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DISPARITIES IN POSTCONVICTION REMEDIES FOR THOSE WHO PLEAD GUILTY AND THOSE CONVICTED AT TRIAL: A SURVEY OF STATE STATUTES AND RECOMMENDATIONS FOR REFORM

Rebecca Stephens[*]

I. INTRODUCTION

On November 19, 1991, a fourteen-year-old girl named Cateresa Matthews went missing in her hometown of Dixmoor, Illinois.[1] A few weeks later, her body was found in a nearby field; she had been sexually assaulted and died from a gunshot wound to the mouth.[2] In late October and early November 1992, police arrested five suspects, all between the ages of fourteen and sixteen, named Robert Taylor, Robert Lee Veal, Jonathan Barr, James Harden, and Shainne Sharp—a group that later came to be known as the "Dixmoor Five."[3] After lengthy interrogations by police, three of the teens confessed to the crime, each implicating the five teens who were ultimately charged.[4] During the pretrial investigation, DNA testing was conducted on sperm recovered from the victim's body; the results excluded all five of the teenagers. Regardless, the State continued to

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[*] J.D. Candidate, Northwestern University School of Law, 2013. I owe much, much gratitude to Stuart Chanen and Professor Joshua Tepfer for inspiring the topic of this Comment and for their many insights and suggestions. I would also like to thank the editorial staff of JCLC for their feedback and assistance, especially Jessica Notebaert, Megan Lawson, and Elie Zenner.

[1] Steve Mills & Andy Grimm, *After Years in Prison, Men Cleared of Dixmoor Crime*, CHI. TRIB., Nov. 4, 2011, § 1, at 12.

[2] *Id.*

[3] *Id.*

[4] *Background on Englewood and Dixmoor Cases*, CTR. ON WRONGFUL CONVICTIONS OF YOUTH, http://www.cwcy.org/englewood_dixmoor.aspx (last visited Oct. 27, 2012).

press charges against all five suspects.[5]

Two of the teens—Robert Veal and Shainne Sharp—agreed to plead guilty and testify against the other three in exchange for shorter sentences.[6] The other three were convicted after trials, and each was sentenced to at least eighty years in prison.[7] Both Veal and Sharp have since recanted their testimony, confessions, and statements implicating the other three men.[8]

In November 1994, thirty-year-old Nina Glover was found naked and strangled to death in a dumpster in the Englewood neighborhood of Chicago's South Side.[9] Four months later, a tip allegedly led police to investigate five teenagers in the murder—Terrill Swift, Harold Richardson, Michael Saunders, Vincent Thames, and Jerry Fincher.[10] After intense, hours-long interrogations, during which the teenagers were not accompanied by counsel or allowed to speak to family members, police said that all five had confessed to raping and killing the woman, although there were major factual discrepancies in their statements.[11] Semen was identified on samples collected from the victim's body and an early form of DNA testing was conducted, excluding all five suspects as possible contributors. Despite this evidence, the prosecutors went forward with the trials.[12] Though it is unclear why the prosecutors continued with the trials after the only physical evidence from the crime excluded all five of the teenagers, later statements by the Cook County State's Attorney's Office (CCSAO) indicated that the prosecutors felt that the confessions alone were strong enough evidence of the teenagers' guilt.[13]

Three defendants—Terrill Swift, Harold Richardson, and Michael Saunders—were convicted almost exclusively based on the confessions and

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[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*; *see also Meet the Exonerated: Vincent Thames*, CTR. ON WRONGFUL CONVICTIONS, http://www.law.northwestern.edu/wrongfulconvictions/exonerations/ilthamesvSummary.html (last visited February 26, 2013).

[11] *Background on Englewood and Dixmoor Cases*, *supra* note 4.

[12] *Id.*

[13] *See* Erica Goode, *When DNA Evidence Suggests 'Innocent,' Some Prosecutors Cling to 'Maybe*,*'* N.Y. TIMES, Nov. 16, 2011, at A19 (quoting State's Attorney Anita Alvarez, "DNA evidence in and of itself is not always the 'silver bullet' that it is sometimes perceived to be"); *see also* Jason Meisner, *Exonerations Urged for 7 Convicted in '90s*, CHI. TRIB., Oct. 1, 2011, §1, at 4 (quoting a CCSAO spokesperson, "DNA evidence is not always in and of itself the factor that would lead to the dismissal or filing of charges").

sentenced to prison terms ranging from thirty to forty years. A fourth, Vincent Thames, after seeing two of the others convicted at trial and sentenced to lengthy prison terms, pleaded guilty and received a thirty-year sentence.[14] These four men later became known as the "Englewood Four."[15] The fifth defendant's confession was suppressed and prosecutors dropped the charges against him.[16] All five of the men claimed their confessions were coerced and false and have since maintained their innocence.

In the state of Illinois, those who plead guilty are barred from later seeking DNA testing on the evidence in their cases.[17] As a result, Robert Veal and Shainne Sharp from the Dixmoor case and Vincent Thames from the Englewood case had no way to prove their innocence. However, in 2011, their codefendants who were convicted at trial successfully petitioned courts to have relevant DNA evidence retested and run through the Combined DNA Index System to see if a match could be found.[18] In each case, the DNA was found to match a violent, career criminal. In the Dixmoor case, the DNA matched a man who already had one rape conviction, and in the Englewood case, the DNA matched a man who had already been convicted of one murder and charged in another after his DNA was found on each of the victims' bodies.[19]

In each case, the defendants who had lost at trial quickly filed motions to vacate their convictions.[20] However, in both cases the State argued that the defendants who pleaded guilty were barred from participating in those postconviction proceedings.[21] While the Illinois postconviction statute does not explicitly bar individuals who plead guilty from filing postconviction petitions, prosecutors argued that because the DNA testing statute has been interpreted as excluding those who plead guilty from petitioning the court

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[14] Petition for Certificate of Innocence at 4, People v. Thames, No. 95 CR 09676-02 (Cir. Ct. Ill. June 5, 2012).

[15] *See Background on Englewood and Dixmoor Cases*, *supra* note 4.

[16] *Id.*

[17] 725 ILL. COMP. STAT. ANN. 5/116-3 (LexisNexis 2012); People v. O'Connell, 879 N.E.2d 315, 319 (Ill. 2007).

[18] *Background on Englewood and Dixmoor Cases*, *supra* note 4.

[19] *Id.*

[20] *Id.*

[21] People's Motion to Dismiss Amended Joint Motion for Relief from Judgment Pursuant to 735 ILCS 5/2-1401 at 14–15, People v. Thames, No. 95CR-15660 (Cir. Ct. Ill. Sept. 14, 2011); People's Motion to Dismiss Petition for Relief from Judgment of Conviction Pursuant to 735 ILCS 5/2-1401 at 4, People v. Veal, No. 93CR-7347 (Cir. Ct. Ill. Aug. 5, 2011) [hereinafter People's Motion to Dismiss Petition for Relief].

for forensic testing, the postconviction statute providing relief from judgments should also be interpreted as barring them from filing motions for postconviction relief.[22] Prosecutors further argued that those who pleaded guilty should not be able to "bootstrap" their claims onto the claims of the other men.[23]

The Dixmoor Five and Englewood Four cases were before two different judges, and the two judges interpreted the statute in conflicting ways. In September 2011, the Dixmoor Five case was argued before Judge Michelle Simmons, who ultimately agreed with the State's arguments and dismissed Robert Lee Veal's postconviction petition, holding that, as a result of his guilty plea, he was barred from the postconviction proceedings to which his codefendants who went to trial were entitled.[24] Ultimately, on November 3, 2011, the CCSAO formally requested that Judge Simmons vacate the convictions of the Dixmoor Five and to *nolle prosequi* future charges.[25] Judge Simmons entered an order vacating the convictions of the three codefendants who went to trial and, a little while later, also vacated the convictions of the two codefendants who pleaded guilty, thus rendering the issue moot.[26]

However, in the Englewood Four case, the judge reached a different conclusion. On October 10, 2011, attorneys for the Englewood Four and the State argued their respective motions before Judge Paul Biebel Jr., Presiding Judge of the Criminal Division of the Circuit Court of Cook County. On November 16, 2011, Judge Biebel issued a written decision holding that those who plead guilty are "not barred from seeking relief pursuant to Section 2-1401," the Illinois statute establishing a process by which a defendant may seek relief from a judicial order more than thirty days after its entry.[27] The judge vacated the convictions of all four of the codefendants.[28]

As demonstrated by the Dixmoor Five and Englewood Four cases, the

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[22] People's Motion to Dismiss Petition for Relief, *supra* note 21. Some of the author's familiarity with the Dixmoor and Englewood cases comes from her work in the Center on Wrongful Convictions of Youth at Northwestern University School of Law.

[23] Transcript of Oral Argument at 16, People v. Veal, No. 93CR-7347 (Cir. Ct. Ill. Sept. 23, 2011).

[24] *Id.* at 37–38.

[25] James Harden, Jonathan Barr, and Robert Taylor's Joint Petition for Certificates of Innocence at 7, People v. Harden et al., Nos. 92CR-27247 & 95CR-23475 (Cir. Ct. Ill. June 6, 2012).

[26] *Id.*

[27] Order at 5, People v. Thames et al., No. 95CR-9676 (Nov. 16, 2011).

[28] *Id.*

law in Illinois governing postconviction remedies for those who plead guilty is unclear and has been interpreted in different and conflicting ways. The postconviction laws in other states are equally diverse and unclear with regard to those who plead guilty.[29] Part II of this Comment analyzes the postconviction remedies available in all fifty states, including access to DNA or other forensic testing and general postconviction remedies, and considers how those who plead guilty are treated differently from those who were convicted at trial. Part III argues that to treat those who plead guilty differently from those who are convicted at trial is inherently unjust. Finally, Part IV provides legislative recommendations to ensure that all people are treated equally in the postconviction context and given opportunities to demonstrate their innocence.

II. BACKGROUND

Generally, there are three main types of postconviction remedies governed by state statute—DNA or other forensic testing, general postconviction remedies, and habeas corpus petitions. For the purposes of this Comment, "DNA or other forensic testing" refers to the ability of someone who has been found guilty of a crime to petition on his own behalf for forensic testing of DNA or other evidence related to the crime he was charged with. "General postconviction remedies" are procedures through which a prisoner requests a court to vacate or correct a conviction or sentence.[30] These include, but are not limited to, the ability of someone who has been convicted of a crime to petition on her own behalf to correct errors of fact or law in her underlying conviction, allege ineffective assistance of counsel, or bring new evidence to the attention of the trial court. "Habeas corpus" refers to the ability of someone who has been convicted of a crime to petition the court for a writ to ensure that his or her imprisonment or detention is not illegal.[31]

A. DNA OR OTHER FORENSIC TESTING

Currently the District of Columbia and all states besides Oklahoma have statutes covering the postconviction right to DNA or other forensic testing.[32] The laws granting postconviction petitioners the right to request

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[29] *See generally* Deborah F. Buckman, Annotation, *Validity, Construction, and Application of State Statutes and Rules Governing Requests for Postconviction DNA Testing*, 72 A.L.R. 6TH 227 (2012).

[30] *See* BLACK'S LAW DICTIONARY 1204 (8th ed. 2004).

[31] *See id.* at 728.

[32] Buckman, *supra* note 29, § 2; *see also* Brandon L. Garrett, *Claiming Innocence*, 92

DNA or other forensic testing vary significantly among the states,[33] and most state statutes do not directly address the issue of whether people who pleaded guilty can apply to have the evidence from their cases tested.[34] While some states explicitly grant guilty pleaders the right to apply for DNA or other forensic testing,[35] others explicitly exclude those who plead guilty from utilizing these provisions.[36] Other states place different limitations on postconviction DNA or other forensic testing, such as time barriers, extra requirements for those who plead guilty, or testing for only certain categories of cases.[37] The remaining states leave open the question

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MINN. L. REV. 1629, 1673 (2008) (providing an overview of postconviction DNA testing statutes for those who claim they were wrongfully convicted); Michael P. Luongo, Note, *Post-Conviction Due Process Right to Access DNA Evidence:* Dist. Attorney's Office v. Osborne, 29 TEMP. J. SCI. TECH. & ENVTL. L. 127, 134 (2010). Massachusetts recently passed a postconviction DNA testing statute, Senate Bill 1987, on February 17, 2012. 2012 Mass. Legis. Serv. ch. 38 (West).

[33] *See* sources cited *supra* note 32.

[34] *See, e.g.*, ALA. CODE § 15-18-200 (LexisNexis 2011) ("An individual convicted of a capital offense who is serving a term of imprisonment or awaiting execution of a sentence of death, through written motion to the circuit court that entered the judgment of sentence, may apply for the performance of forensic . . . (DNA) testing on specific evidence . . ."); ARIZ. REV. STAT. ANN. § 13-4240 (2001) ("At any time, a person who was convicted of and sentenced for a felony offense and who meets the requirements of this section may request the forensic . . . [DNA] testing of any evidence . . . .").

[35] *See, e.g.*, CAL. PENAL CODE § 1405 (West 2011) ("[T]he right to file a motion for postconviction DNA testing provided by this section is absolute and shall not be waived. This prohibition applies to, but is not limited to, a waiver that is given as part of an agreement resulting in a plea of guilty or nolo contendere."); IOWA CODE ANN. § 81.10 (West 2008) ("The court shall grant the motion if . . . [t]he evidence subject to DNA analysis is material to . . . evidence . . . admitted to at a guilty plea proceeding.").

[36] *See, e.g.*, OHIO REV. CODE ANN. § 2953.72 (West 2005 & Supp. 2012) ("An offender is not an eligible offender under division (C)(1) of this section regarding any offense to which the offender pleaded guilty or no contest.").

[37] *See, e.g.*, ME. REV. STAT. ANN. tit. 15, § 2137 (2003 & Supp. 2011) ("A person who has been convicted of and sentenced for a crime under the laws of this State that carries the potential punishment of imprisonment of at least one year and for which the person is in actual execution of either a pre-Maine Criminal Code sentence of imprisonment, including parole, or a sentencing alternative pursuant to Title 17-A, section 1152, subsection 2 that includes a term of imprisonment or is subject to a sentence of imprisonment that is to be served in the future because another sentence must be served first may . . . mov[e] the court to order DNA analysis of evidence."); OR. REV. STAT. § 138.690 (2011) ("A person may file in the circuit court in which the judgment of conviction was entered a motion requesting the performance of DNA (deoxyribonucleic acid) testing on specific evidence if the person: (1) Is incarcerated in a Department of Corrections institution as the result of a conviction for aggravated murder or a person felony as defined in the rules of the Oregon Criminal Justice Commission; or (2) Is not in custody but has been convicted of aggravated murder, murder or a sex crime as defined in ORS 181.594.").

of whether guilty pleaders can apply for DNA or forensic testing; however, some use language regarding trials that could imply that the remedy was meant to be limited solely to those who pleaded not guilty and were convicted by a jury.[38]

1. *States Granting Those Who Plead Guilty the Right to DNA or Other Forensic Testing*

Currently, thirteen states and the District of Columbia explicitly grant those who plead guilty the right to DNA or other forensic testing after the guilty plea is entered.[39] The California and West Virginia statutes provide that the right to file a motion for postconviction DNA testing is absolute and may not be waived, thus barring prosecutors from including provisions in plea agreements that would prevent those who plead guilty from later petitioning for DNA testing.[40] Other statutes allow those who plead guilty to apply for DNA testing because of the effect that exculpatory DNA results might have had on the defendants' decisions to plead guilty.[41] The Texas statute, which requires any applicant for DNA testing to demonstrate that the perpetrator's identity was at issue in the underlying conviction, states that courts are prohibited from finding that identity was not at issue solely based on a defendant's guilty plea.[42] The remaining statutes simply contain language including those who plead guilty as a category of individuals who have the right to apply for DNA testing.[43] In 2012, Massachusetts enacted

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[38] *See, e.g.*, NEB. REV. STAT. § 29-2101, §§ 29-4119–25 (2008) ("[A] person in custody pursuant to the judgment of a court may, at any time after conviction, file a motion, with or without supporting affidavits, in the court that entered the judgment requesting forensic DNA testing of any biological material . . . .").

[39] *See* CAL. PENAL CODE § 1405 (West 2011); D.C. CODE §§ 22-4133, 22-4135 (LexisNexis 2010); HAW. REV. STAT. ANN. § 844D-121 (LexisNexis 2012); IDAHO CODE ANN. §§ 19-4901–02 (2004); IOWA CODE ANN. § 81.10 (West 2008); 2012 Mass. Legis. Serv. ch. 38 (West); MISS. CODE ANN. §§ 99-39-1–29 (2003); MO. ANN. STAT. § 547.035 (West 2001); N.H. REV. STAT. ANN. §§ 651-D:1–5 (LexisNexis 2012); N.M. STAT. ANN. § 31-1A-2 (2010); TEX. CODE CRIM. PROC. ANN. arts. 64.01–05 (West 2007); VA. CODE ANN. § 19.2-327.1 (2008); W. VA. CODE ANN. § 15-2B-14 (LexisNexis 2012); WIS. STAT. ANN. §§ 974.02, 974.06, 974.07 (West 2011).

[40] *See* CAL. PENAL CODE § 1405 (West 2011); W. VA. CODE ANN. § 15-2B-14 (LexisNexis 2012).

[41] *See* IOWA CODE ANN. § 81.10 (West 2008); N.M. STAT. ANN. § 31-1A-2 (2010).

[42] *See* TEX. CODE CRIM. PROC. ANN. art. 64.01–05 (West 2007).

[43] *See* D.C. CODE §§ 22-4133, 22-4135 (LexisNexis 2010); HAW. REV. STAT. ANN. §§ 844D-121–133 (LexisNexis 2012); IDAHO CODE ANN. §§ 19-4901–02 (2004); MISS. CODE ANN. §§ 99-39-1–29 (2003); MO. ANN. STAT. § 547.035 (West 2001); N.H. REV. STAT. ANN. §§ 651-D:1–5 (LexisNexis 2012); VA. CODE ANN. § 19.2-327.1 (2008); W. VA. CODE ANN. § 15-2B-14 (LexisNexis 2012); WIS. STAT. ANN. §§ 974.02, 974.06, 974.07 (West

its postconviction DNA and forensic testing statute.[44] As the bill was being considered, some district attorneys called the bill "flawed" because it allowed those who plead guilty to apply for postconviction DNA testing.[45] However, on February 12, 2012, the bill was signed into law, and in its final form it explicitly states that "[a] person who pleaded guilty or nolo contendere in the underlying case may file a motion" for DNA testing.[46]

Despite not explicitly addressing the issue in its postconviction DNA testing statute,[47] Kansas has also granted those who plead guilty the right to petition for DNA testing. In *State v. Smith*, the Court of Appeals of Kansas overturned the District Court's decision to deny DNA testing to a man convicted of rape and sodomy on the sole basis of his guilty plea.[48] Acknowledging that the purpose of the state's DNA testing statute was to "determine if one who is in state custody was 'wrongfully convicted or sentenced' and if so, to vacate and set aside the judgment," the court stated that to deny all people who plead guilty the ability to apply for DNA testing would be inconsistent with the broad legislative goals underlying the statute.[49]

2. *States Denying Those Who Plead Guilty the Right to DNA or Other Forensic Testing*

Currently, Ohio is the only state whose statute explicitly denies those who plead guilty the right to DNA testing.[50] Initially, the statute allowed inmates who pleaded guilty to a crime that occurred prior to the enactment of the statute to apply for forensic testing as long as the prosecuting attorney agreed,[51] but in 2007 the Supreme Court of Ohio deemed that provision unconstitutional.[52] As the law stands today, no one who pleads

2011).

[44] 2012 Mass. Legis. Serv. ch. 38 (West).

[45] Marc Larocque, *Post-Conviction DNA Testing Proposal Stirs Debate Among Advocates, DAs*, HERALD NEWS (Nov. 27, 2011, 12:20 AM), http://www.heraldnews.com/news/x143555067/Post-conviction-DNA-testing-proposal-stirs-debate-among-advocates-DAs.

[46] 2012 Mass. Legis. Serv. ch. 38 (West).

[47] *See* KAN. STAT. ANN. § 21-2512 (2001).

[48] State v. Smith, 119 P.3d 679, 684 (Kan. Ct. App. 2005).

[49] *Id.* at 683 (quoting State v. Denney, 101 P.3d 1257, 1265 (Kan. 2004)).

[50] *See* OHIO REV. CODE ANN. § 2953.72A(11) (West 2005) (providing that "[a]n offender is not an eligible offender [to apply for DNA testing] regarding any offense to which the offender pleaded guilty or no contest").

[51] *See* OHIO REV. CODE ANN. § 2953.82 (West 2005).

[52] State v. Sterling, 864 N.E.2d 630, 636 (Ohio 2007).

guilty is eligible to apply for DNA testing.

In addition to Ohio's explicit statutory exclusion of guilty pleaders from DNA testing, courts in Illinois, New York, and Pennsylvania have also interpreted their respective DNA testing statutes as excluding those who plead guilty.[53] The Illinois statute does not explicitly restrict those who plead guilty from applying for DNA testing. Instead, it lays out several statutory requirements that must be met in order for DNA testing to be granted: identity must have been at issue in the trial resulting in the defendant's conviction and the test results must have the scientific potential to produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence.[54]

In *People v. Urioste*, the Illinois Appellate Court interpreted these requirements as indicating a legislative intent to allow postconviction forensic testing only in those cases "where such testing could discover new evidence at sharp odds with a previously rendered guilty verdict based upon criminal acts that the defendant *denied* having engaged in."[55] The court went on to note that the "legislature did not want convicted defendants who admitted at their trial to the commission of the acts charged, and did not contest the question of who committed those acts, to make a mockery of the criminal justice system and the statute's grace."[56] In *People v. Lamming*, the Illinois Appellate Court took this analysis a step further, holding that because the defendant in that case pleaded guilty, "he did not have a trial, he did not deny committing the acts charged, and identity was not at issue."[57] Therefore, to allow him (or those who plead guilty in general) access to forensic testing would be inconsistent with legislative intent.[58] In 2007, the Illinois Supreme Court spoke definitively on this issue, holding that "defendants who plead guilty may not avail themselves of [the postconviction DNA testing statute]."[59]

Taking a similar approach, the Superior Court of Pennsylvania interpreted the Pennsylvania forensic testing statute as precluding those

[53] *See* People v. O'Connell, 879 N.E.2d 315, 320 (Ill. 2007); People v. Lamming, 833 N.E.2d 925, 927 (Ill. App. Ct. 2005); People v. Urioste, 736 N.E.2d 706, 716 (Ill. App. Ct. 2000); People v. Byrdsong, 820 N.Y.S.2d 296, 299 (App. Div. 2006); Williams v. Erie Cnty. Dist. Attorney's Office, 848 A.2d 967, 972 (Pa. Super. Ct. 2004).

[54] *See* 725 ILL. COMP. STAT. ANN. 5/116-3 (LexisNexis 2012).

[55] *Urioste*, 736 N.E.2d at 712.

[56] *Id.*

[57] *Lamming*, 833 N.E.2d at 928.

[58] *Id.*

[59] People v. O'Connell, 879 N.E.2d 315, 319 (Ill. 2007).

who plead guilty from later seeking DNA testing.[60] The court reasoned that because the statute requires the applicant to demonstrate that the identity of the perpetrator was at issue in the proceedings that led to conviction, an applicant who pleaded guilty would not be able to meet the requirements of a prima facie case.[61] In addition, the court interpreted the plain meaning of "proceedings," as used by the statute, as not encompassing "negotiations between the prosecution and defense regarding plea bargains."[62]

Similarly, the New York statute does not explicitly address whether those who plead guilty may petition for DNA or forensic testing.[63] In *People v. Byrdsong*, the Appellate Division of the New York Supreme Court held that defendants who plead guilty are not entitled to DNA testing because the statute's references to "trial" indicate a legislative intent to extend the remedy only those defendants who were convicted by a jury.[64]

3. *States Placing Other Limitations on Who May Apply for Forensic Testing*

Some states place limitations on who may apply for DNA or other forensic testing without specifically including or excluding petitioners based solely on the issue of whether they pleaded guilty.[65] Two states—Virginia and Wyoming—currently require those who plead guilty to follow a separate procedure from those convicted at trial if they wish to apply for postconviction DNA testing.[66] Virginia's statute allows those who plead guilty to apply for DNA testing, but once they receive exculpatory results, some petitioners who plead guilty are barred from applying for a writ of

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[60] Williams v. Erie Cnty. Dist. Attorney's Office, 848 A.2d 967, 972 (Pa. Super. Ct. 2004).

[61] *Id.*

[62] *Id.*

[63] *See* N.Y. CRIM. PROC. LAW § 440.30 (McKinney 2006) (providing that "[w]here the defendant's motion requests the performance of a forensic DNA test on specified evidence, and upon the court's determination that any evidence containing . . . ("DNA") was secured in connection with the trial resulting in the judgment, the court shall grant the application for forensic DNA testing of such evidence upon its determination that if a DNA test had been conducted on such evidence, and if the results had been admitted in the trial resulting in the judgment, there exists a reasonable probability that the verdict would have been more favorable to the defendant").

[64] People v. Byrdsong, 820 N.Y.S.2d 296, 299 (App. Div. 2006).

[65] *See, e.g.*, ALASKA STAT. § 12.73.010 (2010) (limiting access to forensic testing for defendants who "did not admit or concede guilt"); MD. CODE ANN., CRIM. PROC. §§ 6-232, 8-201 (LexisNexis 2007) (limiting access to forensic testing by type of crime).

[66] *See* VA. CODE ANN. § 19.2-327.1(A) (2008); WYO. STAT. ANN. §§ 7-12-302–15 (2011).

actual innocence and must instead apply for executive relief, such as a pardon.[67] In Wyoming, individuals who pleaded guilty prior to January 1, 2000, may petition for DNA testing, but in cases where a guilty plea occurred after January 1, 2000, courts may not order DNA testing unless they find that the failure to exercise due diligence in requesting DNA testing at the time of conviction was the result of ineffective assistance of counsel.[68]

Currently, ten states require anyone petitioning for postconviction DNA testing to demonstrate that the identity of the perpetrator was at issue in the proceedings that led to conviction.[69] However, the states do not agree on whether the fact that the defendant pleaded guilty means that identity was not at issue. For example, as discussed above, Illinois courts have determined that once a defendant pleads guilty, identity is no longer an issue.[70] On the other hand, the Texas forensic testing statute states that "the convicting court is prohibited from finding that identity was not an issue in the case solely on the basis of [a guilty] plea, confession, or admission, as applicable."[71]

In the remaining states that require identity to be at issue, it is not clear how this requirement affects those who plead guilty. For example, South Dakota permits forensic testing if the defendant meets a list of conditions, including: "If the petitioner was convicted following a trial, the identity of the perpetrator was at issue in the trial."[72] The statute is silent as to whether those who plead guilty are able to obtain DNA testing, but this provision could be read to suggest that the legislature also intended the statute to apply to guilty pleaders, who need not demonstrate that identity was at issue in order to file a petition for forensic testing.

Many state statutes use language that could be interpreted as requiring

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[67] VA. CODE ANN. §§ 19.2-327.1, 19.2-327.2 (2008). While anyone who pleads not guilty may be issued a writ of actual innocence, for those who plead guilty, the writ of actual innocence is only available in Class 1 or 2 felony cases, or felony cases for which the maximum penalty is imprisonment for life. VA. CODE ANN. § 19.2-327.2 (2008).

[68] WYO. STAT. ANN. § 7-12-303(d) (2011).

[69] *See* GA. CODE ANN. § 5-5-41 (West 2003); 725 ILL. COMP. STAT. ANN. 5/116-3 (LexisNexis 2012); MICH. COMP. LAWS ANN. § 770.16 (West 2006); MINN. STAT. ANN. §§ 590.01–06 (West 2005); MONT. CODE ANN. §§ 46-21-110, 46-21-111 (2011); N.J. STAT. ANN. § 2A:84A-32a (West 2005); N.D. CENT. CODE § 29-32.1-15 (2008); N.M. STAT. ANN. § 31-1A-2 (2010); S.D. CODIFIED LAWS § 23-5B-1 (2004); TEX. CODE CRIM. PROC. ANN. arts. 64.01–05 (West 2007).

[70] People v. O'Connell, 879 N.E.2d 315, 319 (Ill. 2007).

[71] TEX. CODE CRIM. PROC. ANN. art. 64.03(b) (West 2007).

[72] S.D. CODIFIED LAWS § 23-5B-1 (2004).

a trial to have taken place in order for someone to petition for forensic testing.[73] As discussed above, the Illinois statute includes language referring to the "trial court," "time of trial," and "in the trial which resulted in his or her conviction," and Illinois courts have interpreted this as indicating a legislative intent to allow DNA testing only for those who were convicted after a trial.[74]

Other state statutes also include references to trial, but courts have yet to decide whether those statutes exclude those who plead guilty. For example, the Alabama forensic testing statute provides that an individual convicted of a capital offense may apply for DNA testing of specific evidence if such testing was not performed "at the time of the initial trial" and if "the identity of the perpetrator was at issue in the trial that resulted in the conviction of the petitioner."[75] The Arizona, Delaware, and Louisiana forensic testing statutes also include references to trial.[76]

A confession may also bar postconviction DNA testing; in Alaska and Pennsylvania, petitioners who make certain types of admissions are ineligible to seek later DNA testing.[77] In Alaska, defendants cannot apply for postconviction DNA testing if they "admit[ted] or concede[d] guilt under oath in an official proceeding for the offense that was the basis of the conviction," but "the court, in the interest of justice, may waive this requirement," and "the entry of a guilty or nolo contendere plea is not an admission or concession of guilt."[78]

Some states only allow postconviction DNA testing in cases where the

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[73] *See* ALA. CODE § 15-18-200 (LexisNexis 2006); ARIZ. REV. STAT. ANN. § 13-4240 (2010); DEL. CODE ANN. tit. 11, § 4504 (2011); 725 ILL. COMP. STAT. ANN. 5/116-3 (LexisNexis 2012); LA. CODE CRIM. PROC. ANN. art. 926.1 (2006).

[74] *See* 725 ILL. COMP. STAT. ANN. 5/116-3 (LexisNexis 2012); *O'Connell*, 879 N.E.2d at 319.

[75] ALA. CODE § 15-18-200 (LexisNexis 2006).

[76] The Arizona statute allows a petitioner to apply for DNA testing if a reasonable probability exists that "[t]he petitioner's verdict or sentence would have been more favorable if the results of [DNA] testing had been available at the trial leading to the judgment of conviction." ARIZ. REV. STAT. ANN. § 13-4240 (2010). The Delaware statute allows a motion for DNA testing to be granted if "[t]he testing is to be performed on evidence secured in relation to the trial which resulted in the conviction." DEL. CODE. ANN. tit. 11, § 4504 (2011). In Louisiana, petitioners must include in their applications for testing "[a] factual explanation of why there is an articulable doubt, based on competent evidence whether or not introduced at trial, as to the guilt of the petitioner." LA. CODE CRIM. PROC. ANN. art. 926.1(1) (2006).

[77] *See* ALASKA STAT. § 12.73.010 (2010); 42 PA. CONS. STAT. § 9543.1 (2011). Note that Pennsylvania already bars those who plead guilty from postconviction DNA testing. 42 PA. CONS. STAT. § 9543.1(c)(3)(ii).

[78] ALASKA STAT. § 12.73.010 (2010).

underlying conviction is for certain categories or types of crimes. The Florida, Louisiana, and Nevada forensic testing statutes allow DNA testing only in felony cases.[79] The Kansas statute allows postconviction DNA testing only in murder and rape cases, and the Oregon statute provides for postconviction DNA testing only in aggravated murder, murder, or sex crime cases.[80] The Kentucky statute allows DNA testing in cases where a person was convicted of and sentenced to death for a capital offense.[81] The Maryland and South Carolina statutes also provide a list of eligible offenses for postconviction DNA testing.[82] In Maine, a person convicted of a crime that "carries the potential punishment of imprisonment of at least one year" may apply for DNA testing.[83] Further, many states seem to limit DNA testing to cases in criminal courts, excluding juveniles whose cases were adjudicated in juvenile courts.[84]

B. GENERAL POSTCONVICTION REMEDIES

Most states have statutes that govern the procedures and remedies through which defendants can pursue claims regarding constitutional violations, errors of fact in the underlying proceedings, changes in law since the conviction occurred, and other issues.[85] Only a handful of states' statutes explicitly address whether those who plead guilty have access to these remedies;[86] most states leave it to the courts to determine whether those who plead guilty can file postconviction petitions. While most states allow those who plead guilty to file postconviction petitions, either by

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[79] FLA. STAT. ANN. §§ 925.11, 925.12, 943.3251 (West 1998); LA. CODE CRIM. PROC. ANN. art. 926.1 (2006); NEV. REV. STAT. ANN. § 176.0918 (LexisNexis 2010); FLA. R. CRIM. P. 3.853.

[80] KAN. STAT. ANN. § 21-2512 (2001); OR. REV. STAT. § 138.690 (2011).

[81] KY. REV. STAT. ANN. §§ 17.176, 422.285, 422.287 (LexisNexis 2009).

[82] MD. CODE ANN., CRIM. PROC. §§ 6-232, 8-20 (LexisNexis 2007) (as amended by S.B. 211, 2008 Gen. Assemb., Reg. Sess. (Md. 2008)); S.C. CODE ANN. § 17-28-30 (2009).

[83] ME. REV. STAT. tit. 15, § 2137 (2003 & Supp. 2011).

[84] Joshua A. Tepfer & Laura H. Nirider, *Adjudicated Juveniles and Collateral Relief*, 64 ME. L. REV. 554, 559–60 (2012).

[85] *See, e.g.*, IDAHO CODE ANN. §§ 19-4901–11 (2004); 725 ILL. COMP. STAT. ANN. 5/122-1 et seq. (LexisNexis 2012); 42 PA. CONS. STAT. §§ 9543–51 (2011); UTAH CODE ANN. §§ 78B-9-101–405 (LexisNexis 2009); *see also* Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629 (2008) (providing an overview of postconviction remedies for those who claim they were wrongfully convicted).

[86] *See* D.C. CODE § 22-4135 (LexisNexis 2001); MISS. CODE. ANN. §§ 43-21-651, 99-39-5 (2003); 42 PA. CONS. STAT. § 9543 (2011); UTAH CODE ANN. §§ 78B-9-104, 78B-9-402 (LexisNexis 2009); ALASKA R. CRIM. P. 35.1(a)(8); ARIZ. R. CRIM. P. 32.1; FLA. R. CRIM. P. 3.850.

statute or by case law, some states provide limitations for those who plead guilty[87] or allow individuals to waive their postconviction rights as part of a plea agreement.[88] Overall, most statutes are not explicit about the rights of those who plead guilty, so much of the postconviction law governing those who plead guilty is left open for the courts to determine.

1. *States Explicitly Including Those Who Plead Guilty in Their Postconviction Statutes or Case Law*

Only six states and the District of Columbia explicitly include those who plead guilty in their postconviction statutes.[89] Alaska's statute provides that "[a] person who has been convicted of or sentenced for a crime may institute a proceeding for postconviction relief . . . if the person claims . . . that the applicant should be allowed to withdraw a plea of guilty or nolo contendere in order to correct manifest injustice."[90] Arizona's postconviction statute states that "[a]ny person who pled guilty or no contest . . . shall have the right to file a postconviction relief proceeding,"[91] and in *State v. Ward*, the Court of Appeals of Arizona noted that for defendants who plead guilty, proceedings for postconviction relief are the only means available for exercising their rights to appellate review.[92] Both the Washington, D.C., and Utah statutes also explicitly give those who plead guilty the right to petition the court to set aside their guilty pleas on the grounds of new evidence.[93]

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[87] *See, e.g.*, MICH. COMP. LAWS ANN. § 770.3(d) (West 2006); 42 PA. CONS. STAT. § 9543 (2011); R.I. GEN. LAWS § 10-9.1-1 (2011); ALA. R. CRIM. P. 32.2.

[88] *See* DeRoo v. United States, 223 F.3d 919, 923 (8th Cir. 2000); Willett v. State, 993 S.W.2d 929, 929 (Ark. 1999); State v. Valdez, 851 S.W.2d 20, 21–22 (Mo. Ct. App. 1993); State v. Downs, 631 S.E.2d 79, 84–85 (S.C. 2006).

[89] *See* D.C. CODE § 22-4135 (LexisNexis 2001); MISS. CODE ANN. §§ 43-21-641, 99-39-5 (2003); 42 PA. CONS. STAT. § 9543 (2011); UTAH CODE ANN. §§ 78B-9-104, 78B-9-402 (LexisNexis 2009); ALASKA R. CRIM. P. 35.1(a)(8); ARIZ. R. CRIM. P. 32.1; FLA. R. CRIM. P. 3.850.

[90] ALASKA R. CRIM. P. 35.1(a)(8).

[91] ARIZ. R. CRIM. P. 32.1

[92] State v. Ward, 118 P.3d 1122, 1124–25, 1126 (Ariz. Ct. App. 2005).

[93] In Washington, D.C., "[a] person convicted of a criminal offense . . . may move the court to vacate the conviction or to grant a new trial on grounds of actual innocence based on new evidence" by setting forth specific facts "[e]stablishing how that evidence demonstrates that the movant is actually innocent despite having been convicted at trial or having pled guilty." D.C. CODE § 22-4135 (LexisNexis 2001). The Utah postconviction statute provides that "[i]f the conviction for which the petitioner asserts factual innocence was based upon a plea of guilty, the petition shall contain the specific nature and content of the evidence that establishes factual innocence." UTAH CODE ANN. § 78B-9-402 (LexisNexis 2009).

Though the majority of states' statutes do not explicitly grant those who plead guilty access to postconviction remedies, courts in most states allow those who plead guilty to bring postconviction petitions under the same statutes as those who are convicted at trial.[94]

2. *States Placing Limitations on Access to Postconviction Remedies for Those Who Plead Guilty*

Several states give those who plead guilty limited access to postconviction remedies, or access that depends on the issue being raised.[95] For example, the Rhode Island postconviction statute allows a petitioner to bring a postconviction petition alleging that constitutional violations occurred, the court lacked jurisdiction, his sentence was in violation of the law, there are newly discovered facts, or any other violation of the law occurred.[96] In *Miguel v. State*, however, the Supreme Court of Rhode Island stated that "[t]he sole focus of an application for post-conviction relief filed by an applicant who has pled guilty is 'the nature of counsel's advice concerning the plea and the voluntariness of the plea. If the plea is validly entered, we do not consider any alleged prior constitutional infirmity.'"[97]

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[94] *See, e.g.*, Connally v. State, 33 So. 3d 618, 620–21 (Ala. Crim. App. 2007); Graham v. State, 188 S.W.3d 893, 895 (Ark. 2004); People v. Kirk, 221 P.3d 63, 64–65 (Colo. App. 2009); Odiaga v. State, 950 P.2d 1254, 1255–56 (Idaho 1997); Newton v. State, 456 N.E.2d 736, 740 (Ind. Ct. App. 1984); Johnson v. Commonwealth, No. 2006-SC-000548-MR, 2008 WL 4270731, at *3–4 (Ky. Sept. 18, 2008); Diep v. State, 748 A.2d 974, 976 (Me. 2000); Commonwealth v. Fanelli, 590 N.E.2d 186, 188 (Mass. 1992); State v. Coe, 188 N.W.2d 421, 422 (Minn. 1971); State v. Dunster, 707 N.W.2d 412, 414–15 (Neb. 2005); Hart v. State, 1 P.3d 969, 971 (Nev. 2000).

[95] *See* MICH. COMP. LAWS ANN. § 770.3 (West 2006); 42 PA. CONS. STAT. § 9543 (2011); R.I. GEN. LAWS § 10-9.1-1 (2011). People who plead guilty may also lose out on appellate rights that those who went to trial would receive. For example, Michigan's postconviction statute grants individuals convicted of a felony or misdemeanor at trial an automatic right to appeal, but states that "[a]ll appeals from final orders and judgments based upon pleas of guilty or nolo contendere shall be by application for leave to appeal." MICH. COMP. LAWS ANN. § 770.3(1)(d) (West 2006). This means that defendants who plead guilty do not have an automatic right to appeal and an appellate court decides whether or not to hear the case. Bulger v. Curtis, 328 F. Supp. 2d 692, 698 (E.D. Mich. 2004). When several state judges denied appellate counsel to indigent defendants and the Michigan legislature codified this practice by statute, the constitutionality of this statute was challenged. *Id.* at 692. A United States District Court found the categorical denial of counsel to indigent defendants who had pleaded guilty to be unconstitutional. *See id.* However, the decision only pertained to the right to counsel, so as it stands, the right to postconviction remedies for those who plead guilty is still only by leave to appeal.

[96] R.I. GEN. LAWS § 10-9.1-1 (2011).

[97] Miguel v. State, 774 A.2d 19, 22 (R.I. 2001) (quoting State v. Dufresne, 436 A.2d 720,

The Pennsylvania postconviction statute contains a separate provision for those who plead guilty, which states that a petitioner for postconviction relief may show that her conviction resulted from "[a] plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent."[98] This provision is included in a list of several other potential subjects of postconviction petitions, which would appear to indicate that those who plead guilty are not limited to this type of petition.[99] However, in *Commonwealth v. Martinez*, the Superior Court of Pennsylvania stated that "[a]fter a defendant has entered a plea of guilty the only cognizable issues in a [postconviction] proceeding are the validity of the plea of guilty and the legality of the sentence."[100]

3. *The Role of Plea Agreements*

In several states, it is legal for defendants to waive their rights to postconviction remedies in their plea agreements.[101] While it is unknown how many defendants in state court waive their postconviction rights, a 2005 study found that in nearly two-thirds of federal cases settled by a plea agreement, defendants agreed to waive their rights to review.[102] Missouri allows defendants to waive their rights to seek postconviction relief in return for reduced sentences if their records demonstrate that the defendants were properly informed of their rights and that the waivers were made knowingly, voluntarily, and intelligently.[103] Arkansas allows defendants to waive any right to further appeal, postconviction relief, or an attorney as part of a plea bargain.[104] In South Carolina, a capital defendant may waive postconviction rights as long as two prongs are met: (1) the defendant must be mentally competent and comprehend his circumstances (the "cognitive

722 (R.I. 1981)).

[98] 42 PA. CONS. STAT. § 9543 (2011).

[99] *Id.* (providing that a petitioner can assert via postconviction petition that his conviction or sentence resulted from one or more of the following: constitutional violations, ineffective assistance of counsel, obstruction of justice by government officials, or the unavailability of exculpatory evidence).

[100] Commonwealth v. Martinez, 539 A.2d 399, 401 (Pa. Super. Ct. 1988).

[101] *See* DeRoo v. United States, 223 F.3d 919 (8th Cir. 2000); Willett v. State, 993 S.W.2d 929 (Ark. 1999); State v. Valdez, 851 S.W.2d 20 (Mo. Ct. App. 1993); State v. Downs, 631 S.E.2d 79 (S.C. 2006).

[102] Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209 (2005).

[103] Jackson v. State, 241 S.W.3d 831, 833 (Mo. Ct. App. 2007).

[104] *Willett*, 993 S.W.2d at 929–30.

prong") and (2) the defendant must also have the ability to assist counsel or the court in identifying exculpatory or mitigating information (the "assistance prong").[105]

In contrast, several states prohibit the waiver of postconviction rights in plea agreements. In *Hood v. State*, the Supreme Court of Nevada noted the important distinctions between appeal rights, which can be waived in a plea agreement, and postconviction rights:

> Post-conviction remedies differ significantly from a direct appeal. Unlike a direct appeal, post-conviction proceedings collaterally attack the constitutional validity of the conviction, or the legality of continued confinement on a basis other than the manner in which the conviction was obtained. It would be unconscionable for the state to attempt to insulate a conviction from collateral constitutional review by conditioning its willingness to enter into plea negotiations on a defendant's waiver of the right to pursue post-conviction remedies.[106]

Accordingly, the court held that postconviction rights can never be waived as part of a plea agreement.[107] Similarly, Indiana courts have held that provisions in plea agreements in which defendants waive their rights to postconviction relief are void and unenforceable.[108]

C. HABEAS CORPUS

Federal habeas corpus review of state convictions has existed since 1867, when the writ of habeas corpus was made available to state prisoners "in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States."[109] The right to habeas corpus has long been considered a crucial constitutional right; it is taken seriously by the courts and is never to be suspended except in times of severe crisis.[110] Federal habeas corpus provides a means by

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[105] *Downs*, 631 S.E.2d at 85; Singleton v. State, 437 S.E.2d 53, 61 (S.C. 1993).

[106] Hood v. State, 890 P.2d 797, 798 (Nev. 1995).

[107] *Id.*

[108] Majors v. State, 568 N.E.2d 1065, 1067–68 (Ind. Ct. App. 1991).

[109] Act of February 5, 1867, ch. 28, 14 Stat. 385. Additionally, the Constitution itself prohibits suspension of the "Privilege of the Writ of Habeas Corpus." U.S. CONST. art. I, § 9, cl. 2. Prior to the passage of this Act, state prisoners could only petition state courts for writs of habeas corpus, and the federal courts had no habeas corpus jurisdiction over state prisoners. *See Ex Parte* Dorr, 44 U.S. (3 How.) 103, 105 (1845) ("Neither this nor any other court of the United States, or judge thereof, can issue a *habeas corpus* to bring up a prisoner, who is in custody under a sentence or execution of a state court, for any other purpose than to be used as a witness.").

[110] U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."); Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Ex Parte Milligan, 71 U.S. 2 (1866).

which state prisoners can challenge their state court convictions in federal courts.[111] A federal habeas corpus petition may only be filed after a petitioner has exhausted all possible postconviction remedies in state court.[112]

The most commonly used modern federal habeas corpus writ is the writ of *habeas corpus ad subjiciendum* used by prisoners seeking collateral review after the completion of their direct appeals and challenging the constitutionality of their convictions and sentences.[113] Under 28 U.S.C. § 2254, convicted state prisoners may file motions to "vacate, set aside, or correct their sentences."[114] While state prisoners may access federal postconviction proceedings only after completion of direct appeal and habeas or other collateral proceedings in state court, federal prisoners may pursue postconviction proceedings under 28 U.S.C. § 2255 after completion of direct appeal.[115] This Comment does not address the scope of federal habeas corpus remedies, instead focusing solely on postconviction rights provided by state statutes.

"State postconviction remedies . . . are the counterparts to federal habeas corpus statutes . . . . They exist because of, and are modeled on or interpreted in light of, the federal statutes that allow relief to those in custody in violation of the Constitution of the United States."[116] Generally, state habeas corpus statutes exist to provide a means by which someone who believes he is being unlawfully committed, detained, confined, or restrained of his liberty may challenge his detention.

State habeas corpus statutes are usually broad, allowing courts to review the reasons for detention and prevent abuses of power by the state. "Every state and the District of Columbia have procedures for collateral review through applications for writs of habeas corpus or a related remedy known as writs of error *coram nobis*."[117] While some states treat their habeas corpus statutes as their postconviction statutes,[118] many states have

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[111] *See generally* John H. Blume et al., *In Defense of Noncapital Habeas: A Response to Hoffmann and King*, 96 CORNELL L. REV. 435 (2011).

[112] *Id.* at 442.

[113] Sara Rodriguez & Scott J. Atlas, *Habeas Corpus: The Dilemma of Actual Innocence*, 34 LITIG. 35, 36 (2008).

[114] *Id.*

[115] *Id.*

[116] Henry B. Robertson, *The Needle in the Haystack: Towards a New State Postconviction Remedy*, 41 DEPAUL L. REV. 333, 333 (1992).

[117] DONALD E. WILKES JR., STATE POSTCONVICTION REMEDIES AND RELIEF HANDBOOK § 1.3 (2006).

[118] *See* NEV. REV. STAT. ANN. § 34.724 (LexisNexis 2010); TEX. CODE CRIM. PROC. ANN.

separate statutes for habeas corpus in addition to their general postconviction statutory schemes.[119] Habeas corpus statutes do not distinguish between those who plead guilty and those who are convicted at trial, but state habeas corpus statutes differ in their applicability postconviction. Some states expressly allow individuals to file habeas corpus petitions once they have been convicted, while others prohibit anyone from filing a habeas corpus petition to attack the final judgment of a criminal court.[120] As one commentator noted:

> State habeas procedures, however, can be difficult. In every jurisdiction, a well-developed state court habeas corpus record and complete presentation of the claims for relief are required for post-conviction success. States often impose short time limits after a prisoner's conviction becomes final to commence habeas proceedings. Applicants cannot merely relitigate claims that could have been raised on direct appeal. The range of available claims is limited, and, often, the source of such claims depends on information outside the trial record.[121]

Due to the complexity and vast variations among state habeas corpus statutes, this Comment does not analyze state habeas corpus statutes beyond the brief overview provided here.[122]

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arts. 11.01, 11.07 (West 2007); W. VA. CODE ANN. § 53-4A-1 (LexisNexis 2012).

[119] *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 13-4121–4122 (2010); CAL. PENAL CODE § 1473 (West 2002); GA. CODE ANN., § 9-14-1 (West 2003); 735 ILL. COMP. STAT. ANN. 5/10-102 (LexisNexis 2012); IND. CODE ANN. § 34-25.5-1-1 (West 2008); MINN. STAT. ANN. § 589.01 (West 2006); NEB. REV. STAT. § 29-2801 (2009); S.D. CODIFIED LAWS § 21-27-1 (2004); TENN. CODE ANN. § 29-21-101 (2007); WASH. REV. CODE ANN. § 7.36.010 (West 2011).

[120] *See, e.g.*, MICH. COMP. LAWS ANN. § 600.4310 (West 2006) ("An action for habeas corpus to inquire into the cause of detention may not be brought by or on behalf of . . . (3) [p]ersons convicted, or in execution, upon legal process, civil or criminal."); MISS. CODE ANN. § 11-43-3 (2003) ("This chapter shall not apply to any collateral relief sought by any person following his conviction of a crime. Such relief shall be governed by the procedures prescribed in the Mississippi Uniform Post-Conviction Collateral Relief Act."); NEB. REV. STAT. § 29-2801 (2009) (providing that any person, "except persons convicted of some crime or offense for which they stand committed," who is confined in jail or unlawfully deprived of his or her liberty may apply for a writ of habeas corpus); N.J. STAT. ANN. § 2A:67-14 (West 2005) (providing that "[a]ny person committed or restrained of his liberty by virtue of a final judgment of a competent tribunal of civil or criminal jurisdiction or by virtue of any process issued pursuant thereto" "shall not be entitled to prosecute writ of habeas corpus"). *But see* MONT. CODE ANN. § 46-22-101 (2011) ("The writ of habeas corpus is not available to attack the validity of the conviction or sentence of a person who has been adjudged guilty of an offense in a court of record and has exhausted the remedy of appeal."), *invalidated by* Lott v. State, 150 P.3d 337, 342 (Mont. 2006) ("In light of the writ's history and purpose, as well as Montana's constitutional guarantee . . . that the writ of habeas corpus *shall never be suspended*, we conclude that, as applied to a facially invalid sentence . . . the procedural bar created by § 46-22-101(2), MCA, unconstitutionally suspends the writ.").

[121] Robertson, *supra* note 116, at 333.

[122] For more information regarding state and federal habeas corpus procedures and

III. DISCUSSION

Based on an overview of the postconviction remedies available to those who plead guilty, it is clear that there is much variation and ambiguity among the states. While the purposes of postconviction remedies are to ensure that innocent people are not wrongfully convicted and to prevent constitutional violations from going without remedy, the lack of consistency and clarity in these statutes is directly contrary to this goal. As I argue below, the current system of postconviction remedies in most states is patently unjust to defendants who plead guilty. First, any distinction in postconviction rights between those who plead guilty and those who are convicted at trial is based on a faulty assumption—either that innocent defendants do not plead guilty or that those who plead guilty have not been subjected to constitutional violations. Second, limiting postconviction rights for those who plead guilty is at odds with the purposes underlying a general system of postconviction remedies. Finally, the lack of clarity in the laws leads to inconsistent results, denying many deserving petitioners their rights.

A. INNOCENT PEOPLE PLEAD GUILTY

Any distinction in postconviction remedies between those who plead guilty and those convicted at trial is based either on the assumption that innocent people do not plead guilty or on the assumption that constitutional violations do not occur during the plea-bargaining process. However, there is much research demonstrating that innocent people do plead guilty; nearly 10% of the first 300 postconviction exonerations were of people who had pleaded guilty.[123] "The factors that give rise to wrongful convictions have been described with some clarity, and include mistaken eyewitness identification, erroneous forensic science, coerced confessions, police or prosecutorial misconduct, use of untruthful informants or other witnesses, and inadequate or incompetent legal assistance";[124] the same factors can be

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remedies, see generally 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 (2005); Hon. Laura Denvir Stith, *A Contrast of State and Federal Court Authority to Grant Habeas Relief*, 38 VAL. U. L. REV. 421 (2004).

[123] *When the Innocent Plead Guilty*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/Content/When_the_Innocent_Plead_Guilty.php (last visited Dec. 22, 2012); *Facts on Post-Conviction DNA Exonerations*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php (last visited Dec. 22, 2012) (showing that twenty-eight of the first 300 DNA exonerations have been for individuals who pleaded guilty).

[124] Margaret Raymond, *The Problem with Innocence*, 49 CLEV. ST. L. REV. 449, 452

present regardless of whether a defendant goes to trial or pleads guilty.

People may choose to plead guilty to something they did not do for many reasons, including: they lack compelling evidence demonstrating their innocence, they falsely confessed and the confession will be used against them at trial, they received a more lenient sentence as a result of the plea deal, their defense attorney or a prosecutor pressured them into it, they are vulnerable or mentally handicapped, or they feel that they have no other choice.[125] In addition, an innocent person may actually believe that he is guilty. He may be confused as to his prior actions, fail to understand that criminal liability requires both an act or omission and intent, be unable to understand that both the act and intent must be considered criminal, fail to understand that there is no crime unless the act and intent concur, fail to realize that transferred intent may not apply, or fail to recognize other appropriate defenses.[126]

Aside from evidentiary concerns, mistakes, or misconduct, innocent defendants may also feel compelled to plead guilty due to some of the benefits involved. "On balance, plea bargaining is a categorical good for many innocent defendants, particularly in low-stakes cases,"[127] but "even for innocent defendants facing more serious charges, plea bargaining may be, at a minimum, the manifestly least-bad option."[128] Innocent defendants often have incentives to plead guilty because they wish to avoid long sentences or death sentences that would result from being convicted at trial

(2001) (citing BARRY SCHECK ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000)); *see also* Jean Coleman Blackerby, *Life After Death Row: Preventing Wrongful Capital Convictions and Restoring Innocence After Exoneration*, 56 VAND. L. REV. 1179 (2003) (discussing causes of wrongful convictions and ways to prevent them).

[125] BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 150–53 (2011); *see also* 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, 430 (1998) ("Police elicit false confessions so frequently that social science researchers, legal scholars, and journalists have discovered and documented numerous case examples."); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1948 (1992) (noting that many innocent defendants are risk averse and therefore more likely to plead guilty for a reduced sentence rather than go to trial). *See generally Understand the Causes: False Confessions*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/understand/False-Confessions.php (last visited Nov. 9, 2012).

[126] John L. Barkai, *Accuracy Inquiries for All Felony and Misdemeanor Pleas: Voluntary Pleas but Innocent Defendants?*, 126 U. PA. L. REV. 88, 95 n.35 (1977).

[127] Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1119 (2008).

[128] *Id.* at 1120.

for crimes they did not commit.[129] Studies have shown that defendants who maintain their innocence, go to trial, and are found guilty are often given longer sentences because they are viewed as unremorseful, so defendants may wish to avoid the possibility of being penalized for going to trial by taking a lesser sentence through a plea bargain.[130]

Some attorneys even believe that it is advantageous for innocent defendants to plead guilty. As one Chicago attorney stated:

> A lawyer's function is simply to minimize the painful consequences of criminal proceedings for his client. If, for example, I get an offer of probation in a felony case, I jump at it. It doesn't matter whether the client tells me he is innocent, whether I believe him, or even whether I'm 90 percent sure of an acquittal. So long as there is a 10 percent chance of a prison sentence, the client is better off to plead.[131]

In the same study, other attorneys reported that "although they usually refuse to permit 'innocent' defendants to plead guilty, they sometimes made exceptions when prosecutorial offers were unusually generous or unusually coercive."[132] One public defender even stated that sometimes the attorneys in his office "decide that they are going to save themselves and the state a trial" and "put intolerable pressure on a defendant" to plead guilty.[133]

Before a defendant may plead guilty, the court must establish a factual basis for the guilty plea, a process that involves "determining what acts and intent can be attributed to the defendant. If the acts and intent uncovered through the accuracy inquiry correspond to the elements of the crime to which the plea is offered, a 'factual basis' for the plea is said to exist."[134] In practice, this requirement is often insufficient to prevent innocent people from pleading guilty.[135] For example, some judges disregard the importance of this requirement and do not diligently ensure that it is met. A

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[129] Garrett, *supra* note 125, at 150–53.

[130] Richard J. Oppel, *Sentencing Shift Gives New Leverage to Prosecutors*, N.Y. TIMES, (Sep. 26, 2011), http://www.nytimes.com/2011/09/26/us/tough-sentences-help-prosecutors-push-for-plea-bargains.html?_r=3&pagewanted=1 (noting that the phrase "trial penalty" refers to "the fact that the sentences for people who go to trial have grown harsher relative to sentences for those who agree to a plea" and that some experts have noted that "[i]n some jurisdictions, this gap has widened so much it has become coercive and is used to punish defendants for exercising their right to trial").

[131] Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1279 (1975) (quoting a telephone interview with Sherman Magidson).

[132] *Id.*

[133] *Id.* at 1285.

[134] Barkai, *supra* note 126, at 95 n.35.

[135] *See generally* Steven Schmidt, *The Need for Review: Allowing Defendants to Appeal the Factual Basis of a Conviction After Pleading Guilty*, 95 MINN. L. REV. 284 (2010).

survey of Indiana state trial court judges revealed that the state's lack of process requirements for factual basis inquiries led judges to "abdicate . . . their responsibility to ensure that a plea of guilty is voluntarily made with full appreciation of the consequences of the action."[136] Another study revealed that "judges often neglect the factual basis requirement and that questions during pretrial tend to focus on the appropriate sentence rather than on the factual basis for the plea."[137]

Some experts have argued that the factual basis requirement is "relatively unimportant" and "more form than substance."[138] Prosecutors also play a role in this process: "Many commentators have noted that the government's principal goals in plea bargaining are efficiency and obtaining convictions, as opposed to justice and fairness."[139] Prosecutors often hope to secure guilty pleas quickly, "regardless of the factual realities of a case."[140] Other factors can also contribute to the unfairness of the plea-bargaining process and cause innocent people to plead guilty, such as racial disparities and biases and ineffective assistance of counsel.[141]

While many have argued that innocent people plead guilty more often than we think, some have argued that innocent people do not plead guilty at all, or that the problem is not big enough to truly worry about.[142] While it is impossible to know just how many people who plead guilty are actually innocent, anecdotal evidence demonstrates that innocent people often feel compelling pressure to plead guilty. For example, Marcellius Bradford

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[136] Earl G. Penrod, *The Guilty Plea Process in Indiana: A Proposal to Strengthen the Diminishing Factual Basis Requirement*, 34 IND. L. REV. 1127, 1138–43 (2001).

[137] Schmidt, *supra* note 135, at 307 (citing Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 256 (2006)) (internal quotations omitted).

[138] Schmidt, *supra* note 135, at 307.

[139] *Id.* (citing F. Andrew Hessick III & Reshma M. Saujani, *Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 BYU J. PUB. L. 189, 191–93 (2002)).

[140] *Id.*

[141] *Id.* (citing Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 32 (1998)); *see also* United States v. Negrón-Narváez, 403 F.3d 33, 34 (1st Cir. 2005); United States v. Johnson, 89 F.3d 778, 785 (11th Cir. 1996).

[142] Ellen Yaroshefsky, *Ethics and Plea Bargaining: What's Discovery Got to Do With It?*, CRIM. JUST. MAG., Fall 2008, at 28, *available at* http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_cjmag_23_3_yaroshefsky.authcheckdam.pdf ("Although commentators have long argued and explained why innocents are likely to plead guilty, the notion that an innocent person would plead guilty to a crime he or she did not commit was apocryphal until about 15 years ago—and even where acknowledged, believed to be so rare as to not require a systemic look backward.").

served more than six years in Illinois prison for a murder he did not commit after he pleaded guilty and testified against his codefendants in exchange for a twelve-year sentence. Bradford later said he was threatened with a life sentence and coerced to plead guilty and testify. Ultimately, DNA testing exonerated Bradford and his codefendants and implicated the two men who actually committed the crime.[143]

Christopher Ochoa falsely confessed and pleaded guilty to a murder that he did not commit.[144] He later recalled his lawyers pressuring him to plead guilty:

> [They told] him that his detailed confession to a rape and murder was so compelling that he might receive the death penalty. They told him there was "no way an innocent person would give such a detailed statement." He later said that although his lawyers probably "believed [he] was guilty," he also had the impression that "it was less work" for them if he would plead guilty. He was offered a life sentence for his testimony against his also-innocent codefendant, Richard Danziger.[145]

Studies have documented the main causes of false confessions, including duress, coercion, intoxication, diminished capacity, mental impairment, ignorance of the law, fear of violence, the actual infliction of harm, the threat of a harsh sentence, and misunderstanding the sentence.[146] "Psychological studies of confessions that have proved false show overrepresentation of children, the mentally ill and mentally retarded, and suspects who are drunk or high. They are susceptible to suggestion, eager to please authority figures, disconnected from reality or unable to defer gratification."[147] Police officers are also trained to incorporate highly coercive psychological interrogation tactics, such as implying leniency, reducing moral responsibility by blaming peer pressure, pretending to have evidence, and lying to suspects.[148] According to the Innocence Project, false confessions have played a role in 24% of the convictions that have later been reversed by DNA evidence.[149]

Some commentators argue that this issue could be better addressed by stricter enforcement of the factual basis requirements.[150] While that would

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[143] *When the Innocent Plead Guilty*, *supra* note 123.

[144] *Id.*

[145] GARRETT, *supra* note 125, at 150–51.

[146] *Understand the Causes: False Confessions*, *supra* note 125.

[147] David K. Shipler, Op-Ed, *Why Do Innocent People Confess?*, N.Y. Times, Feb. 26, 2012, at SR6.

[148] *Id.*

[149] *Id.*

[150] *See generally* Barkai, *supra* note 126.

certainly help to reduce the number of innocent people who plead guilty, it is not the only solution to the problem. Undoubtedly, even with more stringent factual basis requirements, those who are innocent would still feel compelled to plead guilty. In addition, this could actually be worse for innocent people; because sentences imposed after trial are often longer than those attached to guilty pleas, forcing innocent people to go to trial could result in even more innocent people being in jail. Further, even with strict enforcement of factual basis requirements, other constitutional violations may occur that would merit redress in postconviction proceedings.

B. LIMITING POSTCONVICTION REMEDIES FOR THOSE WHO PLEAD GUILTY IS INCONSISTENT WITH THE PRINCIPLES OF OUR JUSTICE SYSTEM AND THE PURPOSES OF POSTCONVICTION STATUTES

English jurist William Blackstone wrote in the 1760s that it is "better that ten guilty persons escape than that one innocent suffer."[151] This ideology underscores our criminal justice system; the Supreme Court has stated that the "ultimate objective" of our justice system is "that the guilty be convicted and the innocent go free."[152] That the government should not allow an innocent person to plead guilty to a crime he did not commit is one of the basic principles of the U.S. criminal justice system.[153] Connecting these principles to the postconviction context, Justice Marshall stated that "[h]abeas corpus and civil rights actions are of 'fundamental importance . . . in our constitutional scheme' because they directly protect our most valued rights."[154]

Postconviction remedies were created with this principle in mind. The first exoneration through the use of DNA testing occurred in 1989, drawing attention to the national problem of wrongful convictions.[155] As a result of the increasing number of wrongful convictions and exonerations that have come to light in recent years, numerous states have recognized the

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[151] 4 WILLIAM BLACKSTONE, COMMENTARIES *352.

[152] Evitts v. Lucey, 469 U.S. 387, 394 (1985) (quoting Herring v. New York, 422 U.S. 853, 862 (1975)).

[153] *See* ABA STANDARDS FOR CRIMINAL JUSTICE PLEAS OF GUILTY, § 14-1.6 cmt. at 66 (1999) ("Our system has concluded, in order to protect the innocent, that persons whose conduct does not fall within the charges brought by a prosecutor should not be permitted to plead guilty.").

[154] Bounds v. Smith, 430 U.S. 817, 827 (1977) (citations omitted).

[155] *Meet the Exonerated: Gary Dotson*, CTR. ON WRONGFUL CONVICTIONS, http://www.law.northwestern.edu/CWC/exonerations/ilDotsonSummary.html (last visited Nov. 9, 2012).

importance of providing convicted defendants avenues by which to assert or demonstrate their actual innocence and challenge their convictions. For example, in 2010, the Ohio legislature passed Senate Bill 77, "one of the nation's most comprehensive criminal justice reform packages."[156] The bill was a package of "sweeping reforms" designed to prevent wrongful convictions and overturn injustices.[157] Ohio Representative Tyrone Yates, the bill's sponsor in the House of Representatives, called the bill "one of the most important pieces of criminal justice legislation in [the] state in a century."[158] Another Representative, Bill Coley, called the bill a "tremendous tool for fighting crime" and stated that "[n]one of us in this state benefit when a wrongly convicted person sits in prison."[159] However, despite these concerns, the Ohio postconviction statutes do not explicitly include those who plead guilty, and Ohio's forensic testing statute explicitly excludes those who plead guilty.[160]

When the Illinois legislature originally passed its postconviction forensic testing statute, state representatives discussed the purpose and goals of the statute.[161] The bill's sponsor, Peter Roskam, stated, "[I]n my opinion, this Bill is about doing the right thing. Nobody wants the wrong person behind bars. Because if the wrong person is behind bars, that means that there's a bad person who's out there, who's gotten off scot-free."[162] Another representative, Barbara Flynn Currie, stated in support of the bill:

> This is a simple issue of basic justice. The prospect of people doing time for crimes they didn't commit is one that, I should think, would make each of us, and our constituents, shudder. We have had examples, not just from DNA evidence, but also from issues like automated fingerprint identification systems, new technology that can determine whether or not the person who was convicted, in fact, committed the crime.

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[156] *See* Press Release, The Innocence Project, Governor Strickland Signs Groundbreaking Reform Package on Wrongful Convictions, Making Ohio a National Model (Apr. 5, 2010), *available at* http://www.innocenceproject.org/Content/Governor_Strickland_Signs_Groundbreaking_Reform_Package_On_Wrongful_Convictions_Making_Ohio_a_National_Model.php.

[157] *See* Matt Kelley, *Ohio Learns the Lessons of Wrongful Conviction*, CHANGE.ORG, (Mar. 20, 2010), http://mississippiprisonwatch.blogspot.com/2010/03/ohio-learns-lessons-of-wrongful.html.

[158] *Id.*

[159] *See* Jim Siegel, *Wrongly Convicted Applaud House Passage of DNA Bill*, THE COLUMBUS DISPATCH (Mar. 17, 2010), http://www.dispatch.com/content/stories/local/2010/03/17/wrongly-convicted-applaud-passage.html.

[160] OHIO REV. CODE ANN. § 2953.21 (West 2005).

[161] 90th Gen. Assemb., H.R. Transcription Debate, H.B. 2138, at 6–23 (Ill. Apr. 15, 1997).

[162] *Id.* at 17 (statement of Rep. Peter Roskam).

> And I think it would be distressing to the folks back home to think that we are not concerned enough about that possibility that we provide a clear channel, a clear avenue in the law for someone to reraise that basic issue . . . . It is only about fair play and justice. It's only about making sure that the innocent do go free.[163]

Despite these noble intentions, Illinois currently does not allow those who plead guilty to petition for DNA or forensic testing.[164] While the Illinois and Ohio representatives were clearly concerned with fairness and the administration of justice, they neglected to include in their postconviction statutes individuals who plead guilty, who can be just as innocent as those who go to trial.

Many have argued that state interests in finality and efficiency run counter to allowing those who plead guilty to later challenge their convictions.[165] "Prosecutors have sought to narrowly constrain the availability of postconviction DNA testing, citing financial concerns, the need for finality in the criminal justice system, the need to protect the system of plea bargaining, and the specter of a wave of frivolous requests."[166] According to one scholar, finality is an "essential part of the prosecutor's bargain," and "the finality of a plea-bargained case is the indispensable element of the plea bargain itself."[167] This author goes on to argue that to alter the terms of "finality" in the plea-bargaining context would "rewrite the main purpose of the agreement after the fact" and have "major, largely unforeseeable ramifications upon the system."[168] However, the need for justice and truth outweighs the government's interest in finality; "[i]f verdicts were taken as absolutely final, then our law would be a 'pretender to absolute truth.'"[169] One expert noted:

> Postconviction relief assumes by its very existence that finality and comity will be set aside in the appropriate case. The goal is to identify that case, not to balance interests for the sake of achieving some politically expedient consensus. Taken to their logical conclusion, finality and comity would preclude postconviction relief altogether.[170]

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[163] *Id.* at 22–23 (statement of Rep. Barbara Flynn Currie).

[164] People v. O'Connell, 879 N.E.2d 315, 319 (Ill. 2007).

[165] *See, e.g.*, JH Dingfelder Stone, *Facing the Uncomfortable Truth: The Illogic of Post-Conviction DNA Testing for Individuals Who Pleaded Guilty*, 45 U.S.F. L. REV. 47, 52 (2010).

[166] Seth F. Kreimer & David Rudovsky, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, 151 U. PA. L. REV. 547, 561 (2002) (citations omitted).

[167] Stone, *supra* note 165, at 55.

[168] *Id.*

[169] *See* Robertson, *supra* note 116, at 346 (quoting Burr v. Florida, 474 U.S. 879, 880 (1985) (Marshall, J., dissenting)).

[170] *Id.*; *see* Larry W. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991, 1010

While finality may be a highly compelling interest in other areas of law, when an innocent person's liberty is at stake, other interests are more important. In addition, allowing broader access to postconviction remedies may actually increase the sense of finality; recent studies suggest that posttrial DNA testing has more often resulted in confirming the defendant's guilt than in proving his innocence.[171]

Some have also argued that letting defendants plead guilty in exchange for the benefit of reduced sentences and then later use state resources to contest their sentences would encourage guilty defendants to game the system and attempt to get out on technicalities.[172] However, any convicted defendant, whether guilty or innocent, will always have incentives to appeal a conviction. Also, the likelihood of success in postconviction proceedings is very slim and requires a petitioner to meet a high burden of proof. For example, as one commentator notes:

> DNA is effective proof of innocence only in a limited category of cases. Only where biological material can be unequivocally attributed to the perpetrator of a crime and where the suspect can be excluded as the donor of the biological material is the DNA evidence "proof" of innocence. This is likely to be the case only in sex crimes or in cases in which the criminal actor—and only the criminal actor—has left biological material at the site of a crime. Many crimes—even crimes of violence—include no such evidence. In a wide variety of cases, then, DNA evidence cannot dispositively rule out a potential suspect.[173]

Because there is already such a high burden of proof and slim likelihood of success in postconviction proceedings, the fear that expanding postconviction rights to those who plead guilty will lead to actually guilty defendants escaping liability is simply unwarranted. Many states have already put safeguards in place to address this issue, as well as concerns about costs, either by requiring a defendant to cover the costs of DNA testing himself[174] or by requiring a petitioner to show that a favorable result from the DNA testing would be likely to change the result on retrial or

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n.74 (1985).

[171] Gwendolyn Carroll, *Proven Guilty: An Examination of the Penalty-Free World of Post-Conviction DNA Testing*, 97 J. CRIM. L. & CRIMINOLOGY 665, 666 (2007).

[172] *See, e.g.*, People v. Urioste, 736 N.E.2d 706, 714 (Ill. 2000) (stating that to allow convicted defendants who "admitted at their trial to the commission of the acts charged, and did not contest the question of who committed those acts" to access statutory postconviction remedies would be "to make a mockery of the criminal justice system and the statute's grace").

[173] Raymond, *supra* note 124, at 454.

[174] *See, e.g.*, D.C. CODE § 22-4133 (LexisNexis 2001) (providing that the costs of DNA testing shall be paid by the applicant, unless the applicant is financially unable to pay).

demonstrate the petitioner's actual innocence.[175]

IV. RECOMMENDATIONS

As the Dixmoor Five and Englewood Four examples from the Introduction demonstrate,[176] lack of clarity in state postconviction statutes leads to inconsistent results in the courts. While in the case of the Dixmoor Five, the judge ruled that those who plead guilty are meant to be excluded from postconviction remedies, in the very similar Englewood Four case, the judge ruled that those who plead guilty are not barred from bringing postconviction petitions based on newly discovered evidence.[177] State statutes governing postconviction remedies should be made clearer in order to prevent confusion in the courts, and states that do not already grant defendants who plead guilty explicit access to postconviction remedies should amend their statutes to do so.

DNA or other forensic evidence that excludes a defendant is one of the most powerful forms of evidence of innocence, yet in several states people who plead guilty are denied access to this evidence. Again, the Dixmoor Five and Englewood Four cases in Illinois provide a powerful example of how denying defendants who plead guilty access to DNA testing is contrary to the interests of justice. In Illinois, individuals who plead guilty are barred from later seeking DNA testing, but those who are convicted at trial are eligible to file a motion for DNA testing.[178] In both the Dixmoor Five and Englewood Four cases, several of the defendants were convicted by a jury at trial.[179] As such, the codefendants who did not plead guilty were eligible to file a motion for DNA testing on the evidence, which they ultimately did. The results of the DNA tests came back as not only excluding all of the codefendants who were originally convicted in each case, but also as matching a convicted criminal. Fortunately for those who pleaded guilty, they had codefendants who had proceeded to trial and were thus eligible to have the testing done, but what about cases where there are no codefendants?

To prevent this kind of inconsistency and arbitrary line-drawing, state

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[175] *See, e.g.*, 42 PA. CONS. STAT. § 9543.1 (2011) (requiring that exculpatory results of DNA testing would establish the applicant's "actual innocence of the offense for which the applicant was convicted").

[176] *See supra* notes 1–28 and accompanying text.

[177] Transcript of Oral Argument, *supra* note 23, at 37–38.

[178] *See* 725 ILL. COMP. STAT. ANN. 5/116-3 (LexisNexis 2012); People v. O'Connell, 227 Ill.2d 31, 37 (2007).

[179] *Background on Englewood and Dixmoor Cases*, *supra* note 4.

statutes should explicitly allow all defendants, including those who plead guilty, the ability to petition courts for postconviction DNA testing. Concerns about costs can be alleviated by requiring defendants who can afford it to pay for the costs of testing and by limiting testing to cases where the results of testing would be materially relevant to determining who committed the crime. To prevent defendants from "manipulating the system," postconviction DNA statutes may require defendants to show "[a] reasonable probability that the petitioner would not have been convicted or would have received a lesser sentence if favorable results had been obtained through DNA testing at the time of the original prosecution"[180] as a prerequisite to testing.

The absurdity of the distinction between those who plead guilty and those convicted at trial is further demonstrated by the Illinois courts' inconsistent application of the postconviction statute. Once the DNA hit to a convicted sex offender came back, all five of the Dixmoor codefendants had been proven equally innocent. However, based on one judge's construction of the applicable statute, individuals who plead guilty would not have access to the proceedings by which those convicted at trial may move to have their convictions vacated. To vacate only the convictions of those who went to trial, but to let stand the convictions of the codefendants who pleaded guilty makes absolutely no sense; any statutory interpretation that would compel this result cannot be valid.

In addition to allowing defendants who plead guilty to use statutory postconviction remedies, it should be impermissible for defendants who plead guilty to waive their postconviction rights in plea agreements. As several states have recognized, there are serious problems with the practice of allowing defendants who plead guilty to waive these rights. Postconviction remedies are generally the only avenue available for defendants to raise constitutional violations from their initial criminal proceedings, and to allow defendants to waive these rights would be to let constitutional violations on the part of defense attorneys, prosecutors, judges, and other government officials go unnoticed and without remedy.

In 2010, Attorney General Eric Holder reversed a Bush Administration policy under which federal prosecutors were allowed to seek waivers of DNA testing rights from defendants who plead guilty.[181] At the time,

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[180] *Model Legislation: An Act Concerning Access to Post-Conviction DNA Testing*, THE INNOCENCE PROJECT (Oct. 2012), http://www.innocenceproject.org/docs/model/Access_to_Post_Conviction_DNA_Testing_Model_Bill.pdf.

[181] Jerry Markon, *Attorney General Eric Holder Reverses Bush Policy on DNA Waivers*, WASH. POST (Nov. 18, 2010), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/11/17/AR2010111706321.html.

defense lawyers stated that under the previous policy, their clients were "essentially forced to sign the waivers or lose the benefits of a plea agreement, such as a lighter sentence."[182] In reversing the policy, Attorney General Holder emphasized that "DNA evidence is one of the most powerful tools available to the criminal justice system, and these new steps will ensure the department can use DNA to the greatest extent possible to solve crimes and ensure the guilty are convicted."[183] In response to this change, Peter Neufeld, cofounder of the Innocence Project, stated, "It never made any sense to force people, as a condition of a plea, to give up their right to future DNA testing, particularly since we know that factually innocent people plead guilty."[184]

Beyond DNA-testing waivers, in *Hood v. State*, the Supreme Court of Nevada noted the potential consequences of allowing defendants to waive their constitutional postconviction rights in plea agreements. In holding that "[i]t would be unconscionable for the state to attempt to insulate a conviction from collateral constitutional review by conditioning its willingness to enter into plea negotiations on a defendant's waiver of the right to pursue postconviction remedies," the court stated that:

> If postconviction remedies could be waived, the state could prevent a defendant from challenging an involuntary guilty plea or a conviction entered without jurisdiction. Although we do not suggest that the state would act in bad faith in obtaining convictions, we must recognize that it has been a historical function of the courts to construe the legal limits of prosecution under statutory and constitutional law. On occasion, it has been necessary for the courts to curb prosecutorial abuses, or to construe the law in a manner inconsistent with the views of prosecutorial authorities. These judicial functions would be impaired, and the lack of judicial review could raise doubts concerning the constitutional validity of criminal judgments.[185]

In addition, allowing defendants to waive their rights to postconviction remedies in plea agreements presents a dangerous and unacceptable conflict of interest for defense attorneys. Ineffectiveness of defense counsel is a claim that can generally only be raised postconviction, so defense attorneys have an added incentive to encourage their clients to take plea agreements in which they waive their postconviction rights. A publication issued by the American Bar Association noted that "these waivers work to insulate the plea and government and defense counsel's respective actions from any review. Importantly, ethics bodies in five of six jurisdictions, which have considered the question, have issued opinions excluding ineffective

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[182] *Id.*

[183] *Id.*

[184] *Id.*

[185] Hood v. State, 890 P.2d 797, 798 (Nev. 1995).

assistance of counsel claims from the scope of permissible postconviction waivers."[186] This exact problem was noted in *Chaney v. State*, where at a change of plea hearing the plea counsel stated as follows:

> Judge, actually I'd like to make a record as to the waiver of the post-conviction rights . . . . [I]t is the position of the Public Defender's Office that it would be a conflict of interest for me to advise [my client] to waive his post-conviction rights because one of the prongs of that is effective assistance of counsel and it puts me in a very improper position to advise [my client] whether or not I did a good job for him.[187]

Despite this valid concern, the court went on to allow the defendant to waive his postconviction rights, stating that as long as the waiver is made knowingly, intelligently, and voluntarily, it is valid.[188] However, to eliminate conflicts of interest and preserve defendants' rights to constitutional review of their plea attorneys' performances, this type of waiver should not be permitted.

V. CONCLUSION

We know that innocent people plead guilty to crimes they did not commit, yet the statutes governing postconviction relief for those who plead guilty are varied and unclear. As a result, the postconviction remedies available to those who plead guilty yet assert their innocence are currently inadequate to ensure that innocent people do not serve time for crimes they did not commit. Some states explicitly include those who plead guilty in their postconviction statutes and grant them access to DNA testing, postconviction petitions, or habeas corpus petitions. Some states explicitly exclude those who plead guilty from their postconviction statutes, denying them the opportunity to have DNA testing performed on evidence from their cases, denying them access to the courts, or denying them the opportunity to file habeas corpus petitions.

However, most states do not explicitly include or exclude those who plead guilty in their postconviction statutes, instead leaving it to the courts to decide whether those who plead guilty can later seek DNA testing or challenge their convictions. Some state courts have decided to include those who plead guilty, some have decided to exclude them, and others have decided to limit their rights and the situations in which those who

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[186] Alan Ellis & Todd Bussert, *Stemming the Tide of Postconviction Waivers*, CRIM. JUST. MAG., Spring 2010, at 28, *available at* http://www.alanellis.com/CM/Publications/Steamming_the%20_Tide.pdf.

[187] Chaney v. State, 323 S.W.3d 836, 839 (Mo. Ct. App. 2010).

[188] *Id.* at 840.

plead guilty can access the courts or forensic testing. Further, some states allow those who plead guilty to waive their postconviction rights in plea agreements, forfeiting the opportunity to have a court review the processes by which they were convicted.

As the law currently stands, most state laws do not adequately address either the issue of wrongful convictions of those who plead guilty or that of constitutional violations in the context of guilty pleas. In order to remedy this situation, state statutes should be amended specifically to include those who plead guilty, thereby eliminating any confusion or inconsistency in the courts. This is the only way to ensure that everyone's constitutional rights are protected, as we know that the same issues that lead to wrongful convictions at trial also lead to wrongful convictions through guilty pleas.

In addition, postconviction DNA testing statutes should not distinguish between those who plead guilty and those convicted at trial. Most states have passed postconviction DNA testing laws because of an interest in determining with as much certainty as possible whether the person who was convicted of a crime is the person who actually committed the crime. This question is still present in cases where someone pleads guilty. In most states, petitioners are responsible for bearing the costs of postconviction DNA testing, so expanding this right to include those who plead guilty would not be an added burden on state resources. In the interests of justice and certainty, all people, including those who plead guilty, should be given access to postconviction DNA or other forensic testing if the results of the testing would be materially relevant to determining who committed the crime.

Finally, all states should pass statutes prohibiting defendants from waiving their postconviction rights during the plea-bargaining process. Allowing defendants to waive their postconviction rights effectively insulates the process by which pleas are taken from ever being reexamined and opens the door for law enforcement and prosecutorial misconduct to occur and go without remedy. In addition, allowing defendants to waive their postconviction rights, including the right to allege ineffective assistance of counsel, creates perverse incentives for defense attorneys who counsel their clients on whether or not to accept a plea deal. These issues compromise the integrity of the criminal process and undoubtedly lead to injustice.