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# Claiming Innocence

Brandon L. Garrett

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## Article

### Claiming Innocence

Brandon L. Garrett<sup>†</sup>

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Is innocence still irrelevant? In his influential 1970 article, Judge Henry Friendly provocatively asked why innocence is irrelevant to federal habeas corpus review.<sup>1</sup> Judge Friendly proposed that innocence should provide a ground for relief from a criminal conviction, but his call went unheeded, perhaps because at that time innocence could rarely be proven with any certainty. For reasons of reliability, courts distrusted exculpatory witnesses who came forward years after a trial, when their memories had faded and their motives were suspect. In addition, forensic evidence was usually not very probative. Claims asserting the existence of new evidence of innocence were considered fundamentally equivocal, and, as a result, states imposed strict rules of finality, barring claims brought after limitation periods expired. Thus, in the decades since Judge Friendly first asked whether innocence should be relevant to criminal appeals, the Supreme Court has repeatedly declined to

1. See Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 159–60 (1970).

recognize a constitutional claim of innocence. Most prominently, in 1993, in *Herrera v. Collins*, the Court narrowly failed to recognize a constitutional innocence claim in the context of capital cases, emphasizing the dual concerns of finality and reliability.<sup>2</sup>

The advent of DNA testing technology inaugurated an era in which innocence can be proven with far greater certainty long after a crime has occurred. In the process, DNA has undermined the concerns of finality and reliability that supported the result in *Herrera*. No longer is a witness's recollection or even a confession the most reliable evidence of guilt. Instead, physical evidence has taken on central importance in claims of innocence: a cigarette butt, a half-eaten cinnamon bun, a sweat-soaked bandana, or a cotton swab—pieces of stray evidence that would play at most a tangential role two decades ago—can now demonstrate guilt or innocence decades after a crime with no decrease in accuracy. Since 1989, 216 prisoners have been exonerated by post-conviction DNA testing, and thousands of others have been exonerated before trial.<sup>3</sup>

Despite this shift, the Court has failed to recognize a constitutional claim of innocence, and even the most straightforward claims of innocence continue to face substantial obstacles.<sup>4</sup> An illustrative case is that of Frank Lee Smith, a man who spent fourteen years in prison in Florida after a jury con-

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2. 506 U.S. 390, 401, 403–04 (1993); see *infra* Part III.

3. See The Innocence Project, Home Page, <http://www.innocenceproject.org> (last visited Apr. 26, 2008). Throughout this Article, by an exoneration, I mean a legal determination that the conviction should be vacated, either by a court or an executive pardon, based in part on new evidence of innocence, which was not followed by a new trial.

4. The Court had an opportunity in the 2005 Term to reconsider *Herrera* in a case involving post-conviction DNA testing. See *House v. Bell*, 126 S. Ct. 2064, 2078 (2006); *infra* Part I.A. An empirical study that I conducted examining the criminal appeals brought by the first two hundred people exonerated by post-conviction DNA testing presented data regarding how those exonerees often faced difficulties obtaining the DNA testing that ultimately exonerated them and described how few prevailed on claims of innocence. See generally Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55 (2008). All who raised innocence claims before obtaining DNA testing were denied relief. *Id.* at 111. In seeking DNA evidence, approximately half of the two hundred were refused access to DNA testing by law enforcement, often necessitating a court order. *Id.* at 120. Twenty percent required a pardon because, even after being excluded by DNA test results, they lacked any judicial forum for relief; at least twelve were denied relief by courts even after DNA test results excluded them. *Id.*

victed him and sentenced him to death in 1986 for a rape-murder that he did not commit.<sup>5</sup> In 1998, Smith's lawyers obtained a stay of execution and began seeking DNA testing to bolster their case for his innocence, which rested on the recantation of the State's star eyewitness.<sup>6</sup> The district attorney successfully opposed motions seeking DNA testing for years; state laws provided no post-conviction right of access to such evidence.<sup>7</sup> It was not until DNA tests implicated another man in a series of rapes and murders in the area that law enforcement consented to testing. DNA testing ultimately inculpated that man and excluded Smith, but only in December 2000, after Smith had already died of cancer on Florida's death row.<sup>8</sup> Partly in reaction to *Smith v. State*,<sup>9</sup> Florida passed a statute in 2001 entitling a petitioner to obtain DNA testing and, if the results are exculpatory, the right to relief.<sup>10</sup> Like most states that have enacted new innocence claims in recent years, however, Florida included several restrictions limiting access to testing, such as a requirement that a petitioner satisfy a preliminary showing of innocence to receive DNA testing, and until the statute was amended in 2006, time limits on obtaining testing and denial of testing to those who had pleaded guilty.<sup>11</sup> Our system remains at a crossroads, not yet fully adopting an approach that directly assesses the probative impact of evidence of innocence, but failing to discard many of the traditional limitations on innocence claims.

In this Article, I argue that our criminal system should ensure full access to evidence of innocence at trial, and that during appeals and post-conviction proceedings our criminal system should review claims of innocence based only on the probative power of the new evidence of innocence, freed from

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5. See *Smith v. State*, 515 So. 2d 182, 185 (Fla. 1987) (affirming a conviction of first-degree murder and a sentence of death); Frontline, *Requiem for Frank Lee Smith*, <http://www.pbs.org/wgbh/pages/frontline/shows/smith/eight> (last visited Apr. 26, 2008).

6. *Smith*, 515 So. 2d at 185.

7. See Frontline, *supra* note 5.

8. *Id.*

9. *Smith*, 515 So. 2d 182.

10. See, e.g., Alisa Ulferts, *Bill Allows Inmates to Request DNA Tests*, ST. PETERSBURG TIMES (Fla.), Feb. 9, 2001, at 1B, available at 2001 WLNR 11083434.

11. See FLA. STAT. § 925.11(2)(f)(3) (2007); *id.* historical and statutory notes.

traditional restrictions that have hindered even meritorious claims. By a claim of innocence, I mean a legal contention seeking relief from a criminal conviction based chiefly on evidence that the convict did not commit the criminal acts. I divide innocence claims into three basic categories: (1) substantial claims; (2) outcome-determinative claims; and (3) inconclusive claims. These categories reflect a spectrum based on the varying degrees to which the new evidence of innocence—evidence not available at the time of trial—may undermine the evidence that was introduced at the criminal trial. In cases involving substantial showings of innocence, new evidence overwhelmingly shows that the convict was not the perpetrator of a crime. A second category, termed outcome-determinative, includes cases in which the new evidence of innocence does not substantially undercut an element of a crime, conviction, or sentence, but makes it more likely than not that a new jury would fail to convict. The Supreme Court employed such “holistic” analysis regarding the outcome in *House v. Bell*,<sup>12</sup> its first decision to confront DNA evidence of innocence. Finally, the category of inconclusive claims encompasses cases in which DNA technology, although providing information regarding a genetic profile, has limited probative value, such as where biological evidence does not show identity or identity is not disputed.<sup>13</sup>

Courts typically evaluate claims of innocence based on extrinsic considerations, including the trial attorney’s diligence, the crime of conviction, the amount of time that has passed since conviction, whether the petitioner pleaded guilty, and whether a purely hypothetical scenario could explain the DNA exclusion.<sup>14</sup> Such standards may result in courts denying relief to petitioners who raise meritorious claims of innocence. Under the standard of review that I propose, claims of innocence would be assessed based upon the degree to which new evidence of innocence undercuts the evidence of guilt presented at trial. After delineating an approach that simply evaluates the probative impact of new evidence of innocence, I show that our

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12. *House v. Bell*, 126 S. Ct. 2064, 2078 (2006) (explaining how the appropriate inquiry for the Court is a “holistic judgment” on how a reasonable jury would apply the reasonable doubt standard in light of new evidence supplementing the record).

13. *See, e.g., State v. Armstrong*, 700 N.W.2d 98, 127 (Wis. 2005); *infra* note 396 and accompanying text.

14. *See infra* Part II.C.

criminal justice system still fails to uniformly take such an approach, despite the enactment of new statutes permitting post-conviction innocence claims. While rules governing how innocence can be asserted differ at each stage of a criminal case, at no stage is evidence consistently assessed based on its probative value.

With DNA testing in wide use, evidence of innocence has never been more relevant to criminal investigations and trials. Even so, criminal procedure rules still fail to ensure full and accurate access to physical and forensic evidence probative of innocence. Many commentators and legislators have assumed that DNA exonerations would fade away.<sup>15</sup> However, I present new longitudinal empirical analysis of DNA exonerations to show why treatment of DNA during investigations and trials may cause such exonerations to continue for far longer than previously thought. Strikingly, more than one-quarter of post-conviction DNA exonerees were tried and convicted in the DNA era (since 1990).<sup>16</sup> The exonerees did not obtain DNA testing during the trial stage because of, among other reasons, errors or misconduct by forensic experts, ineffective lawyering, and the inadequacies of then-existing DNA technology. Criminal procedure rules, however, do not ensure access to independent forensic experts, preservation of biological evidence, or discovery regarding state forensic analysis. Although DNA testing is conducted more frequently than ever before, the failure of criminal procedure rules to address these problems means that claims of innocence may persist for some time, albeit with a different focus: the proper handling and disclosure of biological material and DNA test results.

Meanwhile, state criminal appeals and post-conviction review, though reshaped by nearly nationwide legislative change,

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15. See JIM DWYER ET AL., ACTUAL INNOCENCE 250 (2000) ("In a few years, the era of DNA exonerations will come to an end."); James S. Liebman, *The New Death Penalty Debate: What's DNA Got to Do with It?*, 33 COLUM. HUM. RTS. L. REV. 527, 547–48 (2002) (describing how "the backlog of existing post-trial cases in which there is DNA evidence to test will not be replenished" but also reasons why exonerations may recur); Michael J. Saks et al., *Toward a Model Act for the Prevention and Remedy of Erroneous Convictions*, 35 NEW ENG. L. REV. 669, 669 (2001) ("The window will soon close . . ."); *infra* note 247 (noting state statutes that include sunset provisions for post-conviction DNA testing based on an assumption that such testing will prove unnecessary after a short period of time).

16. Garrett, *supra* note 4, at 130.

typically lack an avenue for courts to simply assess the probative value of new evidence of innocence. The Supreme Court's failure to recognize a constitutional innocence claim has created substantial pressure on the states that have faced first-hand embarrassment from more than two hundred post-conviction DNA exonerations. In response, within the space of a decade, forty-five jurisdictions enacted statutes providing rights to post-conviction DNA testing and a vacatur if DNA testing, or occasionally other evidence, demonstrates innocence. In this Article, I survey those statutes and evaluate judicial rulings interpreting them. These statutes represent a remarkable change in the law, upending rules of finality and creating the first system of review focused exclusively upon claims of innocence.

Despite these innovations, post-conviction DNA statutes also routinely impose severe limitations on access to DNA testing and relief. Almost all statutes require a preliminary showing of innocence in order to obtain DNA testing itself, and they often bar access to petitioners who pleaded guilty and those whose attorney failed to request DNA testing at trial. Moreover, they impose other substantive and procedural hurdles. Compounding the problem, courts still deny access to potentially exonerating evidence such as DNA testing, typically because of stilted interpretations of the newly enacted statutes or stark misapprehension of the potential probative power of DNA tests. Courts continue to deny relief even to some individuals who actually demonstrate their innocence through testing.

Incomplete recognition of claims of innocence in the states occurred in the shadow of the Supreme Court's reluctance to recognize a constitutional claim of innocence. In 1993, the same year that modern DNA testing began to reshape our criminal system, the Court had an opportunity to decide whether an innocence claim exists under the U.S. Constitution. In *Herrera*, the Court evaded the question, stating hypothetically that a prisoner might have a right not to be executed given an "extraordinary" showing of innocence; no subsequent case has been held to satisfy this standard.<sup>17</sup> In 1995, the Court again

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17. *Herrera v. Collins*, 506 U.S. 390, 417 (1993); *infra* Part III.A. Anthony Amsterdam calls this a "state of denial," explaining that "[t]he fixation of courts on the issue of guilt or innocence almost always takes the form of denying claims of error because the judges believe that a convicted defendant is guilty, not of willingness to provide forums for the vindication of convicted



addressed innocence, ruling in *Schlup v. Delo* that no constitutional claim of innocence exists.<sup>18</sup> It did say, however, that innocence may excuse the procedural default of some other constitutional claim.<sup>19</sup> In its 2005 Term, the Court reiterated these holdings in its first post-conviction DNA case, *House v. Bell*. The Court ruled that a showing of innocence so strong that a new jury “more likely than not” would not convict did not result in freedom for the convicted, but only that the court could reach the merits of a defaulted ineffective assistance of counsel claim.<sup>20</sup>

Although the Supreme Court in *Herrera* and *House* did not recognize a constitutional innocence claim, evidence of innocence has already impacted constitutional criminal procedure in three largely unnoticed ways. First, lower federal courts grant DNA testing to obtain new evidence of innocence during discovery or pursuant to § 1983 actions.<sup>21</sup> Second, several federal courts have held that new evidence of innocence can buttress constitutional claims by illuminating State misconduct or by supporting claims regarding the State’s use of tainted, inaccurate evidence. Third, new evidence of innocence supports relief where, absent such evidence, a court might otherwise find error harmless, including by relying on the perceived reliability of the State’s evidence of guilt. Unfortunately, while these approaches begin to close the gaps at the state and federal levels, they do not provide a uniform standard for claiming innocence.

Adopting a uniform freestanding innocence claim that entitles a court to review the probative impact of new evidence of innocence would require changing existing constitutional criminal procedure. DNA technology has eroded the twin pillars supporting the Court’s ruling in *Herrera*: reliability and finality. Hence, the Court could reconsider establishing a due process right to relief from a conviction or sentence on the ground of innocence. The Court’s “more likely than not” stan-

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persons who present colorable claims of innocence.” Anthony G. Amsterdam, *Verbatim: Lady Justice’s Blindfold Has Been Shredded*, CHAMPION, May 2007, at 51, 51.

18. See 513 U.S. 298, 313–17 (1995).

19. See *id.* at 326–27.

20. *House v. Bell*, 126 S. Ct. 2064, 2086–87 (2006).

21. See 42 U.S.C. § 1983 (2000). For a discussion of such a case, see *infra* notes 302–03 and accompanying text.

dard in *Schlup* already provides a logical standard of review for such a claim.<sup>22</sup>

Until a claim of innocence is established by the Court or by farther-reaching legislation, the clearly innocent will not always readily receive access to proof or relief. Granting relief for unusual claims of innocence in a narrow band of cases should not overly tax the system, so long as a framework is adopted to identify those claims; as the Court has acknowledged, “such decisions are rare.”<sup>23</sup> This is especially true since DNA technology has already transformed the way that actors handle certain serious criminal cases at every stage in the criminal system.

Nevertheless, our courts might not adopt an innocence claim resembling the one I advocate any time soon, nor may they properly apply an optimal standard should one be enacted. After all, under existing state statutes, courts have denied innocent people relief even after DNA testing excluded them. Thus, I describe means outside the existing post-conviction system for granting relief on the basis of innocence, such as innocence commissions or other independent bodies tasked with the review of innocence claims. Whatever the mechanism, as a growing constellation of rights and remedies gradually shifts the focus of our system from solely remedying violations of procedural rights to creating new avenues for redressing substantive claims of innocence, the emphasis should be placed on what makes DNA technology so transformative: the probative impact of new evidence of innocence. Furthermore, our criminal system can avoid the need to later judge innocence if protections better ensure access to evidence of innocence at the time of trial.

This Article begins in Part I by examining the case of *House v. Bell*, in which the Supreme Court confronted the definition of innocence in its first post-conviction DNA case, and then framing how innocence can be assessed based on the probative impact of new exculpatory evidence. Part II then shows how our system fails to strictly assess innocence in that manner at any stage. Our system does not ensure access to DNA evidence of innocence at trial, which results in wrongful convictions. Although states have adopted post-conviction DNA statutes, almost all states exclude entire categories of convicts

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22. *Schlup*, 513 U.S. at 329.

23. *Id.* at 322 n.36.

and impose substantial hurdles unrelated to whether testing could prove innocence. Meanwhile, federal courts lack any actual innocence claim, though they adopt several approaches that begin to move in that direction. Finally, Part III concludes by arguing that the Constitution supports the adoption of a freestanding innocence claim that would grant relief to those who can show that, more likely than not, no reasonable jury would convict in light of the new evidence.

### I. DEFINING INNOCENCE

Which prisoner's habeas petition poses the easiest question for a federal court to decide: (a) the prisoner whose trial lawyer was ineffective and presented a poor defense case; (b) the prisoner who alleges that police officers concealed evidence that would have undermined the prosecutor's case; or (c) the prisoner who offers new DNA evidence of his innocence? The common sense lay-person's answer might be (c): scientific evidence of innocence should most readily lead to the release of a convict.

The hard-nosed post-conviction attorney would counter that, in any federal court, the prisoner in (c) would have little to no chance of success because proving "actual innocence" does not entitle a prisoner to constitutional relief. On the other hand, the claims of (a) and (b) both involve established constitutional criminal procedure rights and thus would have a better chance for success. Indeed, the prisoner in (c) might only have a shot at success if his petition involved *both* DNA evidence of innocence and the sort of run-of-the-mill procedural claim brought by prisoners (a) and (b). This is true because, as I describe below, the Court ruled in *Herrera* and then reaffirmed in *House* that prisoners lack any substantive right to be freed because they are innocent.

#### A. THE CASE OF *HOUSE V. BELL*

In *House*, the Supreme Court for the first time acknowledged the central role that DNA technology can play in criminal cases. The Court ruled that Paul House, a death row prisoner in Tennessee, had presented evidence, including post-conviction DNA testing, showing a reasonable probability of his innocence.<sup>24</sup> The DNA testing showed that semen obtained

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24. *House*, 126 S. Ct. at 2074.

from the victim's clothes did not match Paul House.<sup>25</sup> Yet despite this evidence, rotating combinations of federal judges at different times ruled that (1) House was actually innocent and deserved a new trial; (2) House was guilty and should be executed; and (3) House showed a reasonable probability of his innocence such that his defaulted ineffective assistance of counsel claim should be considered on remand.<sup>26</sup> The *House* case exemplifies how almost two decades into the DNA era, courts remain uncertain about how to approach new evidence of actual innocence, even evidence as powerful as DNA test results.

House's case begins, like many in which DNA evidence has been relevant, with a gruesome crime. Carolyn Muncey was found murdered in the woods near her East Tennessee home in the summer of 1985.<sup>27</sup> The police quickly focused on two suspects: her husband, Hubert, who had grown up in the area and had a history of serious domestic abuse, and Paul House, a convicted sex offender who had recently moved to the area.<sup>28</sup> When someone claimed to have seen House emerge, the day after the murder, from the woods near where Mrs. Muncey's body was found, the police investigated House.<sup>29</sup> He stated he had been at his girlfriend's house that night.<sup>30</sup> She reported that he left her home the night of the murder and returned without his shirt and shoes but with a bruise and scratches.<sup>31</sup> He claimed to have been scratched by his girlfriend's cats and to have bruised his fingers at his construction job.<sup>32</sup>

The State's theory at trial was that House raped and murdered Mrs. Muncey. The testimony of the witness who saw him emerge from the woods and of House's girlfriend provided circumstantial evidence connecting him to the crime. Direct evidence of House's connection rested upon serology evidence derived from semen on the victim's clothes, blood on her nightgown, and from bloodstains on House's jeans.<sup>33</sup>

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25. *Id.* at 2078–79.

26. *Id.* at 2075–76.

27. *Id.* at 2070.

28. *Id.* at 2071.

29. *Id.* at 2070–71.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 2072–73.

At trial, FBI Special Agent Paul Bigbee presented the forensic evidence from the victim's clothes at trial in a manner that improperly exaggerated its probative power.<sup>34</sup> The semen evidence consisted of ABO serology evidence,<sup>35</sup> as DNA testing would not be in use for several more years. The A blood group substances found on the victim's nightgown were consistent with House's A blood type, but also with the victim's blood type. Semen stains on the victim's panties did not exhibit A blood group substances; instead, where only the H substance was detected, those stains were consistent with having originated from an O type secretor. Nonetheless, the FBI Agent told the jury that both sets of stains could have come from House. As the Innocence Project later pointed out in their amicus brief, this testimony was improper science.<sup>36</sup> Special Agent Bigbee attempted to resolve the inconsistency as follows:

Q: Can you tell us whether or not the A substance could have been there, prior to you doing the testing?

A: It could have, yes.

Q: Does the age of the stain make a difference as to whether you find both of these substances?

A: The age of the stain does to some extent make a difference. The environment in which the stain remained after it was deposited could also make a difference. The H blood group substance is the precursor to the B and A blood group substances, chemically, and it can also be degraded from the A or the B to the H.

Q: Which means that the H lasts longer, so to speak?

A: In certain cases, yes.

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34. See Brief of the Innocence Project, Inc., as Amicus Curiae in Support of the Petitioner at 24, *House*, 126 S. Ct. 2064 (No. 04-8990), 2005 WL 779581, at \*18 [hereinafter Innocence Project Brief] (describing "that the FBI serologist who analyzed the stains on the victim's underwear and nightgown, and compared them to the defendant's own blood type, appears to have *wholly misrepresented the results of the original tests to the jury* on both items").

35. Serology refers to a range of laboratory tests that utilize serum and antigen reactions to antibodies to examine, among other things, ABO blood-type groups. JOHN M. BUTLER, FORENSIC DNA TYPING 39 (2d ed. 2005). The ABO blood group substances are found on red blood cells, and for about eighty percent of the population, called "secretors," those substances are expressed in other body fluids, including saliva, semen and vaginal fluid. ABO typing tests fluids for the presence of the A, B, and H blood group substances. See *House*, 126 S. Ct. at 2072.

36. See Innocence Project Brief, *supra* note 34, at 25–26, 2005 WL 779581, at \*19.

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Q: So, A could deteriorate into H?

A: Yes.<sup>37</sup>

While biological material may degrade, the prosecution's witness made up the notion that only certain antigens would "selectively degrade" ("the conveniently 'Vanishing A'")—not only was there no evidence to support the conjecture, but amici pointed out that this concept is "simply unheard of in the field of serology."<sup>38</sup> If "antigens could selectively 'vanish,'" and blood types could mutate from one to another, "then serology would never have been a reliable method."<sup>39</sup> Hence, Special Agent Bigbee was either grossly incompetent, or he fabricated his testimony to "conform with the State's case against Paul House, i.e., to fraudulently misrepresent the results to make him a potential donor of that semen stain."<sup>40</sup>

Moreover, the testimony regarding the nightgown was also false. Bigbee told the jury in crucial testimony that "the person who deposited that semen was blood type A," although the permissible scientific inference, as any competent serologist knew, was that the "donor need not be an 'A secretor' like Paul House, but could have been any man on the planet."<sup>41</sup> This is because in a mixed male-female stain, the female donor's greater proportion of cells may "mask" male antigens; the A stain could have originated entirely from the victim.<sup>42</sup>

At trial, the prosecutor stated that "the fact that there was semen on the outer garment"<sup>43</sup> was the basis for seeking death, as it would support a finding that House murdered the victim "in the process of either rape or attempted rape."<sup>44</sup> After all, the bloodstains on House's jeans and the witness near the woods connected House with a murder, but only the semen provided any evidence of a rape.<sup>45</sup> In response, House maintained his innocence and attacked the forensic evidence.<sup>46</sup> The jury unani-

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37. *Id.* at 25, 2005 WL 779581, at \*18–19.

38. *Id.* at 25 & n.17, 2005 WL 779581, at \*19 & n.13.

39. *Id.*

40. *Id.* at 26, 2005 WL 779591, at \*19.

41. *Id.* at 26, 2005 WL 779591, at \*20 (internal quotation marks omitted).

42. *Id.*

43. *House v. Bell*, 386 F.3d 668, 685 (6th Cir. 2004), *rev'd*, 126 S. Ct. 2064 (2006).

44. *Id.* at 693.

45. *House*, 126 S. Ct. at 2074–75.

46. *Id.* at 2066.

mously found three aggravating factors and, finding no mitigating factors outweighing them, sentenced him to death.<sup>47</sup>

During his appeals, state and federal judges sharply divided over how to handle new evidence of innocence uncovered by House. In his direct appeal, the Tennessee Supreme Court called the trial evidence against House circumstantial but “quite strong.”<sup>48</sup> Then, in House’s subsequent pro se state habeas petition, he defaulted his ineffective assistance of trial counsel claim.<sup>49</sup> When House brought a federal habeas claim he argued that the district court, under *Schlup*, should excuse this procedural default based on evidence of actual innocence.<sup>50</sup> House’s attorney presented newly discovered evidence, including testimony from the State’s medical examiner that the blood on House’s jeans likely came from the sample taken from the victim after her body was discovered.<sup>51</sup> Half a vial of this sample was unaccounted for, and the State’s medical examiner testified that law enforcement must have spilled it onto House’s pants, either accidentally or intentionally.<sup>52</sup> House also presented two witnesses who had known Mr. Muncey for years and who said he had confessed to them that he murdered his wife, several witnesses who said Muncey had physically assaulted his wife, and two witnesses who contradicted Muncey’s alibi.<sup>53</sup>

But most striking, as the Supreme Court would later note, newly conducted DNA testing demonstrated “in direct contradiction of evidence presented at trial . . . that semen on Mrs.

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47. At the sentencing stage, the State sought to prove three separate aggravating factors to support a capital sentence:

(1) that House had previously been convicted of a felony involving the use or threat of violence; (2) that the homicide was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind; and (3) that the murder was committed while House was committing, attempting to commit, or fleeing from the commission of, rape or kidnapping.

*Id.* at 2074. The first factor was straightforward given House’s prior aggravated sexual assault conviction. As to the second two factors, the prosecutor argued that, based on the serology evidence and the nature of the victim’s injuries, she was raped and kidnapped. *Id.*

48. *See* State v. House, 743 S.W.2d 141, 144 (Tenn. 1987), *rev’d sub. nom.*, House v. Bell, 126 S. Ct. 2064 (2006).

49. *House*, 126 S. Ct. at 2075.

50. *Id.* at 2075; *see also* Schlup v. Delo, 513 U.S. 298, 325–27 (1995).

51. *House*, 126 S. Ct. at 2080.

52. *Id.* at 2083.

53. *Id.* at 2084.

Muncey's [clothing] . . . came from her husband, . . . not House."<sup>54</sup> Nevertheless, the district court, after an evidentiary hearing regarding new evidence of innocence, denied relief.<sup>55</sup>

On appeal, the Sixth Circuit divided over which innocence standards applied and which were satisfied. The initial panel affirmed the district court's decision.<sup>56</sup> However, an en banc circuit court changed course, concluding that House made a compelling showing of actual innocence under the demanding standard the Supreme Court announced in *Herrera*: in an extraordinary case, the Due Process Clause of the Fourteenth Amendment might hypothetically prevent the execution of an actually innocent person.<sup>57</sup> The circuit also certified to the Tennessee Supreme Court the question of whether state procedure remained open.<sup>58</sup> But after the state court refused to answer the certified questions,<sup>59</sup> the circuit reversed its en banc decision, with a narrow eight-judge majority ruling that House did not meet his burden under *Schlup* to excuse the procedural default of his *Strickland* claim.<sup>60</sup> In contrast, the seven dissenting judges concluded that not only had House met the *Schlup* burden, but he made such a "persuasive" showing of innocence that his conviction should be vacated under the *Herrera* standard.<sup>61</sup>

Did House show that he was actually innocent, clearly guilty, or somewhere in between? The Supreme Court, divided 5-3, ruled that House fell in between guilty and innocent.<sup>62</sup> By showing that, more likely than not, no reasonable juror could have found him guilty, House satisfied the *Schlup* standard. In perhaps the most significant passage of the opinion, the Court emphasized that the new DNA evidence was of "central importance," particularly because the proof at trial was circumstantial, and because the evidence that the DNA testing contra-

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54. *Id.* at 2078–79.

55. *See id.* at 2075.

56. *Id.*

57. *See* House v. Bell, 311 F.3d 767 (6th Cir. 2002) (en banc). Six judges ruled to certify, with four dissenters arguing he could not obtain relief under *Schlup*, much less *Herrera*. *Id.* at 780–81 (Boggs, J., dissenting).

58. *Id.* at 768 (majority opinion).

59. *See* House v. Bell, 386 F.3d 668, 670 (6th Cir. 2004) (en banc), *rev'd*, 126 S. Ct. 2064 (2006).

60. *See id.* at 685.

61. *Id.* at 708 (Merritt, J., dissenting).

62. *House*, 126 S. Ct. at 2086–87.



dicted “was the only forensic evidence at the scene that would link House to the murder.”<sup>63</sup>

The Court held that the DNA evidence, together with the showing of forensic tampering with the blood evidence that the prosecution introduced at trial and the testimony of witnesses implicating Mr. Muncey, “cast considerable doubt on his guilt.”<sup>64</sup> Despite the powerful showing of innocence, however, the Court did not grant a new trial because under *Schlup*, demonstrating that a new jury would probably not convict merely entitles the petitioner to pass through a “gateway” in which his procedural default is excused and a court may reach the merits of a claim.<sup>65</sup> Thus, the Court remanded for consideration of the merits of the otherwise procedurally defaulted claim of ineffective assistance of counsel.<sup>66</sup>

Yet even if House could have more powerfully shown his innocence, the result might have stayed the same, as no doctrine currently permits relief beyond excusing a procedural default. The last time the issue came before the Court, in *Herrera*, the Court did not decide whether an actual innocence claim existed.<sup>67</sup> Similarly, in *House*, the Court ruled that “whatever burden a hypothetical freestanding innocence claim would require, this petitioner has not satisfied it.”<sup>68</sup> Therefore, under current law, even a showing of innocence sufficient to prove that, more likely than not, a jury would not find an individual guilty, fails to merit a new trial.

A perverse result could have followed. Having satisfied the very stringent *Schlup* standard, an individual like House might nonetheless be denied relief under the less-stringent showing required on his constitutional claim. Under the *Strickland* analysis, House need only show a reasonable probability that attorney ineffectiveness prejudiced the outcome.<sup>69</sup> However, the failure to discover House’s potentially exculpatory evidence in time for the original trial might not be attributable to his counsel’s errors.<sup>70</sup> Fortunately for House, and as I develop in Part

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63. *Id.* at 2079.

64. *Id.* at 2087.

65. *Id.*

66. *Id.*

67. *Herrera v. Collins*, 506 U.S. 390, 417–19 (1993).

68. *House*, 126 S. Ct. at 2087.

69. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984).

70. For example, if DNA testing was not available at the time of trial the

II, his new evidence of innocence does at minimum impact the prejudice inquiry for his underlying *Strickland* claim, providing a potential ground for relief.

Indeed, the district court recently granted House's habeas petition<sup>71</sup> and ordered his release pending the State's appeal.<sup>72</sup> In the meantime, the Sixth Circuit will hear the case yet again. Twenty-two years after his trial, House will leave death row and return home. House is also now wheelchair-bound due to an advanced case of multiple sclerosis.<sup>73</sup> Should the Sixth Circuit affirm the grant of House's petition, the prosecutor stated he plans to pursue a retrial.<sup>74</sup>

#### B. ASSESSING THE PROBATIVE IMPACT OF NEW EVIDENCE OF INNOCENCE

The *House* case represents the first time that the Court confronted DNA evidence of innocence, recognized its "central" importance, and engaged in a "holistic" analysis regarding its effect on the prosecution's case. Before constructing the existing framework of procedural and substantive rights relating to innocence, I first step back to examine what the term "innocent" means in connection with a criminal trial.

The word "innocence" is used casually in the media and by lawyers, convicts, scholars, and courts. I define the innocent as those who did not commit the charged crime. Even though they

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lawyer would not be at fault, although the lawyer could have attacked forensic evidence, like the FBI analyst's faulty testimony, or could have better developing evidence of third-party guilt.

71. See *House v. Bell*, No. 3:96-cv-883, 2007 WL 4568444, at \*9 (E.D. Tenn. Dec. 20, 2007) (granting a conditional writ of habeas corpus that will result in a vacatur unless the State commences a new trial within 180 days after the instant judgment becomes final); see also *id.* (noting the State's failure to disclose certain forensic evidence, and as to third party guilt, that "[i]n a case such as this one . . . where the only evidence against petitioner was circumstantial and the theory of the defense was to shift suspicion from petitioner to the victim's husband, it was incumbent on counsel to discover and present all witnesses who could testify as to the husband's abuse of his wife and thus lend credence to the defense theory").

72. *House v. Bell*, No. 3:96-cv-833, 2008 WL 972709, at \*4 (E.D. Tenn. Apr. 7, 2008) (granting motion for release pending appeal).

73. *Id.*, at \*3 ("[House] now suffers from an advanced case of multiple sclerosis, is unable to walk, and has been confined to a wheelchair for the past several years.").

74. Rose French, *Death Row Inmate Says No Reason to Retry Him—Could Go Free if Tenn. Doesn't Pursue Case*, MEMPHIS COM. APPEAL, Apr. 17, 2008, at B7, available at 2008 WLNR 7157135.

know they are actually innocent, many lack the evidence to prove their innocence to others, making it difficult to distinguish them from the convicts and prisoners who falsely claim innocence.<sup>75</sup>

People seek to prove innocence in several ways, including through an alibi defense, a theory of third-party guilt, or an argument that no crime took place. Claims of innocence can be made at different stages during the criminal process, including during an investigation, as a defense theory at trial, or as a legal claim during post-conviction appeals.

Furthermore, although some commentators casually refer to DNA testing as potentially “conclusive” of innocence or guilt, evidence typically cannot be conclusive of innocence or guilt.<sup>76</sup> This is because all evidence must be evaluated in light of other evidence and the elements of the crime or sentence. DNA evidence, for example, is typically probative only as to the issue of identity, which may or may not be contested in a given case.<sup>77</sup> Consequently, I suggest that any claim of innocence must be evaluated based on its strength: namely, how the particular evidence of innocence interacts with the evidence of guilt. I divide claims of innocence into three classes: (1) substantial cases, limited to those who can offer DNA or other evidence highly probative of identity; (2) outcome-determinative cases, in which DNA results, scientific evidence, or other evidence does not substantially undercut the conviction, but undermines the conviction to some lesser degree, such that a reasonable jury would not convict in light of the new evidence;<sup>78</sup> and (3) inconclusive cases, in which it is equivocal whether the evidence tends to show innocence. These categories represent points along a spectrum of the probative impact of exculpatory evidence.

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75. See Garrett, *supra* note 4, app. C at 141–42 (providing suggestive data regarding cases in which post-conviction DNA testing confirmed guilt). Further, innocent recidivist low-level offenders may not only have little incentive to pursue evidence of innocence, but they may typically accept guilty pleas rather than face pretrial detention and a possible conviction. See Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. (forthcoming 2008).

76. Cf. *House v. Bell*, 126 S. Ct. 2064, 2086 (2006) (“This is not a case of conclusive exoneration.”).

77. See *id.*; see also Anna Franceschelli, *Motions for Postconviction DNA Testing: Determining the Standard of Proof Necessary in Granting Requests*, 31 CAP. U. L. REV. 243, 245 (2003) (“DNA alone does not prove guilt or innocence, as DNA is only one piece of the evidence . . .”).

78. See *House*, 126 S. Ct. at 2078.

### 1. Substantial Claims of Innocence

The most powerfully supported innocence claims are termed “complete exonerations,” and involve cases in which new evidence of innocence is highly dispositive of identity, perhaps meeting an elevated “substantial” or “clear and convincing” evidence standard. DNA testing is currently most commonly relevant in cases involving sexual assaults committed by a single person who is a stranger to the victim.<sup>79</sup> In such cases, when DNA left by the perpetrator does not match the convict, courts can convincingly resolve the issue of the perpetrator’s identity. Such evidence is significant because identity typically is a central issue in several types of serious criminal cases with stranger-perpetrators, including rapes and murders.

DNA evidence is different from traditional evidence of identity, such as eyewitness testimony, confession testimony, and physical evidence left at the scene of a crime. While other evidence can lose reliability—the meaning of physical objects left at a crime scene may be contested, memories of witnesses may be uncertain and subject to deterioration over time, and confessions may be coerced or false—DNA evidence is “uniquely probative” and “timeless” if preserved and tested properly.<sup>80</sup> DNA testing techniques have become more discerning,<sup>81</sup> and have established the gold standard for forensic evidence generally. Unlike many other forms of forensic science, DNA “offer[s] data-based, probabilistic assessments of the meaning of evidentiary ‘matches.’”<sup>82</sup> Indeed, scientists can now determine whether one person out of billions or trillions of people (many times the number of all humans who have ever lived) could randomly

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79. As more resources have been dedicated to DNA testing, DNA has been increasingly used to exonerate or inculcate individuals in burglary cases and other less serious felonies. See, e.g., Jeff Reinitz, *DNA Database Closes Burglary Cases*, WATERLOO-CEDAR FALLS COURIER (Iowa), Apr. 5, 2007, available at 2007 WLNR 6551246.

80. See Innocence Project Brief, *supra* note 34, at 19, 2005 WL 779581, at \*13–14.

81. Cf. *id.* at 16, 2005 WL 779581, at \*12 (“[T]he probative value of DNA testing has been steadily increasing [due to] technological advances . . .” (quoting NAT’L INST. JUSTICE, U.S. DEPT OF JUSTICE, POSTCONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS (1999))).

82. See Michael J. Saks & Jonathan J. Koehler, *The Coming Paradigm Shift in Forensic Identification Science*, 309 SCIENCE 892, 893 (2005) (“DNA typing can serve as a model for the traditional forensic sciences . . .”).

match a DNA profile.<sup>83</sup> DNA testing can be performed reliably on a few dozen cells using the modern short tandem repeat (STR) method, and the science continues to advance to permit testing of smaller samples.<sup>84</sup> DNA evidence may also contain proof of its origin at the crime scene, where typical rape case samples contain a mixture of the perpetrator's semen or saliva and the victim's epithelial cells.<sup>85</sup> This is not to say that DNA testing is foolproof. Human error or misconduct can lead to unsound results or analysis. A series of DNA laboratories have been investigated for systemic errors, and at least three individuals have been wrongly convicted based on faulty DNA testing or analysis.<sup>86</sup>

More recently, DNA evidence has become important in proceedings following an individual's conviction. Post-conviction DNA testing was first used to exonerate an innocent man in 1989, clearing Gary Dotson after ten years of incarceration in Illinois.<sup>87</sup> Two hundred and sixteen innocent people have now been exonerated post-conviction.<sup>88</sup> In addition to post-conviction exonerations, many more people have been cleared by DNA results during criminal investigations and at trial.<sup>89</sup>

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83. See *Martinez v. State*, 549 So. 2d 694, 697 (Fla. Dist. Ct. App. 1989) (affirming admission of DNA testimony that one in 234 billion people shared a profile); NAT'L COMM'N ON THE FUTURE OF DNA EVIDENCE, U.S. DEP'T OF JUSTICE, THE FUTURE OF FORENSIC DNA TESTING 19 (2000) (noting that the statistical probability of a thirteen-STR-loci DNA match between two unrelated persons in the Caucasian American population has been estimated at one in 575 trillion); Edward K. Cheng, *Reenvisioning Law Through the DNA Lens*, 60 N.Y.U. ANN. SURV. AM. L. 649, 649 (2005) ("DNA evidence comes pre-packaged with all the indicia of scientific reliability: population statistics, pre-defined and pre-tested procedural standards, and known error rates.").

84. See also 4 DAVID L. FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE § 30:23, at 149, § 30:31 n.4, at 161 (2007); cf. BUTLER, *supra* note 35, at 146–48 (explaining the usefulness of the STR method with degraded DNA samples).

85. See Keith A. Findley, *New Laws Reflect the Power and Potential of DNA*, WIS. LAW., May 2002, at 20, 23.

86. See Garrett, *supra* note 4, at 84 n.109.

87. See Rob Warden, Executive Dir., Ctr. on Wrongful Convictions, Gary Dotson: The Rape That Wasn't—The First DNA Exoneration in Illinois, <http://www.law.northwestern.edu/cwc/exonerations/ilDotsonSummary.html> (last visited Apr. 26, 2008).

88. The Innocence Project, *supra* note 3.

89. See, e.g., William S. Sessions, *DNA Evidence and the Death Penalty*, JURIST, May 30, 2007, <http://jurist.law.pitt.edu/forumy/2007/05/dna-evidence-and-death-penalty.php> ("In approximately 25 percent of cases the genetic evidence recovered during an investigation does not match the DNA of the suspect.").

Such powerful showings of innocence can be made in non-DNA cases where nonscientific evidence may undercut the conviction so substantially as to make a vacatur necessary. For instance, in colonial times when people were less easy to locate, murder convictions were vacated when the supposed victim resurfaced, alive and well.<sup>90</sup> While courts often regarded new exculpatory evidence—such as recantations—with suspicion, courts have reversed convictions based on convincing presentations of such evidence.<sup>91</sup> Today, although the vast majority of prisoners lack relevant DNA from the crime scene,<sup>92</sup> they may increasingly benefit from new technology-based evidence that also contains strong indicia of reliability, such as video evidence.<sup>93</sup> Additionally, DNA evidence may result in a “partial exoneration” by demonstrating that a sentence for a crime was improper and resulting in relief just as to that aspect of the sentence.<sup>94</sup> Such partial exonerations may arise when the evi-

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90. See EDWIN M. BORCHARD, *CONVICTING THE INNOCENT*, at xviii (1932) (recounting eight examples where, after murder convictions, the victim resurfaced “hale and hearty” and in some the convict “was saved from hanging or electrocution by a hairbreadth”).

91. Examples recounted by Edwin Borchard in his pioneering book included: corroborated confessions of third parties, unusual modus operandi and a continued pattern of crimes after conviction, and corroborated confessions by accomplices who exclude the convict as a participant. See *id.* at xix.

92. See *Protecting the Innocent: Proposals to Reform the Death Penalty: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 221 (2002) (statement of Barry Scheck, Co-Director, Innocence Project) (“The vast majority (probably 80%) of felony cases do not involve biological evidence that can be subjected to DNA testing.”).

93. The Court’s decision to remand for consideration whether actual innocence should excuse procedural default in *Schlup v. Delo*, 513 U.S. 298, 303 (1995), emphasized the probative power of video evidence. The Court’s decision last Term in *Scott v. Harris*, 127 S. Ct. 1769, 1776 (2007), similarly emphasized, in the civil rights context, the probative power of video evidence. With video surveillance increasing, as well as the fact that video cameras are increasingly incorporated into cell phones and PDA’s, video may provide a more important source for alibi evidence in the future. Other electronic evidence may provide a similar degree of certainty. For example, an electronic signature from an ATM machine or a credit card with a signature may show a person’s physical location.

94. Those cases may not often arise because disproving identity will typically exonerate and will not merely result in a sentence reduction. Further, challenging a capital sentence—even with evidence of innocence—is very difficult under current law. For example, if a capital habeas petitioner procedurally defaults on a claim, the Court requires a “clear and convincing” showing that both the elements of the crime and the aggravating factors would not have been found but for an underlying constitutional violation. See *Sawyer v.*

dence exonerates an individual of a crime that served as a predicate crime, or that constituted a sentence-enhancing prior conviction.<sup>95</sup>

## 2. Outcome-Determinative Claims of Innocence

In a second category of cases, new evidence of innocence does not substantially disprove identity or elements of the conviction or sentence. Nevertheless, it undermines the conviction more generally, and under an outcome-based standard, to such a degree that no new jury would reasonably convict. In *House*, DNA testing negated a significant piece of forensic evidence that linked House to the murder, and it undermined any evidence that the motive was rape, which was one of the aggravating factors supporting the death sentence.<sup>96</sup> The Court employed a “holistic judgment”—an evaluation of the evidence in the context of the entire criminal record—to determine whether a new jury would still convict.<sup>97</sup> Thus, under this approach, DNA results that exclude an individual may not demonstrate lack of identity, but it may show that key facts introduced at trial, and likely to have powerfully affected the jury’s decision, were false.<sup>98</sup>

## 3. Indeterminate Cases

Toward the other end of the spectrum, new evidence of innocence can have so little exculpatory power as to be inconclusive. DNA test results can be inconclusive if insufficient biological material remained, or if what remained was degraded. Furthermore, where it is unclear if the perpetrator actually left biological evidence at the crime scene, DNA may not be probative of identity. In many cases, the defendant did not dispute

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Whitley, 505 U.S. 333, 349–50 (1992). Several circuits extended the Court’s rulings to noncapital sentencing, in the context of a showing of innocence to excuse a procedural default. See Matthew Mattingly, Note, *Actually Less Guilty: The Extension of the Actual Innocence Exception to the Sentencing Phase of Non-Capital Cases*, 93 KY. L.J. 531, 531 (2004–2005).

95. Cf., e.g., *Dretke v. Haley*, 541 U.S. 386, 393–94 (2004).

96. See *House v. Bell*, 126 S. Ct. 2064, 2078–79 (2006).

97. See *id.* at 2078 (quoting *Schlup*, 513 U.S. at 328).

98. The situation when the jury heard facts that were false increasingly confronts courts. The Innocence Project argued to the Supreme Court that “DNA has revealed a finite but troubling class of convictions tainted by what is best described as ‘false facts.’” Innocence Project Brief, *supra* note 34, at 3, 2005 WL 779581, at \*3.

identity at trial, but rather raised a justification defense such as self-defense or consent, and if identity cannot be credibly disputed, the new DNA evidence might not significantly undercut the State's case.<sup>99</sup> Additionally, DNA testing may be indeterminate if the test results match co-perpetrators.

The vast majority of claims of innocence fall into this third category. Courts struggle with claims of new evidence of innocence, particularly those that depend on less reliable forms of evidence.<sup>100</sup> Thus, for instance, since a witness's memory may become less trustworthy with the passage of time, courts have ruled that even where the conviction rested on a single witness, that individual's recantation cannot support a vacatur.<sup>101</sup> Along the way to that outcome, however, hard questions occur at the borderlines between substantial, outcome-determinative, and inconclusive cases. Many courts adopt opaque reasoning on such complex matters that fails to focus on the probative power of such evidence. To explore this conclusion, Part II considers how our existing federal and state systems evaluate innocence.

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99. See, e.g., *People v. Gholston*, 697 N.E.2d 375, 378–79 (Ill. App. Ct. 1998) (denying a motion for DNA testing on the basis that such testing could not exculpate where the defendant was found guilty of committing a sexual assault of a woman with accomplices, there was no evidence he ejaculated, and where he was also found guilty of a robbery and battery of two male victims). DNA evidence may also support a self-defense or consent theory.

100. Michael Risinger argues for a more “radical” approach: that showings of innocence that could not satisfy an actual innocence claim should nevertheless be credited by trial and appellate courts, and exploring a new category of “unsafe” verdicts. D. Michael Risinger, *Unsafe Verdicts: The Need for Reformed Standards for the Trial and Review of Factual Innocence Claims*, 41 HOUS. L. REV. 1281, 1334–36 (2004).

101. See Paul von Zielbauer, *Accusers Recant, but Hopes Still Fade in Sing Sing*, N.Y. TIMES, Apr. 13, 2007, at A1 (describing a case in which courts rejected appeals where the only evidence of guilt, five eyewitnesses, all recanted their testimony, citing “the prevailing wisdom of the American justice system, which views recantations as untrustworthy, acts not of conscience, but of sympathy or bribery or coercion”); see also *Dobbert v. Wainwright*, 468 U.S. 1231, 1233 (1984) (Brennan, J., dissenting from denial of application for stay of execution) (“Recantation testimony is properly viewed with great suspicion.”); *People v. Shilitano*, 112 N.E. 733, 736 (N.Y. 1916) (“There is no form of proof so unreliable as recanting testimony. In the popular mind it is often regarded as of great importance. Those experienced in the administration of the criminal law know well its untrustworthy character.”); Janice J. Repka, Comment, *Rethinking the Standard for New Trial Motions Based upon Recantations as Newly Discovered Evidence*, 134 U. PA. L. REV. 1433, 1434–35 (1986); Daniel Wolf, Note, *I Cannot Tell a Lie: The Standard for New Trial in False Testimony Cases*, 83 MICH. L. REV. 1925, 1928 (1985).



## II. INNOCENCE AND LEGAL CHANGE

This Part explores the effect of DNA testing on the criminal system. DNA testing, by providing compelling resolution of identity, has reshaped the criminal system. Nevertheless, the system fails to simply examine the probative impact of new evidence of innocence. At each stage of the criminal process different rules apply, but during each stage scientific proof of identity—particularly DNA evidence—has created a new regime increasingly focused on claims of innocence. That regime, however, remains tied to an old world in which strict barriers obstruct the path to freedom of an innocent convict. Part II.A begins by discussing the transformative effect of DNA-testing technology on criminal investigations. Next, Part II.B discusses how claims of innocence are litigated during criminal trials. Part II.C discusses state appeals and post-conviction review, including the profusion of statutes that now provide for access to post-conviction DNA testing. Finally, Part II.D discusses innocence in the context of federal habeas corpus, in which there is no freestanding constitutional innocence claim, but where innocence and access to DNA is increasingly litigated.

## A. CRIMINAL INVESTIGATIONS

DNA changed the nature of criminal investigations in a range of cases by making it possible to exculpate or inculpate suspects. Typically, law enforcement investigates evidence of innocence, such as alibi evidence or evidence of a third party's guilt, to assess the reliability of its cases. Police are also trained to test the memory of witnesses using identification procedures like lineups; similarly, during interrogations they test the suspect's account against crime-scene details.<sup>102</sup> Such investigative techniques are not foolproof, but they aim for accuracy, and criminal procedure rules prohibit methods with high risks of error, such as coercive interrogations.<sup>103</sup>

By quickly providing dispositive evidence as to identity, DNA testing changes the investigative process, especially in stranger-rape cases. For example, in Virginia, DNA analysis

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102. See, e.g., *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977); Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 438 (1998).

103. See, e.g., *Schneckloth v. Bustamonte*, 412 U.S. 218, 223, 226 (1973).

eliminates twenty-five to thirty percent of suspects in police investigations.<sup>104</sup> Nationally, early in the DNA era when local police sent samples to the FBI for testing, about twenty-five percent of primary suspects were excluded.<sup>105</sup> In the twenty-five percent of cases where testing excludes prime suspects, presumably the prime suspect was identified through some other method, such as eyewitness identification or interrogation. Therefore, DNA may not only call into question traditional investigatory methods and shed light on particular erroneous investigations, but the availability of DNA may more broadly change the way that police investigate cases. For example, law enforcement may prioritize cases in which DNA testing can be conducted.<sup>106</sup> In other cases, law enforcement may use DNA as a tool to enhance other investigative techniques, such as interrogation. Police, for example, may falsely tell a suspect that his DNA matches during interrogation to elicit a confession.<sup>107</sup>

Moreover, DNA inculcates large numbers of suspects, some of whom otherwise would never have been located.<sup>108</sup> The modern national DNA databank system, Combined DNA Index System (CODIS), arose from federal legislation<sup>109</sup> and pools fifty state databanks with the federal databank created by the FBI

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104. See *All Things Considered: DNA Gathering* (NPR radio broadcast July 27, 2000).

105. See Barry C. Scheck, *Barry Scheck Lectures on Wrongful Convictions*, 54 *DRAKE L. REV.* 597, 601 (2006); see also EDWARD CONNORS ET AL., U.S. DEPT OF JUSTICE, *CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL*, at xxviii (1996). That twenty-five percent figure for FBI exclusions still holds true. See Sessions, *supra* note 89.

106. See, e.g., David Kocieniewski, *With Witnesses at Risk, Murder Suspects Go Free*, N.Y. TIMES, Mar. 1, 2007, at A1 (“[T]he New Jersey’s Essex County prosecutor has established an unwritten rule discouraging pursuit of cases that rely on a single witness, and those in which witness statements are not extensively corroborated by forensic evidence.”).

107. See *State v. Chirokovskic*, 860 A.2d 986, 988–89 (N.J. Super. Ct. App. Div. 2004).

108. Indeed, DNA has helped not only to catch serial rapists, but has linked together crimes that police, when relying on traditional evidence, had thought to be unrelated. Cf. *ADVANCED JUSTICE THROUGH DNA TECHNOLOGY* 1–4 (2003), [http://www.whitehouse.gov/infocus/justice/dna\\_initiative\\_policy\\_book.pdf](http://www.whitehouse.gov/infocus/justice/dna_initiative_policy_book.pdf) (discussing examples where DNA aided law enforcement).

109. DNA Identification Act of 1994, Pub. L. No. 103-322, §§ 210301–210306, 108 Stat. 1796, 2065–71 (codified in scattered sections of 42 U.S.C.).

in 1990.<sup>110</sup> These databanks contain over three million profiles, and their size continues to expand, particularly since all fifty states and the federal government enacted laws permitting collection of DNA from those convicted of serious felonies.<sup>111</sup> The federal government and twelve states collect DNA profiles from detainees and arrestees who are never charged, and additional states are considering similar expansions.<sup>112</sup>

As a result of this information, DNA evidence that exculpates the convict can also inculcate a new individual. For example, more than one-third of the first two hundred post-conviction DNA exonerations resulted in the inculcation of the actual perpetrator, with most of these matches the result of a “cold hit” in a DNA databank.<sup>113</sup> The availability of such powerful evidence of guilt has also resulted in legal changes to make new prosecutions possible. This evolution began when prosecutors evaded the statute of limitations by using “John Doe DNA indictments,” in which they indicted the DNA profile itself.<sup>114</sup> Several states have recently passed laws that relax statutes of limitations in DNA cases to permit such prosecutions.<sup>115</sup> Thus,

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110. Cf. Fed. Bureau of Investigation, Dep’t of Justice, CODIS: Combined DNA Index System 2 (2007), available at <http://www.fbi.gov/hq/lab/pdf/codisbrochure2.pdf> (“Today, over 170 public law enforcement laboratories participate in [a National DNA Index System] across the United States.”).

111. See 42 U.S.C. § 14132(a)(1) (Supp. V 2007); Michelle Hibbert, *DNA Databanks: Law Enforcement’s Greatest Surveillance Tool?*, 34 WAKE FOREST L. REV. 767, 774–75 (1999).

112. See, e.g., LA. REV. STAT. ANN. § 15:609 (Supp. 2008); TEX. GOV’T CODE ANN. § 411.1471 (Vernon Supp. 2007); VA. CODE ANN. § 19.2-310.2:1 (Supp. 2007); see also Kevin Johnson, *States Expand Taking of DNA*, USA TODAY, April 14, 2008 at 1A, available at 2008 WLNR 6945263 (noting that twelve states now “permit sampling for some or all felony arrests, up from five in 2006” and that “[a]nother 21 are considering such proposals”); Julia Preston, *U.S. Set to Begin a Vast Expansion of DNA Sampling*, N.Y. TIMES, Feb. 5, 2007, at A1 (“Federal Bureau of Investigation officials said they anticipated an increase ranging from 250,000 to as many as 1 million samples a year. The laboratory currently receives about 96,000 samples a year . . .”).

113. See Garrett, *supra* note 4, at 119.

114. For statutes extending the statute of limitations in sexual assault cases, see, for example, ARK. CODE ANN. § 5-1-109(b)(1)(B) (2006), CONN. GEN. STAT. § 54-193b (2007), FLA. STAT. § 775.15 (15) (2007), and GA. CODE ANN. § 17-3-1(c.1) (2004). For states extending the statute of limitations for all crimes, see, for example, ARK. CODE ANN. § 5-1-109(i)–(j) (2006), DEL. CODE ANN. tit. 11, § 3107(a) (2007), and N.J. STAT. ANN. § 2C:1-6(c) (West 2005).

115. See Meredith A. Bieber, Comment, *Meeting the Statute or Beating It: Using “John Doe” Indictments Based on DNA to Meet the Statute of Limitations*, 150 U. PA. L. REV. 1079, 1079 n.1 (2002). Interestingly, Arkansas opens

in addition to changing investigative techniques, DNA has affected rules of finality for prosecution.

#### B. CRIMINAL TRIALS

Although law enforcement has strong incentives to pursue DNA evidence of guilt, the same incentives do not exist to pursue DNA evidence of innocence. Further, our criminal procedure rules do not yet sufficiently ensure full access at trial to this most powerful evidence of innocence. Due process rules should be understood to provide complete access to DNA and other evidence of innocence at trial. Wrongful convictions will persist, however, unless courts ensure that evidence of innocence is fully disclosed at the time of trial.

Innocence is typically claimed in two ways at trial: through an alibi defense or through evidence of third-party guilt. Alibi defenses traditionally involve calling witnesses to testify that the defendant was not at the scene of the crime. In contrast, claims pointing to third-party guilt typically involve highlighting evidence that suggests another, possibly unknown, individual committed the crime. These claims have not received much judicial or scholarly attention, but have long played an important role in criminal proceedings.<sup>116</sup> Indeed, in my *Judging Innocence* study, four out of eighteen reversals obtained by the exonerees were due to appellate or post-conviction courts reversing based on the trial court's improper exclusion or the State's suppression of evidence of third-party guilt.<sup>117</sup> Importantly, while states have long adhered to much-criticized rules that limit the ability to present evidence of third-party guilt at trial, the Supreme Court recently reaffirmed that due process entitles a defendant to present a theory of third-party guilt, at least in the face of overly restrictive state rules.<sup>118</sup>

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its statute to extension not just in DNA cases, but expecting other advances, to any "test that may become available through an advance in technology." ARK. CODE ANN. § 5-1-109(b)(1)(B) (providing such an extension only for rape cases).

116. See, e.g., Stephen Michael Everhart, *Putting a Burden of Production on the Defendant Before Admitting Evidence That Someone Else Committed the Crime Charged: Is It Constitutional?*, 76 NEB. L. REV. 272 (1997); Brett C. Powell, Comment, *Perry Mason Meets the "Legitimate Tendency" Standard of Admissibility (and Doesn't Like What He Sees)*, 55 U. MIAMI L. REV. 1023 (2001).

117. See Garrett, *supra* note 4, at 104.

118. See *Holmes v. South Carolina*, 126 S. Ct. 1727, 1735 (2006) (holding

In addition to alibi and third-party-guilt evidence of innocence, DNA evidence also may take on a central role in a criminal trial: DNA evidence is now admissible at trial in all states.<sup>119</sup> Law enforcement has strong incentives to conduct DNA testing before trial to prove guilt. Courts have held that uncorroborated inculpatory DNA tests, standing alone, suffice to prove guilt.<sup>120</sup> Thus, in cases in which identity is the primary issue, cases with DNA inculpatory tests typically result in guilty pleas, while those with DNA exclusions may often lead the prosecutor to drop the case. Additionally, DNA test results can bolster an alibi by showing lack of identity, and a “cold hit” in a DNA databank can provide powerful evidence of third-party guilt.

Commentators have observed that “[t]hese days, DNA testing is common on the front end of prosecutions, meaning that in a few years, the window that the 200 exonerations has opened on the justice system will close.”<sup>121</sup> Though DNA testing is now routine before trials, that window may close more slowly than many have supposed. Of the 211 post-conviction DNA exonerations from 1989 through the end of 2007, more than one-fourth, fifty-five individuals, were convicted even though DNA testing was available at the time of their trials.<sup>122</sup>

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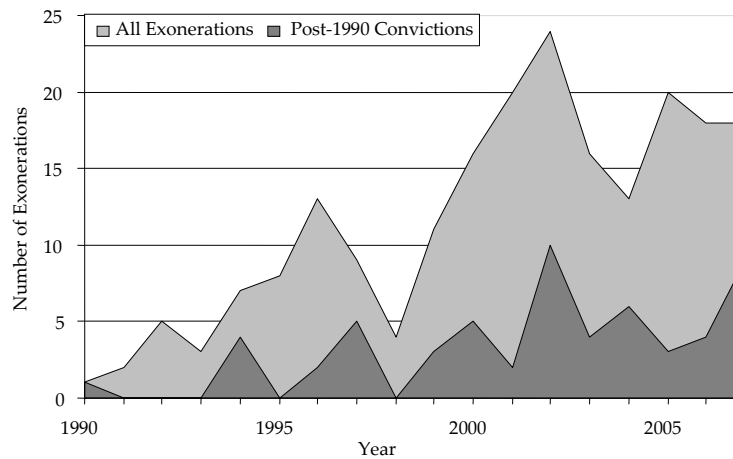
that a court may not exclude probative evidence of third-party guilt based on the strength of the state’s case). For an invaluable set of criticisms of the “direct connection” doctrine, as well as a discussion of the manner in which Federal Rule of Evidence 804 and similar state rules “uniquely disfavor[] statements . . . offered by a defendant in a criminal case to show that someone else might have committed the crime,” see Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 343–46. The direct-connection doctrine “limits admissibility to evidence that not only has a ‘tendency’ to make the defendant’s guilt ‘less probable,’ but that also has a ‘direct connection’ to the crime.” *Id.*

119. See NAT’L COMM’N ON THE FUTURE OF DNA EVIDENCE, *supra* note 83, at 24; Thomas M. Fleming, Annotation, *Admissibility of DNA Identification Evidence*, 84 A.L.R.4TH 313 (1991).

120. As a New York court put it, “the testimony of even one DNA expert that there is a genetic match . . . is legally sufficient to support a guilty verdict.” See *People v. Rush*, 630 N.Y.S.2d 631, 634 (Sup. Ct. 1995), *aff’d*, 672 N.Y.S.2d 362 (App. Div. 1998).

121. Adam Liptak, *Study of Wrongful Convictions Raises Questions Beyond DNA*, N.Y. TIMES, July 23, 2007, at A1 (describing the results of Garrett, *supra* note 4).

122. DNA was first used in a post-conviction case in 1989 in the United States. See Garrett, *supra* note 4, at 57.

**Figure 1. Annual DNA Exonerations and DNA-Era Convictions<sup>123</sup>**

As Figure 1 shows, the annual rate of DNA exonerations increased over time (with variation from year to year). However, the graph also shows a persistent proportion of DNA exonerations of people convicted in the DNA era. Moreover, this proportion has a gradual, though uneven, rise.<sup>124</sup> This suggests that exonerations will not readily disappear despite the increased use of DNA testing during criminal investigations. A range of reasons explain why these individuals were convicted, notwithstanding the availability of DNA testing at trial; these findings are summarized in Table 1, below.

123. The data compiled reflecting the number of DNA exonerees in each year and the year of conviction can also be viewed on the Innocence Project's website, which displays that information in a chart. See The Innocence Project, Know the Cases: Browse the Profiles, <http://www.innocenceproject.org/know/Browse-Profiles.php> (last visited Apr. 26, 2008).

124. Of the five exonerations that have occurred so far in 2008, three, those of Ronald Gene Taylor, Kennedy Brewer, and Nathaniel Hatchett, involved post-1990 convictions. See *id.*

**Table 1. Convictions of the Innocent in the DNA Era (1990–2007)<sup>125</sup>**

Reason Why DNA Testing Did Not Exonerate at the Time of Trial	Number	Percent (of the 55 DNA Era Exonerees)
DNA technology advanced beyond that available at the time of trial	21	38
Found guilty despite DNA testing that excluded	12	22
State forensic experts concealed or misrepresented DNA evidence	10	18
Attorney failed to request DNA	13	24
Court denied DNA request	5	9

The reasons for ongoing convictions of the innocent in the DNA era include: advances in DNA technology, conviction despite DNA exclusion, forensic fraud or error, attorney ineffectiveness, or court denial of a DNA testing request. For some exonerees, more than one reason applied. Each of these reasons suggests why wrongful convictions will still occur unless our system recognizes that due process requires meaningful access to evidence of innocence at the time of trial.

#### 1. Improvements in DNA Technology

Twenty-one of the exonerees were convicted in the DNA era because DNA technology at the time was too primitive to exonerate the individual.<sup>126</sup> Early Restriction Fragment Length Polymorphism (RFLP) testing permitted results only where fairly large quantities of biological material were available for testing.<sup>127</sup> Polymerase Chain Reaction (PCR) testing, which became widely available in the early 1990s, provided an advance

125. Information regarding the reasons why DNA testing was or was not conducted at trial was compiled from available news reports and in several instances, from discussions with counsel. For several exonerees, more than one reason was implicated. *See* Brandon L. Garrett, Database: Post-DNA Exonerations (on file with author).

126. The exonerees are R. Alexander, A. Beaver, R. Brown, A. Coco, S. Cowans, R. Criner, R. Danziger, A. Dominguez, W. Gregory, C. Heins, P. Kordonowy, R. Krone, M. Mercer, N. Miller, M. Mitchell, J. O'Donnell, A. Powell, P. Rose, F. Saecker, D. Warney, and K. Wyniemko. *See id.*

127. *See* BUTLER, *supra* note 35, at 33–35.

in DNA testing by permitting testing of more minute pieces of evidence.<sup>128</sup> Short tandem repeat (STR) testing, first conducted in 1991 but not widely adopted until the mid-to-late 1990s, permitted amplification of DNA, as well as examination of short fragments of DNA that are more likely to be preserved.<sup>129</sup> These improvements in technology were one reason why the annual rate of DNA exonerations sharply increased in the mid-to-late 1990s.<sup>130</sup> Additional advances that enabled new exonerations included the advent in the late 1990s of mitochondrial DNA testing, which is useful for the testing of hair, and of Y-STR testing in 2003, which permits testing on the Y chromosome.<sup>131</sup> Assuming that genetic science and technology continue to improve, innocence claims will continue to be important, particularly as the cost of testing falls and the speed of testing increases.

Related to improvements in technology, the expansion of DNA databanks provided an important source for evidence of third-party guilt, creating the possibility of a cold hit—a match in a DNA database—with the perpetrator. Almost one-fourth of the first two hundred post-conviction DNA exonerations involved such a cold hit.<sup>132</sup> Strikingly, in several cases, even after DNA excluded a convict, the State did not concede innocence until a cold hit occurred.<sup>133</sup> Since databanks continually grow in size, the likelihood that a cold hit will occur continues to grow. As these databases continue to expand, an important, unresolved constitutional question is whether *Brady v. Maryland* entitles a defendant to obtain potentially exculpatory discovery from a database search conducted on DNA found at a

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128. *Id.*

129. *See id.* at 11 (providing a timeline of advances in DNA technology).

130. *See supra* fig.1.

131. *See generally* BUTLER, *supra* note 35, at 201–98 (providing helpful background information about these types of testing). For example, Wilton Dedge's exoneration in 2004 rested on mitochondrial and Y-STR testing, The Innocence Project, Know the Cases: Wilton Dedge, <http://www.innocenceproject.org/Content/84.php> (last visited Apr. 26, 2008), and James Waller's exoneration also rested on Y-STR testing, The Innocence Project, Know the Cases: James Waller, <http://www.innocenceproject.org/Content/439.php> (last visited Apr. 26, 2008).

132. *See* Garrett, *supra* note 4, at 119.

133. The case of Douglas Warney provides an example, *see* Innocence Project, Know the Cases: Douglas Warney, <http://www.innocenceproject.org/Content/281.php> (last visited Apr. 26, 2008), as do the twelve cases discussed *infra* note 403.



crime scene.<sup>134</sup> While several states limit post-conviction DNA testing to cases involving improvements in DNA technology, few provide access to testing where databank searches may locate the perpetrator. Illinois and Ohio explicitly provide a statutory right to a CODIS DNA databank search at the post-conviction stage, while a few states have statutory rights to a CODIS search at the time of trial.<sup>135</sup> The *Brady* due process rule should be understood to ensure a defendant's access to such powerful evidence of third-party guilt both at the time of trial and at the post-conviction stage.

## 2. Conviction Despite DNA Exclusion at Trial

Over twenty percent of these exonerees convicted in the DNA era, or twelve individuals convicted during the time period discussed, were found guilty despite the existence of exclusionary DNA testing at the time of their criminal trials.<sup>136</sup> In each case, the prosecution had a theory to explain the DNA exclusion. All twelve of these convictions were vacated only upon the occurrence of a cold hit in the CODIS database or a DNA match with a subsequently identified suspect.<sup>137</sup>

## 3. Forensic Evidence Concealed or Misrepresented

Eighteen percent of these exonerees, or ten individuals, were exonerated because state crime laboratories failed to conduct DNA testing despite its availability, including because potentially exculpatory DNA evidence was concealed or improper-

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134. See *Brady v. Maryland*, 373 U.S. 83 (1963). Federal DNA statutes are premised in part on a recognition that “[i]t is crucial for defendants to have access to the CODIS system in circumstances that possibly establish innocence.” *United States v. Reynard*, 220 F. Supp. 2d 1142, 1168 (S.D. Cal. 2002) (quoting 146 CONG. REC. H8578 (daily ed. Oct. 2, 2000) (statement of Rep. Jackson-Lee)), *aff’d*, 473 F.3d 1008 (9th Cir. 2007); see also H.R. REP. NO. 106-900, pt. 1, at 10 (2000), as reprinted in 2000 U.S.C.C.A.N. 2323, 2325 (discussing a backlog of DNA samples in crime labs and commenting that “the current inadequacies of the system . . . endanger the innocent”).

135. See 725 ILL. COMP. STAT. 5/116-5 (2006); OHIO REV. CODE ANN. § 2953.74(A)–(B) (LexisNexis Supp. 2007). For statutes permitting a CODIS search before trial, see, for example, N.C. GEN. STAT. § 15A-267(c) (2007).

136. The cases are those of J. Deskovic, C. Elkins, T. Hayes, E. Karage, R. Krone, R. Matthews, A. McCray, J. Ochoa, K. Richardson, R. Santana, Y. Sa-laam, and K. Wise. Krone was retried and found guilty and sentenced to life in prison despite DNA testing conducted before his second trial. See Garrett, *supra* note 125.

137. See, e.g., *People v. Wise*, 752 N.Y.S.2d 837 (Sup. Ct. 2002).

ly reported as inculpatory, or because results were fabricated by the state forensic experts.<sup>138</sup> Such cases highlight the need for courts to ensure complete disclosure of laboratory notes and reports related to the testing of DNA and other biological material.<sup>139</sup> These categories of cases do not include the far more substantial number of cases involving improper use of non-DNA forensic analysis in exoneration cases, such as serology or microscopic hair comparison.<sup>140</sup> Moreover, a series of corruption scandals at major forensic laboratories has recently resulted in exoneration. As a result, several state laboratories have begun conducting unprecedented audits and retesting thousands of old cases to uncover flawed forensic testing at trial.<sup>141</sup> As a re-

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138. The cases are those of G. Alejandro, T. Durham, H. Gonzalez, A. Gossett, D. Holland, M. Pendleton, M. Mercer, J. Sutton, A. Villasana, and J. Willis. See Garrett, *supra* note 125. Michael Mercer's case is included here, but presents close and unresolved issues based on news reports. In that case, "[a] serologist told both juries that an analysis of slides taken for a rape kit had revealed no evidence of sperm," and, as a result, DNA testing was denied on appeal. Robert D. McFadden, *DNA Clears Rape Convict After 12 Years*, N.Y. TIMES, May 20, 2003, at B1. However, it is possible that a serologist using proper methods would not detect any evidence of sperm, and that it was the appellate court that improperly denied access to more sophisticated DNA testing. An additional case, that of Ronald Taylor, is a 2008 exoneration. See The Innocence Project, *DNA Testing Proves That Houston Man Was Wrongfully Convicted of Rape in 1995; Case Highlights Serious HPD Crime Lab Problems*, Oct. 3, 2007, <http://www.innocenceproject.org/Content/915.php>.

139. See Garrett, *supra* note 4, at 84.

140. The use of forensic science in the criminal trials of DNA exonerees is the subject of a work in progress finding improper forensic science testimony by State analysts to have been pervasive in exonerees' trials. See Brandon L. Garrett & Peter J. Neufeld, *Improper Forensic Science and Wrongful Convictions*, 95 VA. L. REV. (forthcoming 2009).

141. For example, the Virginia lab has begun retesting years after the Governor ordered an audit. After assembling thousands of files to test, the laboratory estimated that thirty exoneration might result. This estimate may be quite conservative when two of the first thirty tested were exonerated. See Frank Green, *State's DNA Project Is Slow Going*, RICH. TIMES-DISPATCH (Va.), Aug. 26, 2007, at A1 (describing the limited progress of a Virginia retesting project); *Maryland Police Reviewing 480 DNA Cases*, N.Y. TIMES, Mar. 12, 2003, available at 2003 WLNR 5247183 ("Baltimore County police are reviewing 480 cases worked on by a former department chemist who testified at a 1983 rape trial against a defendant who was later exonerated."); Candace Rondeaux, *Virginia DNA Review Hobbled*, N.Y. TIMES, Dec. 27, 2006, at B1 (quoting the Virginia's state crime laboratory director admitting "[w]e could see as many as 30 possible exoneration when this is all over with"); Robert Tanner, *State Efforts to Check Crime Lab Work Stall Minnesota and Two Other States Find Their New Forensics Oversight Boards Are Thwarted by Politics and Funding*, ST. PAUL PIONEER PRESS (Minn.), Mar. 25, 2007, available at

sult, we can expect additional DNA exonerations in the near future. In the interim, the focus of post-conviction DNA exonerations may change from uncovering the unreliability of traditional forensic sciences, such as hair comparison and blood serology, to uncovering human failures or fraud in DNA laboratories. Paradoxically, DNA laboratories are currently far more carefully regulated than those performing other forensic techniques.<sup>142</sup>

The Supreme Court has held that prosecutors violate due process if they knowingly introduce perjured testimony at trial.<sup>143</sup> If, however, prosecutors merely conceal evidence of innocence, including DNA test results, the defense may never learn of a fabrication, even though the *Brady* rule requires that prosecutors disclose and turn over to the defense all of the potentially exculpatory evidence in the State's control.<sup>144</sup> Recognizing this problem, the District of Columbia passed a statute requiring the prosecutor to disclose in open court the existence of any "physical evidence seized or recovered" during an investigation "which may contain biological material," and any DNA test results.<sup>145</sup> The statute also offers the opportunity for the defense to request or waive DNA testing.<sup>146</sup> As this statute recognizes, the *Brady* mandate is particularly important in the DNA context: as one court put it, "Given the well-known powerful exculpatory effect of DNA testing, confidence in the jury's finding of

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2007 WLNR 5946827 (describing how state forensic review commissions in Minnesota, Texas, and Virginia have yet to reopen a case due to lack of funding or a flat refusal to do so). Private laboratories have also had fabrication scandals. See, e.g., Laura Cadiz, *Md.-Based DNA Lab Fires Analyst over Falsified Tests*, BALT. SUN, Nov. 18, 2004, at A1 (describing the firing of an analyst engaging in fabrication at the prominent Orchid Cellmark laboratory).

142. All public DNA laboratories are now required to be accredited and to undergo external audits at least every two years, based on the requirements of the 2004 Justice for All Act. 42 U.S.C. § 14132(b)(2) (Supp. V 2007); Paul C. Giannelli, *Wrongful Convictions and Forensic Science: The Need to Regulate Crime Labs*, 86 N.C. L. REV. 163, 210 & n.339 (2007).

143. See *Pyle v. Kansas*, 317 U.S. 213, 216 (1942); *Mooney v. Hollohan*, 294 U.S. 103, 112 (1935).

144. *Brady v. Maryland*, 373 U.S. 83, 86–87 (1963). Although *Brady* noted that this duty existed upon request from the defense, the Supreme Court later clarified that the duty existed with a specific request, general request, or no request at all. *United States v. Agurs*, 427 U.S. 97, 107 (1976).

145. D.C. CODE § 22-4132 (Supp. 2007).

146. *Id.*

plaintiff's guilt at his past trial, where such evidence was not considered, would be undermined."<sup>147</sup>

Yet, because courts do not understand how the uniquely probative nature of DNA evidence can alter the *Brady* analysis, they fail to properly apply the *Brady* rule. Courts are divided, with some granting and some denying relief for the concealment of biological material in the original trial. The cases of Dale Brison and Darryl Hunt starkly illustrate the contrasting approaches courts have taken. In Dale Brison's case, the state court ordered DNA testing, finding that a failure to do so would violate *Brady*.<sup>148</sup> In contrast, the Fourth Circuit ruled that Darryl Hunt could not make a *Brady* claim when the State's attorney falsely told his lawyer at the time of trial that the biological material was "too degraded to be tested," even after initial DNA testing excluded Hunt.<sup>149</sup> Instead, the court held Hunt's lawyer "had equal access to the fluid samples, and thus he was under an independent duty to pursue testing alternatives."<sup>150</sup> Thus, even in cases involving exonerees, courts dismiss claims regarding the State's concealment of crucial biological evidence that would have undermined the State's case. As these cases demonstrate, current constitutional rules like *Brady* do not adequately ensure the availability or reliability of DNA testing, despite its newfound importance in criminal trials.

#### 4. Trial Counsel Failure to Request DNA Testing

More than one-fifth of the exonerees, or thirteen individuals, did not receive DNA testing at trial because defense attorneys failed to request it.<sup>151</sup> Of those thirteen exonerees, only three later brought a *Strickland* claim alleging constitutionally ineffective counsel.<sup>152</sup> One of the three exonerees, Brian

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147. *Godschalk v. Montgomery County Dist. Attorney's Office*, 177 F. Supp. 2d 366, 370 (E.D. Pa. 2001); *see also In re Brown*, 952 P.2d 715 (Cal. 1998) (noting a prosecutor's duty to turn over suppressed drug test results).

148. *Commonwealth v. Brison*, 618 A.2d 420, 424–25 (Pa. Super. Ct. 1992) (remanding for DNA testing, finding that DNA evidence was exculpatory evidence that should have been disclosed under *Brady*).

149. *Hunt v. McDade*, No. 98-6808, 2000 WL 219755, at \*4 (4th Cir. Feb. 25, 2000).

150. *Id.*

151. *See supra* tbl.1.

152. Anthony Hicks also brought such a claim, but only after the DNA testing had already exonerated him, and thus he received a reversal. *See infra* notes 162–63, 320 and accompanying text.

Piszczek, lost his claim in the Ohio state appellate court, which ruled that the DNA testing would not have helped his defense given the victim's apparently reliable identification of him as the perpetrator.<sup>153</sup> Similarly, in the case of Josiah Sutton, a state appellate court ruled that the trial lawyer "(1) [] informed appellant's family he would need more money for the analysis to be performed but they failed to pay it; and (2) there were no unadulterated samples left for independent analysis."<sup>154</sup> The Court added that "appellate counsel d[id] not produce any evidence of independent DNA analysis that would vindicate appellant."<sup>155</sup> The case of Mark Bravo was slightly different, because his attorneys claimed to have requested DNA before trial.<sup>156</sup> The prosecutors, however, denied receiving any request and the trial court denied a defense request for a continuance to send the evidence to a laboratory in Maryland.<sup>157</sup> Nevertheless, the appellate court found no prejudice, on the theory that "[t]he tests may not have been possible or if possible, the results might have been inculpatory."<sup>158</sup> A dissenter argued that DNA testing should be permitted because it might prove Bravo's innocence, which ultimately occurred.<sup>159</sup>

In this complex catch-22 lies what Seth Kreimer and David Rudovsky have called the "double helix, double bind."<sup>160</sup> Although courts may cite defense counsel's independent obligation to request DNA testing in support of their refusal to remedy the prosecution's failure to accurately disclose the nature of biological evidence, defense counsel's failure to request the DNA testing may not result in relief for the innocent appellant. This is especially true since, under the deferential *Strickland* inquiry, "a particular decision not to investigate must be direct-

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153. State v. Piszczek, No. 62203, 1993 WL 106966, at \*3 (Ohio Ct. App. Apr. 8, 1993).

154. Sutton v. State, No. 14-99-00951-CR, 2001 WL 40349, at \*2 (Tex. App. Jan. 18, 2001).

155. *Id.*

156. People v. Bravo, 23 Cal. Rptr. 2d 48, 52 (Ct. App. 1993).

157. *Id.*

158. *Id.*

159. See *id.* at 61 (Johnson, J., dissenting) ("[T]he DNA test for which appellant sought a continuance could supply admissible evidence which would offer compelling if not conclusive proof of his innocence.").

160. Seth F. Kreimer & David Rudovsky, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, 151 U. PA. L. REV. 547 (2002).

ly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments."<sup>161</sup> Hence, a failure to request ultimately exculpatory DNA testing might not, and frequently did not, earn relief on appeal. The lone exception among the exonerees was Anthony Hicks, who succeeded on a *Strickland* claim since, although his attorney "knew that the root tissue of hair specimens could be subject to DNA testing . . . [h]e did not discuss this with his client or with the district attorney, or petition the court to have this test performed or do anything to pursue such testing."<sup>162</sup> The Wisconsin Supreme Court found ineffective assistance of counsel—but only after DNA testing had already excluded Hicks.<sup>163</sup>

While courts denying *Brady* claims seem to place the burden on defense lawyers to obtain DNA evidence, defense lawyers may have difficulty evaluating the State's forensic evidence, as indigent defendants lack a right to obtain funding for independent experts to conduct or review DNA testing. Moreover, most states do not routinely fund such assistance.<sup>164</sup> The Court's ruling in *Ake v. Oklahoma*,<sup>165</sup> however, provides a compelling argument justifying provision of independent defense experts. In *Ake*, the Court held that an insanity defense, where made, is so critical to a case's outcome that without the provision of a defense expert psychiatrist, "the risk of an inaccurate resolution of sanity issues is extremely high."<sup>166</sup> Similarly, DNA testing "dramatically enhance[s]" the accuracy of a jury's determination.<sup>167</sup> Courts nevertheless routinely deny access to independent forensic experts, risking inaccurate resolutions.<sup>168</sup>

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161. See *Strickland v. Washington*, 466 U.S. 668, 691 (1984).

162. *State v. Hicks*, 536 N.W.2d 487, 491 (Wis. Ct. App. 1995), *aff'd*, 549 N.W.2d 435 (Wis. 1996).

163. *Hicks*, 549 N.W.2d at 436, 438, 444–45. The Wisconsin Supreme Court also relied heavily on the fact that identity was critical to Hicks's conviction and the State had used the same hair samples that exonerated him as affirmative evidence of his presence at the scene of the crime. *Id.* at 439.

164. See Jay A. Zollinger, *Defense Access to State-Funded DNA Experts: Considerations of Due Process*, 85 CAL. L. REV. 1803, 1803–05 (1997) (describing state case law, and noting that the courts rely on a variety of grounds to deny funds for defense DNA experts).

165. *Ake v. Oklahoma*, 470 U.S. 68 (1985).

166. *Id.* at 82; Paul C. Giannelli, *Ake v. Oklahoma: The Right to Expert Assistance in a Post-Daubert, Post-DNA World*, 89 CORNELL L. REV. 1305, 1340–41 (2004).

167. *Ake*, 470 U.S. at 83.

168. See Giannelli, *supra* note 166, at 1312; see also NAT'L RESEARCH

Even without an independent expert, the defense could cross-examine the law enforcement forensic expert regarding their findings. This may not be an effective alternative, however, as states increasingly permit prosecutors to introduce DNA test results at trial using only a laboratory certificate, thus forestalling the opportunity to cross-examine the expert.<sup>169</sup> Courts permit this practice even though state forensic analysts have mischaracterized forensic results in reports and testimony.<sup>170</sup> Furthermore, prosecutors are not necessarily obligated to provide the defense with laboratory notes underlying the report stating the results. A good example of the potential injustice arising from the combination of these factors is the case of Ar-

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COUNCIL, THE EVALUATION OF FORENSIC DNA EVIDENCE 87 (1996) (urging that a second test performed by an independent expert is “[a] wrongly accused person’s best insurance against the possibility of being falsely incriminated”). At least two courts have held that if the prosecution seeks to introduce DNA evidence at trial, then the defendant has a due process right to the appointment of a defense DNA expert. *Dubose v. State*, 662 So. 2d 1189, 1194, 1197–98 (Ala. 1995); *Polk v. State*, 612 So. 2d 381, 394 (Miss. 1992); *see also* *Husske v. Commonwealth*, 448 S.E.2d 331, 345 (Va. Ct. App. 1994) (finding that the defendant was entitled to the assistance of a DNA expert at trial), *vacated en banc*, 462 S.E.2d 120 (Va. Ct. App. 1995), *aff’d*, 476 S.E.2d 920 (Va. 1996). Other courts have denied requests for DNA experts in cases where forensic evidence is central at trial. The Michigan Supreme Court provides one recent example, insisting on a greater factual nexus or a showing that the expert testimony would have been helpful, where absent appointment of the expert and analysis, no such showing can easily be made. *People v. Tanner*, 671 N.W.2d 728, 731 (Mich. 2003). The case is particularly odd in that the court reasoned that the defense did not need an expert to independently evaluate the prosecution’s forensic evidence, because some of that evidence excluded the defendant: “DNA analysis not only eliminated the possibility that the blood on the victim’s shirt belonged to either defendant or the victim, it established that the blood belonged to an unidentified female.” *Id.* Contrary to the court’s reasoning, however, the DNA exclusion made the need for expert analysis greater, where, as the dissent pointed out, the jury clearly did not understand the power of the DNA evidence that conclusively excluded the defendant. Rather, “the jurors were told that only four percent of black women, women like [the] defendant, match the blood sample found at the scene. This blood was the only physical evidence placing defendant at the scene of the crime.” *Id.* at 732 (Kelly, J., dissenting).

169. *See* Pamela R. Metzger, *Cheating the Constitution*, 59 VAND. L. REV. 475, 478–91 (2006).

170. An example is the case of Dana Holland, in which the trial court refused the defense an independent expert and the Chicago police crime lab expert Pamela Fish falsely told the court that insufficient material existed to conduct DNA testing, which later exonerated Holland. *See* Bluhm Legal Clinic, Northwestern School of Law, Meet the Exonerated, Dana Holland, <http://www.law.northwestern.edu/depts/clinic/wrongful/exonerations/iHollandSummary.html> (last visited Apr. 26, 2008).

mando Villasana. At his 1999 criminal trial, the State gave the defendant's lawyer only the laboratory report, which stated that no semen evidence existed to be tested.<sup>171</sup> However, a post-conviction expert was able to obtain the underlying laboratory notes, which disclosed the existence of other testable biological evidence. This DNA evidence eventually led to his exoneration.<sup>172</sup> Yet when Villasana filed a civil claim arguing that law enforcement officials violated his rights by concealing this biological evidence at his criminal trial, the Eighth Circuit concluded that the officers had no *Brady* obligation to disclose the laboratory notes.<sup>173</sup>

Further, if the State refuses to perform DNA testing, the defendant may have little remedy available at trial, as the Supreme Court has held that "the police do not have a constitutional duty to perform any particular tests."<sup>174</sup> Given the lack of a law enforcement duty, courts must then ensure that the defense can perform any potentially probative tests in order to ensure access to this critical evidence.

To prevent miscarriages of justice, our criminal procedure rules should be understood to provide greater trial protection regarding such highly probative forensic evidence. Ultimately, the *Brady* duty should extend not just to disclosure of the existence of biological evidence and the results of any testing conducted by the State, but also to require full reports and laboratory notes.<sup>175</sup> This in turn would permit far more meaningful defense expert analysis and cross-examination, would encourage consideration of further forensic testing, and would assist

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171. *Villasana v. Wilhoit*, 368 F.3d 976, 977–78 (8th Cir. 2004).

172. *See id.* at 978.

173. *Id.* at 979 (holding that a forensic technician's notes underlying disclosed lab reports on DNA testing were not exculpatory, though they led the defense to perform additional testing, because *Brady* applies only to evidence a reasonable prosecutor would identify at the time as material).

174. *Arizona v. Youngblood*, 488 U.S. 51, 59 (1988).

175. *See, e.g., State v. Schwartz*, 447 N.W.2d 422, 427 (Minn. 1989) ("[F]air trial and due process rights are implicated when data relied upon by a laboratory in performing tests are not available to the opposing party for review and cross examination."); AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: DNA EVIDENCE 81 (3d ed. 2007), available at <http://www.abanet.org/crimjust/standards/dnaevidence.pdf> (proposing a requirement that "[t]he prosecutor should be required . . . to make available to the defense . . . laboratory reports"); Paul C. Giannelli, *Bench Notes & Lab Reports*, CRIM. JUST., Summer 2007, at 50, 50–51.



counsel in satisfying their obligations under *Strickland*.<sup>176</sup> Similarly, given the possible consequences for the client, the failure of counsel to pursue DNA testing should be carefully scrutinized at trial and during appeals. Absent such constitutional protections, wrongful convictions will persist.

##### 5. DNA Testing Denied or Unavailable at Trial

In the early years of DNA testing, five courts denied requests for DNA testing that later exonerated defendants because the courts believed it was not relevant.<sup>177</sup> In retrospect, such rulings appear misguided, since all trial courts now admit DNA testing as reliable, relevant evidence. Nevertheless, as DNA technology continues to evolve, one can imagine a future court hesitating to grant a request for a test that employs new and thus arguably unproven technologies.<sup>178</sup>

None of the cases described above involved the situation in which the State failed to collect or destroyed biological evidence; such a failure would effectively prevent exoneration and also inculcation of the actual perpetrator. However, many cases that could utilize DNA testing do not do so because the relevant biological evidence has been destroyed.<sup>179</sup> In 1989, the Supreme Court ruled that Larry Youngblood could not obtain relief because he could not show that police acted in bad faith in improperly storing biological evidence, which degraded, from the victim of the rape of which he was convicted.<sup>180</sup> Currently, neither negligent nor malicious destruction of biological evidence, nor

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176. See *Strickland v. Washington*, 466 U.S. 668, 687 (1983) (imposing a duty of “reasonably effective assistance” on criminal defense attorneys).

177. See *supra* tbl.1.

178. For example, Virginia currently limits requests under its post-conviction DNA testing statute to testing by the Virginia Department of Forensic Sciences. See VA. CODE ANN. § 19.2-327.1 (Supp. 2007). That department does not yet use Y-STR testing, and thus convicts have had requests for such testing denied, though its use is accepted and has led to exonerations. See Frank Green, *Two Va. Inmates Seek DNA Tests*, RICH. TIMES-DISPATCH (Va.), Oct. 18, 2007, at B3 (describing the bar to obtaining Y-STR testing in Virginia and noting that “[t]he Virginia Forensic Science Board agreed yesterday to consider proposed legislation that would allow an accredited outside laboratory to perform the required DNA testing at the expense of the inmates”).

179. See Miles Moffeit & Susan Greene, *Foiled Justice*, DENV. POST, July 24, 2007, at A1. The Denver Post found 141 cases where efforts to prove innocence were frustrated by lost or destroyed evidence. See *id.*

180. See *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988).

routine, post-trial disposal of evidence result in a sanction.<sup>181</sup> Unsurprisingly, therefore, twenty exonerees unsuccessfully raised destruction-of-exculpatory-evidence claims on appeal or post-conviction.<sup>182</sup> Each was later able to locate other evidence that was fortuitously preserved and that could be subject to DNA testing. One of those twenty was Youngblood, who was exonerated in 2000 because more sophisticated DNA testing produced a profile from the degraded evidence, which both excluded him and inculpated another individual.<sup>183</sup>

Notwithstanding the Court's 1988 ruling that a defendant must show bad faith in storing biological evidence in order to establish a constitutional violation,<sup>184</sup> the advent of DNA testing has led to some legal change in the area of evidence preservation, with twenty-two states passing statutes that require the preservation of DNA evidence. However, violations of these statutes are not generally sanctionable.<sup>185</sup> Colorado's statute, for example, states that it "does not create a duty to preserve biological evidence nor does it create a liability on the part of a law enforcement agency for failing to preserve biological evidence."<sup>186</sup>

DNA testing creates more of a six-fold, rather than a double, bind. A range of contradictory and incomplete criminal procedure rules hinder access to DNA testing at trial, even though it is potentially the most probative exculpatory evidence available. Further, neither the states nor the federal courts have adopted a straightforward right to preserve, disclose, and accurately present evidence of innocence. Compounding the problem, courts fail to ensure that defendants obtain the representation and expert assistance at trial necessary to claim innocence using DNA evidence. Such treatment sharply contrasts

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181. See *id.*; *California v. Trombetta*, 467 U.S. 479, 489 (1984) (holding that the defendant must demonstrate that the evidence "possess[ed] an exculpatory value that was apparent before the evidence was destroyed").

182. See *Garrett*, *supra* note 4, at 96.

183. The Innocence Project, Know the Cases: Larry Youngblood, <http://www.innocenceproject.org/Content/303.php> (last visited Apr. 26, 2008).

184. See *Youngblood*, 488 U.S. at 58.

185. See, e.g., WIS. STAT. § 968.205 (2005–2006). Twenty-two states and the District of Columbia require by statute preservation of biological evidence from crime scenes. The Innocence Project, Preservation of Evidence Fact Sheet, available at <http://www.innocenceproject.org/Content/253.php> (last visited Apr. 26, 2008).

186. See COLO. REV. STAT. § 18-1-414(3) (2007).

with constitutional criminal procedure rules that regulate the most probative evidence of earlier eras, such as eyewitness identifications, confessions, and psychiatric testimony.<sup>187</sup> This comparison demonstrates that constitutional criminal procedure has unquestionably failed to fully adapt to the DNA era. This failure helps explain why one-quarter of DNA exonerations arose from DNA-era trials and why innocence claims will likely persist in our criminal system. Thus, innocence claims will continue to be subject to the contradictory rules governing our complex system of criminal appeals and post-conviction review, as discussed below.

### C. STATE CRIMINAL APPEALS AND DNA STATUTES

Just as a dialectic between the federal and state systems encouraged the creation of state post-conviction remedies in every state, the lack of federal remedies for innocence claims and the availability of new forms of evidence have encouraged almost all states to develop post-conviction innocence statutes.<sup>188</sup>

#### 1. Traditional Rules Governing New Evidence of Innocence

Though high percentages of those who received post-conviction DNA testing have been exonerated,<sup>189</sup> a range of traditional rules has long hindered post-conviction discovery of DNA evidence of innocence. First, state criminal appeals historically have not provided remedies permitting forensic testing.<sup>190</sup> Direct appeals traditionally have permitted motions regarding the sufficiency of the evidence at trial. While such motions do

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187. See *supra* text accompanying notes 102–03, 166.

188. See Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1046–52 (1977); James Liebman et al., *A Broken System: Error Rates in Capital Cases, 1973–1995*, at 19–20 (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Group, Paper No. 15, 2000), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=232712](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=232712).

189. The Innocence Project reported a forty percent exoneration rate; similarly, in Dallas County, Texas, thirteen of thirty-five cases in which the district attorney conducted DNA testing since 2001 resulted in exonerations. Scheck, *supra* note 105, at 601 (“Forty percent of the time, when we finally find the evidence . . . the results come out in favor of the inmate.”); see also Ralph Blumenthal, *For Dallas, New Prosecutor Means an End to the Old Ways*, N.Y. TIMES, June 3, 2007, at N28.

190. See Holly Schaffter, Note, *Postconviction DNA Evidence: A 500 Pound Gorilla in State Courts*, 50 DRAKE L. REV. 695, 704–06 (2002).

not involve newly discovered evidence of innocence, they can involve claims of innocence regarding the evidence introduced at trial.<sup>191</sup>

Second, all states have long allowed new trial motions brought either during the direct appeal or at the post-conviction stage, including those brought on the grounds of newly discovered evidence of innocence. Statutes or case law allowing for such motions vary widely in their standards. Most permit relief if new evidence of innocence is material or creates a probability of a different outcome;<sup>192</sup> some do not specify a standard except that relief may be granted if “the interest of justice” so demands.<sup>193</sup> Others include detailed additional requirements that the new evidence must not be cumulative<sup>194</sup> or must not have been available at the time of trial with due diligence.<sup>195</sup> Some statutes and case law require more than materiality: they require that no juror would have found guilt beyond a reasonable doubt with the new evidence.<sup>196</sup> The state statutes making available new trial motions based on newly discovered evidence of innocence typically also contain statutes of limitations, which states increasingly adopted beginning in the 1970s; currently only twenty states do not have statutes of limitations.<sup>197</sup> For those that do, the limitations period ranges from a mere twenty-one days to three years, and motions aris-

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191. See *Jackson v. Virginia*, 443 U.S. 307, 324 (1979) (setting the federal standard for assessing sufficiency of the evidence, based on whether a reasonable jury could have found guilt, with all inferences drawn in the state’s favor).

192. See, e.g., N.Y. CRIM. PROC. LAW § 440.10(g) (McKinney 2005).

193. See, e.g., N.J. CT. R. 3:20-1.

194. See, e.g., ALASKA STAT. § 12.72.020(b)(2)(B) (2006).

195. See, e.g., FLA. R. CRIM. P. 3.850(b)(1).

196. See, e.g., VA. CODE ANN. § 19.2-327.11(A)(vii) (2004). For a survey of state post-conviction standards regarding newly discovered evidence of innocence, see David R. Dow et al., *Is It Constitutional to Execute Someone Who Is Innocent (and If It Isn’t, How Can It Be Stopped Following House v. Bell?)*, 42 TULSA L. REV. 277, 293–321 (2006).

197. See 1 DONALD E. WILKES JR., STATE POSTCONVICTION REMEDIES & RELIEF HANDBOOK WITH FORMS § 1:6 (2007–2008 ed.). For an excellent discussion of the early development of these state new trial rules, see Daniel S. Medwed, *Up the River Without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts*, 47 ARIZ. L. REV. 655, 666–86 (2005).

ing from new evidence of innocence must be brought during the pertinent limitations period.<sup>198</sup>

State courts have denied post-conviction motions for DNA testing and for post-testing relief, including those brought by subsequently exonerated individuals, citing the expiration of the statute of limitations period after which no motions based on newly discovered evidence of innocence can be brought.<sup>199</sup> As described in the context of cases where DNA technology existed at the time of trial, a combination of reasons explain why DNA evidence is often unavailable or not sought until years after a conviction. In general, DNA testing is typically secured only with great difficulty. Strikingly, most DNA exonerees managed to obtain this testing only where law enforcement voluntarily provided access.<sup>200</sup> Indeed, most DNA exonerees did not receive relief until long after DNA technology became available. Thus, the first two hundred exonerees served an average of twelve years before ultimately being exonerated.<sup>201</sup> For example, only thirteen individuals had been exonerated by the end of 1993.<sup>202</sup> However, only forty-two of two hundred individuals had been exonerated by the end of 1997.<sup>203</sup> Each year produces more high-profile exonerations of actually innocent individuals, for until just recently states did not provide access to post-conviction DNA testing, and law enforcement did not always consent to it. Dealing with this increasing embarrassment and a lack of judicial remedies, governors often had to step in to

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198. See 1 WILKES, *supra* note 197, § 1:6; see also *Herrera v. Collins*, 506 U.S. 390, 410–11 (1993) (noting varying state statutes of limitations).

199. See, e.g., *Commonwealth v. Godschalk*, 679 A.2d 1295, 1297 (Pa. Super. Ct. 1996) (denying DNA testing where the “appellant’s conviction rests largely on his own confession which contains details of the rapes which were not available to the public”); Garrett, *supra* note 4, at 128.

200. In at least seventy-one out of two hundred exonerations (thirty-five percent), the innocent appellant had to obtain a court order to gain access to DNA testing. Garrett, *supra* note 4, at 119. At least 119 received access to DNA testing through the consent of law enforcement or prosecutors. *Id.* I say at least, because there was no information available in press reports concerning how DNA testing was obtained for all two hundred DNA exonerees. Some obtained DNA through more than one route. These categories cannot be sharply separated; for example, in some cases law enforcement agreed to testing but only after a court order was imminent. See generally *id.* at 116–21.

201. See INNOCENCE PROJECT, 200 EXONERATED, TOO MANY WRONGFULLY CONVICTED 2–3 (2007), available at [http://www.innocenceproject.org/200/ip\\_200.pdf](http://www.innocenceproject.org/200/ip_200.pdf).

202. Garrett, *supra* note 4, at 119 n.248.

203. See INNOCENCE PROJECT, *supra* note 201.

grant pardons, which they did in at least twenty percent of the first two hundred DNA exonerations.<sup>204</sup>

## 2. Post-Conviction DNA Statutes

Responding to the increasing political pressure and the lack of available remedies in the state or federal courts, states began enacting statutes providing a right to post-conviction DNA testing and a vacatur if the testing demonstrated innocence, easing the traditional rules of finality that previously restricted motions premised on new evidence of innocence. In 1999, ten years after the first post-conviction DNA exoneration, only New York and Illinois had passed this type of DNA statute.<sup>205</sup> However, forty-four states and the District of Columbia have since enacted such statutes, with most enacted in the past five years.<sup>206</sup> Most of the remaining states are currently considering the adoption of such legislation.<sup>207</sup>

In addition to these efforts at the state level, the federal Innocence Protection Act provides for post-conviction DNA testing in federal criminal cases,<sup>208</sup> and a companion statute, the

204. See Garrett, *supra* note 4, at 120.

205. See Act of May 9, 1997, Pub. Act No. 90-0141, 1997 Ill. Laws 2461 (codified at 725 ILL. COMP. STAT. 5/116-3(a) (2007)); Act of Oct. 18, 1999, ch. 560, 1999 N.Y. Laws 3247 (codified at N.Y. CRIM. PROC. LAW § 440.30(1-a) (McKinney 2005)).

206. See *infra* app.

207. See *infra* app.; see also Kathy Swedlow, *Don't Believe Everything You Read: A Review of Modern "Post-Conviction" DNA Testing Statutes*, 38 CAL. W. L. REV. 355, 356–87 (2002) (providing an excellent review of the first twenty-four innocence statutes and raising many of the concerns echoed here regarding the current forty-four statutes). Oklahoma, on the other hand, had a statute, but it has expired. See *infra* app. See generally The Innocence Project, National View, <http://www.innocenceproject.org/news/National-View.php> (last visited Apr. 26, 2008) (providing a state-by-state guide with links to statutes). Five state courts have issued rulings recognizing a constitutional right to claim innocence, but each state has now also passed a post-conviction DNA testing statute. See *Ex parte* Lindley, 177 P.2d 918, 927 (Cal. 1947) (en banc); *Summerville v. Warden*, 641 A.2d 1356, 1369 (Conn. 1994); *People v. Washington*, 665 N.E.2d 1330, 1337 (Ill. 1996); *State ex rel. Amrine v. Roper*, 103 S.W.3d 541, 543 (Mo. 2003) (en banc); *Ex parte Elizondo*, 947 S.W.2d 202, 206 (Tex. Crim. App. 1996) (en banc); *infra* app. (listing states with DNA testing laws).

208. See 18 U.S.C. § 3600(g)(2) (Supp. IV 2006) (“The court shall grant the motion of the applicant for a new trial or resentencing, as appropriate, if the DNA test results, when considered with all other evidence in the case (regardless of whether such evidence was introduced at trial), establish by compelling evidence that a new trial would result in an acquittal . . .”).

Justice for All Act, provides financial incentives to the states to make available post-conviction DNA testing.<sup>209</sup> Seven states currently lack a statutory right to post-conviction DNA testing.<sup>210</sup> Of those seven, two have had their state supreme courts recognize a right to post-conviction DNA testing and relief based on newly discovered evidence of innocence.<sup>211</sup> This leaves five states, Alabama, Alaska, Massachusetts, Mississippi, and Oklahoma, in which post-conviction DNA testing is only available when law enforcement consents to testing or a federal court grants it.<sup>212</sup>

This expansion of post-conviction options has been supplemented by the relaxation of rules of finality in all jurisdictions but four. Of the five states lacking post-conviction DNA testing statutes or judicial rights of access to testing, three—Alaska, Alabama, and Massachusetts—excuse late post-conviction filings based on evidence of innocence, and a fourth, Oklahoma, permits post-conviction filings based on newly discovered evidence of innocence at any time.<sup>213</sup> Two states, however, Delaware and Idaho, which have DNA statutes, retain statutes of

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209. See 42 U.S.C. § 14163a(b)(1)(D) (Supp. IV 2006). However, allocated federal funds for post-conviction testing in states have not yet been spent. See Richard Willing, *Innocence Testing on Back Burner*, USA TODAY, Oct. 11, 2007, at 1A.

210. The states that lack post-conviction DNA testing statutes are Alabama, Alaska, Massachusetts, Mississippi, South Carolina, and South Dakota. See The Innocence Project, *supra* note 207. Oklahoma had a statute that has now lapsed. *Supra* note 207.

211. The South Dakota Supreme Court ruled that DNA testing be conducted post-conviction where it was likely to produce an acquittal. See *Jenner v. Dooley*, 590 N.W.2d 463, 471–72 (S.D. 1999). The South Carolina Supreme Court did the same. See *State v. Spann*, 513 S.E.2d 98, 99–100 (S.C. 1999).

212. For example, in Alabama, which lacks a DNA testing statute, Dewayne Scott Cunningham lacked access to such testing under state law, and was then denied access to DNA testing by a federal judge. See Brendan Kirby, *Judge Denies Prisoner's DNA Request*, MOBILE PRESS-REG. (Ala.), Jan. 25, 2007, at 1A.

213. Alabama, Alaska, and Massachusetts permit motions for a new trial based on newly discovered evidence of innocence brought after the statute of limitations expires, if they could not have been brought earlier. See ALA. R. CRIM. P. 32.1(e); ALASKA STAT. § 12.72.020(b)(2) (2006); MASS. R. CRIM. P. 30. Wyoming's supreme court has suggested in dicta that evidence of innocence would permit a court to consider an otherwise procedurally defaulted claim. See *Cutbirth v. State*, 751 P.2d 1257, 1259–60 (Wyo. 1988). Oklahoma's statute contains no statute of limitations. See OKLA. STAT. tit. 22, § 1080(d) (2001).

limitations.<sup>214</sup> Thus, all jurisdictions, except Delaware, Idaho, and Mississippi, now make exceptions to statutes of limitations to permit motions based on new evidence of innocence to be filed at any time. As a result of these developments, rules of finality have been substantially displaced.

Litigation under these innocence statutes is increasingly common,<sup>215</sup> with at least twenty-one exonerees obtaining post-conviction DNA testing pursuant to these state statutes.<sup>216</sup> This avenue for relief marks a new development in post-conviction law. No previously existing post-conviction remedies were exclusively devoted to reviewing claims of innocence.

### 3. Restrictions on Access to Post-Conviction DNA Testing

Although rules of finality have been supplanted nationwide, these statutory innocence claims retain other limitations, evident in the often-arbitrary construction of these statutes, which appear to focus more on curtailing relief than on concerns of cost, finality, or accuracy. In other words, though states have relaxed concern with finality, most have done so in a manner that nevertheless precludes classes of convicts from pursuing otherwise viable post-conviction DNA innocence claims. In contrast to rules permitting DNA testing at or before trial, most post-conviction statutes create procedural hurdles that a petitioner must overcome before DNA testing can be obtained. The Appendix depicts each restriction based on a review of state post-conviction DNA procedures.<sup>217</sup>

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214. See DEL. CODE ANN. tit. 11, § 4504(a) (2007); IDAHO CODE ANN. § 19-4902(a) (2004).

215. See generally Marjorie A. Shields, Annotation, *DNA Evidence as Newly Discovered Evidence Which Will Warrant Grant of New Trial or Other Post-conviction Relief in Criminal Case*, 125 A.L.R.5TH 497 (2005) (collecting cases in which courts ruled on new trial motions based on DNA evidence).

216. Thus, looking back at Figure 1 presenting a chart of exonerations over time, these statutes do not explain the sharp rise in DNA exonerations that began in the late 1990s, before most of these statutes took effect. For example, Texas had its record number of five exonerations in 2000, the year before its post-conviction testing statute was enacted. Rather, the explanation may be a delayed reaction to the introduction of more sophisticated STR testing technology in the mid-1990s. See *supra* notes 129–31 and accompanying text.

217. The fairly current survey of these statutes can be found in 1 WILKES, *supra* note 197, § 1:8.



*a. Outcome-Based Statutory Limitations*

One way in which state innocence statutes sharply restrict post-conviction access to DNA testing is by adopting outcome-based tests that place courts in the position of predicting the likely probative impact of the DNA testing. Currently, only three states, Kansas, Nebraska, and Wyoming, allow access to testing on a showing that there is a likelihood that DNA could be probative of innocence.<sup>218</sup> This standard certainly has validity since in cases where DNA testing could not possibly be probative of innocence, it should not be granted.

The vast majority of jurisdictions, thirty-eight of forty-five, or eighty-four percent, however, require a threshold showing of “materiality” before testing may be granted. Materiality requires the petitioner to demonstrate that “a reasonable probability exists that the petitioner would not have been convicted if exculpatory results had been obtained through DNA testing.”<sup>219</sup> This standard mirrors the *Brady* standard, under which materiality is a requirement for obtaining a vacatur for a constitutional violation.<sup>220</sup> Thus, even if DNA could be probative of innocence, no testing will be granted if the trial judge believes insufficient evidence exists to satisfy the reasonable probability standard.

Several states impose a still more onerous standard. Two states, Colorado and Texas, require that it be “more probable than not” that the DNA testing would prove innocence.<sup>221</sup> Moreover, two other states, New Hampshire and Virginia, require clear and convincing evidence of or a substantial showing that testing would demonstrate innocence before a petitioner can obtain DNA testing.<sup>222</sup> Indeed, Virginia requires the peti-

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218. See KAN. STAT. ANN. § 21-2512 (2006); NEB. REV. STAT. § 29-4120(5) (2006); WYO. STAT. ANN. § 7-12-303 (effective July 1, 2008).

219. See, e.g., ARIZ. REV. STAT. ANN. § 13-4240 (2001 & Supp. 2007).

220. See, e.g., *Strickler v. Greene*, 527 U.S. 263, 281 (1999); *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (“We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment irrespective of the good faith or bad faith of the prosecution.”).

221. These states require petitioners to prove by a preponderance of the evidence that DNA testing will demonstrate their innocence. See COLO. REV. STAT. § 18-1-413 (2007); TEX. CODE CRIM. PROC. ANN. art. 64.03(a)(2)(A) (Vernon 2006).

222. N.H. REV. STAT. ANN. § 651-D:2(III) (2007); VA. CODE ANN. § 19.2-327.1 (Supp. 2007).

tioner to satisfy a battery of threshold showings, including providing clear and convincing evidence that the test results would be materially relevant, may prove innocence, and would not be cumulative or contradictory. One must also demonstrate that the petitioner or counsel could not have sought testing earlier through due diligence, and that the chain of custody of the DNA is intact.<sup>223</sup> Many of those exonerated by DNA testing could never have satisfied such rigorous requirements, for only through DNA testing were they able to uncover the evidence of their innocence.

*b. Judicial Interpretation of Outcome-Based Standards*

Nevertheless, even a materiality or reasonable probability requirement would not pose an insurmountable burden if it were properly interpreted to simply require that the DNA testing could be probative of innocence. However, state courts have interpreted statutory threshold requirements very strictly. South Dakota's supreme court, for example, cautioned that DNA testing should only be granted under "extraordinary circumstances."<sup>224</sup> Furthermore, courts strictly interpret burdens imposed by the statutes. Texas courts, for example, deny access to DNA testing if the petitioner does not show by a "preponderance" of the evidence that the testing will exculpate the petitioner, or if a sworn affidavit does not describe innocence with sufficient specificity.<sup>225</sup>

Some courts *sua sponte* construct flimsy hypothetical scenarios and then hold that, if there exists even a possibility that DNA testing might not exculpate, it should not be granted. For instance, the lower and intermediate Texas courts denied DNA

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223. See, e.g., VA. CODE ANN. § 19.2-327.1.

224. See *Jenner v. Dooley*, 590 N.W.2d 463, 471–72 (S.D. 1999) ("Our system of justice will hold little respect if its judgments are never final. Only in extraordinary circumstances should a court allow post-conviction scientific testing.").

225. See, e.g., *Hamilton v. State*, No. 09-05-003 CR, 2006 WL 61937, at \*3 (Tex. App. Jan. 11, 2006) (unpublished mem. opinion) (denying defendant's motion requesting DNA testing because defendant's general assertions of innocence in his affidavit were insufficient to demonstrate by a preponderance of the evidence that he would not have been convicted if exculpatory results had been obtained through DNA testing). This is despite the fact that in revisions to the statute, drafters made clear that "the Legislature did not intend for the defendant to have to prove 'actual innocence' (a principle under habeas law) in order to meet his burden to have the test done." House Criminal Jurisprudence Comm., Bill Analysis, H.B. 1011, 78th Leg., Reg. Sess. (Tex. 2003).

testing in the case of Billy James Smith, claiming that a rape victim could have had sex with her boyfriend, and thus any DNA testing results might not be exculpatory.<sup>226</sup> The Texas Court of Criminal Appeals reversed because it found that DNA testing might have prevented his conviction.<sup>227</sup> DNA testing proved the defendant's innocence and Smith was released, twenty years after he was first incarcerated.<sup>228</sup> In a series of other cases, though, the Texas lower courts' denials of testing have not been reversed, even when predicated on courts' assertions that it would be conceivable for the results to merely match the victim's partner. Such hypotheticals may lack support, but further DNA testing could refute them completely. In these stranger-rape cases, by ordering elimination testing the court could rule out the partner, and a DNA databank match might locate another perpetrator, similarly making the DNA test results dispositive of identity.<sup>229</sup>

Despite this, other courts have constructed similarly irrelevant and refutable hypothetical scenarios. The Ohio Supreme Court denied DNA testing in a sexual assault case where the testing could have provided powerful evidence of innocence, accepting instead the prosecutor's argument that the testing would not be "outcome determinative" should the test results match the victim's then-boyfriend (though he could be eliminated by further testing should the defendant be excluded).<sup>230</sup> In an unusual window into the administration of a state's post-conviction DNA testing program, aggregate data is available

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226. See *Smith v. State*, No. 05-02-01411-CR, 2004 WL 213661, at \*2 (Tex. Crim. App. Feb. 5, 2004), *rev'd*, 165 S.W.3d 361 (Tex. Crim. App. 2005).

227. See *Smith*, 165 S.W.3d at 364–65.

228. The Innocence Project, Profile: Billy James Smith, <http://www.innocenceproject.org/Content/264.php> (last visited Apr. 26, 2008).

229. See, e.g., *Johnson v. State*, 183 S.W.3d 515, 521 (Tex. App. 2006); *Phillips v. State*, No. 05-04-00532-CR, 2005 WL 1819598, at \*6 (Tex. App. Aug. 3, 2005).

230. See Phil Trexler, *Court Denies DNA Test*, AKRON BEACON J. (Ohio), Apr. 12, 2007, at B5, available at 2007 WLNR 6950157. The Court of Appeals of Ohio, Ninth District, found that the defendant did not show that DNA testing would be outcome determinative. See *State v. Wilkins*, 839 N.E.2d 457, 464 (Ohio Ct. App. 2005), *aff'd*, 863 N.E.2d 590 (Ohio 2007). The Ohio Supreme Court summarily affirmed. See *Wilkins*, 863 N.E.2d 590. On the other hand, the Ohio Supreme Court also struck down as unconstitutional under state law a provision that rendered unappealable a decision by a prosecutor not to grant an inmate's request for post-conviction DNA testing. See *State v. Sterling*, 864 N.E.2d 630, 635–36 (Ohio 2007).

regarding DNA testing since Ohio's statute was revised in July 2003. Perhaps in part due to the reasoning adopted by the Ohio courts, only nineteen applications have been granted although 315 prisoners have made applications for DNA testing.<sup>231</sup>

*c. Additional Restrictions on Access to DNA Testing*

In contrast with states like Ohio and Texas, other states like Illinois and New Jersey do not create such strained hypotheticals, nor do they evaluate the strength of the State's trial case when determining whether to grant testing.<sup>232</sup> Yet for almost all states, a range of other threshold restrictions apply. For example, most statutes allow only post-conviction DNA testing; only six states and the District of Columbia permit motions related to non-DNA forensic testing, scientific evidence, or other new evidence of innocence.<sup>233</sup>

All but three of the state post-conviction DNA testing statutes preclude entire categories of convicts who might otherwise be able to prove their innocence from seeking DNA testing. Only three states with such statutes, Hawaii, North Carolina, and Wisconsin, permit all categories of convicts access to DNA testing, although Connecticut merely limits relief to those still incarcerated, Vermont provides access to a fairly large list of felons, and Wyoming provides access to all felons.<sup>234</sup> Outside of these states—for reasons that mirror restrictions in traditional post-conviction law, but have little relevance to the merits of a request for DNA testing—states prohibit

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231. See Laura A. Bischoff & Tom Beyerlein, *Evidence Preservation a Key Piece to Exoneration Puzzle: Ohio's DNA Testing Law Also Closes Door to Many Potential Applicants*, DAYTON DAILY NEWS (Ohio), Dec. 16, 2007, at A12. The database regarding DNA petitions compiled by the Ohio Attorney General's Office is on file with the author and is dated September 14, 2007.

232. See, e.g., *People v. Henderson*, 799 N.E.2d 682, 690 (Ill. App. Ct. 2003) (ordering post-conviction DNA testing despite the fact that evidence against defendant "was indeed overwhelming"); *Bruner v. State*, 88 P.3d 214, 217 (Kan. 2004) (holding it improper to deny statutory testing on the basis that the evidence of guilt was overwhelming); *State v. Peterson*, 836 A.2d 821, 826 (N.J. Super. Ct. App. Div. 2003) (stating that under the DNA testing statute, "the strength of the evidence against a defendant is not a relevant factor in determining whether his identity as the perpetrator was a significant issue").

233. Those jurisdictions are Arkansas (new scientific evidence), Washington, D.C., (new evidence of innocence), Idaho (includes other testing), Illinois (includes other testing), Minnesota (other scientific evidence), New York (any new evidence of innocence), and Virginia (any new scientific evidence).

234. See *infra* app.; see also N.C. GEN. STAT. § 15A-266.4 (2007).

several classes of persons from requesting DNA testing. Aside from limiting testing to those convicted of committing serious crimes, the most prevalent restrictions include guilty plea exclusions, custody requirements, due diligence requirements, and requirements that the technology has changed since the time of trial.

More specifically, twenty-five states limit DNA testing to certain serious crimes, typically felonies, but sometimes violent crimes; indeed, Kentucky and Nevada limit testing to capital cases.<sup>235</sup> Additionally, twenty-one jurisdictions require that the petitioner be incarcerated or in custody in order to obtain testing.<sup>236</sup> Moreover, only seventeen states provide for testing when the petitioner seeks a sentence reduction, not relief from the conviction, although another six states provide judges with the discretion to grant testing in this circumstance.<sup>237</sup> Sixteen states require that identity have been an issue at the criminal trial.<sup>238</sup> These restrictive provisions may forestall relief in cases where there was a guilty plea instead of a trial. Furthermore,

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235. *See infra* app.

236. The jurisdictions are California, Colorado, Connecticut, Kansas, Kentucky, Maine, Michigan, Missouri, Montana, Nebraska, New Hampshire, New Jersey, Ohio, Oregon, Pennsylvania, Rhode Island, Virginia, Washington, West Virginia, and the District of Columbia. *See infra* app.

237. The states providing for testing when the petitioner seeks a sentence reduction are Arkansas, California, Florida, Illinois, Indiana, Kansas, Maryland, Minnesota, Nebraska, Ohio, Oregon, Pennsylvania, Vermont, Virginia, Washington, Wisconsin, and Wyoming. States that provide discretion are Arizona, Connecticut, Hawaii, Kentucky, Rhode Island, and Tennessee.

238. The states are Arkansas, Delaware, Idaho, Illinois, Iowa, Maine, Michigan, Minnesota, Missouri, New Jersey, New Mexico, North Dakota, Ohio, Oregon, Pennsylvania, and Texas. *See infra* app. In addition, Utah requires that a theory of innocence be “not inconsistent with theories previously asserted at trial.” UTAH CODE ANN. § 78-35a-301(2)(c) (2002). The Iowa statute requires that identity “was a significant issue in the crime for which the defendant was convicted.” IOWA CODE § 81.10(7)(c) (2007). Delaware also requires that identity must have been at issue in a criminal trial. *See, e.g., Anderson v. State*, 831 A.2d 858, 865 (Del. 2003) (explaining that the state DNA statute’s identity-at-issue requirement is “relatively straightforward,” where “[i]dentity is always an issue in a criminal trial unless the defendant admits having engaged in the alleged criminal conduct and relies on a defense such as consent or justification”). New York bars relief to guilty plea cases using different language. *See People v. Byrdsong*, 820 N.Y.S.2d 296, 299 (App. Div. 2006) (requiring conviction by verdict and judgment after trial in order to qualify for post-conviction DNA testing under the New York statute); *cf. CAL. PENAL CODE* § 1405(e) (West Supp. 2008) (petition for testing may be heard by judge who “conducted the trial, or accepted the convicted person’s plea of guilty or nolo contendere”).

they require that the defendant have disputed identity and have claimed innocence at the trial, which might have been difficult to do credibly without the support of DNA evidence.<sup>239</sup> Nine exonerees pleaded guilty and many more did not dispute identity at trial, which would have precluded any of them from obtaining DNA testing under these statutes.<sup>240</sup> Recognizing this difficulty, seven states permit testing if identity “should” have been an issue at trial, even if it was not raised.<sup>241</sup> Twelve states require that the requested testing have been technologically impossible at the trial.<sup>242</sup> Yet few states recognize the need for DNA testing on the sole basis that the constantly increasing size of DNA databanks establishes cold hits with actual perpetrators.<sup>243</sup>

A smaller number of states have adopted a range of additional and significant restrictions. Five states require that motions be brought within one to three years after the conviction, though only Delaware and Idaho retain statutes of limitations; the three other states create various good-cause exceptions.<sup>244</sup>

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239. See *Weeks v. State*, 140 S.W.3d 39, 46 (Mo. 2004) (en banc) (noting, in interpreting the state’s DNA statute to apply to such cases, that “[a] person who pleaded guilty is not somehow ‘more’ guilty, or less deserving of a chance to show actual innocence, than one who went to trial”).

240. See Garrett, *supra* note 4, at 123, 171 (stating that nine exonerees pleaded guilty and that DNA testing can only be used to show identity when biological evidence is left at the crime scene, which is not the case in the “vast majority” of criminal cases).

241. The states are California, Florida, Georgia, Hawaii, Montana, New Hampshire, and West Virginia.

242. The states are Delaware, Idaho, Illinois, Maine, Minnesota, Missouri, North Dakota, Ohio, Pennsylvania, Utah, Virginia, and Washington. See *infra* app. Pennsylvania, Virginia, and West Virginia, however, only require new technology where the biological evidence was not newly discovered. Thus, the requirement functions as a due diligence requirement. Maine requires new technology as a reason to excuse failure to file within two years of conviction. Other states, such as Nebraska, New Hampshire, Vermont, West Virginia, and Wisconsin, impose a new technology requirement for successive testing.

243. A New Jersey court recognized this in *State v. DeMarco*, 904 A.2d 797, 807 (N.J. Super. Ct. App. Div. 2006), which granted post-conviction DNA testing under the New Jersey statute, on the ground that “[t]echnological advances since defendant’s conviction have enabled the production of DNA typing data, which could be run through the CoDIS system and potentially implicate another suspect.”

244. The states are Arkansas (rebuttable presumption of no timeliness after three years, though courts may excuse later applications for “good cause” or newly discovered evidence); Delaware (three years); Idaho (one year); Maine (two years after September 1, 2008, or time of conviction, or two years after

Four additional states have determined that attorney error, including failure to request DNA testing at the trial stage or to exercise due diligence, does not merit post-conviction DNA testing.<sup>245</sup> Yet, as discussed above, several exonerees had ineffective lawyers who neglected to request DNA testing.<sup>246</sup> Notwithstanding the ongoing exonerations of DNA-era convicts, four states included sunset provisions under which the statute ceases to operate by a certain year,<sup>247</sup> and one state, Michigan, permits relief only to people convicted *before* 2001. Only a few states have considered what additional testing should be permitted when initial results are inconclusive, when new technological advancements occur, and when new biological evidence is discovered. And only twenty-four states provide counsel to represent petitioners during the complex process of negotiating these procedural hurdles.<sup>248</sup> While these statutes vary widely in procedural restrictions, all state statutes share the requirement that the application be made to the trial court that presided over the conviction.

#### 4. Restrictions on Post-DNA Exclusion Relief

That long list of state limitations is only at the threshold. Even after DNA testing performed excludes an individual, several states impose additional limitations. New York permits relief if the DNA shows a reasonable probability of innocence, while Pennsylvania uses the heightened more-probable-than-not standard.<sup>249</sup> Even more onerous, seven states require that the DNA provide substantial or clear and convincing evidence of innocence in order to justify a vacatur.<sup>250</sup> Offering no guid-

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new technology available); and Minnesota (two years after conviction, unless there is newly discovered evidence that due diligence at the time of trial and within the two-year time period could not have ascertained).

245. The states are Minnesota (due diligence excuses two-year time limit), Missouri, Pennsylvania (listing permissible reasons for not having requested DNA testing at trial), and Virginia.

246. See *supra* Part II.C.4.

247. Florida repealed its sunset provision. States that still retain them are Louisiana, Michigan, Oklahoma, and Oregon.

248. Cf. Garrett, *supra* note 4, at 168 (finding that many states have long provided inadequate indigent defense funding).

249. See, e.g., N.Y. CRIM. PROC. LAW § 440.30 (McKinney 2005); 42 PA. CONS. STAT. ANN. § 9543 (West 2007).

250. The states are Arkansas, Delaware, Maine, Michigan, Ohio, Utah, and Virginia. See *infra* app.

ance or limitations, the remaining states, explicitly or implicitly, grant the trial judge discretion in deciding whether to grant relief based on post-conviction DNA testing.<sup>251</sup>

As in the context of access to DNA testing, courts addressing the effect on relief of such testing have often constructed hypothetical scenarios unrelated to any evidence presented at the original trial in order to deny relief, even after DNA testing excludes the appellant. Perhaps the most notorious example is Texas Court of Appeals Judge Sharon Keller's explanation to *Frontline* reporters in support of her decision to deny relief to Roy Criner, even though DNA testing excluded him. Keller essentially told the reporters that DNA testing could never sufficiently prove innocence because a scenario could always be constructed to explain away the results. She felt that the DNA evidence would not have "made a difference in the verdict" in Criner's case because the sixteen-year-old victim could have been "promiscuous" in the days before her rape-murder, although this allegation of promiscuity was not based on the trial record or any other evidence.<sup>252</sup> It was only after a cigarette butt confirmed that the semen donor was present at the crime scene that Criner was pardoned.<sup>253</sup> Eschewing hypotheticals, other courts have simply discounted the evidence of innocence to reach similar results. For example, courts frequently rely upon equivocal evidence presented at trial and discount DNA evidence as merely cumulative or nonprobative.<sup>254</sup> Such rulings are perhaps unsurprising where the statutes provide little guidance as to what standard to employ when deciding whether to grant relief based on a DNA exclusion.

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251. See, e.g., GA. CODE ANN. § 5-5-41(b)-(c) (1995 & Supp. 2007).

252. See Interview by *Frontline*: The Case for Innocence with Judge Sharon Keller, Texas Court of Criminal Appeals (Public Broadcasting Corporation 2000), available at <http://www.pbs.org/wgbh/pages/frontline/shows/case/interviews/keller.html>.

253. See *Frontline*: The Case for Innocence, Four Cases: Roy Criner, <http://www.pbs.org/wgbh/pages/frontline/shows/case/cases> (last visited Apr. 26, 2008).

254. See, e.g., *Watkins v. Miller*, 92 F. Supp. 2d 824, 827 (S.D. Ind. 2000) (stating that the Indiana Court of Appeals affirmed the denial of post-conviction relief, finding that DNA results exonerating Jerry Watkins only "suggest the possibility" of another perpetrator and that the DNA evidence was merely "cumulative" of inconclusive serology evidence at trial); *People v. McSherry*, 14 Cal. Rptr. 2d 630, 636 (Ct. App. 1992) (depublished) (failing to vacate conviction despite DNA exclusion, citing to serology results and the victim's identification).



Unquestionably, some cases do not deserve DNA testing. Yet the myriad threshold limitations and onerous standards ensure that most courts can deny access to DNA testing that could provide a powerful showing of innocence, and deny relief following highly exculpatory DNA results. Many of the statutes reflect a traditional reluctance to reopen a criminal case, even in the face of powerful DNA evidence of innocence. Those statutes appear to provide mere window-dressing for post-conviction systems determined to deny access to proof of innocence and to deny relief to meritorious claims of innocence. These concerns might prompt some states to amend their statutes, thereby creating another generation of post-conviction DNA statutes that will finally provide unobstructed avenues for relief to the actually innocent.<sup>255</sup> Leaving to legislators the question whether actually innocent individuals may obtain access to evidence of their innocence, and then relief, has perhaps predictably resulted in a patchwork of approaches that continue to create barriers to those who could prove innocence. The following Sections examine whether and how claims of innocence create constitutional questions that entitle an individual to innocence-based relief in the absence of any state law remedy.

#### D. FEDERAL HABEAS CORPUS: RESISTANCE AND INNOCENCE

Traditionally, habeas corpus review provided a conduit for procedural constitutional claims pertaining to a criminal trial's fundamental fairness, but not the defendant's possible innocence.<sup>256</sup> Even today, the vast majority of federal criminal appeals involve constitutional claims related to the integrity of the criminal trial, such as those alleging ineffective assistance

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255. For example, New York is considering legislation to broaden access to post-conviction DNA testing, together with other forensic science reforms. *See, e.g.*, A.08047, 2007 Leg., Reg. Sess. (N.Y. 2007) (amending section 440.30 of the Criminal Procedure Law to clarify that post-conviction testing may be ordered whether a case was resolved by jury trial or otherwise).

256. *See* 28 U.S.C. §§ 2241(c)(3), 2254(a) (2000 & Supp. IV 2006); *Herrera v. Collins*, 506 U.S. 390, 400–02 (1993) (noting that federal habeas typically involves procedural and not substantive review of convictions); William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 447 (1995) (arguing that the “current law of criminal procedure is indeed about procedure,” but also that the origins of such cases lie in substantive questions about what government can criminalize).

of counsel,<sup>257</sup> *Brady* violations, equal protection violations, and procedural violations.<sup>258</sup> Additional procedural rights call for a reversal of a conviction if the trial court failed to exclude unreliable evidence.<sup>259</sup> While many of these protections “promote the ultimate objective that the guilty be convicted and the innocent go free,” they “are granted to the innocent and the guilty alike.”<sup>260</sup> Federal courts rarely conduct purely substantive criminal review, and when they do, it is typically to examine the constitutionality of a criminal prohibition’s scope as applied to the convict’s conduct.<sup>261</sup>

Although the traditional focus of habeas corpus review has been on procedural fairness, petitioners now assert claims of actual innocence in far higher percentages of habeas filings.<sup>262</sup> Such an increase has developed even though the Court has failed to determine “whether federal courts may entertain convincing claims of actual innocence.”<sup>263</sup> Federal courts rarely

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257. See *Strickland v. Washington*, 466 U.S. 668, 671 (1984).

258. See VICTOR E. FLANGO, *HABEAS CORPUS IN STATE AND FEDERAL COURTS* 45–59 (1994).

259. See Garrett, *supra* note 4, at 105 (finding that while few exonerees obtained any relief on any claims, “the subset who did receive reversals most often received reversals on claims regarding seriously erroneous or unreliable factual evidence at their trials”).

260. See *Kimmelman v. Morrison*, 477 U.S. 365, 379–80 (1986) (quoting *Evitts v. Lucey*, 469 U.S. 387, 394 (1985)). Such constitutional claims each require the fault of a government actor, judge, defense attorney, prosecutor, or police. See also *Stone v. Powell*, 428 U.S. 465, 494 (1976).

261. For examples of substantive review, the Court recently limited the class of those eligible for death sentences. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (holding that the Eighth Amendment prohibits the execution of individuals who were juveniles at the time of the offense); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (ruling that the execution of mentally retarded felons violates the Eighth Amendment).

262. See NANCY J. KING ET AL., *FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS* (2007), available at <http://law.vanderbilt.edu/article-search/article-detail/download.aspx?id=1639> (finding that, in a study of sampled habeas filings from 2000–2005, 3.9% of noncapital petitioners raised newly discovered evidence of innocence claims, as did 10.8% of capital petitioners, and that 18.9% raised sufficiency of the evidence claims). A quick survey of citations to the two Supreme Court cases discussing innocence-related rights, *Schlup v. Delo*, 513 U.S. 298 (1995), and *Herrera v. Collins*, 506 U.S. 390 (1993), indicate a large increase in reliance on those decisions. Federal habeas petitions citing to *Schlup* increased from 111 in 1996 to 773 cites in 2006, and citations to *Herrera* rose from 40 cites in 2000, to 267 in 2006. These figures were generated by a search conducted using the Westlaw “all-feds” database for cases citing either *Schlup* or *Herrera*.

263. See *Herrera*, 506 U.S. at 427.

conduct factual review of claims asserted in habeas petitions. The federal habeas corpus statute prohibits evidentiary hearings for the development of new factual evidence except in narrow circumstances, which if met, still permit a discretionary decision by the judge whether to hold a hearing; habeas discovery is also discretionary.<sup>264</sup> Thus, federal courts have long been unlikely places for development of innocence claims, helping to explain why only two of the first two hundred post-conviction DNA exonerees obtained DNA testing during habeas corpus proceedings.<sup>265</sup> Federal courts can, however, provide access to DNA testing; several circuits have done so via § 1983 actions.<sup>266</sup>

The Section that follows describes six tests that the Supreme Court has adopted to assess innocence and guilt post-conviction, and shows how these complex, nuanced standards of review operate. The Section also shows how these standards ultimately do not provide any independent grounds for relief to the actually innocent. In the subsequent Section, therefore, I discuss how federal courts can shift their focus towards an approach that reviews claims of innocence.

#### 1. The Federal Framework for Substantive Review

The Court has adopted six central tests in post-conviction law, and each uses a slightly different formulation of guilt or innocence in determining whether to grant relief. In Justice Antonin Scalia's words, these tests create "ineffable gradations of probability . . . beyond the ability of the judicial mind (or any mind) to grasp."<sup>267</sup> Whatever the gradation, none provides a ground for relief to the actually innocent; instead, various rules permit exceptions to procedural obstacles based on showings of

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264. Federal courts hold hearings in only approximately one percent of habeas filings. See JUDICIAL CONFERENCE OF THE U.S., FED. COURTS STUDY COMM., REPORT OF THE SUBCOMM. ON THE ROLE OF THE FEDERAL COURTS AND THEIR RELATION TO THE STATES 468–515 (1990) (finding hearings granted for 1.1% of petitions); see also 28 U.S.C. § 2554(e)–(f) (2000).

265. Of the sixty exonerees who had a court order access to DNA testing, only two had federal courts grant DNA testing. See *Toney v. Gammon*, 79 F.3d 693, 700 (8th Cir. 1996); *Godschalk v. Montgomery County Dist. Attorney's Office*, 177 F. Supp. 2d 366, 370 (E.D. Pa. 2001). Only nine of the two hundred had a court remand for an evidentiary hearing at any level in their appeals. See Garrett, *supra* note 4, at 105.

266. See *infra* note 302 and accompanying text.

267. See *United States v. Dominguez Benitez*, 542 U.S. 74, 86 (2004) (Scalia, J., concurring) (describing the *Chapman*, *Brecht*, *Agurs*, and *Strickland* standards).

innocence, or they deny relief for claims based on evidence of guilt.

First, harmless error tests epitomize the current post-conviction focus on guilt. Applicable during habeas corpus proceedings, the *Brecht v. Abrahamson* test provides that, in cases where the petitioner suffered a constitutional violation, courts can deny relief if the State can show, based on the totality of the evidence introduced at trial—including the evidence of the petitioner’s guilt—that the error did not substantially contribute to the conviction.<sup>268</sup>

Second, multiple constitutional claims incorporate a guilt-based harmless error rule, with the most notable being the *Brady* right to material exculpatory evidence,<sup>269</sup> and the *Strickland* ineffective assistance of trial counsel claim.<sup>270</sup> Vindication of both of these rights requires a demonstration of prejudice.<sup>271</sup> The Court has rejected an outcome-determinative standard, but has required the appellant to demonstrate a reasonable probability that the error contributed to the trial outcome.<sup>272</sup> Moreover, the Court has encouraged lower courts to evaluate the prejudice prong first and thus avoid reaching the question of the ineffectiveness of trial counsel.<sup>273</sup> A range of other due

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268. See *Brecht v. Abrahamson*, 507 U.S. 619, 638–39 (1993). The Supreme Court has cautioned lower courts not to conduct a hypothetical inquiry asking whether the petitioner would still be convicted based on evidence untainted by constitutional error. See *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (“The inquiry . . . is . . . whether the guilty verdict actually rendered in this trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee.”). Nevertheless, lower courts persist in conducting harmless error analyses in that guilt-based fashion. See Garrett, *supra* note 4, at 107–10; see also Gregory Mitchell, Comment, *Against “Overwhelming” Appellate Activism: Constraining Harmless Error Review*, 82 CAL. L. REV. 1335, 1354 (1994); Amsterdam, *supra* note 17, at 52 (“One reason why the standard gets watered down in practice is that harmless error analysis is seldom written up in appellate opinions in a way that forces the authoring judge, or his or her concurring colleagues, or anybody else, to examine it critically.”).

269. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

270. See *Strickland v. Washington*, 466 U.S. 668, 690 (1984).

271. See *id.* at 687; *Brady*, 373 U.S. at 87.

272. See *Strickland*, 466 U.S. at 693–94 (holding that the petitioner must show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different”).

273. See *id.* at 697 (“If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.”).

process rights also incorporates a prejudice element, and federal courts require that a petitioner show both “cause” and “prejudice” before a court will excuse the procedural default of a claim.<sup>274</sup>

Third, under the Court’s ruling in *Schlup*, federal courts consider evidence of actual innocence under a more-likely-than-not standard,<sup>275</sup> which is an outcome-determinative test more stringent than the prejudice inquiry. Despite requiring a heightened showing of innocence that is sufficient to prevail on an independent constitutional claim, *Schlup* provides no independent innocence claim. As in *House*, if a court finds sufficient evidence of innocence, it may only excuse a procedural default so as to proceed to the merits of the otherwise defaulted constitutional claim.<sup>276</sup> Nevertheless, the *Schlup* standard permits courts to excuse procedural default of constitutional claims in cases involving new evidence of innocence.<sup>277</sup> As developed below, cases involving substantial evidence of innocence may tend to earn relief on underlying constitutional violations. Hence, the innocence gateway provides an important remedy, particularly as the Court developed it in *House* in the context of DNA evidence.<sup>278</sup>

Fourth, *Jackson v. Virginia* claims permit relief if the evidence at trial, viewed in the light most favorable to the prosecution, was so insufficient that no reasonable juror could vote to convict.<sup>279</sup> Such claims almost never earn relief given that the “no reasonable juror could”<sup>280</sup> standard is more stringent than the more-likely-than-not *Schlup* standard.<sup>281</sup>

Fifth, the habeas corpus statutes, as amended by the Antiterrorism and Effective Death Penalty Act (AEDPA),<sup>282</sup> impose

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274. See *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

275. See *Schlup v. Delo*, 513 U.S. 298, 326 (1995).

276. See *id.* at 316–17.

277. See *id.* at 331–32.

278. See *House v. Bell*, 126 S. Ct. 2064, 2077–87 (2006).

279. See *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (“[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”).

280. See *id.*

281. See *Schlup*, 513 U.S. at 327.

282. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, and 42 U.S.C.).

substantial limits on the ability of federal courts to hear new evidence of innocence.<sup>283</sup> The AEDPA imposes a one-year statute of limitations that is triggered not only when the state direct appeal ends, but also on “the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence,” whichever is later.<sup>284</sup> If new evidence of *innocence* surfaces, the defense exercised due diligence, and the new evidence of innocence provides the “factual predicate” of the claim, then a habeas petition may be pursued later than would otherwise be possible.<sup>285</sup> The petition will be dismissed if the petitioner, exercising due diligence, should have presented the new evidence earlier, or if the evidence does not provide a factual predicate for any procedurally preserved constitutional claim.<sup>286</sup>

A hypothetical example helps explain the operation of this rule. Paul House’s habeas petition was his first,<sup>287</sup> but suppose that he had already filed a petition prior to uncovering new evidence of innocence. In this scenario, House would have then encountered substantial statutory obstacles. The AEDPA bars refiling any claim previously brought in a federal habeas corpus application, even if the new evidence provides substantial additional support for the claim.<sup>288</sup>

The AEDPA also restricts the ability to file a second or successive petition with a new, previously unasserted claim.<sup>289</sup> To bring a new claim in a second or successive petition, the statute

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283. See 28 U.S.C. § 2244(d)(1) (2000).

284. *Id.* § 2244(d)(1)(D).

285. See, e.g., *Ege v. Yukins*, 485 F.3d 364, 372–74 (6th Cir. 2007) (tolling the statute of limitations based on new evidence of forensic fraud); see also 1 RANDY HERTZ & JAMES S. LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* § 5.2b n.45 (5th ed. 2005).

286. The Sixth Circuit has equitably tolled the AEDPA statute of limitations on the grounds of actual innocence, and additional federal courts have suggested that equitable tolling could excuse late filing given a sufficient showing of innocence. See *Souter v. Jones*, 395 F.3d 577, 602 (6th Cir. 2005) (“[W]here an otherwise time-barred habeas petitioner can demonstrate that it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying constitutional claims.”); *Gibson v. Klinger*, 232 F.3d 799, 808 (10th Cir. 2000) (“Equitable tolling would be appropriate, for example, when a prisoner is actually innocent . . .”).

287. See *House v. Bell*, 126 S. Ct. 2064, 2075 (2006).

288. See 28 U.S.C. § 2244(b)(1).

289. See *id.* § 2244(b)(2).

requires that the petitioner must seek relief on the rare, new constitutional rule that the Supreme Court has “made retroactive” during collateral appeals.<sup>290</sup> Alternatively, the petitioner may demonstrate the existence of new evidence that could not have been previously discovered with “due diligence,” and that provides “clear and convincing evidence” such that “no reasonable factfinder” would find guilt were this evidence known.<sup>291</sup> If a petitioner failed to exercise diligence in developing facts in the state courts, the AEDPA requires that the habeas petitioner meet an elevated showing of innocence to obtain a federal evidentiary hearing.<sup>292</sup> Demonstrating that no reasonable factfinder would find guilt were this evidence of innocence known is certainly more difficult to accomplish without the benefit of the evidentiary hearing sought precisely to explore that evidence. Taken collectively, these procedural restrictions sharply limit the ability of federal courts to consider new evidence of innocence, particularly because such evidence often surfaces years after a trial.<sup>293</sup>

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290. *Id.* § 2244(b)(2)(A).

291. *Id.* § 2254(e)(2) (2000); *see also id.* § 2244(b)(2)(B)(ii) (stating that a petitioner filing a second claim must show that “the factual predicate for the claim could not have been discovered previously through the exercise of due diligence”); *id.* (noting that a petitioner must “establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense”).

292. *See* 28 U.S.C. § 2254(e)(2) (stating that the granting of an evidentiary hearing is barred where the petitioner “failed to develop” the factual predicate for a claim, unless the petitioner can show both reliance on a new rule “made retroactive” or “a factual predicate that could not have been previously discovered through the exercise of due diligence,” and that “the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense”). The Supreme Court interpreted what it means for a petitioner to “fail[] to develop” facts within the meaning of § 2254(e)(2) and ruled that the court may grant a hearing where counsel exercised diligence during state proceedings. *See Williams v. Taylor*, 529 U.S. 420, 430, 440 (2000).

293. A few habeas petitions have satisfied that standard. *See, e.g., Cooper v. Woodford*, 358 F.3d 1117, 1123–24 (9th Cir. 2004) (permitting a second habeas petition based on new evidence of innocence and ordering mitochondrial DNA testing). *But see Parker v. Sirmons*, No. 07-6021, 2007 WL 1652612, at \*2 (10th Cir. June 8, 2007) (finding that the new evidence did not satisfy the materiality standard for the underlying constitutional claim and, thus, would not satisfy the statutory standard); *Kutzner v. Cockrell*, 303 F.3d 333, 337 (5th Cir. 2002) (finding that the new evidence did not satisfy the statutory standard).

Sixth, the only freestanding claim of innocence in our federal system remains hypothetical under the Court's divided decision in *Herrera*. The Court stated hypothetically that a person facing execution might be entitled to constitutional relief if they could persuasively show innocence in a way that satisfied an unstated but "extraordinarily high" burden.<sup>294</sup> Only Justice Harry Blackmun, joined by two other Justices, suggested a lower, "probably actually innocent" standard for showing innocence.<sup>295</sup> Five Justices stated separately that a freestanding innocence claim should exist, and as Justice Scalia predicted, the result was "a strange regime that assumes permanently, though only '*arguendo*,' that a constitutional right exists, and expends substantial judicial resources on that assumption."<sup>296</sup> However, given *Herrera*'s extraordinarily high burden, every claim for relief brought under *Herrera* has been ultimately dismissed.<sup>297</sup>

With *Herrera*'s result preserving a mirage of an innocence claim bearing a standard that no one has satisfied, the five established innocence-related inquiries offer only gestures toward innocence with procedural "gateways." It should be no surprise, then, that not one person exonerated by post-conviction DNA

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294. See *Herrera v. Collins*, 506 U.S. 390, 417 (1993). Prior decisions had used the word "extraordinary" to refer to the required showing of prejudice, or reasonable probability of innocence. See, e.g., *McCleskey v. Zant*, 499 U.S. 467, 494–95 (1991).

295. Justice Blackmun phrased his standard as requiring a showing that the petitioner "is probably actually innocent." *Herrera*, 506 U.S. at 444 (Blackmun, J., dissenting).

296. *Id.* at 429 (Scalia, J., concurring).

297. See, e.g., *Albrecht v. Horn*, 485 F.3d 103, 126 (3d Cir. 2007) (holding that the *Herrera* standard was not met), *cert. denied*, 128 S. Ct. 890 (2008). The only exceptions were in a few cases, including *House v. Bell*, 126 S. Ct. 2064 (2006), where a court initially granted relief on an innocence claim but then was reversed. See Nicholas Berg, Note, *Turning a Blind Eye to Innocence: The Legacy of Herrera v. Collins*, 42 AM. CRIM. L. REV. 121, 130–36 (2005) (reviewing lower court decisions relying on *Herrera* and finding fifty-four in which the court assumed a bare innocence claim was cognizable, but denied relief). Commenting on this state of affairs, Anthony Amsterdam writes that courts

either refuse to recognize that there is any Due Process or other constitutional right to redress for a claim of mere innocence or they set the standard for relief so high that it cannot be met by anything short of divine revelation manifested by the physical appearance of God in the courtroom, bearing a habeas petition for the convicted defendant in his right hand and a confession by the true perp in his left.

Amsterdam, *supra* note 17, at 53.



testing prevailed on an actual innocence claim during their appeals prior to obtaining DNA testing.<sup>298</sup> Courts denied *Herrera* relief to five people who we now know were actually innocent,<sup>299</sup> including one, Darryl Hunt, who presented to the Fourth Circuit initial DNA test results that excluded him.<sup>300</sup> Following a decades-long campaign to restrict habeas review by emphasizing guilt-based restrictions on habeas relief and innocence-based gateways, innocence remains as irrelevant as Judge Friendly suggested in 1970.<sup>301</sup>

## 2. Innocence and Post-Conviction Review

The adoption of a federal constitutional innocence claim would provide uniformity and ensure an avenue of relief in the states that do not yet provide for meaningful adjudication of innocence claims. Such a solution, sensible as it may be, does not appear imminent given that the Court recently dodged the issue again in *House*. Despite the Court's inaction, federal courts could take several approaches other than through the use of freestanding innocence claims. I discuss below the way that innocence changes the analysis for a range of constitutional criminal procedure claims. Indeed, federal courts have already begun to play an unappreciated role as a backstop to guard against wrongful convictions in situations where new evidence of innocence alters (1) discovery provided during habeas proceedings; (2) the merits analysis for constitutional criminal procedure claims; and (3) the harmless error analysis for constitutional claims.

### a. *Post-Conviction Discovery*

Without considering the merits of any freestanding innocence claim, courts may develop innocence claims factually by providing access to evidence of innocence during discovery. A series of federal courts already do this by entertaining § 1983 petitions for DNA testing;<sup>302</sup> other federal courts grant access

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298. See Garrett, *supra* note 4, at 97 n.157.

299. See *id.* at 96 tbl.5.

300. The panel found the DNA evidence "simply not sufficiently exculpatory to warrant a new trial." Hunt v. McDade, No. 98-6808, 2000 WL 219755, at \*3 (4th Cir. Feb. 25, 2000).

301. See Friendly, *supra* note 1, at 145.

302. See, e.g., Wade v. Brady, 460 F. Supp. 2d 226, 229 (D. Mass. 2006).

to testing as part of discovery during habeas review.<sup>303</sup> For example, evidence of innocence is relevant discovery to a *Schlup* inquiry or to a *Brady* theory, is related to substantive inquiries under a range of criminal procedure rights, and affects prejudice and harmless error analyses.<sup>304</sup> Therefore, in situations where state courts do not afford post-conviction discovery of evidence of innocence, federal courts provide an important backstop by providing discovery, even though they currently cannot grant relief on a freestanding innocence claim.<sup>305</sup> Even without an innocence claim, the federal courts' willingness to factually develop innocence claims may place pressure on states to provide access to DNA testing and other exculpatory evidence at the post-conviction stage, and then to review claims of innocence based on that evidence.

*b. Innocence and Constitutional Criminal Procedure*

In the absence of any separate freestanding innocence claim, new evidence of innocence affects the substantive inquiry for underlying criminal procedure rights. Innocence plays an important role in precisely those constitutional criminal

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303. See *Osborne v. Dist. Attorney's Office*, No. 06-35875, 2008 WL 861890, at \*1 (9th Cir. Apr. 2, 2008) (“[Defendant] has a limited due process right of access to the evidence for purposes of post-conviction DNA testing, which might either confirm his guilt or provide strong evidence upon which he may seek post-conviction relief.”); *McKithen v. Brown*, 481 F.3d 89, 99 (2d Cir. 2007) (joining the “Seventh, Ninth, and Eleventh Circuits, and district courts in the First and Third Circuits,” in holding that “a claim seeking post-conviction access to evidence for DNA testing may properly be brought as a § 1983 suit,” and rejecting the contrary views of the Fourth, Fifth, and Sixth Circuits), *cert. denied*, 128 S. Ct. 1218 (2008). Rule 6(a) of the Rules Governing Section 2254 Cases provides for discovery in habeas proceedings if the petitioner shows “good cause.” R. GOVERNING § 2254 CASES 6(a), *reprinted in* 28 U.S.C. § 2254 cmt. (2000). For a case granting such testing, see *Drake v. Portuondo*, 321 F.3d 338, 345 (2d Cir. 2003).

304. See *supra* Part II.D.1. Such relief is limited by the narrow innocence-based exception to the successive petition rule and the narrow innocence-based exception to the AEDPA's statute of limitations discussed above. See 28 U.S.C. § 2244(b) (2000). Those limits are not insurmountable, however, given the relevance of new evidence of innocence to the merits analyses for a number of central criminal procedure claims. See *infra* Part II.D.2.b.

305. For example, Larry Peterson, exonerated by post-conviction DNA testing, filed a § 1983 action in federal court seeking testing. See *State v. Peterson*, 836 A.2d 821 (N.J. Super. Ct. App. Div. 2003). The action was stayed so that he could pursue statutory testing that was denied in the lower state court but then provided by the appellate court, perhaps in part due to the pending § 1983 action. See *id.* at 823.

procedure contexts in which the Supreme Court has incorporated guilt-based inquiries into the merits analysis to permit relief for a violation. As in civil wrongful conviction suits, the consequence is that DNA evidence can render irrelevant such harmless error rules—under which a court would excuse a constitutional violation if presented with trial evidence of guilt—and also dramatically undermine constitutional presumptions of the reliability of trial evidence.<sup>306</sup> Evidence of innocence may affect a court's ruling regarding the reliability of evidence at trial, which may in turn relate to its assessment of the merits of the constitutional violation or a prejudice inquiry.

For example, a common claim brought by petitioners in which new evidence of innocence supports relief is a *Brady* claim. In its most straightforward form, *Brady* prohibits the withholding from defense counsel of material exculpatory evidence.<sup>307</sup> Some courts have also held that *Brady* creates an ongoing duty for the State to disclose new evidence of innocence, such as newly available DNA testing, even after trial.<sup>308</sup>

Still other constitutional claims require a petitioner to show that a state actor undermined the fairness of the trial.<sup>309</sup> However, as noted above, several rights also relate to the reliability or accuracy of trial evidence.<sup>310</sup> In these cases, evidence of innocence may supplement existing evidence regarding State misconduct, thus bolstering the constitutional showing that the State acted so as to produce an inaccurate result.<sup>311</sup> Most cases involving post-conviction DNA testing also involved an eyewitness identification.<sup>312</sup> Prior to obtaining this DNA testing, none of the exonerees had any success arguing that an eyewitness identification was unconstitutionally suggestive and unreliable<sup>313</sup> under the factors set forth in *Neil v. Big-*

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306. Cf. Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35, 62–69 (arguing that harmless error rules do not apply in civil wrongful conviction actions brought post-exoneration).

307. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

308. See, e.g., *Commonwealth v. Brison*, 618 A.2d 420, 425–26 (Pa. Super. Ct. 1992) (remanding for DNA testing).

309. See, e.g., Robert Hochman, Comment, *Brady v. Maryland and the Search for Truth in Criminal Trials*, 63 U. CHI. L. REV. 1673, 1676 (1996).

310. See *supra* Part II.D.1.

311. See Garrett, *supra* note 4, at 109–10.

312. *Id.* at 73.

313. *Id.* at 104.

gers,<sup>314</sup> and adopted by the Court in *Manson v. Brathwaite*.<sup>315</sup> For example, the court ruled against Carlos Lavernia in a case where the victim testified at trial, in reference to the photo lineup, “That was the man, it was that easy. I’m absolutely positive,” because “Lavernia ha[d] not alleged any factor that would have made the photo lineups impermissibly suggestive, nor [was] any apparent in the trial court record.”<sup>316</sup> However, DNA evidence of innocence may tend to buttress a claim that the eyewitness was mistaken, and therefore unreliable under the *Manson* test.<sup>317</sup>

Similarly, evidence of innocence may bolster a claim that a confession was coerced, on the theory that an innocent person would be less likely to confess absent law enforcement pressure. In addition, because DNA evidence often shows that forensic expert testimony or other testimony at trial was unreliable,<sup>318</sup> it may support a constitutional claim that evidence presented at trial was fabricated. A due process fabrication claim requires a showing that the State knowingly presented false evidence to the jury.<sup>319</sup> However, evidence of innocence can help show that evidence at trial was unreliable or false.<sup>320</sup>

Additionally, new evidence of innocence alters the analysis for the guilt-based prejudice analysis, the second prong of the standard for several constitutional criminal procedure claims.<sup>321</sup> As the Court explained in *Strickland*, “a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming

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314. *Neil v. Biggers*, 409 U.S. 188, 199–200 (1972).

315. *See Manson v. Brathwaite*, 432 U.S. 98, 114 (1977).

316. *See Lavernia v. Lynaugh*, 845 F.2d 493, 499 (5th Cir. 1988).

317. *See Manson*, 432 U.S. at 114 (concluding that “reliability is the linchpin in determining the admissibility of identification testimony”).

318. *Cf. id.* (discussing the reliability of DNA evidence).

319. *See Miller v. Pate*, 386 U.S. 1, 7 (1967).

320. An example is the case of Anthony Hicks. Hicks did not assert a fabrication claim, but the state court granted Hicks a new trial, finding that, based on the DNA test results, the jury would have questioned “the accuracy of the [victim’s] identification.” *State v. Hicks*, 549 N.W.2d 435, 444 (Wis. 1996). In addition, though the prosecution expert testified that hairs found at the scene were consistent with Hicks, “[t]he DNA test result, in conjunction with [the victim’s] testimony about the source of the Negro hairs in her apartment, discredit[ed] one of the pivotal pieces of evidence forming the foundation of the State’s case.” *Id.*

321. *See supra* Part II.D.1.

record support.”<sup>322</sup> Thus, new evidence of innocence may undermine the reliability of the guilty verdict at trial, making a court less likely to hold that there was not a reasonable probability that a constitutional violation affected the outcome. Courts already consider the strength of the prosecution’s case when assessing whether a constitutional violation affected the outcome.<sup>323</sup> Consequently, when DNA evidence of innocence severely undermines that case, the prejudice from the constitutional violation is correspondingly enhanced.

Thus, federal courts have explicitly considered evidence of innocence when conducting prejudice analyses in rulings regarding individuals exonerated by post-conviction DNA testing. For example, in the case of DNA exoneree Stephen Toney, the Eighth Circuit concluded that DNA testing would be relevant “[i]n order to prove the prejudice prong of his ineffective assistance claim.”<sup>324</sup> Similarly, the court emphasized preliminary DNA results in awarding Jerry Watkins relief on a *Brady* claim regarding suppressed police reports that supported a theory of third-party guilt.<sup>325</sup> The court stated that “[w]hen the court also takes into account the DNA evidence” the “clear conclusion [that there was prejudice] becomes even stronger.”<sup>326</sup> Likewise, in the case of Anthony Hicks, the only DNA exoneree to receive a reversal on a *Strickland* claim on the basis of his lawyer’s failure to request DNA testing, the court emphasized that there was prejudice because the post-conviction DNA testing showed that the State’s hair evidence was false.<sup>327</sup> The handful of federal courts that have denied discovery requests for DNA testing

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322. *Strickland v. Washington*, 466 U.S. 668, 696 (1984).

323. See Note, *Identifying and Remediating Ineffective Assistance of Criminal Defense Counsel: A New Look After United States v. Decoster*, 93 HARV. L. REV. 752, 768–69 (1980).

324. *Toney v. Gammon*, 79 F.3d 693, 700 (8th Cir. 1996). Efforts to use discovery to uncover wrongful convictions may also complement aggregative approaches that I have discussed elsewhere, where courts or administrative bodies such as innocence commissions review groups of cases raising indicia of innocence. See Brandon L. Garrett, *Aggregation in Criminal Law*, 95 CAL. L. REV. 383, 435–46 (2007).

325. See *Watkins v. Miller*, 92 F. Supp. 2d 824, 856 (S.D. Ind. 2000).

326. See *id.* at 847. “This court is considering the DNA evidence as it applies to Watkins’ claims of actual innocence and cause and prejudice to excuse his failure to present his *Brady* claims and other constitutional claims to the state courts.” *Id.* at 837.

327. See *State v. Hicks*, 536 N.W.2d 487, 491 (Wis. App. 1995), *aff’d*, 549 N.W.2d 435 (Wis. 1996).

by ruling that such testing is not relevant to a *Brady* analysis have not considered whether DNA results were relevant to the prejudice inquiry.<sup>328</sup>

Even if courts find that DNA testing is relevant to the prejudice prong, such analysis will not benefit many convicts, outside of the cases in which DNA testing or similarly compelling evidence of innocence is available. Few convicts eventually exonerated by post-conviction DNA testing had any new evidence of innocence to present to the courts prior to obtaining DNA testing. As a result, only thirty-three exonerees, or twenty-five percent of those with written decisions studied in *Judging Innocence*, raised innocence-related claims.<sup>329</sup> Of those, seven exonerees proffered third-party guilt evidence, seven presented police reports suppressed at the time of trial, four presented recantations of key witnesses, two presented new alibi evidence, two presented new evidence undercutting informant testimony, one presented evidence of police hypnosis of the victim, one presented new forensic expert evidence, and one, Willie Jackson, offered the in-court confession of the true perpetrator (some presented more than one type).<sup>330</sup>

Conversely, evidence of third-party guilt was the most common claim and source of relief for DNA exonerees. For example, in ruling on Willie Jackson's *Strickland* claim, the district court emphasized that his brother had convincingly confessed to the crime, which was relevant to the prejudice

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328. See, e.g., *Stouffer v. Reynolds*, 168 F.3d 1155, 1173 (10th Cir. 1999) (denying a discovery request for DNA evidence because the petitioner failed to demonstrate a connection between DNA evidence and any cognizable claim); *Payne v. Bell*, 89 F. Supp. 2d 967, 976 (W.D. Tenn. 2000) (finding that DNA testing is not relevant to a *Brady* claim where no argument is made that the state was in possession of DNA evidence at the time of the trial).

329. See Garrett, *supra* note 4, at 110 (noting that only 33 of 113 exonerees studied raised *Brady*, *Schlup*, *Herrera*, or newly discovered evidence claims).

330. The seven with third-party guilt evidence were K. Bloodsworth, R. Bullock, D. Fritz, J. Jones, J. Watkins, K. Waters, and J. Willis; the four with recantation evidence were L. Diaz, G. Dotson, C. Elkins, and F. Smith; the two with evidence undercutting informants were J. Restivo and J. Watkins; the two with new alibi evidence were S. Avery and K. Waters; J. Pierce had new forensic expert evidence; L. Jean received a reversal based on the police hypnosis of the victim in order to secure an identification. Those bringing claims regarding suppressed police records were S. Fappiano, D. Hunt, L. Waters, E. Washington (additional laboratory notes), W. Smith (statements to the police), and R. Williamson (videotape of his polygraph examination).

inquiry.<sup>331</sup> Although Jackson's habeas petition was ultimately dismissed by the Fifth Circuit,<sup>332</sup> four other DNA exonerees received reversals based on third-party guilt prior to obtaining the DNA testing that exonerated them; two received reversals based on *Brady* claims; and two received reversals based on state claims regarding exclusion at trial of third-party guilt evidence.<sup>333</sup>

c. *Innocence and Harmless Error*

A third and related approach incorporates new evidence of innocence into the harmless error inquiry. For almost any constitutional violation, a judge must deny relief if the State can show that the error was either harmless beyond a reasonable doubt, or, on habeas corpus review, did not substantially contribute to the conviction.<sup>334</sup> Innocence plays no formal role in the analysis, for a court focuses only on the degree to which a violation tainted the trial.

However, new evidence of innocence may show that the outcome at trial was otherwise unreliable. I propose that courts, in conducting a harmless error inquiry, should consider other evidence of innocence in determining whether constitutional error affected the outcome. This requires no constitutional reinterpretation, but merely reflects a more balanced method for weighing evidence under the current *Chapman v. California*<sup>335</sup> and *Brecht* harmless error approaches.<sup>336</sup> Courts already consider evidence of guilt unrelated to the constitutional violation. This approach modifies the traditional consideration by inquiring whether evidence of guilt is reliable in light of new evidence of innocence prior to deciding whether that evidence renders error harmless. Incorporation of innocence into harmless error review would impact only cases where petitioners have compelling new evidence of innocence to present. In

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331. See *Jackson v. Day*, No. Civ. A. 950-1224, 1996 WL 225021, at \*5 (E.D. La. May 2, 1996), *rev'd*, 121 F.3d 705 (5th Cir. 1997) (table decision).

332. *Jackson*, 121 F.3d 705.

333. See *Garrett*, *supra* note 4, at 104 n.180.

334. See *supra* Part II.D.1.

335. *Chapman v. California*, 386 U.S. 18 (1966).

336. See *supra* note 268 and accompanying text; see also *Chapman*, 386 U.S. at 24, 26; *Garrett*, *supra* note 306, at 56–63 (discussing the *Chapman* test).

such cases, this incorporation transforms the analysis to an inquiry focusing on both innocence and guilt.

### III. A CONSTITUTIONAL INNOCENCE CLAIM

The lack of a capstone innocence claim under the Federal Constitution has resulted in a conflicted regime. One might expect that the advent of such powerful scientific evidence as DNA would lead to a change in the rules surrounding that evidence, from trial through the post-conviction process, so as to facilitate access and assess the probative power of this evidence. In some respects change has occurred, most notably with increased pre-trial DNA testing and an explosion in new post-conviction avenues for relief. Yet courts still do not routinely ask the simple question whether new evidence of innocence sufficiently undermines the conviction. Instead, a range of procedural hurdles and categorical exclusions persist. Meanwhile, the Court remains on the sidelines, only hypothetically suggesting the existence of a constitutional innocence claim.

This Part describes how DNA and other technology—because they can provide such powerful evidence of identity—should alter the constitutional status of innocence during the criminal process. Though the Court may continue to dodge the issue for many decades to come, the wrongful conviction of an innocent person is such an egregious miscarriage of justice that several existing constitutional rights provide likely candidates for relief. The advent of DNA testing undermines the Court's two central rationales for avoiding the question of whether an innocence claim exists. Selecting a standard of review for an innocence claim does pose difficult questions, but I suggest an outcome-determinative standard that draws a line between outcome-altering and inconclusive cases.

#### A. *HERRERA* REVISITED

Our constitutional regime developed in an era in which innocence could rarely be proven with any certainty. Appellate courts, not in a position to observe and weigh the probative power of witness testimony and physical evidence, could not sensibly review outcomes. Instead, courts developed constitutional rules to preserve the “fundamental fairness” of criminal trials, such as by providing all defendants with procedural



guarantees and by excluding evidence that would be grossly unreliable.<sup>337</sup> Nor was habeas corpus traditionally considered a proper place to raise questions of guilt or innocence. As the Court stated in *Townsend v. Sain*, “the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus.”<sup>338</sup>

Hence, the advent of DNA testing did not easily fit within the existing constitutional regime. Although the Court wrestled with the significance of DNA testing in *House*, it did not recognize a constitutional innocence claim. Had the Court reconsidered *Herrera* in *House*, it might have concluded that the advent of DNA testing upended the two pillars supporting the decision: reliability and finality.

In *Herrera*, Justices O'Connor, Scalia, Kennedy, and Thomas joined the majority decision penned by Chief Justice Rehnquist that held federal habeas review is intended only “to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact” occurring in state criminal trials.<sup>339</sup> This begs the question whether innocence implicates the “constitutionality” of a detention. The *Herrera* majority, however, did not address that question.

Herrera, a Texas death-row prisoner, argued that it would violate the Due Process Clause and the Eighth Amendment’s prohibition on cruel and unusual punishment for him to be executed, due to his asserted actual innocence.<sup>340</sup> Six Justices in *Herrera* agreed that the Fourteenth Amendment supports a freestanding claim for actual innocence.<sup>341</sup> Two of those Justices, Justices O'Connor and Kennedy, joined the majority result that denied relief.<sup>342</sup> Thus, the holding of *Herrera* remains the narrower opinion by Justice Rehnquist,<sup>343</sup> which disclaimed the

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337. See *infra* text accompanying notes 368–71.

338. *Townsend v. Sain*, 372 U.S. 293, 317 (1962).

339. *Herrera v. Collins*, 506 U.S. 390, 400 (1993) (citing *Moore v. Dempsey*, 261 U.S. 86, 87–88 (1923) (Holmes, J.)).

340. *Id.* at 393.

341. See *id.* at 419 (O'Connor & Kennedy, JJ., concurring); *id.* at 429 (White, J., concurring); *id.* at 435 (Blackmun, Stevens & Souter, JJ., dissenting).

342. *Id.* at 421 (O'Connor & Kennedy, JJ., concurring).

343. See *Marks v. United States*, 430 U.S. 188, 193 (1977) (“[W]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the nar-

existence of any constitutional innocence right. Even though the opinion assumed, “for the sake of argument,” that an innocence right exists, it made clear that such a claim would require a “truly persuasive demonstration of ‘actual innocence,’” a standard that Herrera could not meet.<sup>344</sup> Despite Justices O’Connor and Kennedy stating that a freestanding innocence claim should exist, they joined the majority opinion because Herrera’s facts were very unfavorable, and his evidence of innocence was scant. This was no DNA case; Herrera’s only evidence of innocence consisted of hearsay affidavits by three individuals who waited over eight years to claim that Herrera’s brother, now dead, was the culprit.<sup>345</sup> The result in *Herrera* was perfectly understandable as a decision addressing an innocence claim with little merit.

The advent of DNA evidence should cause us to question the underpinnings of *Herrera*: the concepts of finality and reliability. The Court did not chiefly rely on constitutional interpretation in *Herrera*, but rather on those two policy considerations, and thus this Section discusses those rationales before turning to the constitutional text. First, the Court relied in *Herrera* chiefly on the need to preserve finality,<sup>346</sup> one of the central principles animating the Court’s recent habeas corpus jurisprudence.<sup>347</sup> Texas courts had a rule that limited the filing of motions for a new trial based on newly discovered evidence of innocence to a period within sixty days after entry of judgment

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rowest grounds . . . .” (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (Stewart, Powell & Stevens, JJ.)).

344. *Herrera*, 506 U.S. at 417 (majority opinion); see also *The Supreme Court, 1992 Term—Leading Cases*, 107 HARV. L. REV. 144, 282 (1993).

345. See *Herrera*, 506 U.S. at 417.

346. *Id.* at 401 (“Few rulings would be more disruptive of our federal system than to provide for federal habeas review on freestanding claims of actual innocence.”).

347. See, e.g., *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993) (“The reason most frequently advanced in our cases for distinguishing between direct and collateral review is the State’s interest in the finality of convictions that have survived direct review within the state court system.”); see also *McCleskey v. Zant*, 499 U.S. 467, 491 (1991) (“Finality has special importance in the context of a federal attack on a state conviction.”); *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977) (discussing the importance of deciding all issues at trial). See generally Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963) (discussing the importance of finality in such situations).

of conviction.<sup>348</sup> The Court noted that the practice in states remained “divergent,” as seventeen states, like Texas, provided for sixty days or less, fifteen states allowed the motion to be filed more than three years after conviction, and the other states permitted motions somewhere in between.<sup>349</sup>

This pillar supporting the *Herrera* result has been toppled by the advent of DNA testing. When *Herrera* was decided in 1993, only four years after DNA evidence had become available, the Court cited the divided “contemporary practice in the States” regarding claims of new evidence of innocence.<sup>350</sup> That practice has dramatically shifted, and as just described, almost all states enacted statutes to permit relief on the basis of newly discovered DNA or other scientific evidence of innocence. As noted above, not only do all but five jurisdictions ensure some access to post-conviction DNA testing upon which motions based on new evidence of innocence may be filed, all but three jurisdictions now make exceptions to any statutes of limitations to permit motions supported by new evidence of innocence.<sup>351</sup> Indeed, while problematic in a number of respects, almost all of the newly enacted statutes go much farther than *Herrera* by providing for testing and a vacatur in most serious criminal cases, rather than just in capital cases. And while many statutes contain various restrictions on access to testing, these restrictions do not rest on notions of finality. Further, few of the statutes restrict in any way (or define) the conditions under which a court may grant relief regarding new evidence of innocence.

The Court continues to rely on a finality rationale that has since been abandoned by the states. In addition to finality, the *Herrera* Court also emphasized federalism as a justification for its decision. The Court noted that “[f]ew rulings would be more disruptive of our federal system than to provide for federal habeas review of freestanding claims of actual innocence,” given that state statutes of limitations codified a concern for finality.<sup>352</sup> The Court noted that “[o]nce a defendant has been afforded a fair trial and convicted of the offense for which he was

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348. See *Herrera*, 506 U.S. at 410.

349. *Id.* at 410–11.

350. *Id.* at 411.

351. See *supra* Part II.C.2–3.

352. *Herrera*, 506 U.S. at 401.

charged, the presumption of innocence disappears,”<sup>353</sup> demonstrating its concern for federalism principles. Most states, however, now allow for post-conviction DNA testing.

Further undermining a federalism rationale, the AEDPA now requires that any actual innocence claim would have to be first exhausted in the state courts, and it also entitles state court factual determinations to a presumption of correctness.<sup>354</sup> Paradoxically, establishing an innocence claim under the U.S. Constitution may reduce the burgeoning litigation of innocence in federal habeas corpus cases by ensuring that petitioners be required to first seek available state remedies, and therefore providing strong incentives for states to make adequate remedies available.

A second pillar of the *Herrera* decision was reliability. The Court’s decision “rests on assumptions about the fallibility of the search for truth” that the advent of DNA technology toppled.<sup>355</sup> The Court in *Herrera* emphasized that “the passage of time only diminishes the reliability of criminal adjudications” due to the “erosion of memory and dispersion of witnesses.”<sup>356</sup> Granting *Herrera*’s request would, in the words of the Court, place the district court in the “difficult” position of having to “weigh the probative value of ‘hot’ and ‘cold’ evidence.”<sup>357</sup> This concern was logical in *Herrera* itself because witnesses’ “belated affidavits” were the only “new” evidence.<sup>358</sup> However, DNA evidence alters the reliability analysis because it produces accurate results, if properly stored, for decades after biological material is gathered.<sup>359</sup> Reliability concerns no longer provide strong support for the Court’s decision in *Herrera*, at least not in cases in which such new scientific evidence may be far more reliable than the evidence that was presented at trial.

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353. *Id.* at 399.

354. See 28 U.S.C. § 2254(b), (d) (2000); *Herrera*, 506 U.S. at 440–41 (Blackmun, J., dissenting).

355. See Kreimer & Rudovsky, *supra* note 160, at 599–600.

356. See also *Herrera*, 506 U.S. at 403–04 (majority opinion) (“[W]hen a habeas petitioner succeeds in obtaining a new trial, the ‘erosion of memory and dispersion of witnesses that occur with the passage of time’ prejudice the government and diminish the chances of a reliable criminal adjudication . . . .” (quoting *McCleskey v. Zant*, 499 U.S. 467, 491 (1991)) (alteration in original)).

357. *Id.* at 404.

358. *Id.* at 418.

359. See Christopher H. Asplen, *Integrating DNA Technology into the Criminal Justice System*, 83 JUDICATURE 144, 146 (1999).

Although its original underpinnings have eroded, it is possible other concerns could justify the holding in *Herrera*. One concern not discussed by the Court in *Herrera* is deterrence. This omission is unsurprising, however, for deterrence itself is undermined when the innocent continue to be punished while the guilty go free.<sup>360</sup> Similarly, another concern could be the cost of relitigating judgments. As the Court noted in *Schlup*, however, the number of meritorious innocence claims will not be high.<sup>361</sup> DNA testing itself is increasingly inexpensive. And outside the majority of states that now pay for access to DNA testing, nonprofit innocence projects willingly fund this testing.<sup>362</sup> Further, federal courts already conduct a range of time-consuming factual review focusing on questions of guilt and innocence, which includes review of newly discovered evidence of innocence. As the dissenters in *Herrera* noted, over the past several decades, “the Court adopted the view of Judge Friendly that there should be an exception to the concept of finality when a prisoner can make a colorable claim of actual innocence.”<sup>363</sup> As discussed above, federal judges review guilt and innocence in myriad ways, but they cannot provide relief to petitioners raising free-standing innocence claims. As this Section has demonstrated, neither original nor current rationales provide strong support for *Herrera*, suggesting the need to consider a constitutional framework for review of innocence claims, which the next Section develops.

#### B. INNOCENCE AND DUE PROCESS

The Due Process Clause provides a natural foundation for a claim of innocence. Justice Scalia expressed a view to the contrary in *Herrera*, stating that

there is no basis in text, tradition, or even in contemporary practice (if that were enough) for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence

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360. See A. Mitchell Polsky & Steven Shavell, *The Economic Theory of Public Enforcement of Law*, 38 J. ECON. LITERATURE 45, 60–62 (2000) (showing that erroneous convictions lower deterrence by reducing the difference between the penalties expected from violating the law and from not violating it).

361. See *Schlup v. Delo*, 513 U.S. 298, 311–12 (1995).

362. See, e.g., Innocence Project, About the Organization, <http://www.innocenceproject.org/about/Mission-Statement.php> (last visited Apr. 26, 2008).

363. See *Herrera*, 506 U.S. at 438 (Blackmun, J., dissenting).

brought forward after conviction . . . . With any luck, we shall avoid ever having to face this embarrassing question again.<sup>364</sup>

Unsurprisingly, the Court faced the embarrassing question again, in *House*, and because it again failed to resolve the existence of an innocence claim—this time in an era in which new technology more readily proves innocence—the Court may continue to face this question. A less conclusory look at text, tradition, and contemporary practice is entirely justified.

First, the text of the Fourteenth Amendment provides a basis for “an independent constitutional violation” if an individual would be subjected to criminal punishment despite actual innocence.<sup>365</sup> The Due Process Clause provides that minimally fair due process be afforded to those deprived by the government of life, liberty, or property, with the amount of process required dependent on its cost, the risk of error, and the individual interest at stake.<sup>366</sup> A strong procedural due process argument in favor of recognizing an innocence claim can be made given the very low cost of considering new evidence of innocence, the great interest of both the prisoner and the State in correcting a wrongful conviction, and the reduction in the risk of erroneous determinations due to the reliability of new scientific evidence, including DNA technology.<sup>367</sup>

In addition, the concerns of fundamental fairness that underlie our constitutional criminal procedure seek to prevent imprisoning an innocent person, and therefore support an innocence claim.<sup>368</sup> As Justice Lewis Powell wrote in *Kuhlmann v. Wilson*, “a prisoner retains a powerful and legitimate interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated.”<sup>369</sup> Similarly, in his concurrence in *Herrera*, Justice Byron White focused on the Court’s due process rationale in *Jackson v. Virginia*, which held

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364. *Id.* at 427–28 (Scalia, J., concurring).

365. *Id.* at 400 (majority opinion).

366. See U.S. CONST. amend. XIV; *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

367. See Kreimer & Rudovsky, *supra* note 160, at 593–94 (developing a procedural due process theory of a right to potentially exculpatory DNA testing post-conviction); see also George C. Thomas III et al., *Is It Ever Too Late for Innocence? Finality, Efficiency, and Claims of Innocence*, 64 U. PITT. L. REV. 263 (2003) (arguing that the Due Process Clause requires allowing independent claims of actual innocence in cases with “powerful claims”).

368. See *Herrera*, 506 U.S. at 435 n.5 (Blackmun, J., dissenting).

369. *Kuhlmann v. Wilson*, 477 U.S. 436, 452 (1986).

that the conviction should be overturned if a jury could not have rationally convicted beyond a reasonable doubt.<sup>370</sup> Finally, the Court's aforementioned and longstanding jurisprudence surrounding interests of trial accuracy and fundamental fairness supports an innocence claim where the jury would not, based on new evidence, convict beyond a reasonable doubt.<sup>371</sup>

The Court has also interpreted the Due Process Clause as providing substantive protections. As the *Herrera* dissenters and Justice O'Connor in her concurring opinion pointed out, decades of substantive due process opinions ruled out practices "contrary to contemporary standards of decency"<sup>372</sup> or "shocking to the conscience"<sup>373</sup> or contrary to a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."<sup>374</sup> Those Justices concluded that convicting an innocent person runs contrary to fundamental principles of justice.

In addition to due process, both the Eighth and Sixth Amendments could provide support for a freestanding innocence claim. While the *Herrera* majority did not address the issue, the dissenters in *Herrera* advocated extending the Eighth Amendment to innocent people facing capital punishment.<sup>375</sup> The dissenters argued that "executing an innocent person epitomizes 'the purposeless and needless imposition of pain and suffering'" and therefore constitutes "cruel and unusual punishment" within the meaning of the Eighth Amendment.<sup>376</sup> Similar arguments can be made that it would be cruel and unusual to punish innocent people by incarcerating them for non-capital offenses.<sup>377</sup>

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370. *Herrera*, 506 U.S. at 429 (White, J., dissenting) (citing *Jackson v. Virginia*, 443 U.S. 307, 324 (1979)).

371. See *supra* notes 256–66 and accompanying text.

372. *Herrera*, 506 U.S. at 430 (Blackmun, J., dissenting) (citing *Ford v. Wainwright*, 477 U.S. 399, 406 (1986)); *id.* at 419 (O'Connor, J., concurring) (same).

373. *Id.* at 430 (Blackmun, J., dissenting) (citing *Rochin v. California*, 342 U.S. 165, 172 (1952)); *id.* at 419 (O'Connor, J., concurring) (same).

374. *Id.* at 419 (O'Connor, J., concurring) (quoting *Ford*, 477 U.S. at 406, *Rochin*, 342 U.S. at 172, and *Medina v. California*, 505 U.S. 437, 445–46 (1992)).

375. *Id.* at 431–35 (Blackmun, J., dissenting).

376. *Id.* at 431–32 (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977)).

377. See, e.g., Vivian Berger, *Herrera v. Collins: The Gateway of Innocence for Death-Sentenced Prisoners Leads Nowhere*, 35 WM. & MARY L. REV. 943,

Another previously unexplored source in the Constitution that supports an innocence claim arises from the Sixth Amendment right to a jury trial.<sup>378</sup> In the *Apprendi* line of decisions, the Court held that criminal defendants have a right to have a jury find all the elements of a crime beyond a reasonable doubt, as well as any facts that affect the length of their sentence.<sup>379</sup> In part due to the truth-finding purpose of a jury, the Court has defined this as a bright-line rule.<sup>380</sup> One can argue that a defendant does not receive a valid jury trial if false evidence on a material issue was presented to the jurors. However, such Sixth Amendment review would still be subject to a harmless error analysis.<sup>381</sup>

In response to the dissent, the *Herrera* majority cited to the range of celebrated constitutional protections that ensure against wrongful convictions, but then noted that “[d]ue process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person.”<sup>382</sup> Here, too, technology has changed the analysis. The cost of DNA testing is fairly low, with the most expensive tests costing a few thousand dollars and with the typical price being much less.<sup>383</sup> As noted, some states have

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1012 (1994).

378. U.S. CONST. amend. VI.

379. See *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

380. The Court stated in *United States v. Booker*, 543 U.S. 220, 244 (2005), that the Sixth Amendment serves to secure “the interest in fairness and reliability protected by the right to a jury trial . . . [which] has always outweighed the interest in concluding trials swiftly.” See also *Apprendi*, 530 U.S. at 477.

381. All fifty states adopt the harmless error doctrine, which allows “a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations.” *United States v. Lane*, 474 U.S. 428, 445 (1986) (referring also to the congressional policy embodied in 28 U.S.C. § 2111 (2000), which provides that “judgments shall not be reversed for ‘errors or defects which do not affect the substantial rights of the parties’”); see also RUSSELL L. WEAVER ET AL., *PRINCIPLES OF CRIMINAL PROCEDURE* 420 (2d ed. 2007) (explaining that “a trial error that is not of constitutional dimension . . . is harmless when it plainly appears from the facts and circumstances of the case that the error did not affect the verdict”).

382. *Herrera v. Collins*, 506 U.S. 390, 399 (1993) (quoting *Patterson v. New York*, 432 U.S. 197, 208 (1977)).

383. At the upper end, DNA tests can cost several thousand dollars. See Teresa Johnson, *Orange County’s Innocence Project*, ORANGE COUNTY LAW., Dec. 2001, at 18, 19. The price also depends on how many pieces of evidence must be tested and the types of tests employed. See, e.g., Tania Simoncelli & Barry Stenhardt, *California’s Proposition 69: A Dangerous Precedent for Criminal DNA Databases*, DNA FINGERPRINTING & CIV. LIBERTIES, Summer 2006,



passed statutes agreeing to pay for testing.<sup>384</sup> If the state in certain categories of cases was unwilling to pay for testing, the costs of testing would likely be borne by a nonprofit Innocence Project; such projects have often paid for DNA testing in cases where the results might exculpate.<sup>385</sup> Even supposing that the state did pay for every DNA test without federal or nonprofit assistance, doing so would still cost far less to the state than the litigation of the typical criminal procedure claims prisoners bring, which can demand complex briefing and judicial review during lengthy state and federal appeals that can last for years.

The minimal cost of DNA testing is also overwhelmed by the cost of keeping an innocent person behind bars, even putting to one side the social cost of such a wrongful incarceration. One must also consider the great social cost arising from cases in which the actual perpetrator continues to commit additional serial crimes, as many did in the cases for which individuals were exonerated by post-conviction DNA testing.<sup>386</sup>

Not only are the costs of litigating claims of innocence far less than the great sums we already expend on far more time-consuming and resource-intensive claims, but there is also little danger of the floodgates opening such that courts would be in-

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at 199, 209 (describing the average cost of testing DNA of blood samples at one lab as \$315 per sample).

384. Many states require payment for DNA testing only if the petitioner is able to pay. *See, e.g.*, MICH. COMP. LAWS § 770.16 (2006); R.I. GEN. LAWS § 10-9.1-12(c) (2007). *But see* MD. CODE ANN., CRIM. PROC. § 8-201(g) (LexisNexis 2007) (stating that the petitioner shall pay expenses unless the results are favorable to the petitioner, in which case the court shall order the state to pay).

385. Thus, proposals to sanction petitioners whose guilt is confirmed by post-conviction DNA testing have little merit and overstate the costs of testing, which are continually decreasing. *See, e.g.*, Gwendolyn Carroll, Comment, *Proven Guilty: An Examination of the Penalty-Free World of Post-Conviction DNA Testing*, 97 J. CRIM. L. & CRIMINOLOGY 665, 692-97 (2007) (proposing the adoption of a system like Missouri's, whereby petitioners whose tests confirm guilt are sanctioned through the loss of good time credit); *see also* MO. REV. STAT. § 650.058 (2007). Yet deterring meritorious applications is socially costly for reasons discussed. In contrast, DNA testing that confirms guilt may terminate otherwise burdensome appeals. Further, many for whom DNA testing is relevant serve life terms or face the death penalty, and such a proposal would have little effect on those individuals. *Cf.* Carroll, *supra*, at 695 (recognizing that "this proposal . . . would have no consequences for a petitioner who has accumulated no good time credit").

386. *See* Garrett, *supra* note 4, at 119 (relaying that 37% of the first two hundred DNA exonerations involved identification of the perpetrator, and 24.5% through a "cold hit" in which the perpetrator had subsequently been involved in additional crimes and was identified in a felon database).

undated with innocence claims. On the one hand, where the technology has continued to improve, the very same convicts may seek repeated tests. Indeed, some have been exonerated only by improved testing technology after initial testing was inconclusive.<sup>387</sup> Yet most criminal cases do not often both have identity as a disputed issue and also involve relevant biological evidence. Currently, a narrow category of prisoners can be exonerated pursuant to an innocence claim. To date, 216 prisoners have been exonerated by post-conviction DNA testing through the Innocence Project alone.<sup>388</sup> Additional cases may involve other scientific or otherwise compelling evidence of innocence, though such non-DNA cases may sometimes pose more difficult questions for courts depending on how probative the new scientific evidence is.<sup>389</sup>

Our post-conviction system does not resemble any model of efficient dispute resolution. That system typically imposes a range of procedural barriers that limit assertion of innocence claims, based on the view that any new avenue for review of innocence claims imposes a new cost on the system. However, innocent convicts without an avenue for innocence-based relief will typically not just face routine dismissals of innocence claims, but will instead pursue traditional remedies and assert innocence through indirect and procedurally difficult-to-adjudicate means. Guilty appellants will do the same. Reviewing innocence claims certainly provides far more targeted relief than the raft of criminal procedure rules that apply comprehensively to regulate all criminal investigations and trials.

The only consideration remaining from the *Herrera* decision is tradition. In support of its decision, the *Herrera* Court

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387. For an example, see the story of Stephen Avery, who was exonerated by more sophisticated DNA technology after spending more than eighteen years in prison. Wisconsin Innocence Project, Steven Avery Exonerated After 18 Years in Prison, [http://www.law.wisc.edu/fjr/innocence/avery\\_summary.htm](http://www.law.wisc.edu/fjr/innocence/avery_summary.htm) (last visited Apr. 26, 2008).

388. The Innocence Project, *supra* note 3.

389. For example, revelations regarding improper testimony by FBI analysts concerning bullet lead comparison may result in a series of reversed convictions in non-DNA cases. John Solomon, *FBI Forensic Test Full of Holes*, WASH. POST, Nov. 18, 2007, at A1 (describing how hundreds of defendants' convictions are now in question due to now-discredited FBI bullet lead testimony introduced at their trials); *see also* John Solomon, *Silent Injustice: Bullet-Matching Science Debunked*, WASHINGTONPOST.COM, <http://www.washingtonpost.com/wpdyn/content/discussion/2007/11/15/DI2007111501575.html> (last visited Apr. 26, 2008).

cited the paucity of relief available after trial at common law<sup>390</sup> (though explanations for lack of such post-conviction remedies at common law include the lack of prisons and near-summary execution for felonies). Such long-ago discarded practices have no relevance today, nor do comparatively recent post-conviction rules—now amended by DNA statutes—that limited claims based on new evidence of innocence. While in the past a court reviewed the fairness of a trial with difficulty, in an era where innocence can be proved with great certainty, a court is in a far better position to assess actual innocence. Indeed, why have constitutional criminal procedural protections “ensuring against the risk of convicting an innocent person” if federal courts must remain powerless when convicted individuals are known to be innocent?<sup>391</sup>

### C. AN OUTCOME-DETERMINATIVE STANDARD

The above discussion suggests several constitutional sources, some considered by the Court but none established, that could ground a constitutional innocence claim. What form such a claim should take and under what standard innocence should be assessed remain important questions. Any meaningful standard would ensure at a minimum that substantial claims of innocence receive relief, for when new evidence of innocence demonstrates someone’s innocence either substantially or clearly and convincingly, there is little, if any, justification for denying relief. Courts should decide whether to grant a new trial based on the outcome-based more-likely-than-not standard advanced by the *Herrera* dissenters and adopted by the Court in *House* in the context of excusing procedural default. The Court in *House* emphasized that *Schlup* review requires “a holistic judgment about ‘all the evidence’ and its likely effect on reasonable jurors applying the reasonable-doubt standard.”<sup>392</sup> Adopting that standard would ensure relief in cases where scientific or other evidence shows innocence so strongly that a new jury would probably not convict, and the standard would also deter frivolous filings.

What I have termed substantial claims of innocence face no difficulty meeting this standard; by definition such claims sa-

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390. *Herrera v. Collins*, 506 U.S. 390, 408 (1993).

391. *Id.* at 398.

392. *House v. Bell*, 126 S. Ct. 2064, 2078 (2006) (citation omitted).

tisfy a higher clear and convincing standard of review. Other cases, perhaps like *House*, will pose harder questions in which the petitioner would have to persuade the court that “more likely than not” no reasonable juror would convict in light of the new evidence of innocence.<sup>393</sup>

Though neither has adopted such a standard in the context of innocence claims, federal appellate courts have long applied outcome-determinative standards in the context of constitutional claims, and many state courts apply such a standard for new trial motions.<sup>394</sup> Further, following *House*, courts now have guidance regarding the central importance of DNA evidence to a holistic inquiry, making it more difficult for a court to improperly deny relief using hypothetical scenarios in the face of a clear exclusion. And even if DNA evidence does not totally undercut evidence at trial, it may still raise sufficient questions such that no reasonable juror would come out the same way.<sup>395</sup> Other cases may remain inconclusive and would not satisfy the standard.<sup>396</sup> In those situations, a petitioner would have to first exhaust state process, as § 2254 requires for the consideration of any constitutional claim during federal habeas corpus pro-

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393. *Schlup v. Delo*, 513 U.S. 298, 329 (1995). A few state courts adopt such a formal distinction between relatively easier and harder cases. For example, the Nebraska courts vacate a conviction if DNA results exclude, but courts may instead grant a new trial if merely exculpatory DNA results suggest a probability of a substantially different outcome at trial. *See, e.g., State v. Buckman*, 675 N.W.2d 372, 381 (Neb. 2004).

394. As the Court put it in *Strickland v. Washington*, 466 U.S. 668, 693 (1984), an “outcome-determinative standard has several strengths. It defines the relevant inquiry in a way familiar to courts, though the inquiry, as is inevitable, is anything but precise.” State courts typically adopt the same standard for new trial motions; for example, New York asks whether it is probable that new evidence of innocence would have caused a different result. *See* N.Y. CRIM. PROC. LAW § 440.10(1)(g) (McKinney 2005).

395. For example, Lonnie Erby, convicted of the serial rape of three teenage girls, was exonerated based on DNA testing of two rapes, but the crime scene evidence was destroyed in a third separate incident prosecuted as part of the same serial pattern of attacks; the court concluded that the DNA evidence from the two cases also supported a vacatur in the third. *See* Peter Shinkle, *Man Cleared by DNA Tests Is Freed After 17 Years*, ST. LOUIS POST-DISPATCH, Aug. 26, 2003, at A1.

396. A case that raised great difficulties for the Wisconsin courts involved DNA testing that uncovered two male profiles, one that was not the convict, but one that was inconclusive. *See* *State v. Armstrong*, 700 N.W.2d 98, 128–29 (Wis. 2005) (reversing for a new trial, concluding that “[t]he jury did not have an opportunity to hear and evaluate the DNA evidence that excludes Armstrong as the source of the hairs and the semen”).

ceedings,<sup>397</sup> which would create pressure for states to resolve innocence claims in the first instance.

Likewise, the existence of an innocence right under the Due Process Clause would affect the conduct of local law enforcement, prosecutors, defense attorneys, and judges.<sup>398</sup> Vacating a conviction and granting a new trial confronts the prosecutor with deciding whether sufficient evidence exists to retry a case. In those situations where witnesses are still available and where the prosecutor is convinced the case has merit, a retrial may be pursued. For that reason, a post-conviction reversal does not necessarily ensure that a wrongful conviction is remedied; indeed, a dozen exonerees had more than one retrial—two had three trials—before DNA testing ultimately exonerated them.<sup>399</sup>

#### D. INSTITUTIONALIZING INNOCENCE REVIEW

In this Part, I have described and then advocated a constitutional claim of innocence with an outcome-based standard applicable to all convicts. Such a claim is far broader than the one narrowly rejected by the Supreme Court in *Herrera*. Even in the absence of a uniform innocence claim correlated to the evidence's probative impact, new evidence of innocence already has altered the inquiry for constitutional criminal procedure claims. Commentators feared that a shift towards reviewing innocence claims might weaken constitutional criminal procedure protections while benefiting only a narrow group of actually innocent persons.<sup>400</sup> That shift has already occurred, as DNA evidence has reshaped how our criminal system reviews cases at every stage. It is hard to maintain that our system should not always provide relief to the identifiable, actually innocent convicts, especially when the costs of identifying them may be far less than resolving the complex procedural claims they would otherwise assert.

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397. See 28 U.S.C. § 2254(b) (2000).

398. Concealment of evidence of innocence would violate *Brady* for a new reason, because doing so would involve suppression of potentially outcome-determinative evidence relevant to a claim of innocence. See *supra* note 271 and accompanying text.

399. See Garrett, *supra* note 4, at 98–99.

400. See generally Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. CRIM. L. & CRIMINOLOGY 587 (2005).

Nevertheless, the Supreme Court appears unlikely to interpret the Due Process Clause or any other constitutional provision as supporting an innocence claim of the type described. Nor have most states adopted anything like the optimal statute advanced, which simply assesses the probative impact of new evidence of innocence.

Adding still more gloom to the picture, there are good reasons to think that whatever standard of review is adopted, constitutional or statutory, courts may misinterpret it to deny relief to the innocent because of an adherence to finality, however wrongheaded. After all, appellate courts have long been criticized for inconsistent application of the more permissive *Chapman* harmless error standard, which, like any potential innocence claim, requires courts to weigh evidence of guilt.<sup>401</sup> My dataset of the first two hundred post-conviction DNA exonerees provides additional reasons to distrust appellate adjudication of innocence claims. In these exonerees' cases, courts frequently found constitutional error to be harmless, and even called the evidence of guilt "overwhelming."<sup>402</sup>

Indeed, federal and state courts denied at least twelve exonerees relief despite being presented with DNA test results excluding them.<sup>403</sup> For example, after DNA test results excluded Stephen Avery, the Wisconsin intermediate court nevertheless denied his appeal.<sup>404</sup> The court concluded that even DNA evidence did not meet the fairly lenient reasonable-

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401. See, e.g., Harry T. Edwards, *To Err Is Human, but Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1171–72 (1995) (describing the application of the harmless error doctrine as the "guilt-based approach"); James S. Liebman & Randy Hertz, *Brecht v. Abrahamson: Harmful Error in Habeas Corpus Law*, 84 J. CRIM. L. & CRIMINOLOGY 1109, 1110–11 (1994) (noting the varying impact of *Brecht* on the application of the harmless error doctrine in different courts); Mitchell, *supra* note 268, at 1335 (explaining the three harmless error tests and arguing that the disparity between the tests may determine whether a conviction is upheld or overturned); Jason M. Solomon, *Causing Constitutional Harm: How Tort Law Can Help Determine Harmless Error in Criminal Trials*, 99 NW. U. L. REV. 1053, 1059–64 (2005) (noting that most scholars believe the different approaches are irreconcilable).

402. See Garrett, *supra* note 4, at 107–09.

403. Those exonerees are S. Avery, R. Criner, W. Dedge, C. Elkins, D. Halstead, A. Hicks, L. Holdren, D. Hunt, J. Kogut, L. McSherry, J. Restivo, and J. Watkins. For profiles of those individuals, see The Innocence Project, *supra* note 123.

404. *State v. Avery*, 570 N.W.2d 573, 580 (Wis. Ct. App. 1997).

probability standard under a state new-trial statute.<sup>405</sup> In making this determination, the court relied on the certainty of the victim who identified him, who said, "It's as if I have a photograph in my mind."<sup>406</sup> A court did not vacate Avery's conviction until six years later, in 2002, when more powerful DNA testing confirmed the exclusion and also resulted in a cold hit with a prisoner who was incarcerated for crimes similar to the ones with which Avery was charged.<sup>407</sup> Thus, because of the possibility courts will misinterpret the standards applicable to an innocence claim, such rulings may persist even if legislators and courts adopt the proposed standard for assessing claims based on the probative impact of new evidence of innocence.

In light of the reluctance of courts to upset finality and the unlikelihood the Court will adopt a constitutional innocence claim, our system could instead turn to outside institutions to review innocence claims. The United Kingdom, for example, empowers its Criminal Cases Revision Commission to investigate wrongful convictions.<sup>408</sup> Similarly, in Canada, a Minister of Justice can convene a Criminal Conviction Review that can order a new trial.<sup>409</sup> North Carolina has adopted such an approach, creating an Innocence Commission to determine whether a convict has shown factual innocence.<sup>410</sup> The Commission then refers cases to a three-judge panel that has authority to grant a new trial.<sup>411</sup> In addition to North Carolina, five other states have created innocence commissions or study commissions.<sup>412</sup>

Such institutions can also be created within the criminal justice system. Prosecutor's offices have established internal

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405. *Id.* at 581 ("[T]he presence of DNA from an unidentified third party did not create a reasonable probability of a different result on retrial.").

406. *Id.* at 580.

407. See Wisconsin Innocence Project, *supra* note 387.

408. I assess Innocence Commissions and the United Kingdom model in a prior work. See Garrett, *supra* note 324, at 437.

409. *Id.*

410. *Id.*

411. *Id.*

412. *Id.* at 438 (describing Innocence Commissions in California, Connecticut, Texas, Virginia, and Wisconsin); see also Sandra Svoboda, *Righting the Wrongfuls: DNA Lessons Guide Proposed Laws*, METRO TIMES (Detroit), Oct. 17, 2007, <http://www.metrotimes.com/editorial/story.asp?id=11932> (discussing current legislative proposals in Michigan).

institutions to review potential wrongful conviction cases,<sup>413</sup> as have public defenders, sometimes in collaboration with members of the nationwide network of Innocence Projects.<sup>414</sup> In addition, courts have engaged in systemic inquiries, conducting DNA testing and reviewing cases as part of inquiries into faulty case work in forensic laboratories.<sup>415</sup> Finally, state pardon procedures and boards can and do consider evidence of actual innocence, and could do so in a more formalized manner; such remedies remain discretionary, however.<sup>416</sup>

These new institutions remain new, largely untested, and highly experimental. Yet regardless of the approach adopted, there are reasons to think that an institution acquainted with the causes of wrongful convictions and with special administrative expertise in reviewing claims of innocence could do a better job than generalist appellate courts when reviewing claims of innocence.

Evaluating the probative impact of new exculpatory evidence produces a narrow band of cases from which innocence claims can be more readily identified and remedied. It takes no more analysis to separate substantial and outcome-determinative from inconclusive cases than it does to conduct complex post-conviction harmless error inquiries. This is especially true since, regardless of the actor conducting the innocence review, the inquiry should be limited to the probative impact of the new evidence of innocence. The continued application of categorical exclusions, guilt-based standards, and procedural limitations on access to evidence of innocence and

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413. Garrett, *supra* note 324, at 440–41.

414. See Jennifer Emily, *Dallas County OKs Adding Post to Review DNA Requests*, WFAA.COM (Dallas), Oct. 16, 2007, <http://www.wfaa.com/sharedcontent/dws/news/localnews/stories/101707dnmetdaldna.17a13e9f8.html>.

415. See Garrett, *supra* note 324, at 412–16 (describing the West Virginia Supreme Court's appointment of a Special Master to review cases affected by state crime laboratory forensic fraud); see also Roma Khanna & Steve McVicker, *Panel Will Review 180 HPD [Houston Police Department] Crime Lab Cases*, HOUS. CHRON., Oct. 12, 2007, available at 2007 WLNR 20049034 ("Harris County criminal district judges are poised to appoint a panel to review 180 cases with problematic Houston crime lab evidence, ending a dispute about how to scrutinize those cases.").

416. See Dow et al., *supra* note 196, app. B (providing a comprehensive survey of state pardon and clemency procedures and structures and noting any provisions for review of new evidence of innocence).



relief will ensure that wrongful convictions and high-profile exonerations persist.

Our system should certainly not view post-conviction review as a substitute for efforts to more accurately determine innocence at the trial level. If evidence of innocence is properly developed at trial, appellate and post-conviction judging becomes less necessary. In Part II, I recommended criminal investigation and trial protections to ensure that DNA testing is conducted properly, test results and lab notes are disclosed, and evidence is properly preserved. Other efforts to ensure a more reliable investigative record, such as requiring police to videotape confessions and eyewitness identifications, can better inform those tasked with judging innocence after the fact. Avoiding wrongful convictions in the first instance can hopefully reduce the need to assess claims of innocence during criminal appeals and post-conviction proceedings.

### CONCLUSION

Everything and nothing has changed since 1970, when Judge Friendly called the lack of a freestanding constitutional innocence claim “an anomaly.”<sup>417</sup> Decades later, the status of claims of innocence is no longer anomalous. Yet, despite a surge in the consideration of innocence claims in various forms, well into the DNA age, remedies for innocence remains incomplete. This seems intuitively odd. A false conviction is fundamentally unjust in any system of law; indeed, the Supreme Court has long recognized this, characterizing federal review as “designed to guard against extreme malfunctions in the state criminal justice systems.”<sup>418</sup> Those words ring hollow when the Court continually refuses to recognize an innocence claim, even when presented with convincing proof of “extreme malfunctions.”<sup>419</sup>

In response to the Court’s failure, almost all states have enacted statutes to permit relief based on evidence of innocence, since, after all, it is the states and local governments who face first-hand the injustice and political embarrassment of mounting numbers of DNA exonerations. Although the creation of this new post-conviction avenue represents a definitive

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417. See Friendly, *supra* note 1, at 158–60 & n.87.

418. See *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring).

419. *Id.*

turn away from finality, states have included in these statutes arbitrary restrictions that deny DNA testing to those who could otherwise prove innocence if given the chance, and that block relief to many who have demonstrated, to a high degree of certainty, their innocence.

Our criminal system's conflicted reaction to the advent of DNA testing illuminates the strained relationship between science, technology, and the substance and procedure of criminal law protections. The Supreme Court could ensure a more uniform approach towards claims of innocence by adopting a constitutional innocence claim. This remains unlikely. In *House*, the Court evaded its most recent opportunity to establish such a claim, instead permitting only "gateway" relief.<sup>420</sup> The Court did, however, point the way towards a sensible standard of review for innocence claims by highlighting the role of probative but not dispositive DNA evidence, and by adopting an outcome-determinative standard that asks if a new jury would still convict. Whether the Court eventually reaches the issue or not, the groundwork for an innocence-based regime has emerged. Already, lower federal courts recognize that the ability to prove innocence alters the analysis of underlying criminal procedure rights and application of a harmless error analysis.

The advent of DNA testing created enormous pressure at each stage of the criminal process to provide relief to those who can prove their innocence. Miscarriages of justice uncovered through DNA testing, DNA databanks, and other evolving technology will continue to test our criminal justice system as it adapts to new methods of proof. Yet only if our criminal justice system adopts stronger protections to secure access to evidence of innocence during investigations and trials can wrongful convictions be averted in the first instance. Due process should be understood to require full access to DNA and other scientific evidence at the time of trial. Until our criminal trial courts ensure such access, post-conviction DNA exonerations will maintain pressure on political actors to create more effective remedies by, for example, revising statutory innocence claims, or by establishing Innocence Commissions to review potential wrongful convictions. Similarly, the Supreme Court will continue to face the question whether to recognize a freestanding constitutional claim of innocence. While constitutional interpretation

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420. *House v. Bell*, 126 S. Ct. 2064, 2077 (2006).

lags, new technology will persist in illuminating powerful new evidence of innocence. As technology drives change, the existing constellation of rights and remedies in our criminal system may finally evolve to ensure full access to evidence of innocence at trial, as well as a meaningful post-conviction avenue for claims of innocence.

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## APPENDIX: STATE POST-CONVICTION DNA STATUTES

State	Statute	Date enacted	What standard to obtain DNA testing? <sup>421</sup>	Petitioner must be in custody	Limited to technology not available at trial	Other Limitations <sup>422</sup>	The standard to obtain relief if testing excludes <sup>423</sup>
Alabama	<i>No statute</i>						
Alaska	<i>No statute</i>						
Arizona	ARIZ. REV. STAT. ANN. § 13-4240 (2001 & Supp. 2007)	2000	R			C	
Arkansas	ARK. CODE ANN. §§ 16-112-201 to -207 (2006 & Supp. 2007)	2001	R			I, T	C
California	CAL. PENAL CODE § 1405 (West Supp. 2008)	2000	R	Y		C	
Colorado	COLO. REV. STAT. §§ 18-1-411 to -416 (2007)	2003	M	Y			
Connecticut	CONN. GEN. STAT. § 54-102kk (2007)	2003	R	Y			
Delaware	DEL. CODE ANN. tit. 11, § 4504 (2007)	2000	R		Y	I, T	C
District of Columbia	D.C. CODE §§ 22-4131 to -4133 (Supp. 2007)	2002	R	Y		C	
Florida	FLA. STAT. §§ 925.11, 943.3251 (2007)	2001	R			C	

421. (L) Just a likelihood (the DNA test results could be relevant to innocence); (R) Materiality (or reasonable probability that testing could prove innocence); (M) More probable than not (preponderance); (C) Clear and convincing or a substantial showing.

422. (A) Trial attorney fault; (C) Limited to certain crimes (typically felonies); (G) Guilty plea cases excluded; (I) Identity must have been an issue at trial; (S) Sunset provision; (T) Time limit.

423. If left blank, the trial judge has discretion whether to provide relief.

State	Statute	Date enacted	What standard to obtain DNA testing? <sup>421</sup>	Petitioner must be in custody	Limited to technology not available at trial	Other Limitations <sup>422</sup>	The standard to obtain relief if testing excludes <sup>423</sup>
Georgia	GA. CODE ANN. § 5-5-41(c) (Supp. 2007)	2003	R			C	
Hawaii	HAW. REV. STAT. §§ 844D-121 to -133 (Supp. 2007)	2005	R				
Idaho	IDAHO CODE ANN. §§ 19-4901(a)(6), 4902(b)–(f) (2004)	2001	R		Y	I, T	
Illinois	725 ILL. COMP. STAT. 5/116-3 (2006)	1997	R		Y	I	
Indiana	IND. CODE §§ 35-38-7-1 to -19 (LexisNexis Supp. 2007)	2001	R			C	
Iowa	IOWA CODE § 81.10 (2007)	2005	R			C, I	
Kansas	KAN. STAT. ANN. § 21-2512 (Supp. 2006)	2001	L	Y		C	
Kentucky	KY. REV. STAT. ANN. § 422.285 (LexisNexis Supp. 2007)	2002	R	Y		C <sup>424</sup>	
Louisiana	LA. CODE CRIM. PROC. ANN. art. 926.1 (Supp. 2008)	2001	R			C, S	
Maine	ME. REV. STAT. ANN. tit. 15, §§ 2137–2138 (Supp. 2007)	2001	R	Y	Y	C, I, T	C

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424. Capital cases only.

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State	Statute	Date enacted	What standard to obtain DNA testing? <sup>421</sup>	Petitioner must be in custody	Limited to technology not available at trial	Other Limitations <sup>422</sup>	The standard to obtain relief if testing excludes <sup>423</sup>
Maryland	MD. CODE ANN., CRIM. PROC. § 8-201 (Supp. 2007)	2001	R			C	
Massachusetts	<i>No statute</i>						
Michigan	MICH. COMP. LAWS § 770.16 (2006)	2001	R	Y		C, G, I, S	C
Minnesota	MINN. STAT. § 590.01(1a) (2006)	1999	R		Y	A, I, T	
Mississippi	<i>No statute</i>						
Missouri	MO. REV. STAT. §§ 547.035, .037 (Supp. 2007)	2001	R	Y	Y	A, I	C
Montana	MONT. CODE ANN. § 46-21-110 (2007)	2003	R	Y		C	
Nebraska	NEB. REV. STAT. §§ 29-4116 to -4125 (2006 & Supp. 2007)	2001	L	Y			
Nevada	NEV. REV. STAT. §§ 176.091, .0919 (2007)	2003	R			C <sup>425</sup>	
New Hampshire	N.H. REV. STAT. ANN. § 651-D:2 (2007)	2004	C	Y			
New Jersey	N.J. STAT. ANN. § 2A:84A-32a (West Supp. 2007)	2002	R	Y		I	
New Mexico	N.M. STAT. § 31-1A-2 (Supp. 2007)	2003	R			C, I	

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425. Capital cases only.

State	Statute	Date enacted	What standard to obtain DNA testing? <sup>421</sup>	Petitioner must be in custody	Limited to technology not available at trial	Other Limitations <sup>422</sup>	The standard to obtain relief if testing excludes <sup>423</sup>
New York	N.Y. CRIM. PROC. LAW § 440.30(1-a) (McKinney 2005)	1994	R			G	R
North Carolina	N.C. GEN. STAT. ANN. §§ 15A-269, -270 (2007)	2001	R				
North Dakota	N.D. CENT. CODE § 29-32.1-15 (2006)	2005	R		Y	I	
Ohio	OHIO REV. CODE ANN. §§ 2953.21, .23, .71-.83 (LexisNexis Supp. 2007)	2003	R	Y	Y	C, I	C
Oklahoma	OKLA. STAT. ANN. tit. 22, §§ 1371-1372 (West Supp. 2008)	2002	R	Y		C, S <sup>426</sup>	
Oregon	2005 Or. Laws 2205; 2003 Or. Laws 1128; 2001 Or. Laws 1817	2001	R	Y		C, I, S	
Pennsylvania	42 PA. CONS. STAT. ANN. § 9543.1 (West 2007)	2002	R	Y	Y	A, I	M
Rhode Island	R.I. GEN. LAWS §§ 10-9.1-10 to -12 (Supp. 2007)	2002	R	Y			
South Carolina	<i>No statute</i>						

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426. Statute expired in 2005.

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State	Statute	Date enacted	What standard to obtain DNA testing? <sup>121</sup>	Petitioner must be in custody	Limited to technology not available at trial	Other Limitations <sup>122</sup>	The standard to obtain relief if testing excludes <sup>123</sup>
South Dakota	<i>No statute</i>						
Tennessee	TENN. CODE ANN. §§ 40-30-301 to -313 (2006 & Supp. 2007)	2001	R			C	
Texas	TEX. CODE CRIM. PROC. ANN. arts. 17.48, 64.01-.05 (Vernon 2006 & Supp. 2007)	2001	M			I	R
Utah	UTAH CODE ANN. §§ 78-35a-301 to -304 (2002 & Supp. 2007)	2001	R		Y	C	C
Vermont	Vt. STAT. ANN. tit. 13, § 5561 (Supp. 2007)	2007	R			C	
Virginia	VA. CODE ANN. §§ 19.2-327.1 to -327.6 (Supp. 2007)	2001	C	Y	Y	A, C	C
Washington	WASH. REV. CODE § 10.73.170 (2006)	2000	R	Y	Y	C	
West Virginia	W. VA. CODE ANN. § 15-2B-14 (LexisNexis Supp. 2007)	2004	R	Y		C	
Wisconsin	Wis. STAT. § 974.07 (2005-2006)	2001	R				
Wyoming	WYO. STAT. ANN. § 7-12-303 (effective July 1, 2008)	2008	L			C	



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