive due process right to DNA evidence that could prove their innocence.⁴⁰ In the Alaska case of *District Attorney v. Osborne*, Chief Justice John Roberts wrote that those convicted have only limited rights to due process, particularly in regard to postconviction relief.⁴¹ The right to DNA testing—even when testing could conclusively determine the perpetrator—is not automatically part of those due process rights.⁴² Thus, the holding in *Osborne* means the

(May 2004), available at <http://www.justice.gov/oig/special/0405/final.pdf> (laying out the high reliability between properly gathered and maintained DNA samples and finding a suspect); see also David Dobbs, *DNA's Accuracy Puts Traditional Forensics on Trial*, POPULAR MECHANICS, July 1, 2006, <http://www.popularmechanics.com/science/health/Forensics/3010536>.

35. See Matt Kelley, *Exonerated: Wrongful Convictions Overturned and the Lessons We Can Learn*, CHANGE.ORG, Oct. 5, 2008, <http://news.change.org/stories/exonerated-wrongful-convictions-overturned-and-the-lessons-we-can-learn>.

36. *Know the Cases, INNOCENCE PROJECT*, <http://www.innocenceproject.org/know/> (last visited Apr. 9, 2011) (explaining 268 postconviction exonerations based on DNA evidence have occurred in the United States).

37. See Kelley, *supra* note 35 (discussing that criminal justice problems have always existed, but DNA exonerations expose issues beyond a doubt).

38. Of the 268 postconviction exonerations based on DNA evidence, seventeen of those have involved death row inmates. *Id.*

39. Editorial, *Protect the Innocent*, ST. PETERSBURG TIMES, Apr. 13, 2002, at 14A (detailing Smith's conviction for raping and murdering an eight-year-old girl and his fourteen years spent on death row maintaining his innocence, which prosecutors objected to, even after testing proved his innocence).

40. *Dist. Attorney's Office v. Osborne*, 129 S. Ct. 2308, 2322 (2009) ("We are reluctant to enlist the Federal Judiciary in creating a new constitutional code of rules for handling DNA.").

41. *Id.* at 2320 ("A criminal defendant proved guilty after a fair trial does not have the same liberty interests as a free man.").

42. *Id.* ("Osborne's right to due process is not parallel to a trial right, but rather must be analyzed in light of the fact that he has already been found guilty at a fair trial, and has only a limited interest in postconviction relief. . . . Instead, the question is whether . . . [Alaska's] procedures for postconviction relief 'offends some

ability of an inmate to gain access to DNA testing as a right depends almost entirely on state legislatures and state courts.⁴³

Forty-eight states, the District of Columbia, and the federal government have adopted some form of postconviction DNA testing law.⁴⁴ Some significant challenges arise when these laws are applied to cases like *Richards*, which do not involve rape kits but rather require a broader view of how DNA testing can prove innocence.⁴⁵ Furthermore, the laws are not uniform, and in the politically charged atmosphere of criminal lawmaking, some of the laws are poorly thought out. This Article reviews these postconviction statutes from the perspective of practitioners who litigate these cases, while also exploring the major questions that ought to be addressed by the statutes, including:

For what crimes should DNA testing be available?

What standards must be met for postconviction testing?

Who should do the testing?

Who should pay for the testing?

Should counsel be appointed?

Should there be time limits on the testing?

How long should biological material be maintained after conviction, and should there be sanctions for the failure to maintain it properly?

Should the courts order DNA results be run through the DNA

principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,' or 'transgresses any recognized principle of fundamental fairness in operation.'").

43. *Id.* at 2322 ("The elected governments of the States are actively confronting the challenges DNA technology poses to our criminal justice systems and our traditional notions of finality, as well as the opportunities it affords."); *see also id.* at 2321 ("While the Alaska courts have not had occasion to conclusively decide the question, the Alaska Court of Appeals has suggested that the State Constitution provides an additional right of access to DNA [testing].").

44. The only two states without postconviction DNA testing statutes are Oklahoma and Massachusetts. Oklahoma's DNA testing statute contained a "sunset provision" that expired on July 1, 2005. OKLA. STAT. ANN. tit. 22, § 1371(B) (West 2003). Massachusetts has no DNA testing statute.

45. *See infra* Part II.

databank?

Should the denial of a DNA testing motion be appealable?

Should postconviction DNA testing be granted to those inmates who plead guilty or confessed to their crime?

Should testing be available to individuals who are no longer incarcerated or who may be subject to requirements such as sex-offender registration?

Ultimately, this Article makes recommendations for statutory changes and interpretations. The *Richards* case is referred to throughout this Article as a reference point for the rationales behind these recommendations.

II. FOR WHAT CRIMES SHOULD DNA TESTING BE AVAILABLE?

The classic type of case for postconviction DNA testing is a rape case, particularly one in which consent is not a defense, and semen is collected from a live victim. The victim can testify about all consensual sexual encounters, and if the semen does not match those individuals or the suspect, then it would appear there is a clear exclusion of the defendant as the perpetrator.⁴⁶

Modern DNA techniques are applicable to a broad range of crimes beyond rape and murder. For example, with the development of mitochondrial DNA testing, it is now possible to obtain DNA results from a hair strand without the root.⁴⁷ Thus, DNA testing could be an important forensic tool in a case involving a crime scene where the presence, or

46. When the victim is dead, prosecutors have sometimes argued in postconviction proceedings that there must have been a second attacker in addition to the defendant and the defendant simply did not ejaculate, which would explain why his semen was not present. Defense attorneys refer to this as the “unindicted co-ejaculator” theory. See Hilary S. Ritter, Note, *It’s the Prosecution’s Story, but They’re Not Sticking to It: Applying Harmless Error and Judicial Estoppel to Exculpatory Post-Conviction DNA Testing Cases*, 74 *FORDHAM L. REV.* 825, 843–44 (2005).

47. *Advancing Justice Through DNA Technology: Using DNA to Solve Crimes*, U.S. DEP’T OF JUSTICE, http://www.justice.gov/ag/dnapolicybook_solve_crimes.htm (last visited Apr. 10, 2011) (stating mitochondrial DNA is powerful in “kidnapping, missing persons, and skeletal remains” cases where nuclear DNA is not available); see also Paul Giannelli, *Forensic Science: Scientific Evidence and Prosecutorial Misconduct in the Duke Lacrosse Rape Case*, 45 *CRIM. L. BULL.* 665, 666 n.5 (2009).

absence, of hair strands could be exculpatory, such as a burglary during which hair was left at the crime scene.

In William Richards's case, due to advances in mitochondrial DNA testing over the past decade, the hair strands found under Pamela's fingernails could actually be DNA tested.⁴⁸ Although the *Richards* case is a murder case, this type of evidence could be relevant to any case in which hair can be linked to, or used to exclude, a suspect.

Furthermore, the amount of biological material needed to obtain a cellular DNA result has greatly decreased over the past two decades. Early DNA testing required a stain roughly the size of a quarter, whereas a profile can now be obtained from a microscopic amount of biological material.⁴⁹ In turn, increases in DNA typing broaden the number of crimes that may possibly have exculpatory DNA results.

A majority of the jurisdictions that currently have some type of postconviction DNA testing statute limit the testing to specific crimes or classes of crimes. The most stringent state is Kentucky, which limits the ability to make a motion for postconviction DNA testing to individuals convicted of a capital offense and sentenced to death.⁵⁰ Alabama is a close second; an actual death sentence is not required, but a right to postconviction DNA testing is limited to capital offense convictions.⁵¹ Indiana, Kansas, Maryland, and Nevada statutes mandate a conviction for murder, certain categories of felonies, or both.⁵²

48. See Stiglitz, *supra* note 11, at 1361; see also Bruce Budowle et al., *Forensics and Mitochondrial DNA: Applications, Debates, and Foundations*, 4 ANN. REV. GENOMICS & HUM. GENETICS 119, 121–22 (2003), available at <http://www.sjsu.edu/people/steven.lee/courses/JS111FLUOR/s0/mtDNA%20review.pdf> (emphasizing the increased importance mitochondrial DNA has played in previously difficult forensic cases).

49. See Budowle et al., *supra* note 48, at 122 (“In cases where the amount of extracted DNA is very small or degraded, it is more likely that a . . . result can be obtained by . . . [mitochondrial] DNA than . . . nuclear DNA.”); see also Robert Aronson & Jacqueline McMurtrie, *The Use and Misuse of High-Tech Evidence by Prosecutors: Ethical and Evidentiary Issues*, 76 FORDHAM L. REV. 1453, 1470 nn.108–09 (2007).

50. KY. REV. STAT. ANN. § 422.285(1) (LexisNexis 2005 & Supp. 2010).

51. ALA. CODE § 15-18-200(a) (LexisNexis Supp. 2010). A capital offense encompasses a list of eighteen crimes involving some variation of murder. *Id.* § 13A-5-40(a)(1)–(18) (LexisNexis 2005 & Supp. 2010).

52. Indiana requires a conviction for either murder or a Class A, B, or C felony. IND. CODE ANN. § 35-38-7-1 (LexisNexis Supp. 2010). The Kansas statute only applies to convictions for murder and rape. KAN. STAT. ANN. § 21-2512(a) (2007).

In addition to limiting the types of convictions, Oregon's statute on eligibility to file a postconviction motion for DNA testing adds a distinction between those individuals who are in custody and those who are not.⁵³ If an individual is institutionalized, the underlying conviction must have been for aggravated murder or a "person felony."⁵⁴ If the applicant is not in custody, the conviction must be for aggravated murder, murder, or a sex

Maryland convictions must be for murder, manslaughter, rape, or a sexual offense. MD. CODE ANN., CRIM. PROC. § 8-201(b) (LexisNexis 2008 & Supp. 2010). Nevada requires a conviction for a category A or B felony. NEV. REV. STAT. § 176.0918(1) (2009).

53. OR. REV. STAT. ANN. § 138.690 (West Supp. 2010).

54. *Id.* Oregon defines person felonies as follows:

Escape I; Supplying Contraband as defined in Crime Categories 6 and 7; Aggravated Murder; Murder; Felony Murder; Manslaughter I; Manslaughter II; Negligent Homicide; Criminal Mistreatment I; Female Genital Mutilation; Assaulting a Public Safety Officer; Use of Stun Gun, Tear Gas, Mace I; Kidnapping II; Kidnapping I; Coercion as defined in Crime Category 7; Rape III; Rape II; Rape I; Sodomy III; Sodomy II; Sodomy I; Sexual Penetration II; Sexual Penetration I; Sexual Abuse II; Sexual Abuse I; Felony Public Indecency; Unlawful Contact with a Child; Custodial Sexual Misconduct in the First Degree; Incest; Abandon Child; Buying/Selling Custody of a Minor; Child Neglect I; Using Child In Display of Sexual Conduct; Encouraging Child Sex Abuse I; Encouraging Child Sex Abuse II; Possession of Material Depicting Sexually Explicit Conduct of Child I; Possession of Material Depicting Sexually Explicit Conduct of Child II; Stalking; Violation of Court's Stalking Order; Theft by Extortion as defined in Crime Category 7; Burglary I as defined in Crime Categories 8 and 9; Arson I; Robbery III; Robbery II; Robbery I; Tree Spiking (Injury); Abuse of Corpse I; Intimidation I; Unlawful Use of a Weapon; Inmate In Possession of Weapon; Felony Possession of a Hoax Destructive Device; Unlawful Possession of Soft Body Armor as defined in Crime Category 6; Promoting Prostitution; Compelling Prostitution; Felony Animal Abuse I; Aggravated Animal Abuse I; Environmental Endangerment; Causing Another to Ingest a Controlled Substance as defined in Crime Categories 8 and 9; Unlawful Administration of a Controlled Substance as defined in Crime Categories 5, 8, and 9; Maintaining Dangerous Dog; Hit and Run Vehicle (Injury); Felony Driving Under the Influence of Intoxicants; Hit and Run Boat; Purchase or Sale of a Body Part for Transplantation or Therapy; Alteration of a Document of Gift; Subjecting Another Person to Involuntary Servitude I and II; Trafficking in Persons; Aggravated Vehicular Homicide; Luring a Minor; Online Sexual Corruption of a Child I and II; Aggravated Harassment; Aggravated Driving While Suspended or Revoked; Manufacturing or Delivering a Schedule IV Controlled Substance Thereby Causing Death to a Person; and attempts or solicitations to commit any Class A or Class B person felonies as defined herein.

OR. ADMIN. R. 213-003-0001(14) (2011) (citations omitted), available at http://arcweb.sos.state.or.us/rules/OARS_200/OAR_213/213_003.html.

crime.⁵⁵

A number of jurisdictions have somewhat less stringent statutes, yet still restrict application to a certain subset of convictions. For example, the District of Columbia's postconviction DNA statute only limits application to those convicted of "a crime of violence."⁵⁶ With similar restrictions, Georgia's statute allows application by those convicted of "a serious violent felony."⁵⁷ South Carolina has an even broader statute, which contains twenty-four qualifying offenses.⁵⁸ Vermont's statute lists fourteen

55. OR. REV. STAT. ANN. § 138.690(2) (West Supp. 2010).

56. D.C. CODE § 22-4133(a) (LexisNexis 2010). A "crime of violence" includes:

aggravated assault; act of terrorism; arson; assault on a police officer (felony); assault with a dangerous weapon; assault with intent to kill, commit first degree sexual abuse, commit second degree sexual abuse, or commit child sexual abuse; assault with intent to commit any other offense; burglary; carjacking; armed carjacking; child sexual abuse; cruelty to children in the first degree; extortion or blackmail accompanied by threats of violence; gang recruitment, participation, or retention by the use or threatened use of force, coercion, or intimidation; kidnapping; malicious disfigurement; manslaughter; manufacture or possession of a weapon of mass destruction; mayhem; murder; robbery; sexual abuse in the first, second, or third degrees; use, dissemination, or detonation of a weapon of mass destruction; or an attempt or conspiracy to commit any of the foregoing offenses.

Id. § 23-1331(4).

57. GA. CODE ANN. § 5-5-41(c)(1) (West Supp. 2010). A "serious violent felony" is defined as: murder or felony murder; armed robbery; kidnapping; rape; aggravated child molestation; aggravated sodomy; and aggravated sexual battery. *Id.* § 17-10-6.1(a)(1)–(7).

58. S.C. CODE ANN. § 17-28-30(A) (Supp. 2010). The "qualifying offenses" are as follows: murder; killing by poison; killing by stabbing or thrusting; voluntary manslaughter; homicide by child abuse; aiding and abetting a homicide by child abuse; lynching in the first degree; killing in a duel; spousal sexual battery; criminal sexual conduct in the first, second, and third degree; criminal sexual conduct with a minor; arson in the first degree resulting in death; burglary in the first degree for which the person is sentenced to ten years or more; armed robbery for which the person is sentenced to ten years or more; damaging or destroying a building, vehicle, or property by means of an explosive incendiary resulting in death; abuse or neglect of a vulnerable adult resulting in death; sexual misconduct with an inmate, patient, or offender; unlawful removing or damaging of an airport facility or equipment resulting in death; interference with traffic-controlled devices or railroad signs or signals resulting in death; driving a motor vehicle under the influence of alcohol or drugs resulting in death; obstruction of railroad resulting in death; and accessory before the fact to any offense enumerated in this section. *Id.* § 17-28-30(A)(1)–(24).

qualifying crimes,⁵⁹ but it also allows application when there is a conviction for any felony not enumerated in the list of qualifying crimes.⁶⁰ Tennessee's statute parallels the statute in Vermont in that it lists certain offenses but provides discretion to the trial judge to grant a postconviction DNA testing motion for any other offense that may contain biological evidence.⁶¹

The majority of states—thirty-seven of the forty—with postconviction testing statutes and the federal government impose minimal to no conditions on individuals with respect to the underlying conviction. Seventeen of the state statutes and the federal statute require the underlying conviction to be a felony.⁶² The remaining twenty states permit an individual convicted of any crime to bring a postconviction motion for DNA testing.⁶³

59. VT. STAT. ANN. tit. 13, § 5561(b)(2)(A)–(B) (2009). The qualifying crimes are as follows: arson causing death; assault and robbery with a dangerous weapon; assault and robbery causing bodily injury; aggravated assault; murder; manslaughter; aggravated murder; kidnapping; unlawful restraint; maiming; sexual assault; aggravated sexual assault; burglary into an occupied dwelling; and lewd and lascivious conduct with a child. *Id.* § 5561(b)(2)(A)(1)–(14).

60. *Id.* § 5561(b)(2)(B).

61. TENN. CODE ANN. § 40-30-303 (2006).

62. ALASKA STAT. § 12.73.010(a) (2010); ARIZ. REV. STAT. ANN. § 13-4240(A) (2010); CAL. PENAL CODE § 1405(a) (West Supp. 2011); FLA. STAT. ANN. § 925.11(1)(a)(1) (West Supp. 2011); IOWA CODE § 81.10(1) (2009); LA. CODE CRIM. PROC. ANN. art. 926.1(A)(1) (2008 & Supp. 2011); ME. REV. STAT. ANN. tit. 15, § 2137(1) (2003 & Supp. 2010); MICH. COMP. LAWS ANN. § 770.16(1) (West 2006 & Supp. 2010); MONT. CODE ANN. § 46-21-110(1) (2009); N.M. STAT. ANN. § 31-1A-2(A) (2010); OHIO REV. CODE ANN. § 2953.72(C)(1)(a) (LexisNexis 2010); S.D. CODIFIED LAWS § 23-5B-1 (Supp. 2010); UTAH CODE ANN. § 78B-9-301(2) (LexisNexis 2008 & Supp. 2010); VA. CODE ANN. § 19.2-327.1(A) (2008); WASH. REV. CODE ANN. § 10.73.170(1) (West 2002 & Supp. 2011); W. VA. CODE ANN. § 15-2B-14(a) (LexisNexis 2009); WYO. STAT. ANN. § 7-12-303(c) (2009); *see* 18 U.S.C. § 3600(a) (2006) (providing testing for those “under a sentence of imprisonment or death”).

63. ARK. CODE ANN. § 16-112-201(a) (2006); COLO. REV. STAT. § 18-1-412(1) (2010); CONN. GEN. STAT. ANN. § 54-102kk(a) (West 2009) (requiring applicant be incarcerated); DEL. CODE ANN. tit. 11, § 4504(a) (2007); HAW. REV. STAT. § 844D-121 (Supp. 2007); IDAHO CODE ANN. § 19-4901(a) (2004 & Supp. 2010); 725 ILL. COMP. STAT. ANN. 5/116-3(a) (West 2008); MINN. STAT. ANN. § 590.01(1a)(a) (West 2010); MISS. CODE ANN. § 99-39-5(1) (West 2006 & Supp. 2010); MO. ANN. STAT. § 547.035 (West 2002) (requiring the applicant be in custody); NEB. REV. STAT. ANN. § 29-4120(1) (LexisNexis 2009) (requiring the applicant be in custody); N.H. REV. STAT. ANN. § 651-D:2(I) (LexisNexis 2007 & Supp. 2010) (requiring the applicant be in custody); N.J. STAT. ANN. § 2A:84A-32a(a) (West Supp. 2010) (stating current imprisonment is a prerequisite); N.Y. CRIM. PROC. LAW § 440.10(1)(a) (McKinney

No reason exists, other than cost, for limiting the number or type of crime for which postconviction DNA testing can be utilized. As DNA testing becomes cheaper, faster, and more discriminating, the possibility for discovering determinate samples—samples that could determine culpability if their results were known—becomes much greater. As discussed in this Article, dangers of cost overruns can be limited by ensuring the proper standards and procedures are followed when granting testing.

III. WHAT STANDARDS MUST BE MET FOR POSTCONVICTION TESTING?: THE ONE-STEP, TWO-STEP, THREE-STEP DANCE

In order to obtain postconviction DNA testing in California, the Penal Code requires that a petitioner makes a prima facie showing “the evidence sought to be tested is material to the issue of the convicted person’s identity as the perpetrator of, or accomplice to, the crime, special circumstance, or enhancement allegation that resulted in the conviction or sentence”⁶⁴ and “the requested DNA testing results would raise a reasonable probability that, in light of all the evidence, the convicted person’s verdict or sentence would have been more favorable if the results of DNA testing had been available at the time of conviction.”⁶⁵

Section 1405 of the California Penal Code was enacted in 2000.⁶⁶ Since then, the courts have had great difficulty in interpreting what “reasonable probability” means and to what the standard should be specifically applied. Some judges have interpreted this provision as requiring the court to first, without having the testing conducted, decide whether there is a reasonable probability the testing will result in exculpatory evidence. Further, these same judges have rules allowing the defendant to be entitled to this exculpatory evidence, which is separate from the question of whether there is “a reasonable probability that, in light of all the evidence,” the verdict or sentence should be different.

For example, in the case of *People v. McFadden*, a California

2005 & Supp. 2011); N.C. GEN. STAT. § 15A-269(a) (2009); N.D. CENT. CODE § 29-32.1-15(1) (2006); 42 PA. CONS. STAT. ANN. § 9543.1(a)(1) (West 2007); R.I. GEN. LAWS § 10-9.1-11(c) (Supp. 2010) (requiring the individual be serving time); TEX. CODE CRIM. PROC. ANN. art. 64.01(a) (West 2006 & Supp. 2010); WIS. STAT. ANN. § 974.07(2) (West 2007 & Supp. 2010).

64. CAL. PENAL CODE § 1405(f)(4).

65. *Id.* § 1405(f)(5).

66. 2000 Cal. Legis. Serv. 821 (West).

molestation case, the California Innocence Project sought to have the victim's underwear tested. Investigators confirmed the presence of semen on the underwear, but they were never previously tested for DNA. The victim positively identified McFadden at trial as the one who committed the molestation. In denying McFadden's motion for DNA testing, the court stated:

Well, I heard this trial. And I remember the evidence that was presented in this case. . . . The Court does not conclude that there's a reasonable probability that a different result would have been obtained if testing had been available and performed at the time of the trial.⁶⁷

In the *McFadden* case, the court never considered the question of whether the evidence could be potentially exculpatory because the judge predetermined the outcome of the DNA testing.⁶⁸ This "two-step" approach makes it very difficult to win a postconviction testing motion when there has already been a determination by a judge or jury that the defendant was guilty beyond a reasonable doubt. Thus, it becomes difficult for the judge to conclude it is likely the test results will be exculpatory.

In other words, in *In re Richards*, Richards was convicted based upon all of the evidence presented by the parties—the possible bite mark, the blue thread under Pamela's nail, the blood spatters, and everything else the jury considered in convicting Richards.⁶⁹ Under the two-step approach, the judge would have to be confident, without conducting any testing, that the jury got it wrong. Otherwise, how could the judge conclude there was a reasonable probability the testing would be exculpatory?

Compounding the futility of this approach is the fact the statute allows the trial court to rule on a written motion for DNA testing.⁷⁰ This is presumably due to the trial court's familiarity with the case, which makes it better able to determine whether, "in light of all the evidence" presented at trial, DNA evidence results would raise a "reasonable probability" that would have favorably affected the outcome at trial.⁷¹ Under the two-step approach, therefore, the judge who actually presided over the case must

67. Reporter's Transcript of Motion re: DNA Testing at 6–7, *People v. McFadden*, No. FVI010285 (Cal. Super. Ct. 2006) (on file with author).

68. *See id.*

69. *In re Richards*, No. E049135, 2010 WL 4681260, at *1–9 (Cal. Ct. App. Nov. 19, 2010), review granted S189275 (Cal. Feb. 23, 2011).

70. CAL. PENAL CODE § 1405(a).

71. *See id.* § 1405(f)(5).

determine, without first ordering the testing, whether there is a reasonable probability the testing would be exculpatory—in effect, whether it is likely the judge presided over a wrongful conviction. Consequently, under the two-step analysis, the only inmates who would be able to meet the requirement would be those inmates who do not need postconviction DNA testing; testing would be limited to those cases where the judge is already convinced of innocence regardless of the testing.

The only way the statute can be interpreted without frustrating its purpose is to take a “one-step” approach. The court should determine whether the result of a favorable DNA test *could* produce evidence that, even when considering all the evidence produced at trial, creates a reasonable probability the convicted person’s verdict or sentence would have been more favorable if the results of the DNA testing had been available at the time of trial. If the court fails to make the presumption of a favorable DNA testing result, the statute can never achieve its purpose.

In California, this issue was resolved only after extensive litigation. In *Richardson v. Superior Court of Tulare County*, decided a full eight years after California’s DNA statute was enacted, the California Supreme Court explained the proper posture for a superior court’s analysis: to presume favorable results when evaluating whether a defendant has met his or her burden under the statute.⁷²

The potential ambiguity in California’s statute regarding the “reasonable probability” interpretation is also present in the postconviction DNA testing statutes of the District of Columbia,⁷³ Georgia,⁷⁴ and Iowa.⁷⁵

72. *Richardson v. Superior Court*, 77 Cal. Rptr. 3d 226, 231 (2008) (explaining an appellate court’s review of the superior court determination to grant or deny a motion for testing “is necessarily based upon the trial court’s judgment—that is, its evaluation of the weight of trial evidence in relation to DNA testing *presumably favorable* to petitioner” (emphasis added)); *see also id.* at 234 (explaining that, in determining whether a defendant has met his burden under the statute, “the trial court does not, and should not, decide whether, *assuming a DNA test result favorable to the defendant*, that evidence in and of itself would ultimately require some form of relief from the conviction” (emphasis added)).

73. D.C. CODE § 22-4133(d) (LexisNexis 2010) (“[T]here is a reasonable probability that testing will produce non-cumulative evidence that would help establish that the applicant was actually innocent of the crime for which the applicant was convicted . . .”).

74. GA. CODE ANN. § 5-5-41(c)(3)(D) (West Supp. 2010) (“The requested DNA testing would raise a reasonable probability that the petitioner would have been acquitted if the results of DNA testing had been available at the time of conviction, in

The fairly recently enacted Hawaii statute was drafted almost identically to the statute in California.⁷⁶ In addition, however, the Hawaii statute states the court *shall* order the testing if it finds, among other things, “[a] reasonable probability exists that the defendant would not have been prosecuted or convicted if *exculpatory results* had been obtained through DNA analysis, even if the defendant later pled guilty or no contest.”⁷⁷

By inserting “exculpatory” before the word “results,” Hawaii made the reasonable probability requirement unambiguous.⁷⁸ Hawaii’s statute thus leaves little room for misinterpretation by requiring the assumption the results will be favorable.

The Arizona statute is similar to Hawaii in that it uses the “reasonable probability” standard, though it requires the court to order the testing if it finds, among other things, “a reasonable probability exists that the petitioner would not have been prosecuted or convicted if *exculpatory results* had been obtained through deoxyribonucleic acid testing.”⁷⁹

The Texas statute permits the court to order the testing if it finds, among other things, “the person would not have been convicted if *exculpatory results* had been obtained through DNA testing.”⁸⁰

light of all the evidence in the case.”).

75. IOWA CODE § 81.10(7)(e) (2009) (“DNA analysis of the evidence would raise a reasonable probability that the defendant would not have been convicted if DNA profiling had been available at the time of the conviction and had been conducted prior to the conviction.”).

76. In Hawaii, the trial court *may* order testing if it finds:

[a] reasonable probability exists that DNA analysis of the evidence will produce results that would have led to a more favorable verdict or sentence for the defendant had the results been available at the proceeding leading to the verdict or sentence, even if the defendant pled guilty or no contest.

HAW. REV. STAT. § 844D-123(b)(1) (Supp. 2007).

77. *Id.* § 844D-123(a)(1) (emphasis added).

78. *See id.*

79. ARIZ. REV. STAT. ANN. § 13-4240(B)(1) (2010) (emphasis added). If this standard is met, the court *must* order testing. *Id.* However, an Arizona court, like Hawaii, *may* order testing if it finds “[a] reasonable probability exists that either: (a) The petitioner’s verdict or sentence would have been more favorable if the results of deoxyribonucleic acid testing had been available at the trial leading to the judgment of conviction [or] (b) Deoxyribonucleic acid testing will produce exculpatory evidence.” *Id.* § 13-4240(C)(1).

80. TEX. CODE CRIM. PROC. ANN. art. 64.03(a)(2)(A) (West 2006 & Supp. 2010) (emphasis added). Texas does not have the permissive counterpart like Hawaii and Arizona.

The language of the Hawaii, Arizona, and Texas statutes removes the judicial determination of whether the test result would be exculpatory by requiring the court to base its analysis on a presumably exculpatory result of the testing. The postconviction DNA testing statutes in Colorado,⁸¹ Connecticut,⁸² Indiana,⁸³ Kentucky,⁸⁴ Missouri,⁸⁵ Nevada,⁸⁶ New Mexico,⁸⁷ Pennsylvania,⁸⁸ Rhode Island,⁸⁹ Tennessee,⁹⁰ Wisconsin,⁹¹ and Wyoming⁹²

81. COLO. REV. STAT. § 18-1-413(1)(a) (2010) (“A court shall not order DNA testing unless the petitioner demonstrates by a preponderance of the evidence that: (a) Favorable results of the DNA testing will demonstrate the petitioner’s actual innocence.”).

82. CONN. GEN. STAT. ANN. § 54-102kk(b)(1) (West 2009) (stating a court shall order DNA testing if “[a] reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing”). A Connecticut court *may* order testing if “[a] reasonable probability exists that the requested testing will produce DNA results which would have altered the verdict or reduced the petitioner’s sentence if the results had been available at the prior proceedings leading to the judgment of conviction.” *Id.* § 54-102kk(c)(1).

83. IND. CODE ANN. § 35-38-7-8(4) (LexisNexis Supp. 2010) (stating courts shall determine whether petitioner proved “[a] reasonable probability exists that the petitioner would not have: (A) been: (i) prosecuted for; or (ii) convicted of; the offense; or (B) received as severe a sentence for the offense; if exculpatory results had been obtained through the requested DNA testing and analysis”).

84. KY. REV. STAT. ANN. § 422.285(2)(a) (LexisNexis 2005 & Supp. 2010) (“A reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing and analysis.”). Kentucky also gives a court discretion to grant the motion for testing if “[a] reasonable probability exists that either: The petitioner’s verdict or sentence would have been more favorable if the results of DNA testing and analysis had been available at the trial leading to the judgment of conviction; or DNA testing and analysis will produce exculpatory evidence.” *Id.* § 422.285(3)(a).

85. MO. ANN. STAT. § 547.035(7)(1) (West 2002) (“A reasonable probability exists that the movant would not have been convicted if exculpatory results had been obtained through the requested DNA testing.”).

86. NEV. REV. STAT. § 176.0918(7)(a) (2009) (“A reasonable possibility exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through a genetic marker analysis of the evidence identified in the petition.”).

87. N.M. STAT. ANN. § 31-1A-2(C)(5) (2010) (“[I]f the DNA testing he is requesting had been performed prior to his conviction and the results had been exculpatory, there is a reasonable probability that the petitioner would not have pled guilty or been found guilty.”).

88. 42 PA. CONS. STAT. ANN. § 9543.1(c)(3)(ii) (West 2007) (“DNA testing of the specific evidence, assuming exculpatory results, would establish: (A) the applicant’s actual innocence of the offense for which the applicant was convicted.”).

all assume test results will be favorable to the defendant. Confusingly, Wyoming's statute assumes exculpatory results but does not mandate testing, merely providing that the court "may order testing" if the defendant meets the requirements of the statute.⁹³ Thus, Wyoming's statute adds an additional caveat: even in cases in which favorable results would lead to a reversal, testing is ordered only at the court's discretion.⁹⁴ This means a court in Wyoming could deny testing even when all parties agree the testing could not only exonerate a defendant, but find the real perpetrator.

The statutes of fifteen additional states and the federal government are written to require the judge to take two steps in determining whether

89. R.I. GEN. LAWS § 10-9.1-12(a)(1) (Supp. 2010) ("A reasonable probability exists the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing."). Rhode Island also gives courts discretion to grant the motion for testing if "[a] reasonable probability exists that the requested testing will produce DNA results which would have altered the verdict or reduced the petitioner's sentence if the results had been available at the prior proceedings leading to the judgment of conviction." *Id.* § 10-9.1-12(b)(1).

90. TENN. CODE ANN. § 40-30-304(1) (2006) ("A reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA analysis."). Tennessee also gives courts discretion to grant the motion for testing if "[a] reasonable probability exists that analysis of the evidence will produce DNA results that would have rendered the petitioner's verdict or sentence more favorable if the results had been available at the proceeding leading to the judgment of conviction." *Id.* § 40-30-305(1).

91. WIS. STAT. ANN. § 974.07(7)(a)(2) (West 2007 & Supp. 2010) ("It is reasonably probable that the movant would not have been . . . convicted . . . for the offense . . . if exculpatory deoxyribonucleic acid testing results had been available before the prosecution, conviction, finding of not guilty, or adjudication for the offense."). Wisconsin also gives the judge discretion to grant the motion if "[i]t is reasonably probable that the outcome of the proceedings that resulted in the conviction . . . or the terms of the sentence . . . would have been more favorable to the movant if the results of deoxyribonucleic acid testing had been available before he or she was . . . convicted." *Id.* § 974.07(7)(b)(1).

92. WYO. STAT. ANN. § 7-12-305(d) (2009) ("DNA testing of the specified evidence would, assuming exculpatory results, establish: (i) The actual innocence of the movant of the offense for which the movant was convicted; or (ii) In a capital case: (A) The movant's actual innocence of the charged or uncharged conduct constituting an aggravating circumstance; or (B) A mitigating circumstance as a result of the DNA testing.").

93. *Id.* (requiring a prima facie showing by the applicant of supporting evidence).

94. *See id.* § 7-12-305(e).

the standard is met.⁹⁵

95. 18 U.S.C. § 3600(a)(8) (2006) (“The proposed DNA testing of the specific evidence may produce new material evidence that would (A) support the theory of defense referenced in paragraph (6); and (B) raise a reasonable probability that the applicant did not commit the offense.”); ALASKA STAT. § 12.73.020(a) (2010) (“The proposed DNA testing of the specific evidence may produce new material evidence that would . . . raise a reasonable probability that the applicant did not commit the offense.”); ARK. CODE ANN. § 16-112-202(8) (2006) (“The proposed testing of the specific evidence may produce new material evidence that would . . . raise a reasonable probability that the person making a motion under this section did not commit the offense.”); FLA. STAT. ANN. § 925.11(2)(f)(3) (West Supp. 2011) (“Whether there is a reasonable probability that the sentenced defendant would have been acquitted or would have received a lesser sentence if the DNA evidence had been admitted at trial.”); LA. CODE CRIM. PROC. ANN. art. 926.1(C)(1) (2008 & Supp. 2011) (“There is an articulable doubt based on competent evidence, whether or not introduced at trial, as to the guilt of the petitioner and there is a reasonable likelihood that the requested DNA testing will resolve the doubt and establish the innocence of the petitioner. In making this finding the court shall evaluate and consider the evidentiary importance of the DNA sample to be tested.”); MD. CODE ANN., CRIM. PROC. § 8-201(d)(1)(i) (LexisNexis 2008 & Supp. 2010) (“A reasonable probability exists that the DNA testing has the scientific potential to produce exculpatory or mitigating evidence relevant to a claim of wrongful conviction or sentencing.”); MISS. CODE ANN. § 99-39-5(1)(f) (West Supp. 2010) (“That there exists biological evidence secured in relation to the investigation or prosecution attendant to the petitioner’s conviction not tested, or, if previously tested, that can be subjected to additional DNA testing, that would provide a reasonable likelihood of more probative results, and that testing would demonstrate by reasonable probability that the petitioner would not have been convicted or would have received a lesser sentence if favorable results had been obtained through such forensic DNA testing at the time of the original prosecution.”); N.H. REV. STAT. ANN. § 651-D:2(III)(e) (LexisNexis 2007 & Supp. 2010) (“If the requested DNA testing produces exculpatory results, the testing will constitute new, noncumulative material evidence that will exonerate the petitioner by establishing that he or she was misidentified as the perpetrator or accomplice to the crime.”); N.J. STAT. ANN. § 2A:84A-32a(d)(5) (West Supp. 2010) (“The requested DNA testing result would raise a reasonable probability that if the results were favorable to the defendant, a motion for a new trial based upon newly discovered evidence would be granted. The court in its discretion may consider any evidence whether or not it was introduced at trial.”); N.Y. CRIM. PROC. LAW § 440.30(1-a)(a) (McKinney 2005) (“[I]f a DNA test had been conducted on such evidence, and if the results had been admitted in the trial resulting in the judgment, there exists a reasonable probability that the verdict would have been more favorable to the defendant.”); N.C. GEN. STAT. § 15A-269(b)(2) (2009) (“If the DNA testing being requested had been conducted on the evidence, there exists a reasonable probability that the verdict would have been more favorable to the defendant.”); OR. REV. STAT. ANN. § 138.692(2)(d) (West Supp. 2010) (“There is a reasonable possibility that the testing will produce exculpatory evidence that would establish the innocence of the person of: (A) The offense for which the person was convicted; or (B) Conduct, if the exoneration of the person of the conduct would result

The statutes of nine states require three steps to be met before a judge can grant a postconviction DNA testing motion. In these states, courts must determine whether the results would be favorable, whether favorable results would have made a difference in the verdict, and finally, whether the DNA results *would have been merely cumulative* to the evidence already presented at trial.⁹⁶ Only if a defendant proves all three

in a mandatory reduction in the person's sentence."); S.C. CODE ANN. § 17-28-90(B)(5) (Supp. 2010) ("[I]f the requested DNA testing produces exculpatory results, the testing will constitute new evidence that will probably change the result of the applicant's conviction or adjudication if a new trial is granted and is not merely cumulative or impeaching."); VT. STAT. ANN. tit. 13, § 5566(a)(1) (2009) ("A reasonable probability exists that the petitioner would not have been convicted or would have received a lesser sentence for the crime which the petitioner claims to be innocent of in the petition if the results of the requested DNA testing had been available to the trier of fact at the time of the original prosecution."); WASH. REV. CODE ANN. § 10.73.170(3) (West 2002 & Supp. 2011) ("[T]he convicted person has shown the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis."); W. VA. CODE ANN. § 15-2B-14(f)(5) (LexisNexis 2009) ("The requested DNA testing results would raise a reasonable probability that, in light of all the evidence, the convicted person's verdict or sentence would have been more favorable if DNA testing results had been available at the time of conviction. The court in its discretion may consider any evidence regardless of whether it was introduced at trial.").

96. DEL. CODE ANN. tit. 11, § 4504(a)(5) (2007) ("The requested testing has the scientific potential to produce new, noncumulative evidence materially relevant to the person's assertion of actual innocence."); 725 ILL. COMP. STAT. ANN. 5/116-3(c)(1) (West 2008) ("[T]he result of the testing has the scientific potential to produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence even though the results may not completely exonerate the defendant."); KAN. STAT. ANN. § 21-2512(c) (2007) ("The court shall order DNA testing . . . upon a determination that testing may produce noncumulative, exculpatory evidence relevant to the claim of the petitioner that the petitioner was wrongfully convicted or sentenced."); MINN. STAT. ANN. § 590.01(1a)(c)(2) (West 2010) ("[T]he testing has the scientific potential to produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence."); NEB. REV. STAT. ANN. § 29-4120(5) (LexisNexis 2009) ("[T]esting may produce noncumulative, exculpatory evidence relevant to the claim that the person was wrongfully convicted or sentenced."); N.D. CENT. CODE § 29-32.1-15(3)(b) (2006) ("[T]he testing has the scientific potential to produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence."); UTAH CODE ANN. § 78B-9-301(2)(f) (LexisNexis 2008 & Supp. 2010) ("[T]he evidence that is the subject of the request for testing has the potential to produce new, noncumulative evidence that will establish the person's factual innocence."); VA. CODE ANN. § 19.2-327.1(A)(iii) (2008) ("[T]he testing is materially relevant, noncumulative, and necessary and may prove the convicted person's actual innocence."); 2010 Idaho Sess. Laws 289 ("The result of the testing has the scientific potential to produce new, noncumulative evidence that would show that it is more probable than not that the petitioner is innocent.").

steps is she then entitled to relief.

Only three states have statutes requiring a single step in determining whether or not the standard is met.⁹⁷

Two states, Maine and Michigan, create their own variation of the problem explained above by providing that the courts consider only the first step when making their decisions. In determining whether the defendant's motion should be granted, courts in Maine are required to decide whether the applicant preserves prima facie evidence that the results of testing are "material to the issue of whether the [defendant] is the perpetrator of, or accomplice to, the crime that resulted in the conviction."⁹⁸ The related statutes do not discuss how "materiality" is defined under the section, but presumably this means the courts must determine whether DNA testing results would be favorable. If, as discussed above, the court believes the evidence used to convict was sufficient, it will likely conclude the DNA testing results will not be favorable, and the testing will not be ordered.

Finally, South Dakota's statute provides for relief if the defendant can "identif[y] a theory of defense that: (a) Is consistent with an affirmative defense presented at trial; or (b) Would establish the actual innocence of the [defendant] of the felony offense."⁹⁹ There have been no cases interpreting this seemingly cryptic language, so the defendant's burden under the statute is altogether unclear. Presumably this language means the defendant must show the results of DNA testing would be in line with a third-party culpability defense that had previously been presented at the trial or that the requested results would test favorable to the defendant. If

97. ALA. CODE § 15-18-200(a) (Supp. 2010) ("[T]he results of the forensic DNA testing, on its face, would demonstrate the convicted individual's factual innocence of the offense convicted."); MONT. CODE ANN. § 46-21-110(5)(e) (2009) ("[T]he requested testing results would establish, in light of all the evidence, whether the petitioner was the perpetrator of the felony that resulted in the conviction."); OHIO REV. CODE ANN. § 2953.74(C)(5) (LexisNexis 2010) ("The court determines that, if DNA testing is conducted and an exclusion result is obtained, the results of the testing will be outcome determinative regarding that offender.").

98. ME. REV. STAT. ANN. tit. 15, § 2138(4-A)(E) (2003 & Supp. 2010); *cf.* MICH. COMP. LAWS ANN. § 770.16(4)(a) (West 2006 & Supp. 2010) (ordering testing if the defendant provides "prima face proof that the evidence sought to be tested is material to the issue of the convicted person's identity as the perpetrator of, or accomplice to, the crime that resulted in the conviction"). As with many states' DNA testing statutes, the language used is substantially the same; Maine and Michigan either share a common source for their statutes or one was modeled after the other.

99. S.D. CODIFIED LAWS § 23-5B-1(9) (Supp. 2010).

so, this would mean the South Dakota statute runs afoul of the same problems outlined above.

As has been demonstrated in hundreds of DNA exonerations across the country, reliance on a two-step approach to determining whether testing should be ordered will often preclude testing from being performed when, in fact, it should be completed. A study of the first 225 cases of DNA exonerations performed by the New York-based Innocence Project shows 77% involved eyewitness misidentification, 52% involved improper forensics, 16% involved informants and snitches, and 23%—almost one in four—involved false confessions or admissions.¹⁰⁰

This last statistic regarding false confessions or admissions is particularly telling and demonstrative of why a two-step approach does not work. Courts employing a two-step analysis would logically and invariably conclude further DNA testing would produce inculpatory, not exculpatory, results in cases in which the inmate has confessed to the crime. Yet, in almost a quarter of the first 225 exonerations, courts reaching this conclusion would have prevented testing and consequently failed to overturn a wrongful conviction.¹⁰¹

A one-step analysis should be required by a postconviction DNA testing statute. Given what is known about DNA exonerations, the alternative is simply untenable.

IV. THE IDENTITY ISSUE

A common, and generally misguided, worry is postconviction DNA laws might “open the floodgate” of inmate litigation.¹⁰² States have generally addressed this concern by only considering postconviction motions in cases in which the identity of the perpetrator was at issue at trial. A similar or identical limitation is in the postconviction DNA testing statutes of the federal government¹⁰³ and the following states: Alabama,¹⁰⁴

100. See *The Causes of Wrongful Conviction*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand> (last visited Apr. 12, 2011) (providing a visual representation of how these problems compare).

101. See *id.*

102. NAT'L COMM'N ON THE FUTURE OF DNA EVIDENCE, U.S. DEP'T OF JUSTICE, POSTCONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS 18 (1999), available at <http://www.ncjrs.gov/pdffiles1/nij/177626.pdf>.

103. 18 U.S.C. § 3600(a)(7) (2006).

104. ALA. CODE § 15-18-200(e)(3) (Supp. 2010) (The petition must contain “[p]rima facie evidence demonstrating that the identity of the perpetrator was at issue

Alaska,¹⁰⁵ Arkansas,¹⁰⁶ Delaware,¹⁰⁷ Florida,¹⁰⁸ Georgia,¹⁰⁹ Hawaii,¹¹⁰ Idaho,¹¹¹ Illinois,¹¹² Iowa,¹¹³ Maine,¹¹⁴ Michigan,¹¹⁵ Minnesota,¹¹⁶ Missouri,¹¹⁷ New Jersey,¹¹⁸ New Mexico,¹¹⁹ North Dakota,¹²⁰ Ohio,¹²¹ Pennsylvania,¹²² South Dakota,¹²³ and Texas.¹²⁴

California employs a similar, albeit somewhat less restrictive, standard. California courts will only consider cases in which “[t]he identity

in the trial.”).

105. ALASKA STAT. § 12.73.020(8) (2010).

106. ARK. CODE ANN. § 16-112-202(7) (2006).

107. DEL. CODE ANN. tit. 11, § 4504(a)(3) (2007).

108. FLA. STAT. ANN. § 925.11(2)(a)(4) (West Supp. 2011). However, Florida’s Rules of Criminal Procedure allows for DNA testing so long as the movant alleges that identity is a genuinely dispute issue, or that DNA testing of the requested item would exonerate the inmate. Fla. R. Crim. P. 3.853 (2011). *See also* Crow v. State, 866 So. 2d 1257 (Fla. Dist. Ct. App. 2004) (“It is apparent from this language that testing may be available even if the defendant does not deny commission of the act alleged to be a crime. The pertinent part of the rule makes testing available if the result would show that the defendant was misidentified or if the result would otherwise exonerate the defendant.”).

109. GA. CODE ANN. § 5-5-41(c)(7)(E) (West Supp. 2010).

110. HAW. REV. STAT. § 844D-123(a)(2) (Supp. 2007). This limitation only applies to postconviction DNA testing motions that the court must grant. *Id.* § 844D-123(a) (“The court *shall* order testing” (emphasis added)). If the court has discretion in granting the postconviction DNA testing motion, then identity need not be an issue in the case. *Id.* § 844D-123(b).

111. IDAHO CODE ANN. § 19-4902(c)(1) (2004 & Supp. 2010).

112. 725 ILL. COMP. STAT. ANN. 5/116-3(b)(1) (West 2008).

113. IOWA CODE § 81.10(7)(c) (2009).

114. ME. REV. STAT. ANN. tit. 15, § 2138(4-A)(D) (2003 & Supp. 2010).

115. MICH. COMP. LAWS ANN. § 770.16(4)(b)(iii) (West 2006 & Supp. 2010).

116. MINN. STAT. ANN. § 590.01(1a)(b)(1) (West 2010).

117. MO. ANN. STAT. § 547.035(2)(4) (West 2002). In Missouri, the motion must allege “identity was an issue in the trial.” *Id.*

118. N.J. STAT. ANN. § 2A:84A-32a(d)(3) (West Supp. 2010).

119. N.M. STAT. ANN. § 31-1A-2(C)(5) (2010). Alternatively, in lieu of identity being an issue in the case, if the DNA testing the petitioner requests “had been performed prior to his conviction and the results had been exculpatory, [the petitioner must show] there is a reasonable probability that the petitioner would not have pled guilty or been found guilty.” *Id.*

120. N.D. CENT. CODE § 29-32.1-15(2)(a) (2006).

121. OHIO REV. CODE ANN. § 2953.74(C)(3) (LexisNexis 2010).

122. 42 PA. CONS. STAT. ANN. § 9543.1(c)(3)(i) (West 2007).

123. S.D. CODIFIED LAWS § 23-5B-1(10) (Supp. 2010).

124. TEX. CODE CRIM. PROC. ANN. art. 64.03 (West 2006 & Supp. 2010).

of the perpetrator of the crime was, or should have been, a significant issue in the case.”¹²⁵ Defense attorneys refer to the defense in these cases as TODDI—“The Other Dude Did It.”

Notably, the California statute does not require a showing that the defendant knows or suspects the identity of the actual perpetrator of the crime.¹²⁶ The statute merely requires the *identity* of the perpetrator be “at issue,” meaning, at the time of trial, there was a genuine prima facie dispute between the parties as to who committed the crime.¹²⁷ Further, the statute also allows for situations in which the identity of the perpetrator “should have been [] a significant issue in the case.”¹²⁸ Thus, even if the defense’s argument at the original trial did not involve the issue of identity, the statute can still be used to secure postconviction DNA testing if identity *should have been* argued but was not.¹²⁹

For example, suppose a defendant is charged with murder, and there are no witnesses to the crime. Assume the defendant is developmentally disabled, cannot remember the events because of intoxication, or is otherwise unable to assist the attorney in forming a defense. At trial, the defense pursues a self-defense argument, believing it to be the best opportunity for acquittal. By arguing self-defense, the identity of the defendant no longer remains an issue. However, if evidence later shows the defendant was not involved in the crime, he or she may be prohibited from pursuing postconviction DNA testing unless a postconviction DNA statute allows testing where identity *was or should have been an issue*.

The legislative history provides for the correct interpretation of this portion of the statute. Discussion from the California Senate Committee meeting on April 11, 2000, noted the intended limitations for who may qualify for relief under Penal Code Section 1405:

[T]he only persons who could request DNA testing under this bill are those who had cases in which “identity” was the key issue. Thus, these are cases where a person was identified by a victim or witness as the person who had committed the crime and no defense such as self-defense or consent was used. This will limit the number of cases that this bill will apply to. The number of cases will also be limited because

125. CAL. PENAL CODE § 1405(f)(3) (West Supp. 2011).

126. *See id.*

127. *See id.*

128. *Id.*

129. *See id.*

there must be some sort of genetic material available to be tested.¹³⁰

Montana,¹³¹ West Virginia,¹³² South Carolina,¹³³ New Hampshire,¹³⁴ and Oregon¹³⁵ impose the same limitation California does. However, the majority of postconviction DNA testing statutes are silent on the issue of identity. The postconviction DNA statutes of the following states have no such requirement: Arizona,¹³⁶ Colorado,¹³⁷ Connecticut,¹³⁸ District of Columbia,¹³⁹ Indiana,¹⁴⁰ Kansas,¹⁴¹ Kentucky,¹⁴² Louisiana,¹⁴³ Maryland,¹⁴⁴ Mississippi,¹⁴⁵ Nebraska,¹⁴⁶ Nevada,¹⁴⁷ New York,¹⁴⁸ North Carolina,¹⁴⁹ Rhode Island,¹⁵⁰ Tennessee,¹⁵¹ Utah,¹⁵² Vermont,¹⁵³ Virginia,¹⁵⁴

130. *Forensic Testing: Post Conviction: Hearing on S.B. 1342 Before the S. Comm. on Pub. Safety*, 1999-2000 Reg. Sess. (Cal. 2000), http://info.sen.ca.gov/pub/99-00/bill/sen/sb_1301-1350/sb_1342_cfa_20000411_140345_sen_comm.html.

131. MONT. CODE ANN. § 46-21-110(5)(c) (2009) (“[T]he identity of the perpetrator of the felony was or should have been a significant issue in the case.”).

132. W. VA. CODE ANN. § 15-2B-14(f)(3) (LexisNexis 2009) (“The identity of the perpetrator of the crime was, or should have been, a significant issue in the case.”).

133. S.C. CODE ANN. § 17-28-40(C)(5) (Supp. 2010). In South Carolina, the applicant must “explain why the identity of the applicant was or should have been a significant issue during the original court proceedings.” *Id.*

134. N.H. REV. STAT. ANN. § 651-D:2(I)(a) (LexisNexis 2007 & Supp. 2010). In New Hampshire, the petition must “[e]xplain why the identity of the petitioner was or should have been a significant issue during court proceedings.” *Id.*

135. OR. REV. STAT. ANN. § 138.694(1)(b)(C) (West Supp. 2010). This only applies if the applicant is filing a petition requesting the appointment of counsel. *Id.* § 138.694(1). Oregon provides an exception: “[I]f the person was documented as having mental retardation prior to the time the crime was committed,” then identity need not have been at issue and simply should have been at issue. *Id.* § 138.694(1)(b)(C).

136. ARIZ. REV. STAT. ANN. §§ 13-4231 to -4240 (2010).

137. COLO. REV. STAT. §§ 18-1-411 to -416 (2010).

138. CONN. GEN. STAT. ANN. §§ 54-102jj to -102kk (West 2009).

139. D.C. CODE § 22-4133 (LexisNexis 2010).

140. IND. CODE ANN. §§ 35-38-7-1 to -19 (LexisNexis Supp. 2010).

141. KAN. STAT. ANN. § 21-2512 (2007).

142. KY. REV. STAT. ANN. §§ 422.285–.287 (LexisNexis 2005 & Supp. 2010).

143. LA. CODE CRIM. PROC. ANN. art. 926.1 (2008 & Supp. 2011).

144. MD. CODE ANN., CRIM. PROC. § 8-201 (LexisNexis 2008 & Supp. 2010).

145. MISS. CODE ANN. §§ 99-39-5 to -11 (West 2006 & Supp. 2010).

146. NEB. REV. STAT. ANN. § 29-4120 (LexisNexis 2009).

147. NEV. REV. STAT. § 176.0918 (2009).

148. N.Y. CRIM. PROC. LAW § 440.10 (McKinney 2005 & Supp. 2011).

149. N.C. GEN. STAT. § 15A-269 (2009).

150. R.I. GEN. LAWS § 10-9.1-12 (Supp. 2010).

151. TENN. CODE ANN. §§ 40-30-303 to -305 (2006).

Washington,¹⁵⁵ Wisconsin,¹⁵⁶ and Wyoming.¹⁵⁷

Given the examples above, it is clear legislatures addressing the identity issue have struggled to balance the goals of exclusion and inclusion. On one hand, there are valid interests in limiting testing in which identity is not an issue because DNA is ultimately a tool for confirming or excluding a suspect. However, the purpose of any DNA statute is to ensure individuals have access to testing when the results of testing would be dispositive of their guilt or innocence, which means they should be broadly construed to prevent innocent inmates from falling through the cracks.

Statutes incorporating the “should have been” language seem to better balance these interests; however, in cases in which identity was not, or should not have been, an issue, statutes should grant courts the discretion to order testing in the interest of justice. This allows even those individuals who may have argued consent or self-defense to be granted testing if the court determines there is merit to testing.

V. WHO SHOULD DO THE TESTING?

The question as to who should do the testing is a difficult one. Police crime labs have often been accused of bias against the defense and even specific fraud.¹⁵⁸ The most recent and notorious example of this is the FBI crime lab frauds in Houston.¹⁵⁹ Two hundred eighty boxes of lost evidence, including a fetus and body parts, were found after the laboratory’s DNA testing division was shut down as a result of an audit.¹⁶⁰ The audit had revealed poor training, flawed recordkeeping, and misinterpreted data that led to defendants being convicted instead of exonerated.¹⁶¹ Over 8,000

152. UTAH CODE ANN. §§ 78B-9-301 to -304 (LexisNexis 2008 & Supp. 2010).

153. VT. STAT. ANN. tit. 13, §§ 5561–5570 (2009).

154. VA. CODE ANN. §§ 19.2-327.1 to -327.3 (2008 & Supp. 2010).

155. WASH. REV. CODE ANN. § 10.73.170 (West 2002 & Supp. 2011).

156. WIS. STAT. ANN. § 974.07 (West 2007 & Supp. 2010).

157. WYO. STAT. ANN. § 7-12-303 (2009).

158. Paul C. Giannelli, *The Abuse of Scientific Evidence in Criminal Cases: The Need for Independent Crime Laboratories*, 4 VA. J. SOC. POL’Y & L. 439, 442–44 (1997).

159. Ralph Blumenthal, *Lost Evidence Is Found in Houston Crime Lab*, N.Y. TIMES, Aug. 27, 2004, <http://www.nytimes.com/2004/08/27/us/lost-evidence-is-found-in-houston-crime-lab.html>.

160. *Id.*

161. *Id.*

cases could have been affected by the recovered evidence.¹⁶² There is also the notorious case of Fred Zain, the West Virginia DNA lab specialist who “falsified test results in as many as 134 cases” over a span of ten years.¹⁶³

Zain worked as the Chief of Serology at the West Virginia Division of Public Safety from 1979 to 1989.¹⁶⁴ “In 1987, Glen Dale Woodall was convicted of multiple felonies, including two counts of sexual assault”¹⁶⁵ Zain’s testimony was “that, based upon his scientific analysis of the semen recovered from the victims, ‘the assailant’s blood types . . . were identical to Mr. Woodall’s’” and the probability of this occurring in West Virginia’s males was six in ten thousand.¹⁶⁶ Pursuant to a petition for writ of habeas corpus, subsequent DNA testing conclusively established Glen Dale Woodall could not have been the perpetrator.¹⁶⁷

Following Woodall’s release, an investigation revealed serious misconduct on Zain’s part.¹⁶⁸ Employees whom Zain supervised testified

162. *Id.* A report, based upon a two-year, independent investigation of 850 serology cases handled by the Houston lab, recommended in 2007 that the District Attorney’s office inform prisoners from 599 of the cases that “the independent investigation has identified a potential issue with the forensic serology work performed by the Crime Lab in his case.” MICHAEL R. BROMWICH, FINAL REPORT OF THE INDEPENDENT INVESTIGATOR FOR THE HOUSTON POLICE DEPARTMENT CRIME LABORATORY AND PROPERTY ROOM 2, 11, 12 (2007), available at <http://www.hpdlabinvestigation.org/reports/070613report.pdf>.

163. *See, e.g.*, Giannelli, *supra* note 158, at 442–44.

164. *In re* Investigation of the W. Va. State Police Crime Lab., Serology Div., 438 S.E.2d 501, 509 (W. Va. 1993) (reprinting a report by Judge Holliday and adopted by the court). Although Fred Zain’s position at the serology lab ended in 1989, he continued to provide his expert opinion in West Virginia criminal prosecutions after his position ended. *Id.* at 510.

165. *Id.* at 509.

166. *Id.* (quoting *State v. Woodall*, 385 S.E.2d 253, 260 (W. Va. 1989)).

167. *Id.*

168. *Id.* at 503. The Laboratory Accreditation Board of the American Society of Crime Laboratory Directors (ASCLD) issued a report that revealed numerous acts of misconduct by Fred Zain, which included:

- (1) overstating the strength of results;
- (2) overstating the frequency of genetic matches on individual pieces of evidence;
- (3) misreporting the frequency of genetic matches on multiple pieces of evidence;
- (4) reporting that multiple items had been tested, when only a single item had been tested;
- (5) reporting inconclusive results as conclusive;
- (6) repeatedly altering laboratory records;
- (7) grouping results to create the erroneous impression that genetic markers had been obtained from all samples tested;
- (8) failing to report conflicting results;
- (9) failing to conduct or to report conducting additional testing to

“they observed Zain recording on his worksheet results from enzyme test plates which appeared to them and to other employees . . . to be blank.”¹⁶⁹ The investigation yielded evidence that

Zain had falsely reported results on worksheets that could not be supported by data on the laboratory notes, including falsely reporting that testing had been performed on multiple items, when only a few had been tested, and falsely reporting that multiple genetic markers had been identified, when only a few had been tested [There were] improprieties in every case reviewed in which Zain had been involved.¹⁷⁰

Even when a laboratory is free from fraud or bias, state-run labs may not be a good option to conduct testing for the simple reason they may not be motivated to perform and complete tests on a case they consider “closed.” As such, the lab may give the testing of evidence in a postconviction case a very low priority, with current, “active” cases—in which the results of testing could lead to a conviction—taking precedence. This is exactly what happened in the William Richards case. The superior court granted Richards’s order for testing and directed the testing facility at the Department of Justice to perform preliminary testing in mid-2003.¹⁷¹

Of all the provisions found in postconviction DNA testing statutes, the issue of who should conduct the testing seems to be the most highly variable. Generally, however, the statutes can be grouped into four broad categories:

Category I—State Labs

Twenty states specifically direct testing be done at the state lab or a state-affiliated lab,¹⁷² or in the case of the federal government, by the

resolve conflicting results; (10) implying a match with a suspect when testing supported only a match with the victim; and (11) reporting scientifically impossible or improbable results.

Id.

169. *Id.* at 511. One of the employees estimated she had observed Zain reporting results from a blank plate at least one hundred times. *Id.*

170. *Id.* at 513.

171. Stiglitz, *supra* note 11, at 1361.

172. ALA. CODE § 15-18-200(g)(1) (LexisNexis Supp. 2010) (requiring testing by the Department of Forensic Sciences or a “laboratory mutually agreed upon by the state and the petitioner”); ALASKA STAT. § 12.73.050(c) (2010) (requiring testing to be performed at laboratory operated or approved by the Department of Public Safety); ARK. CODE ANN. §§ 16-112-208(a)(1), -208(a)(2)(A) (2006) (stating the State Crime

FBI.¹⁷³

Category II—Party Determination

Eleven states allow the parties to agree between themselves on a private lab, or if they are unable to agree, the statute authorizes the court to determine a lab.¹⁷⁴

Laboratory or another qualified lab may do the testing); FLA. STAT. ANN. § 925.11(2)(h) (West Supp. 2011) (testing “shall be carried out by the Department of Law Enforcement or its designee”); GA. CODE ANN. § 5-5-41(c)(9) (West Supp. 2010) (requiring testing by the Division of Forensic Sciences, Georgia Bureau of Investigation); IDAHO CODE ANN. § 19-4902(g) (Supp. 2010) (specifying the state will conduct the testing if the petitioner qualifies for the test at public expense or the petitioner may choose and pay for an accredited lab to conduct the testing); KY. REV. STAT. ANN. § 422.287(3) (LexisNexis 2005 & Supp. 2010) (requiring testing by either the Department of Kentucky State Police Laboratory or a lab it chooses); ME. REV. STAT. ANN. tit. 15, §§ 2136(2), 2138(5) (2003 & Supp. 2010) (requiring testing by the “crime lab,” which is defined as “the Maine State Police Crime Laboratory located in Augusta”); NEV. REV. STAT. § 176.0918(9)(b)(1) (2009); N.H. REV. STAT. ANN. § 651-D:2(IV)(c) (LexisNexis 2007 & Supp. 2010) (requiring testing by the New Hampshire State Police Forensic Laboratory; “[h]owever, the court, upon a showing of good cause, may order testing by another laboratory”); OR. REV. STAT. ANN. § 138.692(4) (West Supp. 2010) (requiring testing by the state crime lab *unless* the parties agree otherwise); 42 PA. CONS. STAT. ANN. § 9543.1(e)(1)(i)–(iii) (West 2007) (permitting the parties to agree to an alternate lab, but if the applicant is indigent, then the testing is conducted by the Pennsylvania State Police or its designee); R.I. GEN. LAWS § 10-9.1-12(c) (Supp. 2010) (requiring testing by the Rhode Island Department of Health unless good cause is shown); S.D. CODIFIED LAWS § 23-5B-6 (Supp. 2010) (requiring testing by the South Dakota Division of Criminal Investigation or a qualified lab chosen by the court); TEX. CODE CRIM. PROC. ANN. art 64.03(c), (d)(1)–(3) (West 2006 & Supp. 2010) (stating the state crime lab, or one of its affiliates, will conduct the testing unless the defendant requests another laboratory accredited by the state); UTAH CODE ANN. § 78B-9-301(7)(a) (LexisNexis 2008 & Supp. 2010) (stating the state crime lab will conduct the testing “unless the person establishes that the state crime laboratory has a conflict of interest or does not have the capability to perform the necessary testing”); VA. CODE ANN. § 19.2-327.1(E) (2008) (requiring testing by the Department of Forensic Science); W. VA. CODE ANN. § 15-2B-14(g) (West 2009) (“Testing shall be conducted by a DNA forensic laboratory in this state.”); WASH. REV. CODE ANN. § 10.73.170(5) (West Supp. 2011) (requiring testing by the Washington State Crime Patrol Lab); WYO. STAT. ANN. § 7-12-306(a) (2009).

173. 18 U.S.C. § 3600(c)(1)–(2) (2006) (requiring the court to order testing done by the FBI and permitting the court to order testing “by another qualified laboratory if the court makes all necessary orders to ensure the integrity of the specific evidence and the reliability of the testing process and test results”).

174. ALA. CODE § 15-18-200(g)(1); CAL. PENAL CODE § 1405(g)(2) (West Supp. 2011); HAW. REV. STAT. § 844D-127 (Supp. 2007); LA. CODE CRIM. PROC. ANN. art. 926.1(F) (2008 & Supp. 2011); MD. CODE ANN., CRIM. PROC. § 8-201(f)(4)

Category III—Court Determination

Five states allow the court to select the lab and are silent about the parties.¹⁷⁵

Category IV—No Designation

Twelve states have no language relating to the selection of the lab or are silent about whether the parties or the court ultimately determine the selection.¹⁷⁶

In terms of cost, private labs can be more cost-effective. For example, in 2006 the North Carolina Department of Justice conducted a cost study of DNA testing and analysis.¹⁷⁷ The study results revealed the average cost of analyzing a rape kit in a state crime lab was \$568.96.¹⁷⁸ A private lab could conduct the same testing for \$445, with a total cost of \$681.03 after similar processing costs are added.¹⁷⁹ This total figure is lower than several state

(LexisNexis 2008 & Supp. 2010); MISS. CODE ANN. § 99-39-11(5) (West Supp. 2010); MO. ANN. STAT. § 547.035(7) (West 2002); MONT. CODE ANN. § 46-21-110(6) (2009); N.J. STAT. ANN. § 2A:84A-32a(e)(1)–(2) (West Supp. 2010); N.C. GEN. STAT. § 15A-269(b)(1) (2009); VT. STAT. ANN. tit. 13, § 5568(a) (2009).

175. ARIZ. REV. STAT. ANN. § 13-4240(F) (2010); IND. CODE ANN. § 35-38-7-12 (LexisNexis Supp. 2010); MICH. COMP. LAWS ANN. § 770.16(6) (West 2006 & Supp. 2010); OHIO REV. CODE ANN. § 2953.78(A) (LexisNexis 2010) (“A court shall not select or use a testing authority for DNA testing unless the attorney general approves or designates the testing authority pursuant to division (C) of this section and unless the testing authority satisfies the criteria set forth in section 2953.80 of the Revised Code.”); TENN. CODE ANN. § 40-30-310 (2006).

176. COLO. REV. STAT. §§ 18-1-411 to -416 (2010); CONN. GEN. STAT. ANN. §§ 54-102jj to -102kk (West 2009); DEL. CODE ANN. tit. 11, § 4504 (2007); D.C. CODE §§ 22-4133 to -4135 (LexisNexis 2010); 725 ILL. COMP. STAT. ANN. 5/116-3 (West 2008); IOWA CODE § 81.10 (2009); KAN. STAT. ANN. § 21-2512 (2007); MINN. STAT. ANN. § 590.01–.10 (West 2010); NEB. REV. STAT. ANN. § 29-4120(6) (LexisNexis 2009); N.M. STAT. ANN. § 31-1A-2(I) (2010); N.Y. CRIM. PROC. LAW § 440.30 (McKinney 2005); N.D. CENT. CODE § 29-32.1-01 to -15 (2006).

177. OFFICE OF STATE BUDGET & MGMT., N.C. DEP’T OF JUSTICE, COST STUDY OF DNA TESTING AND ANALYSIS 1 (2006), available at http://www.osbm.state.nc.us/files/pdf_files/3-1-2006FinalDNAReport.pdf.

178. *Id.* at 7. This estimate includes prescreening costs, evidence control, quality reviews, and searching the Combined DNA Index System (CODIS). *Id.*

179. *Id.* In response to a September 2004 request for bids to outsource rape kits involved in cases without a suspect, one private lab submitted a bid for \$445 to the State Bureau of Investigation Crime Lab. The contractor cost did not include the State Bureau of Investigation in-house costs for evidence control, quality reviews, or searching CODIS for a match. *See id.* at 7–8.

laboratories.¹⁸⁰

In order to avoid the taint of biased postconviction DNA testing and potential delay, testing should be done by private labs. Private labs have sprung up across the United States over the past two decades.¹⁸¹ There is a formal accreditation for these labs and they are often used by both prosecutors and defense attorneys.

VI. WHO SHOULD PAY FOR THE TESTING?

Prior to the passage of California's postconviction testing law, if inmates were lucky enough to get a judge to grant a DNA testing motion, they had to pay for the testing.¹⁸² The cost of testing is typically well beyond the means of most inmates and their families.¹⁸³ Without the means to pay for the testing, it would not happen.

One of the arguments against passing California's postconviction DNA testing law was it would break the state budget if thousands of inmates filed for testing.¹⁸⁴ The limiting provisions within the statute discussed herein have made that a false concern, as very few motions have been filed or granted. The California Innocence Project and the Northern California Innocence Project, for example, have together filed fewer than twenty motions for DNA testing in the past ten years.

180. *Id.* at 8.

181. See *ASCLD/LAB Accredited Laboratories*, AM. SOC'Y CRIME LAB. DIRS./LAB. ACCREDITATION BD., <http://www.asclcd-lab.org/accreditedlabs.html> (last visited March 30, 2011). As of September 14, 2010, there were 385 crime labs with ASCLD/LAB accreditation. *Id.*

182. See Jerilyn Stanley, *Review of Selected 2000 California Legislation: Criminal Procedure: DNA: Law Enforcement's Miracle of Technology: The Missing Link to Truth and Justice*, 32 MCGEORGE L. REV. 601, 606 (2001) (comparing California's previously existing DNA testing law with the newly enacted post-conviction DNA testing statute, and noting under the new statute "DNA testing costs will be paid by the State unless the court makes the dual finding, in the interest of justice, that the inmate is not indigent and is capable of paying.").

183. The cost of STR or Y-STR analysis of evidence and a reference sample from one private lab referenced is \$1,295 per sample. ORCHID CELLMARK, FORENSIC SERVICES FEE SCHEDULE (2010). The cost of mtDNA analysis is \$2,850 for a sample of evidence; \$1,450 per sample reference if it is blood or a buccal swab; \$2,250 per sample reference if it is hair, bone, or other; \$3,500 per sample if it is a highly degraded sample; and lastly \$1,000 per sample to simply extract and amplify DNA. *Id.* The cost of expert testimony, reserved with four-weeks notice, is \$2,000 per day plus expenses. *Id.*

184. *Cf.* ASSEMBLY APPROPRIATIONS COMM., REP. ON S.B. 1342, 1999-00 Reg. Sess. (Cal. 1999).

Even with the high cost of DNA testing, the cost pales in comparison to the societal costs that arise when a wrongfully convicted person is in prison. First, there are costs associated with supporting families who have often lost their main support when a father, mother, wife, or husband goes to prison. Second, there are often costs associated with a wrongful conviction when there is an actual offender who is not brought to justice and continues to commit crimes. Finally, there are the most basic and quantifiable costs of housing, feeding, and providing medical care to a wrongfully convicted person.¹⁸⁵

In California, the state pays for DNA testing if an inmate can hurdle all of the other requirements of Penal Code section 1405.¹⁸⁶ Thirty other states, the District of Columbia, and the United States have statutes similar to California and will pay for DNA testing if the other statutory requirements are met or the person is indigent.¹⁸⁷ In other states, there are

185. The average cost to incarcerate a state prison inmate in California in 2001 was \$25,053 per year; the national average was \$22,650 for the same year. JAMES J. STEPHAN, U.S. DEP'T OF JUSTICE, STATE PRISON EXPENDITURES, 2001, at 3 tbl.2 (2004), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/spe01.pdf>. The average annual cost to incarcerate an inmate in the Federal Bureau of Prisons system was \$22,632. *Id.*

186. CAL. PENAL CODE § 1405(i)(1) (West Supp. 2011) (“The cost of DNA testing ordered under this section shall be borne by the state or the applicant, as the court may order in the interests of justice, if it is shown that the applicant is not indigent and possesses the ability to pay. However, the cost of any additional testing to be conducted by the district attorney or Attorney General shall not be borne by the convicted person.”).

187. 18 U.S.C. § 3600(c)(3) (2006); ALA. CODE § 15-18-200(g)(2) (Supp. 2010); ALASKA STAT. § 12.73.050(c) (2010); ARK. CODE ANN. § 16-112-208(a)(3) (2006); CONN. GEN. STAT. ANN. § 54-102kk(d) (West 2009); DEL. CODE ANN. tit. 11, § 4504(e) (2007); D.C. CODE § 22-4133(e)(1) (LexisNexis 2010); FLA. STAT. ANN. § 925.11(2)(g) (West Supp. 2011); GA. CODE ANN. § 5-5-41(c)(8) (West Supp. 2010); IDAHO CODE ANN. § 19-4902(g) (Supp. 2010); KAN. STAT. ANN. § 21-2512(d) (2007); KY. REV. STAT. ANN. § 17.176(3) (LexisNexis 2008); KY. REV. STAT. ANN. § 422.285(4) (LexisNexis 2005 & Supp. 2010); LA. CODE CRIM. PROC. ANN. art. 926.1(K) (2008 & Supp. 2011); ME. REV. STAT. ANN. tit. 15, § 2138(7) (2003 & Supp. 2010); MICH. COMP. LAWS ANN. § 770.16(6) (West 2006 & Supp. 2010); MONT. CODE ANN. § 46-21-110(11) (2009); NEB. REV. STAT. ANN. § 29-4121 (LexisNexis 2009); NEV. REV. STAT. § 176.0918(13) (2009); N.H. REV. STAT. ANN. § 651-D:2(V) (LexisNexis 2007 & Supp. 2010); N.M. STAT. ANN. § 31-1A-2(I) (2010); N.C. GEN. STAT. § 15A-269(d) (2009); OHIO REV. CODE ANN. § 2953.73(F) (LexisNexis 2010); OR. REV. STAT. ANN. § 138.692(5) (West Supp. 2010); 42 PA. CONS. STAT. ANN. § 9543.1(e)(2)(ii) (West 2007); R.I. GEN. LAWS § 10-9.1-12(c) (Supp. 2010); S.C. CODE ANN. § 17-28-90(E) (Supp. 2010); S.D. CODIFIED LAWS § 23-5B-13(2)(a) (Supp. 2010) (implying the state is responsible for payment because the state conducts the testing, and permitting the state to file a motion seeking to assess the

various approaches. Three other states have two standards—one in which the court *must* order testing and another in which the court *may* order testing—and financial responsibility depends on which standard the court applies.¹⁸⁸

Three states condition financial responsibility on where the testing is conducted.¹⁸⁹ Three states require the applicant to pay for testing,¹⁹⁰ and

costs against the applicant if the testing results show the applicant was the source of the evidence); UTAH CODE ANN. § 78B-9-301(7)–(9) (LexisNexis 2008 & Supp. 2010) (providing testing for indigent defendants, but only if the results of testing are favorable); W. VA. CODE ANN. § 15-2B-14(i) (LexisNexis 2009); WIS. STAT. ANN. § 974.07(12)(a), (c) (West 2007 & Supp. 2010); WYO. STAT. ANN. § 7-12-309(a)–(b) (2009).

188. ARIZ. REV. STAT. ANN. § 13-4240(D) (2010) (“If the court orders testing pursuant to subsection B, the court shall order the method and responsibility for payment, if necessary. If the court orders testing pursuant to subsection C, the court may require the petitioner to pay the costs of testing.”); HAW. REV. STAT. § 844D-128 (Supp. 2007) (“Analysis ordered pursuant to section 844D-123(a) shall be paid for using funds from the DNA registry special fund established pursuant to section [706-603(3)]. The court may require payment for analysis ordered pursuant to section 844D-123(b) to be made by the defendant, the DNA registry special fund, or a combination thereof.”); TENN. CODE ANN. § 40-30-306 (2006) (“In the case of an order issued pursuant to § 40-30-304, the court shall order the analysis and payment, if necessary. In the case of an order under § 40-30-305, the court may require the petitioner to pay for the analysis.”).

189. In Mississippi, if the applicant is indigent and the state performs the testing, the state bears the costs. MISS. CODE ANN. § 99-39-11(6) (West Supp. 2010). Alternatively, if a private lab performs the testing, the court may assess the costs against either the applicant or the state. *Id.* § 99-39-11(7). If Mississippi’s state crime lab lacks the ability or the resources to conduct the testing, the state is required to pay for the testing at a private facility. *Id.* § 99-39-11(8). Texas’s statute relieves the state from liability for payment if the court orders the testing to be done at a lab other than the Department of Public Safety’s lab or a lab under contract with the Department of Public Safety, unless good cause is shown. TEX. CODE CRIM. PROC. ANN. art. 64.03(d) (West 2006 & Supp. 2010). Vermont’s statute requires the state to pay if the state crime lab performs the testing. VT. STAT. ANN. tit. 13, § 5568(c)(1) (2009). Alternatively, the court may impose costs against the applicant, the state, or both if testing is performed at a private lab. *Id.* § 5568(c)(2). If, however, the state crime lab does not have the ability or lacks the resources to conduct the testing, the state must pay the costs of testing at a private lab. *Id.* § 5568(c)(3).

190. COLO. REV. STAT. § 18-1-415 (2010) (requiring the prisoner to pay unless indigent, in which case it comes out of the budget for the defender); MD. CODE ANN., CRIM. PROC. § 8-201(g)(1) (LexisNexis 2008 & Supp. 2010); N.J. STAT. ANN. § 2A:84A-32a(g) (West Supp. 2010). *But cf.* MD. CODE ANN., CRIM. PROC. § 8-201(g)(2) (requiring the state to pay for testing if the results are favorable to the applicant).

nine states do not specify who is responsible for the costs of testing.¹⁹¹

Of all of the statutes, eight states provide the court with the ability to make the petitioner pay for the costs of testing if the results are unfavorable to him or her.¹⁹² Conversely, some states must pay for testing if the results are favorable to the petitioner.¹⁹³

California inmates make \$0.30 to \$0.95 per hour before deductions.¹⁹⁴ Considering the average cost of analyzing a rape kit in a state crime lab is \$568.96,¹⁹⁵ it would take an inmate earning \$0.95 per hour over 598 hours to pay for the testing—not including taxes and assuming the inmate puts his entire paycheck toward saving for a rape kit.

191. Illinois, Indiana, Iowa, Minnesota, Missouri, New York, North Dakota, Washington, and Virginia do not specify who bears responsibility. Iowa and Missouri provide the court may order the costs of testing to be borne by the inmate if the results are unfavorable, but they do not specify who is to pay for the testing “up front.” IOWA CODE § 81.10(12) (2009); MO. ANN. STAT. § 650.058(2)(1) (West Supp. 2011). Indiana’s statute states the court shall determine “the method and responsibility” for the testing, but it provides no further language. IND. CODE ANN. § 35-38-7-10 (LexisNexis Supp. 2010). Minnesota’s statute does provide for costs and filing fees to be borne by the state, but it does not specify who pays for testing. MINN. STAT. ANN. § 590.02(2) (West 2010).

192. In Kansas, the court cannot impose such a requirement if the petitioner is indigent. KAN. STAT. ANN. § 21-2512(f)(1)(B) (2007). In South Carolina, on petition of the attorney general or solicitor, the court is required to make the petitioner pay for testing done by the state that inculpates the petitioner. S.C. CODE ANN. § 17-28-100(B)(2) (Supp. 2010). In North Carolina, the court is required to make the petitioner pay so long as the person is not indigent. N.C. GEN. STAT. § 15A-270(b) (2009). In Utah, the court is required to make the petitioner pay and is silent on the issue of indigency. UTAH CODE ANN. § 78B-9-304(1)(b) (LexisNexis 2008 & Supp. 2010). In Arkansas, if upon motion by the state, the court determines the applicant’s claim of innocence was false, the court may require the applicant to pay for testing. ARK. CODE ANN. § 16-112-208(c)(2)(B) (2006). In Iowa, the defendant pays for the testing if the results “indicate conclusively” that he or she is the perpetrator. IOWA CODE § 81.10(12) (2009). In Missouri, the applicant must pay the costs of the testing if the testing confirms the person’s guilt. MO. ANN. STAT. § 650.058(2) (West Supp. 2011). In South Dakota, the court must assess the costs against the applicant upon motion by the state. S.D. CODIFIED LAWS § 23-5B-13(2)(a) (Supp. 2010).

193. MD. CODE ANN., CRIM. PROC. § 8-201(g)(2) (LexisNexis 2008 & Supp. 2010). In Nevada, Utah, and Wyoming, the petitioner does not pay for testing if the petitioner is incarcerated, indigent, and the results are favorable to him or her. NEV. REV. STAT. § 176.0918(13) (2009); UTAH CODE ANN. § 78B-9-302(4) (LexisNexis 2008); WYO. STAT. ANN. § 7-12-309 (2009).

194. *Fast Facts*, ST. OF CAL. PRISON INDUS. AUTH., http://www.pia.ca.gov/About_PIA/FastFacts.html (last visited Mar. 31, 2011).

195. OFFICE OF STATE BUDGET & MGMT., *supra* note 177, at 7.

If the inmate has the means to pay for the testing, then he or she should bear the costs. However, considering the realities of incarceration, the presumption should always be the state pays for testing. Thus, the government should bear the cost of DNA testing, regardless of the circumstances or test results. This would ensure inmates who are wrongfully convicted have realistic means to access DNA evidence.

VII. SHOULD COUNSEL BE APPOINTED?

The right to counsel in criminal proceedings has come a long way since the days of *Gideon v. Wainwright*, when defendants were forced to represent themselves in felony trials.¹⁹⁶ However, although modern criminal procedure requires counsel be appointed in all criminal trials in which a defendant is facing incarceration,¹⁹⁷ and all fifty states require counsel for the initial criminal appeal,¹⁹⁸ inmates are often left on their own in the world of postconviction litigation.¹⁹⁹ Thirty years ago, when faced with the choice of offering inmates access to counsel or a prison law library,²⁰⁰ nearly all states took the cheaper route of providing barely functional and inadequate law libraries.²⁰¹

The difficulty of litigating a postconviction DNA motion varies based upon the statute. However, it is universally difficult for an inmate to pursue these motions unassisted by counsel. In order to achieve success with these motions, a litigant must be able to investigate the evidence, draft the testing motion, litigate the testing motion, negotiate and oversee the

196. *Gideon v. Wainwright*, 372 U.S. 335, 337 (1963) (discussing the state of Florida's law that appointed defense counsel only for capital offenses).

197. *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (holding that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial").

198. *See, e.g., Douglas v. California*, 372 U.S. 353, 357 (1963) ("[W]here the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor." (emphasis omitted)).

199. *See Murray v. Giarratano*, 492 U.S. 1, 7–10 (1989) (holding states are not constitutionally required to appoint counsel for death row inmates seeking postconviction relief).

200. *Bounds v. Smith*, 430 U.S. 817, 830 (1977) ("[A]dequate law libraries are one constitutionally acceptable method to assure meaningful access to the courts . . .").

201. *See Wayne Ryan, Access to the Courts: Prisoner's Right to a Law Library*, 26 *How. L.J.* 91, 103–05 (1983) (describing the minimal requirements for a prison library).

lab testing, understand the test results, and then be able to draft and litigate the appropriate motions, petitions, and appeals in light of the results.

The first step, investigating the evidence, can be very difficult. States such as California require a determination that biological material is available and in a testable condition.²⁰² This often requires a scavenger hunt of courthouses, crime labs, and evidence rooms to find the evidence. It is impossible for this type of work to be conducted from the confines of a jail cell.

For example, in the case of William Richards, there were several items needed for DNA testing—the murder weapon, the victim’s fingernail, hair recovered from underneath the fingernail, the victim’s clothing, and several areas on the crime scene where blood was found.²⁰³ To establish the evidence existed and was in testable condition, the defense needed to bring an expert into the evidence room to document the evidence.²⁰⁴

Drafting the testing motion is another difficult step, as the motions are not simple. They require facts and arguments sufficient to justify the legal standards that are statutorily required. They require an understanding of the law and, to some extent, the science of DNA. It is not simply a process of filling in forms.

Making the litigation even more difficult is the fact that prosecutors are rarely cooperative during the process of postconviction DNA testing litigation. Therefore, these motions are universally litigated, requiring court appearances and the ability to articulate to the judge the basis for the motion, including explaining how the scientific testing can lead to exculpatory results. In the *Richards* case, the motion required an understanding of mitochondrial DNA, which was needed to test the hair under the fingernail, traditional DNA testing on the blood, and the legal knowledge to conduct the hearing.²⁰⁵ Typically, lawyers struggle with the scientific issues in these cases, even after litigating many of them. It is unrealistic to expect inmates to prepare themselves for such an event or series of events.

Even if the DNA motion is successful, the litigant must then negotiate

202. CAL. PENAL CODE § 1405(f)(1) (West Supp. 2011).

203. Stiglitz, *supra* note 11, at 1359–62.

204. *See id.* at 1361.

205. *See In re Richards*, No. E049135, 2010 WL 4681260, at *13–14 (Cal. Ct. App. Nov. 19, 2010).

the order for testing and oversee the lab testing to some degree. Once the testing results are known, there is the task of understanding what they mean. Labs are not in the business of making forensic conclusions as to what the results mean in the context of the case, so this creates another difficult task for the litigant to perform.

Finally, there is the task of using exculpatory testing results to gain a reversal of a conviction. This also requires legal knowledge to draft and litigate whatever motions, petitions, and appeals are appropriate in light of the results.

Postconviction DNA testing statutes discussing the appointment of counsel can be organized in two categories: those that allow a court to appoint counsel at the discretion of the court and those that require the appointment of counsel. Within these categories, the statutes can be further subdivided by the timing of the appointment of counsel—statutes that provide for counsel before the motion is brought, statutes that provide for counsel after the motion is brought, and statutes that do not specify when counsel is to be appointed—or even whether counsel may be appointed at all.

A. *Category I—Discretionary Appointment*

The following states give judges discretion in appointing counsel but require the appointment occurs prior to bringing the motion for DNA testing: Alabama,²⁰⁶ Arkansas,²⁰⁷ Idaho,²⁰⁸ and Washington.²⁰⁹

206. See ALA. CODE § 15-18-200(g)(3) (LexisNexis Supp. 2010) (“The circuit court may appoint counsel for an indigent petitioner solely for the purpose of proceeding under this provision providing for post-conviction DNA testing.”).

207. ARK. CODE ANN. § 16-112-207(a)(1) (2006) (“A person financially unable to obtain counsel who desires to pursue the remedy provided in this subchapter may apply for representation by the Arkansas Public Defender Commission or appointed private attorneys.”).

208. IDAHO CODE ANN. § 19-4904 (2004) (“If the applicant is unable to pay court costs and expenses of representation, including stenographic, printing, witness fees and expenses, and legal services, these costs and expenses, and a court-appointed attorney may be made available to the applicant in the preparation of the application, in the trial court, and on appeal, and paid, on order of the district court, by the county in which the application is filed.”).

209. WASH. REV. CODE ANN. § 10.73.170(4) (West 2002 & Supp. 2011) (“Upon written request to the court that entered a judgment of conviction, a convicted person who demonstrates that he or she is indigent . . . may request appointment of counsel solely to prepare and present a motion under this section, and the court, in its discretion, may grant the request.”).

The following states give judges discretion in appointing counsel, but if they are appointed, the appointment occurs after bringing the motion for DNA testing: Florida,²¹⁰ Maine,²¹¹ Nevada,²¹² Mississippi,²¹³ and Utah.²¹⁴ The federal statute also falls into this category.²¹⁵

Indiana is the only state that truly gives the judge discretion to appoint counsel at any point in the proceedings.²¹⁶

The following jurisdictions give courts discretion in appointing counsel but do not explicitly specify when the appointment is to occur: Arizona,²¹⁷ District of Columbia,²¹⁸ Kansas,²¹⁹ Minnesota,²²⁰ New

210. FLA. STAT. ANN. § 925.11(2)(e) (West Supp. 2011) (“Counsel may be appointed to assist the sentenced defendant if the petition proceeds to a hearing and if the court determines that the assistance of counsel is necessary and makes the requisite finding of indigency.”).

211. ME. REV. STAT. ANN. tit. 15, § 2138(3) (2003 & Supp. 2010) (“If the court finds that the person filing a motion under section 2137 is indigent, the court may appoint counsel for the person at any time during the proceedings under this chapter.”).

212. NEV. REV. STAT. § 176.0918(4)(b) (2009) (noting after a petition is filed and the court determines whether (1) the petitioner is indigent and (2) counsel was appointed in the convicting case, the court may “appoint counsel for the limited purpose of reviewing, supplementing and presenting the petition to the court”).

213. MISS. CODE ANN. § 99-39-23(1) (West 2006 & Supp. 2010) (“If an evidentiary hearing is required, the judge may appoint counsel for a petitioner who qualifies for the appointment of counsel under [Mississippi law].”). However, if the defendant was sentenced to death and is indigent, the court must appoint counsel. *Id.* § 99-39-23(9).

214. UTAH CODE ANN. §§ 78B-9-109(1), -302(5)(a) (LexisNexis 2006) (allowing for appointment of counsel if any part of the petition survives summary judgment).

215. 18 U.S.C. § 3600(b)(3) (2006).

216. IND. CODE ANN. § 35-38-7-11 (LexisNexis Supp. 2010) (“The court may appoint defense counsel for the person who was convicted of the offense at any time during any proceedings under this chapter if the person is indigent.”).

217. ARIZ. REV. STAT. ANN. § 13-4240(E) (2010) (“The court may appoint counsel for an indigent petitioner at any time during any proceedings under this section.”).

218. D.C. CODE § 22-4133(e)(2) (LexisNexis 2010) (“The court may appoint counsel for an applicant for DNA testing pursuant to this section who is financially unable to obtain adequate representation.”).

219. KAN. STAT. ANN. § 21-2512(e) (2007) (“The court may at any time appoint counsel for an indigent applicant under this section.”).

220. MINN. STAT. ANN. § 590.05 (West 2010) (“A person financially unable to obtain counsel who desires to pursue the remedy provided in section 590.01 may apply for representation by the state public defender. The state public defender shall

Hampshire,²²¹ North Dakota,²²² Tennessee,²²³ and Vermont.²²⁴

The following states require counsel to be appointed in postconviction proceedings but do not state when appointment is to occur: Alaska²²⁵ and Rhode Island.²²⁶

represent such person under the applicable provisions of sections 611.14 to 611.27, if the person has not already had a direct appeal of the conviction. The state public defender may represent, without charge, all other persons pursuing a postconviction remedy under section 590.01, who are financially unable to obtain counsel.”). A portion of this statute allowing the public defender to decline representation if the defendant had pleaded guilty at trial was found unconstitutional under the Minnesota Constitution. *Deegan v. State*, 711 N.W.2d 89, 98 (Minn. 2006).

221. N.H. REV. STAT. ANN. § 651-D:2(V) (LexisNexis 2007 & Supp. 2010) (“The court may appoint counsel for an indigent petitioner under this section.”).

222. N.D. CENT. CODE § 29-32.1-05(1) (2006 & Supp. 2009) (“If an applicant requests counsel and the court is satisfied that the applicant is indigent, counsel shall be provided at public expense to represent the applicant.”). North Dakota only provides indigent defendants with counsel in postconviction relief situations at the discretion of the court “when it would be beneficial to the applicant.” *State v. McMorrow*, 332 N.W.2d 232, 237 (N.D. 1983) (citing *State v. Mulqueen*, 188 N.W.2d 360, 366 (Iowa 1971)). The state also requires the case to present a “substantial issue of law or fact” before counsel will be appointed. *Id.* (citing *Furgison v. State*, 217 N.W.2d 613, 615–16 (Iowa 1974)).

223. TENN. CODE ANN. § 40-30-307 (2006) (“The court may, at any time during proceedings instituted under this part, appoint counsel for an indigent petitioner.”).

224. Specifically, the Vermont statute provides:

The court may appoint counsel if the petitioner is unable financially to employ counsel and may order that all necessary costs and expenses incident to the matter, including but not limited to court costs, stenographic services, printing, and reasonable compensation for legal services, be paid by the state from the appropriation to the defender general.

VT. STAT. ANN. tit. 13, § 5562 (2009).

225. ALASKA STAT. § 12.73.010(d) (2010) (“If an applicant is indigent, filing fees must be paid under AS 09.19, and counsel shall be appointed under AS 18.85.100 to represent the applicant.”).

226. R.I. GEN. LAWS § 10-9.1-5 (Supp. 2010) (“An applicant who is indigent shall be entitled to be represented by the public defender.”). It should be noted the public defender may decline to represent a defendant if he or she believes there is no “reasonable likelihood of success” in the case. *Louro v. State*, 740 A.2d 343, 344 (R.I. 1999). Of course, many of the defendants applying for testing and appointment of counsel under this section had likely been represented by the public defender at their trial. The structure of the statute and relevant caselaw seems to create a potential conflict—if a defendant is asserting the public defender who represented him or her was ineffective for failing to investigate a potential DNA claim, it is possible and probable the public defender would decide the claim has no “reasonable likelihood of success” and therefore decline to represent him or her, leaving the defendant without

The statutes of the following states do not contain provisions relating to the appointment of counsel: Delaware, Georgia, Illinois, Louisiana, Maryland, New York, Ohio, and Pennsylvania. The only state that explicitly denies a defendant the right to counsel is South Dakota.²²⁷

If nothing else, this Article should illuminate to even the casual reader the complexities of postconviction DNA testing statutes and the potential difficulties involved in gaining access to DNA evidence. Counsel should be appointed as early in the proceedings as possible, before the time for filing of a motion for testing. In this manner, innocent inmates may actually have a chance at navigating the labyrinthine statutory schemes they will no doubt face.

B. *Category II—Appointment Required*

Other states have provisions that *require* the judge to appoint counsel for a defendant bringing or having brought a DNA testing motion. The following states require the judge to appoint counsel before the petition is brought: California,²²⁸ Oregon,²²⁹ Texas,²³⁰ West Virginia,²³¹ and

representation.

227. S.D. CODIFIED LAWS § 23-5B-3 (Supp. 2010) (“The court may not appoint counsel for an indigent petitioner under this chapter. However, the court may refer requests for DNA testing to the Innocence Project in South Dakota or such volunteer attorney as the State Bar of South Dakota may designate.”).

228. CAL. PENAL CODE § 1405(b)(3)(A) (West Supp. 2011) (“Upon a finding that the person is indigent, he or she has included the information required in paragraph (1), and counsel has not previously been appointed pursuant to this subdivision, the court shall appoint counsel to investigate and, if appropriate, to file a motion for DNA testing under this section and to represent the person solely for the purpose of obtaining DNA testing under this section.”).

229. OR. REV. STAT. ANN. § 138.694(2) (West Supp. 2010) (“The court shall grant a petition [for appointment of counsel if certain conditions are met].”).

230. TEX. CRIM. PROC. CODE ANN. § 64.01(c) (West 2006 & Supp. 2010). The section states:

A convicted person is entitled to counsel during a proceeding under this chapter. The convicting court shall appoint counsel for the convicted person if the person informs the court that the person wishes to submit a motion under this chapter, the court finds reasonable grounds for a motion to be filed, and the court determines that the person is indigent. Counsel must be appointed under this subsection not later than the 45th day after the date the court finds reasonable grounds or the date the court determines that the person is indigent, whichever is later.

Id.

231. W. VA. CODE ANN. § 15-2B-14(b)(3)(A) (LexisNexis 2009) (“Upon a

Wyoming.²³²

The following states require the judge to appoint counsel, but only after the motion is brought: Colorado,²³³ Connecticut,²³⁴ Hawaii,²³⁵ Iowa,²³⁶ Kentucky,²³⁷ Michigan,²³⁸ Missouri,²³⁹ Montana,²⁴⁰ Nebraska,²⁴¹ New

finding of indigency, the inclusion of information required in subdivision (1) of this section, and that counsel has not previously been appointed pursuant to this subdivision, the court shall appoint counsel. Counsel shall investigate and, if appropriate, file a motion for DNA testing under this section. Counsel represents the indigent person solely for the purpose of obtaining DNA testing under this section.”).

232. WYO. STAT. ANN. § 7-12-308 (2009) (“A convicted person is entitled to counsel during a proceeding under this act. Upon request of the person, the court shall appoint counsel for the convicted person if the court determines that the person is needy and the person wishes to submit a motion under W.S. 7-12-303(c). Counsel shall be appointed as provided in W.S. 7-6-104(c)(viii).”).

233. COLO. REV. STAT. § 18-1-412(4) (2010) (“If the court does not deny the petitioner’s motion for testing, the court shall appoint counsel if the court determines the petitioner is indigent and has requested counsel. The court shall forward a copy of the motion for DNA testing to the district attorney.”).

234. CONN. GEN. STAT. ANN. § 54-102kk(e) (West 2009) (“In a proceeding under this section, the petitioner shall have the right to be represented by counsel and, if the petitioner is indigent, the court shall appoint counsel for the petitioner in accordance with section 51-296.”). It is not clear from the language of the statute whether an inmate can secure counsel before the filing of a motion upon a proper showing. The structure of the statute seems to indicate Connecticut inmates are only entitled to representation after the court has received a petition for testing, not before.

235. HAW. REV. STAT. § 844D-124(b) (Supp. 2007) (“If the defendant has filed pro se, upon a showing that DNA testing may be material to the defendant’s claim of wrongful conviction, the court shall appoint counsel for the defendant.”).

236. IOWA CODE § 81.10(11) (2009) (“If the court determines a defendant who files a motion under this section is indigent, the defendant shall be entitled to appointment of counsel as provided in chapter 815.”).

237. KY. REV. STAT. ANN. § 422.285(4) (LexisNexis 2005 & Supp. 2010) (“If the court orders testing and analysis under subsection (2) or (3) of this section the court shall appoint counsel to those petitioners who qualify for appointment under KRS Chapter 31.”).

238. A court is not required to appoint counsel until the DNA testing has been ordered and the results show the defendant was not the source. MICH. COMP. LAWS ANN. § 770.16(8) (West 2006 & Supp. 2010) (“If the results of the DNA testing show that the defendant is not the source of the identified biological material, the court shall appoint counsel . . .”).

239. MO. ANN. STAT. § 547.035(6) (West 2002) (“If a hearing is ordered, counsel shall be appointed to represent the movant if the movant is indigent.”).

240. MONT. CODE ANN. § 46-21-201(2) (2009) (“If the death sentence has not been imposed and a hearing is required or if the interests of justice require, the court shall order the office of state public defender, provided for in 47-1-201, to assign

Jersey,²⁴² New Mexico,²⁴³ North Carolina,²⁴⁴ South Carolina,²⁴⁵ Virginia,²⁴⁶ and Wisconsin.²⁴⁷

VIII. SHOULD THERE BE TIME LIMITS ON THE TESTING?

There are two types of time limits applied to DNA testing. The first

counsel for a petitioner who qualifies for the assignment of counsel under Title 46, chapter 8, part 1, and the Montana Public Defender Act, Title 47, chapter 1.”); *see also id.* § 46-21-201(3) (2009) (“Within 30 days after a conviction for which a death sentence was imposed becomes final, the sentencing court shall notify the sentenced person that if the person is indigent, as defined in 47-1-103, and wishes to file a petition under this chapter, the court will order the office of state public defender, provided for in 47-1-201, to assign counsel who meets the Montana supreme court’s standards and the office of state public defender’s standards for competency of assigned counsel in proceedings under this chapter for an indigent person sentenced to death.”).

241. NEB. REV. STAT. ANN. § 29-4122 (LexisNexis 2009) (“Upon a showing by the person that DNA testing may be relevant to the person’s claim of wrongful conviction, the court shall appoint counsel for an indigent person . . .”). Like Connecticut’s statute, Nebraska’s law is vague about whether there would be any case where a defendant could secure counsel before filing a motion for testing. The structure of the statute seems to indicate counsel may only be appointed after, not before, filing.

242. N.J. STAT. ANN. § 2A:84A-32a(c) (West Supp. 2010) (“The court shall appoint counsel for the convicted person who brings a motion pursuant to this section if that person is indigent.”).

243. N.M. STAT. ANN. § 31-1A-2(D) (2010) (“If the petitioner satisfies the requirements set forth in Subsection C of this section, the district court shall appoint counsel for the petitioner, unless the petitioner waives counsel or retains his own counsel.”).

244. N.C. GEN. STAT. § 15A-269(c) (2009) (“The court shall appoint counsel for the person who brings a motion under this section if that person is indigent. If the petitioner has filed pro se, the court shall appoint counsel for the petitioner upon a showing that the DNA testing may be material to the petitioner’s claim of wrongful conviction.”).

245. S.C. CODE ANN. § 17-28-60 (Supp. 2010) (“The applicant must request counsel at the time he files his application. The court must appoint counsel for an indigent applicant after the court has determined that the application is sufficient to proceed to a hearing but prior to the actual hearing.”).

246. VA. CODE ANN. § 19.2-327.1(H) (2008) (“In any petition filed pursuant to this chapter, the defendant is entitled to representation by counsel subject to the provisions of Article 3 (§ 19.2-157 et seq.) of Chapter 10 of this title.”).

247. WIS. STAT. ANN. § 974.07(11) (West 2007 & Supp. 2010) (“A court considering a motion made under sub. (2) by a movant who is not represented by counsel shall, if the movant claims or appears to be indigent, refer the movant to the state public defender for determination of indigency and appointment of counsel under s. 977.05(4)(j).”).

type limits how long an inmate will have to bring a testing motion. The second type, known as a sunset provision, actually limits how long the testing statute will be in effect. Both types of limits increase the possibility innocent inmates, who could prove their innocence through the use of postconviction DNA testing, will die in prison.

In terms of limiting the time to bring an individual DNA testing motion, there are several reasons an inmate may not be able to bring the motion for a long time. The inmate may not have knowledge of the law or the availability of the evidence. The legal resources, as discussed above, may not be available under the state's law, and even if it is possible to get a lawyer under the state's statute, an inmate might spend years unsuccessfully attempting to get legal assistance. From the confines of a prison cell, all an inmate can do is write letters, which more often than not go unanswered.

Even if an inmate has the ability and resources to bring a DNA motion, exculpatory facts in the case might not come to light until long after a filing deadline has passed. For example, a defendant may be wrongfully convicted of rape even though there was biological evidence on the crime scene that matched neither the victim nor the defendant. Years later, even if the actual rapist is arrested and the rapist's DNA can be matched to the crime scene, a filing deadline could make it impossible to prove innocence.

The vast majority of postconviction DNA statutes permit an individual to bring a motion at any time. The statutes in the following jurisdictions expressly permit an individual convicted of a crime to bring a motion at any time: Arizona,²⁴⁸ Connecticut,²⁴⁹ District of Columbia,²⁵⁰ Florida,²⁵¹ Georgia,²⁵² Hawaii,²⁵³ Idaho,²⁵⁴ Kansas,²⁵⁵ Kentucky,²⁵⁶

248. ARIZ. REV. STAT. ANN. § 13-4240(A) (2010).

249. CONN. GEN. STAT. ANN. § 54-102kk(a) (West 2009). The motion must be brought while the person is incarcerated. *Id.*

250. D.C. CODE § 22-4133(a) (LexisNexis 2010).

251. FLA. STAT. ANN. § 925.11(1)(b) (West Supp. 2011). *But see* FLA. STAT. ANN. § 925.12 (West Supp. 2011) (barring motions for testing in cases where the inmate pled guilty or nolo contendere, unless the inmate did not know of the presence of biological material which could have been tested; if the inmate knew of material that could have been tested at the time of the plea, by the text of the statute he or she may be barred from bringing a later motion).

252. GA. CODE ANN. § 5-5-41(a)-(c) (West 2003 & Supp. 2010). The Georgia statute treats a postconviction motion for DNA testing as a "motion made after time expires." *Id.* This means the defendant must show "good reason" for filing the motion

Nebraska,²⁵⁷ New Hampshire,²⁵⁸ Rhode Island,²⁵⁹ Tennessee,²⁶⁰ Utah,²⁶¹ and Wisconsin.²⁶²

Other states do not expressly state the individual can bring a motion at any time, but it can be inferred due to the lack of a time restriction. These states include: California,²⁶³ Colorado,²⁶⁴ Illinois,²⁶⁵ Indiana,²⁶⁶ Iowa,²⁶⁷ Maryland,²⁶⁸ Missouri,²⁶⁹ Montana,²⁷⁰ Nevada,²⁷¹ New Jersey,²⁷²

more than thirty days after the conviction. *Id.*; see also *Union Life Ins. Co. v. Aaronson*, 136 S.E.2d 142, 143 (Ga. Ct. App. 1964). In addition, the basis for granting such a motion is “much stricter” than a normal motion. *Gordon v. State*, 387 S.E.2d 40, 41 (Ga. Ct. App. 1989) (citing *Dick v. State*, 287 S.E.2d 11 (Ga. 1982)).

253. HAW. REV. STAT. § 844D-121 (Supp. 2007).

254. 2010 Idaho Sess. Laws 286, 289–90 (allowing, at any time, a petition for the testing of evidence “which resulted in [the petitioner’s] conviction but which was not subject to the testing that is now requested because the technology for the testing was not available at the time of trial”).

255. KAN. STAT. ANN. § 21-2512(a) (2007) (limiting testing to those in custody following murder or rape convictions).

256. KY. REV. STAT. ANN. § 422.285(1) (LexisNexis 2005 & Supp. 2010) (limiting testing to those sentenced to death).

257. NEB. REV. STAT. ANN. § 29-4120(1) (LexisNexis 2009) (requiring a person be in custody in order to request DNA testing).

258. N.H. REV. STAT. ANN. § 651-D:2(I) (LexisNexis 2007 & Supp. 2010) (requiring the person be in custody pursuant to a court judgment following a conviction or adjudication in order to request DNA testing).

259. R.I. GEN. LAWS § 10-9.1-11(c) (Supp. 2010) (requiring the person be “currently serving an actual term of imprisonment and incarceration” in order to request DNA testing).

260. TENN. CODE ANN. § 40-30-303 (2006).

261. UTAH CODE ANN. § 78B-9-301(2) (LexisNexis 2008 & Supp. 2010).

262. WIS. STAT. ANN. § 974.07(2) (West 2007 & Supp. 2010).

263. CAL. PENAL CODE § 1405(a) (West Supp. 2011) (requiring the person be “currently serving a term of imprisonment”).

264. COLO. REV. STAT. § 18-1-412 (2010) (requiring the person be incarcerated).

265. 725 ILL. COMP. STAT. ANN. 5/116-3(a) (West 2008).

266. IND. CODE ANN. § 35-38-7-5 (LexisNexis Supp. 2010).

267. IOWA CODE § 81.10(1) (2009).

268. MD. CODE ANN., CRIM. PROC. § 8-201(b) (LexisNexis 2008 & Supp. 2010).

This section will remain unchanged when the current Maryland law is abrogated in 2013. *Id.* (annotation).

269. MO. ANN. STAT. § 547.035(1) (West 2002) (requiring the person be in custody to request testing).

270. MONT. CODE ANN. § 46-21-110(1) (2009) (requiring the person be serving a term of incarceration).

New Mexico,²⁷³ New York,²⁷⁴ North Carolina,²⁷⁵ North Dakota,²⁷⁶ Ohio,²⁷⁷ South Dakota,²⁷⁸ Texas,²⁷⁹ Virginia,²⁸⁰ Washington,²⁸¹ and West Virginia.²⁸²

Two states impose time limitations if certain conditions are not met. In Vermont, if the underlying conviction is not for a “qualifying offense,” the petition must be filed within thirty months of the conviction.²⁸³ Otherwise, the petition may be filed at any time.²⁸⁴ Similarly, in South Carolina, there is no time limit unless the applicant pled guilty or *nolo contendere*, whereby the applicant has seven years to file.²⁸⁵

Alaska, Arkansas, Delaware, Mississippi, and the federal government impose variations of a three-year limitation. The statutes of Alaska and Arkansas presume the application is timely if it is filed within three years of the date of conviction and, conversely, presume the application is untimely if it is filed three years or more after the conviction.²⁸⁶ Alaska’s statute also requires the claim be filed by July 1, 2020, if the conviction was entered before July 1, 2010.²⁸⁷ Unlike Alaska and Arkansas, an application made in

271. NEV. REV. STAT. § 176.0918 (2009) (requiring the person be under sentence of imprisonment).

272. N.J. STAT. ANN. § 2A:84A-32a(a) (West Supp. 2010) (requiring the person be currently serving a term of imprisonment).

273. N.M. STAT. ANN. § 31-1A-2(A) (2010).

274. N.Y. CRIM. PROC. LAW § 440.30(1-a) (McKinney 2005).

275. N.C. GEN. STAT. § 15A-269(a) to -270.1 (2009).

276. N.D. CENT. CODE § 29-32.1-15 (2006).

277. OHIO REV. CODE ANN. § 2953.72(A), (C)(1)(b) (LexisNexis 2010) (requiring certain offenders still be in prison in order to request testing). DNA testing is not available to offenders who plead guilty or no contest. *See id.* § 2953.72(C)(2).

278. S.D. CODIFIED LAWS § 23-5B-1 (Supp. 2010).

279. TEX. CODE CRIM. PROC. ANN. art. 64.01(a) (West 2006 & Supp. 2010).

280. VA. CODE ANN. § 19.2-327.1(A) (2008).

281. WASH. REV. CODE ANN. § 10.73.170 (West 2002 & Supp. 2011) (requiring the person be currently serving a term of imprisonment).

282. W. VA. CODE ANN. § 15-2B-14(a) (LexisNexis 2009) (requiring the person be currently serving a sentence).

283. VT. STAT. ANN. tit. 13, § 5561(b)(2)(B) (2009).

284. *Id.* § 5561(a).

285. S.C. CODE ANN. § 17-28-30(B) (Supp. 2010) (requiring the applicant be currently incarcerated in order to request testing).

286. ALASKA STAT. § 12.73.040 (2010); ARK. CODE ANN. § 16-112-202(10) (2006).

287. 2010 Alaska Sess. Laws ch. 20, at 15, available at <http://www.legis.state.ak.us/PDF/26/Bills/SB0110Z.PDF>.

Delaware or Mississippi must be made within three years.²⁸⁸

For the federal statute, there is a presumption the application is timely if filed within three years and a rebuttable presumption it is not timely after three years.²⁸⁹ Maine, Minnesota, and Oregon have similar limitations. A motion filed in Maine must be filed within the latter of “two years after the date of conviction” or, in cases in which the request for testing is based on new DNA technology, “within 2 years from the time that the technology became commonly known and available.”²⁹⁰ A motion filed in Minnesota must be filed within two years of “the entry of judgment of conviction or sentence if no direct appeal is filed” or an appellate court’s disposition of the petitioner’s direct appeal, whichever is later.²⁹¹ A motion filed in Oregon must be filed within two years.²⁹²

288. In Delaware, the motion must be made within three years after the judgment of conviction is final. DEL. CODE ANN. tit. 11, § 4504(a) (2007). In Mississippi, the motion must be

made within three (3) years after the time in which the petitioner’s direct appeal is ruled upon by the Supreme Court of Mississippi or, in case no appeal is taken, within three (3) years after the time for taking an appeal from the judgment of conviction or sentence has expired, or in case of a guilty plea, within three (3) years after entry of the judgment of conviction.

MISS. CODE ANN. § 99-39-5(2) (West 2006 & Supp. 2010).

289. 18 U.S.C. § 3600(a)(10) (2006). The presumption may be rebutted upon a finding:

(i) that the applicant was or is incompetent and such incompetence substantially contributed to the delay in the applicant’s motion for a DNA test; (ii) the evidence to be tested is newly discovered DNA evidence; (iii) that the applicant’s motion is not based solely upon the applicant’s own assertion of innocence and, after considering all relevant facts and circumstances surrounding the motion, a denial would result in a manifest injustice; or (iv) upon good cause shown.

Id. § 3600(a)(10)(B).

290. ME. REV. STAT. ANN. tit. 15, § 2137(2)(B)–(C) (2003 & Supp. 2010).

291. MINN. STAT. ANN. § 590.01(4)(a)(1)–(2) (West 2010). Despite the two-year limitation, a court may still review a petition under certain circumstances. *Id.* § 590.01(4)(b)(1)–(5). Even in these limited circumstances, the petition must still be filed within two years of the date the claim arises. *Id.* § 590.01(4)(c).

292. OR. REV. STAT. ANN. § 138.510(3) (West 2003 & Supp. 2010). If no appeal was taken, then the motion must be filed within two years from the date of the judgment or order. *Id.* § 138.510(3)(a). If an appeal was taken, then the motion must be filed within two years from the date the appeal became final. *Id.* § 138.510(3)(b). If a petition for certiorari to the United States Supreme Court was filed, then the motion must be filed within two years of the date of denial or the date of entry of a final state court judgment following remand from the Supreme Court, whichever is later. *Id.* §

Only two states impose a one-year time limit. In Alabama, the applicant must file within one year of the certificate of judgment if the case was appealed, within one year after the time for filing an appeal lapses if the case was not appealed, or within twelve months of August 1, 2009.²⁹³ In Pennsylvania, a petition must be filed within one year of the date the judgment becomes final.²⁹⁴

In Wyoming, an applicant may proceed with the motion so long as it is brought prior to bringing a motion for a new trial.²⁹⁵

Louisiana and Michigan do not have limitations applicable to the individuals bringing the motion; however, they have imposed limitations on the length of time the statute is in effect, virtually eliminating their postconviction DNA statutes at some point in the future. In Louisiana and Michigan, if an inmate fails to meet that deadline, he or she is barred from ever being able to challenge his or her conviction on grounds of DNA evidence. In Louisiana, an inmate convicted of a felony must file an application for DNA testing prior to August 31, 2014.²⁹⁶ In Michigan, an inmate convicted of a felony before January 8, 2001, has until January 1, 2012, to petition for DNA testing.²⁹⁷ Meanwhile, Oklahoma's DNA testing statute expired on July 1, 2005.²⁹⁸

There is no logical argument, other than an appeal to cost savings, why there should be any time limits on the request for testing or the testing statute itself. If one admits wrongful convictions exist in this country, and that postconviction DNA testing can address the issue of wrongful convictions, then time limits on testing make no sense.

138.510(3)(c)(A)–(B).

293. ALA. CODE § 15-18-200(f)(1)(c) (LexisNexis Supp. 2010); ALA. R. CRIM. P. § 32.2(c)(1)–(2) (LexisNexis 2009 & Supp. 2010).

294. 42 PA. CONS. STAT. ANN. § 9545(b)(1) (West 2007). Certain circumstances warrant an exception to the one-year limitation. *Id.* § 9545(b)(1)(i)–(iii). If an exception applies, the petition must be filed within sixty days of the date the claim could have been brought. *Id.* § 9545(b)(2).

295. WYO. STAT. ANN. § 7-12-303(c) (2009).

296. LA. CODE CRIM. PROC. ANN. art. 926.1(A)(1) (2008 & Supp. 2011). If the inmate was sentenced to death prior to the effective date of the Act, the inmate may file the application at any time. *Id.* § 926.1(A)(2).

297. MICH. COMP. LAWS ANN. § 770.16(1) (West 2006 & Supp. 2010). Michigan's statute does not impose a time limit for inmates convicted *after* January 8, 2001. *Id.*

298. See OKLA. STAT. ANN. tit. 22, § 1371(B) (West 2003) (“There is hereby created the Oklahoma Indigent Defense System DNA Forensic Testing Program to continue until July 1, 2005.”).

IX. HOW LONG SHOULD BIOLOGICAL MATERIAL BE MAINTAINED
AFTER CONVICTION, AND SHOULD THERE BE SANCTIONS FOR THE
FAILURE TO MAINTAIN IT PROPERLY?

California Penal Code section 1417.9, entitled “Retention of Biological Material,” states “the appropriate governmental entity *shall retain all biological material* that is secured in connection with a criminal case for the period of time that any person remains incarcerated in connection with that case.”²⁹⁹ The statute also requires that, before any destruction of biological materials, a number of individuals be notified, including the prisoner, the prisoner’s attorney, the public defender, and the district attorney in the county of conviction.³⁰⁰ Further, if a motion for postconviction DNA testing is filed pursuant to section 1405, and other requirements are met, the destruction should be halted.³⁰¹

This is a tremendous step forward in the treatment of evidence after conviction and in the protection of a convicted defendant’s due process rights. And it is arguably an appropriate nod to those counties whose evidence lockers are full from floor to ceiling with unused evidence and need to clean house occasionally. However, if the “appropriate governmental entity” does, in fact, wind up destroying the evidence in violation of the statute, the statute provides no remedy.³⁰² No damages. No rehearing. Nothing. The defendant seeking relief is afforded a plethora of rights pursuant to statute, but if those rights are violated, he or she is up the proverbial creek without a paddle.

This means postconviction prisoners without attorneys must remain hyper-vigilant if they wish to have their evidence retained, a daunting prospect for any pro se litigant who may or may not have knowledge of the law, procedures, or what the evidence can prove.

The following jurisdictions require evidence to be preserved for the period the defendant is incarcerated:³⁰³ Alaska,³⁰⁴ Arizona,³⁰⁵

299. CAL. PENAL CODE § 1417.9(a) (West Supp. 2010) (emphasis added).

300. *Id.* § 1417.9(b)(1).

301. *Id.* § 1417.9(b)(2)(A).

302. *See id.* § 1417.9.

303. “Incarcerated” may also refer to statutes that provide for evidence preservation until the defendant’s sentence expires.

304. ALASKA STAT. § 12.36.200(a)(2) (2010). The duty to preserve evidence for the period the defendant remains incarcerated only applies to those convicted of a crime or adjudicated delinquent under AS 11.41.100–11.41.130, 11.41.410, or 11.41.434. *Id.* The duty to preserve remains while the defendant is subject to registration as a sex

Connecticut,³⁰⁶ Florida,³⁰⁷ Kentucky,³⁰⁸ Mississippi,³⁰⁹ Nevada,³¹⁰ Texas,³¹¹ Wisconsin,³¹² District of Columbia,³¹³ Hawaii,³¹⁴ Illinois,³¹⁵ Maine,³¹⁶ Maryland,³¹⁷ Michigan,³¹⁸ Minnesota,³¹⁹ Nebraska,³²⁰ New Hampshire,³²¹ New Mexico,³²² North Carolina,³²³ Rhode Island,³²⁴ South Carolina,³²⁵ and

offender. *Id.*

305. ARIZ. REV. STAT. ANN. § 13-4221(A)(1) (2010). This provision only applies to evidence secured in connection with a felony sexual offense or homicide, and it continues to apply until the completion of the defendant's supervised release. *Id.*

306. CONN. GEN. STAT. ANN. § 54-102jj(b) (West 2009).

307. FLA. STAT. ANN. § 925.11(4) (West Supp. 2011) (requiring (1) evidence be kept for any crime for which DNA testing may be requested and (2) evidence be preserved for sixty days after the death penalty is imposed).

308. KY. REV. STAT. ANN. § 524.140(7) (LexisNexis 2008).

309. MISS. CODE ANN. § 99-49-1(3)(a)(ii) (West Supp. 2010).

310. NEV. REV. STAT. § 176.0912(1) (2009). This only applies to a category A or B felony. *Id.*

311. TEX. CODE CRIM. PROC. ANN. § 38.43(c) (West Supp. 2010). Texas expressly eliminates the duty to preserve once the defendant is released on parole. *Id.* § 38.43(c)(2).

312. WIS. STAT. ANN. § 165.81(3)(b) (West 2006).

313. D.C. CODE § 22-4134(a)–(b) (LexisNexis 2010). This provision only applies to a crime of violence and allows for disposal after notice. *Id.*

314. HAW. REV. STAT. § 844D-126(a) (Supp. 2007).

315. 725 ILL. COMP. STAT. ANN. 5/116-4(b) (West 2008). If sentence of death was imposed, then evidence must be permanently retained. *Id.* If the underlying conviction was “for an offense or an attempt of an offense defined in Article 9 of the Criminal Code of 1961 or in Section 12-13, 12-14, 12-14.1, 12-15, or 12-16 of the Criminal Code of 1961,” then the duty to preserve evidence exists until the completion of the sentence, including supervised release. *Id.* However, the state only has to preserve evidence for seven years following conviction for any other felony. *Id.*

316. ME. REV. STAT. ANN. tit. 15, § 2138(14) (2003 & Supp. 2010).

317. MD. CODE ANN., CRIM. PROC. § 8-201(i)–(j) (LexisNexis 2008 & Supp. 2010).

318. MICH. COMP. LAWS ANN. § 770.16(12) (West Supp. 2010).

319. MINN. STAT. ANN. § 590.10(1) (West 2010) (limiting disposal to only after notice and providing court sanctions if evidence is improperly destroyed).

320. NEB. REV. STAT. ANN. § 29-4125(1)–(2) (LexisNexis 2009) (allowing for disposal after notice).

321. N.H. REV. STAT. ANN. § 651-D:3 (LexisNexis 2007 & Supp. 2010) (allowing for destruction after notice).

322. N.M. STAT. ANN. § 31-1A-2(L) (2010).

323. N.C. GEN. STAT. § 15A-268(a6) (2009). If the defendant was convicted based on a guilty plea, the evidence is preserved only for three years from the date of conviction or until the defendant is released, whichever is earlier. *Id.*

324. R.I. GEN. LAWS § 10-9.1-11(a)–(b) (1997 & Supp. 2010) (allowing for the

the federal government.³²⁶

A few states require the evidence to be preserved for a certain number of years after a conviction. In Arkansas, the evidence must be preserved permanently if it relates to a conviction for a violent offense, for twenty-five years if it relates to a conviction for a sex offense, and for seven years if it relates to “any other felony for which the defendant’s genetic profile may be taken.”³²⁷ In Georgia, if the death penalty is imposed the evidence must be preserved until the sentence has been carried out.³²⁸ However, if the case involved one of a number of enumerated serious violent felonies, such as sodomy, statutory rape, child molestation, bestiality, incest, or sexual battery, the evidence must be maintained for a period of ten years after the judgment becomes final or ten years after May 27, 2003, whichever is later.³²⁹ Iowa requires evidence samples be preserved for only three years “beyond the limitations for the commencement of criminal actions.”³³⁰ Montana imposes a preservation period of three years after the conviction becomes final, or for any period of more than three years if a court order issued within three years of the conviction becomes final so requires.³³¹ Wyoming’s statute provides for biological material to be preserved for five years or the length of incarceration, whichever is longer.³³² Authorities may dispose of evidence

destruction of evidence on petition).

325. S.C. CODE ANN. § 17-28-320(C) (Supp. 2010). The duty to preserve evidence only applies to certain convictions. *Id.* § 17-28-320(A)(1)–(24). However, if that conviction is based on a plea of guilty or *nolo contendere*, the evidence “must be preserved for seven years from the date of sentencing, or until the person is released from incarceration, dies while incarcerated, or is executed[,] . . . whichever comes first.” *Id.* § 17-28-320(C).

326. 18 U.S.C. § 3600A (2006). The statutory scheme provides for the evidence to be tested “if a defendant is under a sentence of imprisonment for such offense.” *Id.* § 3600A(a). The evidence may be destroyed after 180 days if the defendant is provided with proper notice, does not file a motion for testing, and “has exhausted all opportunities for direct review of the conviction.” *Id.* § 3600A(c)(3).

327. ARK. CODE ANN. § 12-12-104(b)(2) (2009).

328. GA. CODE ANN. § 17-5-56(b) (West Supp. 2010).

329. *Id.*

330. IOWA CODE § 81.10(10) (2009). “State law determines the manner in which the government commences criminal proceedings.” *State v. Nelsen*, 390 N.W.2d 589, 591 (Iowa 1986) (citing *State v. Jackson*, 380 N.W.2d 420, 423 (Iowa 1986)). The filing of a complaint commences a criminal proceeding in Iowa. *Id.* (citations omitted).

331. MONT. CODE ANN. § 46-21-111(1)(a) (2009). This only applies to a felony conviction. *Id.*

332. WYO. STAT. ANN. § 7-2-105(r) (2009).

after five years provided they notify the defendant, the prosecutor, and the defendant's attorney—or the public defender if the defendant did not have an attorney—and give the defendant an opportunity to respond.³³³ Colorado requires the evidence be preserved for the life of the defendant if the conviction was for a felony or various sex offenses.³³⁴

A small minority of states impose an obligation to preserve evidence only *after* the inmate has filed a motion for DNA testing. These states include: Indiana,³³⁵ Kansas,³³⁶ Louisiana,³³⁷ Pennsylvania,³³⁸ Washington,³³⁹ Tennessee,³⁴⁰ Utah,³⁴¹ and Ohio.³⁴²

At least one state, Missouri, provides for evidence preservation but does not state the length of time such evidence must be preserved.³⁴³ The remainder of states do not have evidence-preservation statutes.³⁴⁴

DNA evidence should be preserved indefinitely or, at the very least, for the length of time the inmate is incarcerated. DNA technology is constantly evolving. Increasingly refined tests are continuously being developed, and evidence previously thought to be “untestable” is now being processed as a matter of course. An individual convicted and

333. *Id.*

334. COLO. REV. STAT. § 18-1-1102 to -1103(2) (2010).

335. IND. CODE ANN. § 35-38-7-14(1) (LexisNexis Supp. 2010).

336. KAN. STAT. ANN. § 21-2512(b)(2) (2007).

337. LA. CODE CRIM. PROC. ANN. art. 926.1(H)(3) (2008 & Supp. 2011). The duty to preserve evidence only exists until August 31, 2014. *Id.* If the defendant has been sentenced to death, the duty to preserve the evidence is automatic. *Id.* art. 926.1(H)(4).

338. 42 PA. CONS. STAT. ANN. § 9543.1(b)(2) (West 2007).

339. WASH. REV. CODE ANN. § 10.73.170(6) (West Supp. 2011). The provision provides that in felony cases the court “may” order the preservation of biological material. *Id.*

340. TENN. CODE ANN. § 40-30-309 (2006).

341. UTAH CODE ANN. § 78B-9-301(5) (LexisNexis 2008 & Supp. 2010) (imposing on officials a “duty to cooperate in preserving evidence”).

342. OHIO REV. CODE ANN. § 2953.77, .81(A) (LexisNexis 2010). It is important to note the duty to preserve evidence only applies if DNA testing is performed based on the petition. *Id.*

343. MO. ANN. STAT. § 650.056 (West 2006 & Supp. 2011) (“Any evidence leading to a conviction of a felony described in subsection 1 of section 650.055 which has been or can be tested for DNA shall be preserved by the investigating law enforcement agency.”).

344. Those states are Alabama, Delaware, Idaho, New Jersey, New York, North Dakota, Oregon, South Dakota, Vermont, and West Virginia.

sentenced to twenty years imprisonment may find relief through a new and more discriminating testing procedure during his incarceration—but only if the evidence still exists.

Very few states impose any meaningful remedy to the defendant if evidence is destroyed. Maryland's statute provides a meaningful remedy, but the remedy is limited to instances in which the "failure to produce evidence was the result of intentional and willful destruction."³⁴⁵ If this is the case, the court must order a postconviction hearing and "infer that the results of the postconviction DNA testing would have been favorable to the defendant."³⁴⁶

The following jurisdictions impose criminal penalties for violating an evidence preservation statute: Arkansas,³⁴⁷ Kentucky,³⁴⁸ South Carolina,³⁴⁹ Wyoming,³⁵⁰ the District of Columbia,³⁵¹ North Carolina,³⁵² Louisiana,³⁵³

345. MD. CODE ANN., CRIM. PROC. § 8-201(j)(3)(i) (LexisNexis 2008 & Supp. 2010). This provision will be abrogated effective December 31, 2013, thereby eliminating this remedy for the defendant. *Id.* (annotation).

346. *Id.* § 8-201(j)(3)(ii).

347. ARK. CODE ANN. § 12-12-104(e) (2009). Arkansas's statute only applies to those who purposely fail to comply with the provisions of the evidence-preservation statute. *Id.* § 12-12-104(e)(1).

348. KY. REV. STAT. ANN. § 524.100, .140(6) (LexisNexis 2008).

349. S.C. CODE ANN. § 17-28-350 (Supp. 2010). This section reads:

A person who willfully and maliciously destroys, alters, conceals, or tampers with physical evidence or biological material that is required to be preserved pursuant to this article with the intent to impair the integrity of the physical evidence or biological material, prevent the physical evidence or biological material from being subjected to DNA testing, or prevent the production or use of the physical evidence or biological material in an official proceeding, is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars for a first offense, and not more than five thousand dollars or imprisoned for not more than one year, or both, for each subsequent violation.

Id. However, it should be noted that section 17-28-360 states "[u]nless there is an act of gross negligence or intentional misconduct this article may not be construed to give rise to a claim for damages against the State of South Carolina" or its agents and the "[f]ailure of a custodian of evidence to preserve physical evidence or biological material pursuant to this article does not entitle a person to any relief from conviction or adjudication but does not prohibit a person from presenting this information at a subsequent hearing or trial." *Id.* § 17-28-360.

350. WYO. STAT. ANN. § 7-2-105(s) (2009). The section reads:

Whoever willfully or maliciously destroys, alters, conceals or tampers with evidence that is required to be preserved under subsection (r) of this section

Tennessee,³⁵⁴ and the federal government.³⁵⁵

with the intent to impair the integrity of that evidence, to prevent that evidence from being subjected to DNA testing or to prevent the production or use of that evidence in an official proceeding shall upon conviction be subject to a fine of not more than ten thousand dollars (\$10,000.00), imprisonment for not more than five (5) years, or both.

Id.

351. D.C. CODE § 22-4134(d) (LexisNexis 2010). This section reads:

Whoever willfully or maliciously destroys, alters, conceals, or tampers with evidence that is required to be preserved under this section with the intent to (1) impair the integrity of that evidence, (2) prevent that evidence from being subjected to DNA testing, or (3) prevent the production or use of that evidence in an official proceeding, shall be subject to a fine of \$100,000 or imprisoned for not more than 5 years, or both.

Id.

352. N.C. GEN. STAT. § 15A-268(i) (2009). The section reads:

Whoever knowingly and intentionally destroys, alters, conceals, or tampers with evidence that is required to be preserved under this section, with the intent to impair the integrity of that evidence, prevent that evidence from being subjected to DNA testing, or prevent production or use of that evidence in an official proceeding, shall be punished as follows:

- (1) If the evidence is for a noncapital crime, then a violation of this subsection is a Class I felony.
- (2) If the evidence is for a crime of first degree murder, then a violation of this subsection is a Class H felony.

Id.

353. LA. CODE CRIM. PROC. ANN. art. 926.1(H)(6) (2008 & Supp. 2011). Louisiana only imposes criminal penalties for “willful or wanton misconduct or gross negligence.” *Id.*

Except in the case of willful or wanton misconduct or gross negligence, no clerk of court or law enforcement officer or law enforcement agency, including but not limited to any district attorney, sheriff, the office of state police, local police agency, or crime laboratory which is responsible for the storage or preservation of any item of evidence in compliance with the requirements of Paragraph (H)(3) shall be held civilly or criminally liable for the unavailability or deterioration of any such evidence to the extent that adequate or proper testing cannot be performed on the evidence.

Id.

354. TENN. CODE ANN. § 40-30-309 (2006) (“The intentional destruction of evidence after such an order [to subject the evidence to DNA analysis] may result in appropriate sanctions, including criminal contempt for a knowing violation.”).

355. 18 U.S.C. § 3600A(f) (2006) (“Whoever knowingly and intentionally

The following states give the court discretion to order whatever remedies, or impose whatever sanctions, the court deems appropriate: Alaska,³⁵⁶ Colorado,³⁵⁷ Maine,³⁵⁸ Mississippi,³⁵⁹ Minnesota,³⁶⁰ and Indiana.³⁶¹

The following states' statutes contain provisions that expressly eliminate the existence of any cause of action that may arise from evidence destruction: Virginia³⁶² and Iowa.³⁶³ The remaining states do not address

destroys, alters, or tampers with biological evidence that is required to be preserved under this section with the intent to prevent that evidence from being subjected to DNA testing or prevent the production or use of that evidence in an official proceeding, shall be fined under this title, imprisoned for not more than 5 years, or both.”).

356. ALASKA STAT. § 12.36.200(g) (2010) (“If a court finds that evidence was destroyed in violation of the provisions of this section, the court may order remedies the court determines to be appropriate.”). However, the statute also states: “A person may not bring a civil action for damages against the state or a political subdivision of the state, their officers, agents, or employees, or a law enforcement agency, its officers, or employees for any unintentional failure to comply with the provisions of this section.” *Id.* § 12.36.200(h). Thus, it is clear that whatever remedies the Alaskan courts deem “appropriate” for unintentional violations, monetary recovery is not one of them. *See id.*

357. COLO. REV. STAT. § 18-1-1104(4) (2010) (“If upon request a law enforcement agency cannot produce DNA evidence that is subject to preservation pursuant to section 18-1-1103, the court shall determine whether the disposal of the DNA evidence violated the defendant’s due process rights, and, if so, the court shall order an appropriate remedy.”).

358. ME. REV. STAT. tit. 15, § 2138(2) (2003 & Supp. 2010) (“If evidence is intentionally destroyed after the court orders its preservation, the court may impose appropriate sanctions.”).

359. MISS. CODE ANN. § 99-49-1(5) (West Supp. 2010) (“If the court finds that biological evidence was destroyed in violation of the provisions of this section, it may impose appropriate sanctions and order appropriate remedies.”).

360. MINN. STAT. ANN. § 590.10(1) (West 2010) (“If evidence is intentionally destroyed after the filing of a petition under section 590.01, subdivision 1a, the court may impose appropriate sanctions on the responsible party or parties.”).

361. IND. CODE ANN. § 35-38-7-14(3) (LexisNexis Supp. 2010) (“If evidence is intentionally destroyed after the court orders its preservation, the court may impose appropriate sanctions.”).

362. VA. CODE ANN. § 19.2-270.4:1(E) (2008) (“Nothing in this section shall create any cause of action for damages against the Commonwealth, or any of its political subdivisions or officers, employees or agents of the Commonwealth or its political subdivisions.”); *see also id.* § 19.2-327.1(G) (“Nothing in this section shall create any cause of action for damages against the Commonwealth, or any of its political subdivisions or any officers, employees or agents of the Commonwealth or its political subdivisions.”).

363. IOWA CODE § 81.10(10) (2009) (“This section does not create a cause of

any potential remedies or sanctions for a failure to preserve evidence.³⁶⁴

Obviously, it is difficult to state that there is one appropriate remedy for all situations and violations of a preservation statute, and perhaps the best that can be said is each violation invites a remedy tailored to the particular situation. However, an order without the threat of punishment for a violation invites the violation. Therefore, in the interests of ensuring adherence to the statute and its edicts, there must be some penalty for the violation.

X. SHOULD THE COURTS ORDER DNA RESULTS BE RUN THROUGH THE DNA DATABANK?

In 1990, the FBI created the Combined DNA Index System (CODIS) as a pilot project in fourteen states and local labs.³⁶⁵ In 1994, Congress passed the DNA Identification Act, granting the FBI the ability to establish a national index to facilitate law enforcement exchange of DNA identification information.³⁶⁶ Pursuant to the statute,

The index . . . shall include only information on DNA identification records and DNA analysis that are . . . [among other things] . . . maintained by Federal, State, and local criminal justice agencies . . . pursuant to rules that allow disclosure of stored DNA samples and DNA analyses only—(A) to criminal justice agencies for law enforcement identification purposes; (B) in judicial proceedings, if otherwise admissible pursuant to applicable statutes or rules; (C) *for criminal defense purposes, to a defendant, who shall have access to samples and analyses performed in connection with the case in which such defendant is charged*; or (D) if personally identifiable information is removed, for a population statistics database, for identification research and protocol development purposes, or for quality control purposes.³⁶⁷

action for damages or a presumption of spoliation in the event evidence is no longer available for testing.”).

364. These states include Arizona, California, Florida, Georgia, Montana, Missouri, Nevada, Texas, Wisconsin, Connecticut, Hawaii, Illinois, Michigan, Nebraska, New Hampshire, New Mexico, Rhode Island, Washington, Kansas, Pennsylvania, Utah, and Ohio.

365. U.S. DEP’T OF JUST., FED. BUREAU OF INVESTIGATION, CODIS: COMBINED DNA INDEX SYSTEM (2010), *available at* http://www.fbi.gov/about-us/lab/codis/codis-brochure-2010/at_download/file.

366. DNA Identification Act, 42 U.S.C. § 14132(a) (2006).

367. *Id.* § 14132(b)(3) (emphasis added).

All fifty states have “statutory provision[s] for the establishment of a DNA database that allow[] for the collection of DNA profiles from offenders convicted of particular crimes.”³⁶⁸

CODIS contains two indices used to solve crimes: the convicted offender index and the forensic index.³⁶⁹ “The convicted offender index contains DNA profiles of individuals convicted of certain crimes”³⁷⁰ DNA profiles acquired from crime scenes are maintained in the forensic index.³⁷¹ CODIS software automatically searches both indices for a DNA match.³⁷²

CODIS contains DNA profiles from the local, state, and national levels.³⁷³ As of February 2011, “[t]he National DNA Index (NDIS) contain[ed] over 9,404,747 offender profiles and 361,176 forensic profiles.”³⁷⁴ All fifty states, the District of Columbia, Puerto Rico, and the United States Army participate in CODIS.³⁷⁵ “CODIS software enables [s]tate, local, and national law enforcement crime laboratories to compare

368. U.S. DEP’T OF JUST., OFFICE OF JUST. PROGRAMS, SPECIAL REPORT: USING DNA TO SOLVE COLD CASES 9 (2002).

369. *Id.* at 10.

370. *Id.*

371. *Id.*

372. *Id.*

373. *Levels of the Database*, DNA INITIATIVE, <http://www.dna.gov/dna-databases/levels> (last visited Apr. 28, 2010).

A local laboratory . . . can maintain its own local database of forensic profiles—local DNA index system (LDIS)—and upload approved profiles to SDIS.

The state database, or State DNA index system (SDIS), contains forensic profiles from local laboratories in that state, plus forensic profiles analyzed by the state laboratory itself. The state database also contains DNA profiles of convicted offenders. States may have their own regulations regarding which profile types can be maintained at SDIS.

....

Profiles from the states (including the FBI) are uploaded into the National DNA Index System (NDIS).

Id.

374. *CODIS—NDIS Statistics*, FBI, <http://www.fbi.gov/about-us/lab/codis/ndis-statistics> (last visited April 20, 2011). In 2000, CODIS had only 460,365 offender profiles and 22,484 forensic profiles. U.S. DEP’T OF JUST., *supra* note 365.

375. *Id.*

DNA profiles electronically, thereby linking serial crimes to each other and identifying suspects by matching DNA profiles from crime scenes with profiles from convicted offenders.”³⁷⁶

CODIS has gained notoriety for solving crimes and identifying missing and unidentified persons,³⁷⁷ but its ability to exonerate innocent inmates, however, has been underutilized and underrated.³⁷⁸ Of all the postconviction DNA testing statutes, only six jurisdictions provide for the DNA results to be run through CODIS.³⁷⁹ One state, Pennsylvania, has recently developed caselaw that seems to indicate inmates who are requesting DNA testing should also be allowed to access the database.³⁸⁰ Sadly, the federal statute does not provide defense access to the index.

As with many of the issues relating to DNA testing statutes, the

376. U.S. DEP’T OF JUST., *supra* note 368, at 9.

377. U.S. DEP’T OF JUST., *supra* note 365.

378. The FBI’s CODIS brochure focuses on CODIS’s ability to solve crimes. *Id.* However, an inmate’s claim that he or she did not commit the crime for which they stand convicted is not a crime the FBI is looking to solve, as the inmate’s conviction implies the crime was actually solved—and favorably to the government.

379. *E.g.*, N.C. GEN. STAT. § 15A-269(b) (2009); OHIO REV. CODE ANN. § 2953.74(E) (LexisNexis 2010) (allowing a comparison based on the offender’s request or on the court’s initiative). In Colorado, the court must “determine[] that a reasonable probability exists that the database search will produce exculpatory or mitigating evidence relevant to a claim of wrongful conviction or sentencing” before a database search may be ordered. COLO. REV. STAT. § 18-1-412(9) (2010). Illinois requires the convict to prove a prima facie case on several elements before succeeding on a motion for a comparison analysis of genetic marker groups. 725 ILL. COMP. STAT. ANN. 5/116-3(a)–(b) (West 2008). In Maryland, the court must “find[] that a reasonable probability exists that the data base search will produce exculpatory or mitigating evidence relevant to a claim of wrongful conviction or sentencing” before ordering a database search. MD. CODE ANN., CRIM. PROC. § 8-201(d)(2) (LexisNexis 2008 & Supp. 2010). In Mississippi,

[t]he court may order additional testing . . . upon a showing by the petitioner that the comparison of a DNA profile derived from the biological evidence at the scene of the crime for which he was convicted could, when compared to the DNA profiles in the SDIS or CODIS database systems, provide evidence that raises a reasonable probability that the trier of fact would have come to a different outcome by virtue of that comparison demonstrating the possible guilt of a third party or parties.

MISS. CODE ANN. § 99-39-11(10) (West 2006 & Supp. 2010). It is unclear whether this language allows for defendants to petition, and for courts to order, profiles to be run through CODIS. *Id.*

380. *See* Commonwealth v. Conway, 14 A.3d 101 (2011).

failure of legislatures to include language allowing defendants to access CODIS is generally defended by pointing to the potential cost. Police and investigative agencies claim defendants cannot, and should not, be allowed access to CODIS to conduct their own investigations because to do so would “open the floodgates” of potential litigation.

This creates real-life problems in many different cases. Often, DNA profiles will be found at the crime scene that do not match the victim or the suspect. If the profile were to be run through CODIS, there may be a match to an individual in the system. Without defense access to CODIS, however, police and prosecuting agencies are free to disregard such evidence and claim they have the “right” man, leaving the defendant without any recourse.

In William Richards’s case, the prosecution repeatedly asserted there was no evidence of anyone at the crime scene except William and Pamela.³⁸¹ Biological evidence found on the scene that did not match either of them countered this theory.³⁸² The opportunity to run the evidence through CODIS could have resulted in a match with a convicted murderer, which illustrates the value and importance of the evidence. However, there is no provision in California’s DNA statute authorizing such a search.

No case illustrates more clearly the need to allow defendants access to CODIS than the case of Ray Krone. Krone was a mailman living in Arizona in December of 1991 when Kimberly Ancona’s body was found in a pool of blood on the floor of a Phoenix bar.³⁸³ Ancona was a cocktail waitress at the CBS Lounge, where she was apparently stabbed to death at closing time.³⁸⁴ Krone became a suspect in the case when the police

381. See *In re Richards*, No. E049135, 2010 WL 4681260, at *3, 6 (Cal. Ct. App. Nov. 19, 2010) (including excerpts from the prosecution’s case, which notes the only vehicle tread marks at the scene came from the defendant’s vehicle and the victim’s vehicle; the only shoe prints that could be accounted for were those of the victim, the defendant, and the authorities at the crime scene; and upon fanning out the search at a 100-yard radius down a hill around the crime scene, there was no evidence indicating that someone else had climbed the hill up to the property; in addition, there was “no blood evidence of a third person being present during the crime.”).

382. See *id.* at *11 (noting the trial court’s finding that when the bite mark hair analysis, tuft under victim’s finger, and “flat stone versus the cinderblock” inquiry are taken together, “the DNA evidence establishes that someone other than petitioner and the victim was present at the crime scene.”).

383. Robert Nelson, *About Face*, PHOENIX NEW TIMES, Apr. 21, 2005, <http://www.phoenixnewtimes.com/2005-04-21/news/about-face/>.

384. *Id.*

received information that he might have been at the bar at closing time and because his name was found in Ancona's address book.³⁸⁵

When Krone was initially taken into custody, he had no idea what was going on.³⁸⁶ He worried about missing his softball game that weekend, but he figured the police would soon learn he had nothing to do with the killing and would let him go.³⁸⁷ He had no idea that over the next decade he would be convicted not once, but twice, for the death of Ancona, and that he would spend years on Arizona's death row.³⁸⁸

Krone, like William Richards, was convicted of murder based upon an alleged matching bite mark found on Ancona's breast.³⁸⁹ Krone was questioned the day Ancona's body was found and gave a styrofoam impression of his teeth to the police.³⁹⁰ His bite was determined to be unique and a match, and was so critical to his conviction that he became known as the "Snaggletooth Killer."³⁹¹

DNA proved to be a much more powerful weapon than the *science* of bite marks when, years after Krone's conviction, DNA tests on blood and saliva on Ancona's clothing not only excluded Krone and Ancona as potential donors, but matched a man named Kenneth Phillips.³⁹² The match was only possible because the DNA databank was searched.³⁹³ Phillips was in the databank as a result of his conviction for attempted child molestation.³⁹⁴ At the time of Ancona's murder, Phillips lived less than half a mile from the scene of the crime.³⁹⁵ Phillips reportedly admitted to being at the bar the night of the killing and to waking up the next day with blood on his hands.³⁹⁶ Krone was exonerated and released from prison in

385. *Id.*

386. See Molly Otoole, *Ex-Death Row Inmate Krone Speaks to the Sun*, CORNELL DAILY SUN (Nov. 13, 2006), <http://cornellsun.com/node/19806>.

387. *Id.*

388. Nelson, *supra* note 383.

389. *Id.*

390. *Id.*

391. *Id.*

392. *Id.*

393. *Id.*

394. J. Harry Jones, *Attorney Fights Till It's Right; He Proves Client Not Killer After 10 Years in Prison*, SAN DIEGO UNION TRIB., Apr. 19, 2002, at 2-3.

395. Nelson, *supra* note 383.

396. Teresa Ann Boeckel & Laura Laughlin, *DNA Frees Former Death-Row Inmate: Two Juries Found Him Guilty, but New DNA Evidence Persuaded Prosecutors to Seek His Release*, YORK DAILY RECORD, Apr. 9, 2002, at 1A.

2002 after spending more than ten years incarcerated for a crime he did not commit.³⁹⁷

The case of Ray Krone exemplifies the importance of providing CODIS access to incarcerated inmates who claim DNA testing can prove their innocence. Without CODIS access, Krone could only prove there was biological material on Ancona's clothes that was not his or hers but could have come from a variety of sources. A jury convicted Krone, not just once, but twice, of murder despite this fact, so it certainly was not sufficient evidence to exonerate him.³⁹⁸ It took the match to a convicted felon, Phillips's opportunity to commit the crime, and Phillips's confession to secure a reversal of Krone's conviction.

XI. SHOULD THE DENIAL OF A DNA TESTING MOTION BE APPEALABLE?

Under the California DNA testing statute, motions for DNA testing are made before the trial court where the conviction occurred,³⁹⁹ presumably because those courts have the most knowledge about the case. While this is often true, certain biases can creep into the process due to perhaps too much exposure to the case. Courts, like prosecutors, can be hesitant to reopen cases that required a great deal of effort in the past. Fundamentally, the basis for appeal in all legal processes is to get a fresh

397. Nelson, *supra* note 383.

398. *Death Penalty Overhaul: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. (2002) (statement of Barry Scheck, Cofounder, The Innocence Project, Benjamin N. Cardozo School of Law). Mr. Scheck used the *Krone* case in his testimony before the Senate Judiciary Committee to illustrate the need to provide CODIS access to defendants:

Ray Krone was able to get testing of blood and saliva stains, originally thought to have been left by the murderer, that were found on the pant leg and tank top of the victim. An STR (Short Tandem Repeat) DNA test performed on the stains showed Krone was not the source, yet that new evidence alone might not have been enough to vacate his conviction. The stains, it could be argued, might not have come from the murderer at all; unlike semen in a sexual assault . . . , where samples can be taken from any possible prior consensual partners, getting "elimination samples" for small blood and saliva stains could prove more difficult. Luckily, however, the STR profile from the stains could be run through the national DNA databank . . . , and it generated a "hit," a sex offender who had committed similar crimes (he bit his rape victims) in the Phoenix area.

Id.

399. CAL. PENAL CODE § 1405(a) (West Supp. 2011).

view on a ruling.

Twenty-four states' provisions permit an appeal of a judge's decision to grant or deny postconviction DNA testing.⁴⁰⁰ Three states do not allow for an appeal but permit review through alternate means.⁴⁰¹ The statutes of only two states explicitly state a decision is never appealable as a matter of right.⁴⁰² Twenty-one states,⁴⁰³ the District of Columbia, and the federal government do not specify in their statutes whether a decision is appealable.

There is no reason the denial of a motion for DNA testing should not be appealable, other than cost. Conversely, there are many reasons why such denials should be appealable, as the caselaw in those states allowing it have shown. The simple truth is courts make mistakes, and testing statutes, as with any statutes, are often misinterpreted.

400. ARK. CODE ANN. § 16-112-206 (2006); FLA. STAT. ANN. § 925.11(3) (West Supp. 2011); GA. CODE ANN. § 5-5-41(c)(13) (West Supp. 2010); HAW. REV. STAT. § 844D-129 (Supp. 2007); IDAHO CODE ANN. § 19-4909 (2004); MD. CODE ANN., CRIM. PROC. § 8-201(j)(6) (LexisNexis 2008 & Supp. 2010); MASS. R. CRIM. P. 30(a)(8) (West 2002); MICH. COMP. LAWS ANN. § 770.16(10) (West 2006 & Supp. 2010); MINN. STAT. ANN. § 590.06 (West 2010); MISS. CODE ANN. § 99-39-25(1) (West 2006 & Supp. 2010); MO. ANN. STAT. § 547.037(6) (West Supp. 2011); MONT. CODE ANN. § 46-21-203 (2009); NEB. REV. STAT. ANN. § 29-4122(2) (LexisNexis 2009) (In actuality, it is unclear whether Nebraska's statutory scheme permits an individual to appeal the denial of a motion for DNA testing, the denial of a motion for appointment of counsel to pursue a motion for DNA testing, or both); N.J. STAT. ANN. § 2A:84A-32a(h) (West Supp. 2010); N.M. STAT. ANN. § 31-1A-2(K) (Supp. 2010); N.C. GEN. STAT. § 15A-270.1 (2009); OHIO REV. CODE ANN. § 2953.73(E) (LexisNexis 2010); 42 PA. CONS. STAT. ANN. § 9546(d) (West 2007) (providing appeals only for convictions in death penalty cases); R.I. GEN. LAWS § 10-9.1-9 (1997); S.C. CODE ANN. § 17-28-90(G) (Supp. 2010); TEX. CODE CRIM. PROC. ANN. art. 64.05 (West 2006); UTAH CODE ANN. § 78B-9-303(2)(e) (LexisNexis 2008); VT. STAT. ANN. tit. 13, § 5567 (2009); WIS. STAT. ANN. § 974.07(13) (West 2007 & Supp. 2010).

401. CAL. PENAL CODE § 1405(j) (West Supp. 2011) (allowing review by petition for writ of mandate or prohibition); W. VA. CODE ANN. § 15-2B-14(j) (LexisNexis 2009) (same); WYO. STAT. ANN. § 7-12-313(a) (2009) (permitting review under writ of review).

402. ME. REV. STAT. ANN. tit. 15, § 2138(6) (2003 & Supp. 2010) (allowing the Maine Supreme Court to establish rules for appeals); VA. CODE ANN. § 19.2-327.1(G) (2008).

403. The states include Alabama, Alaska, Arizona, Colorado, Connecticut, Delaware, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Nevada, New Hampshire, New York, North Dakota, Oklahoma, Oregon, South Dakota, Tennessee, and Washington.

XII. SHOULD POSTCONVICTION DNA TESTING BE GRANTED TO THOSE INMATES WHO PLEAD GUILTY OR CONFESS TO THEIR CRIME?

One thing we have learned from the hundreds of DNA exonerations over the past two decades is sometimes people confess or plead guilty to crimes they have not committed.⁴⁰⁴ This happens for a number of reasons. In the area of confessions, it is sometimes due to the fact police training on interrogations is focused on getting a suspect to confirm the officers' suspicions, not necessarily getting the truth.⁴⁰⁵ In the area of plea-bargaining, sometimes innocent people do not want to roll the dice in the criminal justice casino and instead plead guilty to a lesser crime to avoid more jail time.⁴⁰⁶ The fact that many people confess or plead guilty to crimes they have not committed almost mandates these people should not be closed off from relief under a postconviction DNA testing statute.

Four states' statutes either eliminate or impose restrictions on an inmate's ability to access postconviction DNA testing if the inmate pleaded guilty or *nolo contendere*.⁴⁰⁷ Some statutes state or suggest a plea of guilty

404. According to the Innocence Project, false confessions, admissions, or incriminating statements occurred in roughly 25% of DNA exonerations that have occurred in the United States. *Understand the Causes: False Confessions*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/False-Confessions.php> (last visited Apr. 20, 2011).

405. *See id.* (“[S]ome police officers, convinced of a suspect’s guilt, occasionally use tactics so persuasive that an innocent person feels compelled to confess.”).

406. *See id.* (“[Some suspects] are told they will be convicted with or without a confession, and that their sentence will be more lenient if they confess.”).

407. In Ohio, “[a]n offender is not an eligible offender . . . regarding any offense to which the offender pleaded guilty or no contest.” OHIO REV. CODE ANN. § 2953.72(C)(2) (LexisNexis 2010). In South Carolina, if an inmate pleads guilty or *nolo contendere* to the underlying crime, a postconviction DNA testing motion must be brought within seven years from the date of sentencing. S.C. CODE ANN. § 17-28-30(B) (Supp. 2010). In Vermont, postconviction DNA testing is not permitted if the individual’s conviction was the result of a plea agreement “until after July 1, 2008.” VT. STAT. ANN. tit. 13, § 5561(e) (2009). The strange wording of this statute seems to indicate individuals convicted by plea agreement needed to merely wait until 2008 before filing a motion. *Id.* In Wyoming,

[t]he court may not order DNA testing in cases in which the trial or a plea of guilty or *nolo contendere* occurred after January 1, 2000 and the person did not request DNA testing or present DNA evidence for strategic or tactical reasons or as a result of a lack of due diligence, unless the failure to exercise due diligence is found to be a result of ineffective assistance of counsel. A person convicted before January 1, 2000 shall not be required to make a showing of due diligence under this subsection.

does not matter.⁴⁰⁸ In one state, Pennsylvania, subsequent caselaw has barred inmates who plead guilty from requesting testing unless the inmate also claims that the plea was involuntary.⁴⁰⁹ Some statutes provide or suggest a plea of guilty does not matter.⁴¹⁰ However, the majority of

WYO. STAT. ANN. § 7-12-303(d) (2009).

408. D.C. CODE § 22-4133(b)(4) (LexisNexis 2010); FLA. STAT. ANN. § 925.11(1)(a)(2) (West Supp. 2011); HAW. REV. STAT. § 844D-123(a)(1) (Supp. 2007); IOWA CODE § 81.10(7)(d) (2009); MISS. CODE ANN. § 99-39-5(2)(a)(ii) (West 2006 & Supp. 2010); N.M. STAT. ANN. § 31-1A-2(C)(5) (Supp. 2010); TEX. CODE CRIM. PROC. ANN. art. 64.03(b) (West 2006 & Supp. 2010); 2010 Idaho Sess. Laws 289. Missouri's statute requires the clerk to notify the court reporter to prepare and file the transcript of the movant's guilty plea once a motion for DNA testing has been made and an order to show cause has been issued to the prosecution. MO. ANN. STAT. § 547.035(4)–(5) (West 2002 & Supp. 2011). However, the motion must allege, among other things, the evidence was unavailable at trial and identity was an issue during the trial. *Id.* § 547.035(2). New York's statutes interact in a similar way. *Compare* N.Y. CRIM. PROC. LAW § 440.10(7)–(8) (McKinney 2005 & Supp. 2011) (allowing the court to vacate a guilty plea), *with id.* § 440.30(1-a)(a) (requiring a trial and verdict before a defendant may make a motion for DNA testing that may later form the basis for a motion to vacate judgment under section 440.10). Alaska's statute states DNA testing is available if “the applicant did not admit or concede guilt under oath in an official proceeding for the offense . . . , except that the court, in the interest of justice, may waive this requirement; for the purposes of this paragraph, the entry of a guilty or nolo contendere plea is not an admission or concession of guilt.” ALASKA STAT. § 12.73.020(3) (2010). Confusingly, the statute also states DNA testing is available only if “the applicant was convicted after a trial and the identity of the perpetrator was a disputed issue in the trial,” leaving open the question whether an individual who pled guilty may be granted relief under this section—because the guilty plea means there was no trial and no issue to dispute. *Id.* § 12.73.020(8).

409. *Williams v. Erie Cnty. Dist. Attorney's Office*, 848 A.2d 967 (Penn. 2004).

410. D.C. CODE § 22-4133(b)(4) (LexisNexis 2010); FLA. STAT. ANN. § 925.11(1)(a)(2) (West Supp. 2011); HAW. REV. STAT. § 844D-123(a)(1) (Supp. 2007); IOWA CODE § 81.10(7)(d) (2009); MISS. CODE ANN. § 99-39-5(2)(a)(ii) (West 2006 & Supp. 2010); N.M. STAT. ANN. § 31-1A-2(C)(5) (Supp. 2010); TEX. CODE CRIM. PROC. ANN. art. 64.03(b) (West 2006 & Supp. 2010); 2010 Idaho Sess. Laws 289. Missouri's statute requires the clerk to notify the court reporter to prepare and file the transcript of the movant's guilty plea once a motion for DNA testing has been made and an order to show cause has been issued to the prosecution. MO. ANN. STAT. § 547.035(4)–(5) (West 2002 & Supp. 2011). However, the motion must allege, among other things, the evidence was unavailable at trial and identity was an issue during the trial. *Id.* § 547.035(2). New York's statutes interact in a similar way. *Compare* N.Y. CRIM. PROC. LAW § 440.10(7)–(8) (McKinney 2005 & Supp. 2011) (allowing the court to vacate a guilty plea), *with id.* § 440.30(1-a)(a) (requiring a trial and verdict before a defendant may make a motion for DNA testing that may later form the basis for a motion to vacate judgment under section 440.10). Alaska's statute states DNA testing is available if “the applicant did not admit or concede guilt under oath in an official proceeding for the offense . . . , except that the court, in the interest of justice, may

statutes, including the federal statute, do not address the issue.⁴¹¹

XIII. SHOULD TESTING BE AVAILABLE TO INDIVIDUALS WHO ARE NO LONGER INCARCERATED OR WHO MAY BE SUBJECT TO REQUIREMENTS SUCH AS SEX-OFFENDER REGISTRATION?

In the age of sexually-violent-predator laws, notification laws, and registration laws relating to people convicted of sex crimes, the fact an individual is no longer incarcerated does not mean they do not continue to suffer the ramifications of their conviction. Furthermore, there are still the traditional stigmas resulting from probation, parole, and a criminal record. Therefore, it seems the same opportunities for DNA testing should be available for them, regardless of incarceration status.

The statutes of five states permit individuals who are not incarcerated to bring a motion for post-conviction DNA testing.⁴¹² Nineteen

waive this requirement; for the purposes of this paragraph, the entry of a guilty or nolo contendere plea is not an admission or concession of guilt.” ALASKA STAT. § 12.73.020(3) (2010). Confusingly, the statute also states DNA testing is available only if “the applicant was convicted after a trial and the identity of the perpetrator was a disputed issue in the trial,” leaving open the question whether an individual who pled guilty may be granted relief under this section—because the guilty plea means there was no trial and no issue to dispute. *Id.* § 12.73.020(8).

411. Many statutes do not squarely address the issue at all. *Commonwealth v. Wright*, No. 21 EAP 2008, 2011 WL 650555, at *10 (Pa. Feb. 23, 2011) (“Forty-two states, the District of Columbia, and the federal government have enacted statutes providing for postconviction DNA testing, and none of those statutes expressly bars DNA testing in cases where there is a confession—even if it has been ruled voluntary.”). In *Wright*, the Pennsylvania Supreme Court ruled a voluntary confession was not a bar to DNA testing, so long as the other requirements of the DNA testing statute were satisfied. *Id.* at *1. The court noted, “[N]owhere in [the DNA testing statute] did the legislature include an explicit prohibition to prevent a convicted individual who has confessed to a crime, and who otherwise meets all of the statutory requirements, from obtaining DNA testing, merely because of the existence of the confession.” *Id.* at *13. When determining if a confession is voluntary, “a court is constrained to examine only whether an individual’s confession was the product of coercion, duress, or the use of other measures by interrogators deliberately calculated to overcome his or her free will” and not whether the confession is in fact true, an analysis far different from the “substantive issue of the defendant’s guilt or innocence,” which is the aim of the DNA testing statute. *Id.* at *13–14 (citations omitted).

412. In Alaska, the petitioner can apply for DNA testing if he or she has not been convicted of a felony and has not been “unconditionally discharged.” 2010 Alaska Sess. Laws ch. 20, at 6, available at <http://www.legis.state.ak.us/PDF/26/Bills/SB0110Z.PDF>. Presumably, this means a defendant may still petition for relief while he or she is on parole or otherwise suffers from the collateral consequences of a conviction. In Mississippi, a petitioner can request DNA testing if he or she is

postconviction DNA statutes require a person seeking testing to be incarcerated.⁴¹³ The statutes of twenty-one states are silent on the issue.⁴¹⁴ The statutes of at least four states contain conflicting language, making the

incarcerated, civilly committed, on parole, on probation, or registered as a sex offender. MISS. CODE ANN. § 99-39-5(1)(f) (West 2006 & Supp. 2010). In Ohio, a petitioner can request DNA testing if he or she is sentenced to, and under, a community control sanction, or required to register as a sex offender. OHIO REV. CODE ANN. § 2953.72(C)(1)(b)(ii)–(iii) (LexisNexis 2010). Oregon’s statute requires the petitioner be “incarcerated . . . as the result of a conviction for aggravated murder or a person felony,” but petitioners not in custody can also bring a motion if they have been “convicted of aggravated murder, murder or a sex crime.” OR. REV. STAT. ANN. § 138.690(1)–(2) (West Supp. 2010). Wyoming’s statute may imply the petitioner does not need to be incarcerated because the statute only requires a person be “convicted of a felony,” and the petitioner must pay for the costs of testing unless certain conditions are met, one of which is that he or she is incarcerated. WYO. STAT. ANN. §§ 7-12-303(c), -309(a)(i) (2009).

413. 18 U.S.C. § 3600(a) (2006) (“[U]nder a sentence of imprisonment or death”); ALA. CODE § 15-18-200(a) (LexisNexis Supp. 2010) (“An individual convicted of a capital offense who is serving a term of imprisonment or awaiting execution of a sentence of death”); CAL. PENAL CODE § 1405(a) (West Supp. 2011) (“A person who was convicted of a felony and is currently serving a term of imprisonment”); COLO. REV. STAT. § 18-1-412(1) (2010) (“An incarcerated person may apply”); CONN. GEN. STAT. ANN. § 54-102kk(a) (West 2009 & Supp. 2010) (“[A]ny person who was convicted of a crime and sentenced to incarceration may, at any time during the term of such incarceration, file a petition”); D.C. CODE § 22-4133(a) (LexisNexis 2010 & Supp. 2010) (“A person in custody”); KAN. STAT. ANN. § 21-2512(a) (2007) (“[A] person in state custody”); KY. REV. STAT. ANN. § 422.285(1) (LexisNexis 2005 & Supp. 2010) (“[A] person who was convicted of and sentenced to death for a capital offense”); MICH. COMP. LAWS ANN. § 770.16(1) (West 2006 & Supp. 2010) (requiring a defendant be serving a prison sentence, but only if the conviction occurred on or after January 8, 2001); MO. ANN. STAT. § 547.035(1) (West 2002 & Supp. 2011) (“A person in the custody of the department of corrections”); MONT. CODE ANN. § 46-21-110(1) (2009) (“A person convicted of a felony who is serving a term of incarceration”); NEB. REV. STAT. § 29-4120(1) (LexisNexis 2009) (“[A] person in custody”); N.H. REV. STAT. ANN. § 651-D:2(I) (LexisNexis 2007 & Supp. 2010) (“A person in custody”); N.J. STAT. ANN. § 2A:84A-32a(a) (West Supp. 2010) (“[C]urrently serving a term of imprisonment”); R.I. GEN. LAWS § 10-9.1-11(c) (Supp. 2010) (“[A]ny person who was convicted of and sentenced for a crime and who is currently serving an actual term of imprisonment and incarceration”); S.C. CODE ANN. § 17-28-30(A) (Supp. 2010) (“[C]urrently incarcerated for the offense”); S.D. CODIFIED LAWS § 23-5B-1(1) (Supp. 2010) (“[U]nder a sentence of imprisonment or death”); WASH. REV. CODE ANN. § 10.73.170(1) (West 2002 & Supp. 2011) (“[C]urrently serving a term of imprisonment”); W. VA. CODE ANN. § 15-2B-14(a) (LexisNexis 2009) (“[C]urrently serving a term of imprisonment”).

414. These states include Arizona, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana, Maryland, Minnesota, New Mexico, North Carolina, North Dakota, New York, Texas, Tennessee, Vermont, Virginia, and Wisconsin.

issue of whether the individual must be incarcerated simply unclear.⁴¹⁵

The rise and increasingly Draconian consequences of sex offense registration and other collateral consequences mean individuals subject to these laws have a very strong argument that they should be allowed access to postconviction DNA testing even after their release from prison. The argument against such inclusion is, again, one of cost.

XIV. CONCLUSION

It is no surprise the postconviction DNA testing statutes enacted over the past two decades have been flawed. The complicated and evolutionary nature of this new science, combined with the political nature of lawmaking—particularly when legislators are extending rights to those who have been convicted and sent to prison—are a recipe for shortcomings. Some of those shortcomings have been addressed by this Article, although surely we will discover more as the science evolves. At a minimum, postconviction DNA statutes:

- Should not limit testing to any particular crimes. The only reason to limit testing in this way is cost, but the cost of DNA testing is dwarfed by the societal costs of a wrongful prosecution and conviction and the incarceration costs of an individual who is wrongfully incarcerated for even a relatively minor crime. Further, with the advent of mitochondrial DNA testing, it is possible to prove the presence or absence of a person from *any* crime scene or

415. For example, in Pennsylvania, to be eligible for post-trial relief, the petitioner must be “currently serving a sentence of imprisonment, probation or parole for the crime.” 42 PA. CONS. STAT. ANN. § 9543(a)(1)(i) (West 2007). However, section 9543.1(a)(1) states only those “serving a term of imprisonment or awaiting execution” are entitled to testing under this section. *Id.* § 9543.1(a)(1). Nevada’s statutory scheme is also confusing. *Compare* NEV. REV. STAT. § 176.0918(1) (2009) (requiring a person be under sentence of imprisonment to petition for genetic testing), *with id.* § 176.0918(13) (distinguishing between petitioners who are incarcerated and those who are not for purposes of determining who will pay the cost of testing, possibly implying those not incarcerated may be able to petition for testing). Similarly, Utah’s statute states the department of corrections will pay for testing if the defendant is indigent and incarcerated, but it does not otherwise mention the defendant’s status as an incarcerated inmate, leaving open the question of whether nonincarcerated individuals may be afforded postconviction testing. UTAH CODE ANN. § 78B-9-301(2), -301(8)(a)(iii) (LexisNexis 2008 & Supp. 2010). In Arkansas, an individual “convicted of a crime” may make a motion “to discharge [himself or herself] or to resentence [himself or herself] or grant a new trial or correct the sentence or make other disposition as may be appropriate.” ARK. CODE ANN. § 16-112-201 (2006 & Supp. 2009). This seems to cover many bases, but it does not explicitly address whether nonincarcerated individuals may be granted postconviction testing.

connect or disconnect him or her from clothes or weapons used in a crime.

- Should allow for testing when results are potentially exculpatory and should not give judges the discretion to make pretesting predictions part of their analysis as to whether to grant testing. Such predictive analysis is at the root of wrongful convictions that can sometimes be righted with the hard science of DNA.
- Should not preclude testing based upon whether or not identity was raised as a trial defense when testing is potentially exculpatory. The fears of a floodgate of testing necessitating this type of restriction have proven to be false, and such limitations can sometimes be contrary to the interests of justice.
- Should allow for testing in private labs to avoid bias and delay, which has sometimes been associated with government labs.
- Should provide government payment for testing. The overwhelming majority of inmates are indigent and unable to pay the costs. This inability to pay should not be a barrier in proving their innocence and potentially establishing the guilt of another party.
- Should provide for the appointment and compensation of counsel. Postconviction DNA litigation is a highly complex and specialized area of the law. No benefit inures to society in forcing inmates to navigate these processes alone.
- Should not include time limits for seeking testing or sunset provisions, which serve no purpose except to frustrate the pursuit of an otherwise valid claim. New developments in DNA technology and basic notions of justice and fairness are strong arguments against these provisions.
- Should provide reasonable requirements for maintaining biological evidence and penalties for failure to preserve evidence. Again, new technology can make untestable evidence testable in the future, and the cost of preservation is minimal when countered against wrongful conviction costs.
- Should provide the right to petition the court to order CODIS searches. Inmates should have access to this tool to prove their innocence, which can sometimes also lead to the identification of the actual perpetrator.
- Should provide for the right to appeal denials of testing. Often there is potential bias in the courts considering these motions. There should be an opportunity for review to make sure the standards of the law are being followed.
- Should allow DNA testing to those who have confessed or pleaded guilty. The

exoneration of similarly situated people has proven innocent people do confess and do plead guilty, and they should not be prevented from obtaining relief.

- Should not be limited to those who are incarcerated, considering the increasing severity of postincarceration requirements, particularly for those who have been convicted of sex offenses.

If these issues are not addressed, three things are guaranteed to occur. First, innocent men and women will continue to be incarcerated for crimes they did not commit, and they will continue to serve prison sentences—and even die in prison—without being given the opportunity to establish their innocence. Second, guilty men and women will continue to remain free, avoiding the just punishment they should receive for their crimes. Finally, the cost of litigating DNA cases will increase. For each confusing, misleading, or inadequate statute in a given jurisdiction, many innocent individuals will be forced to spend thousands—perhaps even hundreds of thousands—of dollars to convince a court to properly interpret that statute and grant them relief. These costs will always be passed on to the taxpayer, directly or indirectly, and they need not occur at all.

DNA is an amazing forensic tool, but its utility in the postconviction world is only as good as the statutes that govern its use. Through thoughtful reform these statutes can be more practical, easier to apply, and more effective in serving the legislative goals.