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PROVEN GUILTY: AN EXAMINATION OF THE PENALTY-FREE WORLD OF POST- CONVICTION DNA TESTING

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The phenomenon of exonerations of wrongfully convicted prisoners through post-conviction DNA testing has received extensive and very positive media coverage. However, post-conviction DNA testing, more often than not, provides either inconclusive results or, in many cases, confirms the guilt of the prisoner seeking testing. In addition, DNA testing is costly, time-consuming, and provides an additional administrative burden on already over-extended state criminal justice systems. Only one state in the country, Missouri, has a statutory provision that sanctions petitioners who seek guilt-confirming, post-conviction DNA tests. This Comment proposes and evaluates four possible solutions to the problem of this unrecognized and unnecessary burden on the justice system, and advocates for the adoption of a system by which petitioners whose tests confirm guilt would be sanctioned through the loss of good time credit, which is given to prisoners as a reward for exemplary conduct in prison.

I. INTRODUCTION

The fairy tale-like story of the innocent man wrongly accused and convicted of a crime, later freed through post-conviction DNA testing, is told every week in magazines, newspaper comments, television shows, and radio interviews.¹ However, there is a far more common story,² one that

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¹ See, e.g., *The Aftermath of Murder: Daughter of Victim, Daughter of Man Convicted in Long-Ago Murder Clash Over His Fate*, ST. LOUIS POST-DISPATCH, Oct. 23, 2005, at A10; Stephanie Booth, *I Fight for Wrongfully Convicted Prisoners: Hundreds of Innocent Men Have Been Locked Up for Violent Crimes They Didn't Commit*, COSMOPOLITAN, Sept. 2005, at 232; *Frontline: What Jennifer Saw* (PBS television broadcast Feb. 25, 1997); *Stories of the Innocence Project: Marvin Anderson's Nightmare* (Court TV television broadcast 2004).

² Angela Rozas, *Lawyers Drop Bid to Clear Man's Name: DNA Test Links Convicted Rapist*, CHI. TRIB., Oct. 30, 2003, at B2 (Assistant State's Attorney Mark Ertler said that "a majority of the cases he has handled in which DNA testing is later requested have resulted in positive matches. 'It's not unusual. You just don't hear about cases where the DNA

often goes untold. It is the story of the petitioner who spends years lobbying the government, either with or without the assistance of an innocence project attorney, to perform a post-conviction DNA test. This petitioner absorbs hundreds of hours of an already overburdened state prosecutor's time and puts the victim through the grief and pain of doubting the resolution of her ordeal. At last the petitioner is granted the test, which can cost as much as \$5,000,³ and it seems that his struggle will be vindicated. But this story does not have a fairy tale ending. Instead, the results of the post-conviction DNA test confirm the guilt of the petitioner, rather than proving his innocence.

Estimates on the percentage of cases in which post-conviction testing confirms the petitioner's guilt range from "about half the cases"⁴ to about 60% of cases⁵ in which testing "further implicate[s] the defendant."⁶ For Assistant Cook County State's Attorney Mark Ertler, the numbers are similarly sobering. In October 2005, Ertler had thirty pending petitions from inmates seeking post-conviction DNA testing.⁷ In 2004, ten of Ertler's testing petition cases had met resolution.⁸ Of those ten, none were conclusively exculpatory.⁹ Rather, two resulted in matches to the petitioner's DNA,¹⁰ confirming guilt.¹¹ Each petition may take anywhere

confirms they're the right person convicted.'").

³ Daniel S. Medwed, *Actual Innocents: Considerations in Selecting Cases for a New Innocence Project*, 81 NEB. L. REV. 1097, 1098 n.4 (2003).

⁴ Peter J. McQuillan, DNA News, (2005), <http://www.innocenceproject.org/dnanews/index.php> (last visited Oct. 20, 2005).

⁵ The 60% statistic is also somewhat misleading. The implication of that statistic is that 40% of those granted post-conviction DNA testing are exonerated by those tests. However, as Ertler's record indicates, testing results do not fall neatly into categories of "exculpatory" and "guilt-confirming." Test results can, for any number of reasons, be inconclusive. For example, if a sample is too small, it can be insufficient to positively identify the DNA source. See *infra* note 140 for further explanation of inconclusive samples.

⁶ Stephanie Simon, *DNA Tests for Inmates Debated*, L.A. TIMES, Feb. 10, 2003, at A10. "Further implication" of the petitioner is yielded by tests in which the tested DNA sample matches the DNA of the petitioner.

⁷ Interview with Mark Ertler, Deputy Supervisor of the Special Litig. Unit for Cook County, Cook County State's Attorney's Office, in Chi., Ill. (Sept. 22, 2005).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ A study of the results of post-conviction DNA testing was conducted by the St. Louis Circuit Attorney's Office (STLCAO) beginning in 2003. Robert Patrick, *Review of DNA Sets Very Few Free*, ST. LOUIS POST-DISPATCH, Nov. 15, 2005, at A1, A7-A8. As a part of an initiative begun by Circuit Attorney Jennifer Joyce, the STLCAO reviewed 1,400 cases to evaluate the potential usefulness of post-conviction DNA testing. *Id.* After reviewing evidence and trial transcripts in those cases, the STLCAO determined that the testing of DNA evidence could prove relevant in approximately 210 cases. *Id.* Of those 210 cases,

from one year to many years to reach resolution, depending on the evidentiary complications and peculiar circumstances of a particular case.¹²

While the stretched resources of prosecutors' offices are one serious concern raised by the problem of post-conviction testing that confirms the petitioner's guilt,¹³ another far less quantifiable factor is the trauma experienced by the victim. Reopening a case can be acutely stressful, painful, and traumatic for the victims and families of victims.¹⁴ Jennifer Joyce, the St. Louis Circuit Attorney, has witnessed the experience of victims whose cases have been reopened by post-conviction testing petitions:¹⁵

[Joyce] personally counseled shaking, sobbing victims who were distraught to learn that their traumas were being aired again. One victim, she said, became suicidal and then vanished; her family has not heard from her for months. Another, a deaf elderly woman, grew so despondent that her son has not been able to tell her the results of the DNA test. Every time he raises the issue, she squeezes her eyes shut so she will not be able to read his lips. DNA tests confirmed that she was raped by Kenneth Charron in 1985, when she was 59. To get that confirmation, however, investigators had to collect a swab of saliva from her so that they could analyze her DNA. They also had to inquire about her sexual past, so they could be sure the semen found in her home was not that of a consensual partner. The questioning sent the woman into such depression that she's now on medication.¹⁶

three people were freed based on the testing. *Id.* According to the review's coordinator, Assistant Circuit Attorney Ed Postawko, "About seven people who claimed innocence were proven guilty" by the testing. *Id.* Jackson County, the district encompassing Kansas City, has had similar results. Ted Hunt, the chief trial assistant for the Kansas City prosecutor, has said that "the five DNA tests done in old cases in Jackson County all confirmed the defendant's guilt." *Id.*

¹² *Id.*

¹³ See Simon, *supra* note 6, at A10 ("[St. Louis Circuit Attorney Jennifer] Joyce's staff spent scores of hours and thousands of dollars on those [post-conviction DNA] tests.").

¹⁴ See generally Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 965-66 ("A victim's contact with the criminal justice system may hinder him or her from coming to grips with death, meaning, responsibility, and isolation in innumerable ways. . . . To be of value to past victims of core crimes, victim's rights proposals ideally ought to assist, rather than interfere with, the victim's resolution of the experience.").

¹⁵ See generally Cynthia Bryant, *When One Man's DNA Is Another Man's Exonerating Evidence: Compelling Consensual Sexual Partners of Rape Victims to Provide DNA Samples to Post-conviction Petitioners*, 33 COLUM. J.L. & SOC. PROBS. 113, 141-50 (2000) (discussing the need for obtaining elimination samples from third parties who may have had contact with the victim of a rape, and from whom a sample of DNA is necessary in order eliminate the third party as the perpetrator of the crime). The same principle explains the taking of a saliva swab from the victim of a crime—the victim's DNA, like that of the consensual partner, must be sampled in order to eliminate it as the source of the DNA gathered during the physical examination of the victim.

¹⁶ Simon, *supra* note 6, at A10.

The concern of traumatizing a victim by seeking post-conviction DNA testing¹⁷ is echoed by Ertler, who notes that, “[The office of the state’s attorney] notifies the victims as a professional courtesy, but it is a horrible process for them. Often, they have to come in and give a sample and have to relive the process fifteen or twenty years after they thought they’d gotten some resolution.”¹⁸ An obvious response to any evocation of victim trauma is that however terrible the post-conviction process may be for a victim, it is outweighed by the potential harm of keeping an innocent person in prison. However, if, as in the case of Kenneth Charon, the test only serves to confirm the petitioner’s guilt, the expense and pain of the post-conviction petitioning process are entirely unnecessary and, this Comment will argue, eminently avoidable.

In order to deter frivolous¹⁹ applications for post-conviction DNA testing, this Comment proposes and assesses three alternative solutions, all of which take the form of revisions or additions to state statutes that provide for post-conviction DNA testing. The first proposed solution is the creation of a more rigorous screening process for applications for post-conviction DNA testing. The process would incorporate less subjective standards for the determination of whether or not to grant a test.²⁰ Because state statutes providing for post-conviction DNA testing are relatively new,²¹ there is some disparity in their structures and approaches to the problem of post-conviction testing, specifically with regard to the necessary conditions that

¹⁷ See, e.g., Telephone Interview with Robert Hovey, Supervisor of DNA Review Unit, Cook County State’s Attorney’s Office, in Chi., Ill. (Oct. 14, 2005) (“Anytime, particularly when you’re dealing with a sex offense, when you have a case that becomes active again, that is something that is very stressful for the victim. Part of the healing process for a victim or the family of a victim is to have some closure, and reopening the case is extremely hard on them.”).

¹⁸ Interview with Mark Ertler, *supra* note 7.

¹⁹ This Comment will refer to “frivolous” petitions as those that result in tests that confirm the defendant’s guilt. The term “frivolous,” as used in this Comment, does not carry the same connotations of triviality or silliness as it does in common language use. This term is derived from the statutory language that penalizes the filing of petitions without substantial justification or for the purposes of harassment. See *infra* note 184 and accompanying text.

²⁰ See *infra* Section IV.

²¹ In 1999, only fifteen states had provisions for the granting of new trials on the basis of post-conviction testing, and a federal provision for such testing was only passed into law in 2004. Justice for All Act of 2004, H.R. 5107, 108th Cong. (2004); OFF. OF JUSTICE PROGRAMS, U.S. DEP’T OF JUSTICE, POSTCONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS 2 (1999) [hereinafter POSTCONVICTION DNA TESTING]. As of June 2005, thirty-nine states had statutes providing for such tests. Seth Axelrad & Juliana Russo, *Survey of Post-Conviction DNA Testing Statutes* (2005), http://www.aslme.org/dna_04/grid/Post_Conviction_Grid.xls.

a petitioner must meet in order to receive a test.²² The development of more stringent and uniform screening standards could potentially reduce, if not entirely eliminate, the problem of frivolous petitioning.

However, this proposal has four serious flaws. First, the established screening process is already fairly comprehensive in most states and, if not explicitly articulated in the statutory description of the process, is described in somewhat greater detail in the state courts' interpretations of the statutes.²³ Second, subjectivity of evaluation may very well be an inescapable element in the evaluation process for post-conviction testing petitions.²⁴ Third, a more stringent application process carries the risk of failing to exonerate an innocent person for failure to meet a heavier evidentiary burden.²⁵ Fourth, even if a more rigorous screening process could be effectuated, it would not necessarily reduce the number of applications; instead, it would simply reduce the number of those petitioners who are ultimately granted tests.²⁶ Thus, a proposal that places the onus on the courts and attorneys of reducing the burden on courts and attorneys is fundamentally misguided. In order to be effective, the proposal must deter guilty petitioners from seeking testing in the first place, while not discouraging innocent petitioners.

The second proposal would shift the burden of payment for the costs of testing to the petitioner, rather than the state. Virtually every state that provides for post-conviction testing, as it now stands, funds the testing for indigent petitioners, and requires only solvent petitioners to advance the funding for the test.²⁷ If states were to require a petitioner to advance some, if not all, of the cost of the test, that condition might deter petitioners who know they are guilty from seeking testing. However, as with the first proposal, there are problems with this idea. First, indigent petitioners might be unfairly excluded, thus barring potentially innocent inmates from obtaining testing. Second, mandatory testing payments may invoke Fourteenth Amendment due process concerns. Finally, payment may not provide a sufficiently effective screen of the guilty petitioners.

The third proposal follows Missouri's statutory model. The Missouri law that provides for post-conviction testing also levies specific penalties against petitioners who seek testing only to have the results confirm their

²² See *infra* Section IV.C.

²³ See *infra* Section III.C.

²⁴ See *infra id.*

²⁵ See *infra id.*

²⁶ See *infra id.*

²⁷ Axelrad & Russo, *supra* note 21.

guilt.²⁸ Not only is that person then liable for the costs of the test,²⁹ but he is also subject to sanction under a different law that mandates that sixty days be added to the sentence of any person who files a frivolous claim with the court.³⁰ Missouri is the only state that has incorporated into its post-conviction statute a provision that renders such a sanction mandatory in the case of guilt-confirming tests.³¹

The third proposal urges the adoption of the Missouri statutory framework, specifically the incorporation of a sentence extension for those petitioners whose tests confirm their guilt. This Comment proposes that the sentence extensions be effected through the use of good time penalties. Every state that has a provision for post-conviction DNA testing also has a system of awarding “good time credits.” Good time credits are reductions in length of the prisoner’s sentence that may be granted for various forms of good behavior, and may be deducted for rules violations and, in some states, for the filing of frivolous claims with the court.³² Although Missouri is the first and only state to levy sentencing sanctions against those petitioners whose tests confirm their guilt, no state has used good time penalties as the sanctioning mechanism in post-conviction testing cases. This Comment’s third proposal relies on the logic of the Missouri statute, that petitioners who seek tests only to have the tests confirm their guilt should be subject to sentencing sanctions, but suggests implementing the existing good time credit sanctioning structure as a means of penalizing guilty petitioners.

A mandatory sanction of a deduction of good time credits would not harm those who are innocent and have been wrongfully convicted. To the contrary, its function as a deterrent would reduce the burden on the courts, on prosecutors, and on innocence project attorneys. This would, in turn, free up the resources of money and time, which could then be allocated to those who truly are innocent and who will benefit from the exculpatory evidence that can be provided by post-conviction DNA testing. The innocent have nothing to lose by pursuing a post-conviction DNA testing petition. But under the status quo, neither do the guilty, and the result is the unnecessary and preventable burdening of an already over-burdened

²⁸ MO. REV. STAT. § 650.055 (2006).

²⁹ *Id.*

³⁰ *Id.* § 217.262.

³¹ Axelrad & Russo, *supra* note 21.

³² ARIZ. REV. STAT. ANN. § 41-1604.7(I)(1) (2006); DEL. CODE ANN. tit. 11, § 4504 (2006); 725 ILL. COMP. STAT. 5/116-3 (2006); KAN. STAT. ANN. § 21-2512 (2006); KY. REV. STAT. ANN. §§ 422.285, 422.287 (West 2006); MINN. STAT. §§ 590.01-.06 (2006); MO. REV. STAT. §§ 547.035, 650.055.

criminal justice system. This proposal will not only prevent needless trauma to the victims and reduce the waste of resources, it will facilitate the just resolution of the cases of both the guilty and the innocent.

Section II of this Comment provides a general factual background on the process of post-conviction DNA testing and the goals of innocence projects nationwide, specifically those of the Cardozo School of Law's Innocence Project as a representative model of DNA-testing-focused projects.³³ Section III describes the screening process of post-conviction DNA testing applications. This section discusses the innocence projects' (both Cardozo's and other similar projects) application screening process used in selecting the petitioners for whom they will work as advocates,³⁴ the courts' interpretations of post-conviction DNA testing statutes,³⁵ and the screening process for re-testing as described in statutes and common law.³⁶

Section IV describes a categorization method for reviewing testing applications, proposes a framework of analysis for post-conviction testing petitions, and discusses the potential disadvantages of the proposed method.³⁷ Section V examines the issue of payment for testing costs, and suggests the possibility of requiring petitioners to advance the costs of the testing until and if they are exonerated by the results.³⁸ Section VI surveys the existing state statutory structure for the penalization of frivolous petitions, describes the Missouri statutory model, and discusses the costs and benefits of applying the forfeiture of good time credits as a sanction against those whose post-conviction DNA tests confirm their guilt.³⁹

II. POST-CONVICTION DNA TESTING AND THE INNOCENCE PROJECT

The Innocence Project and many similar organizations throughout the country have received widespread national media coverage, both in the popular media and the academic community, and have brought a great deal of public attention to the phenomenon of wrongfully convicted, and sometimes wrongfully executed, prisoners.⁴⁰ Attempts to exonerate the

³³ See *infra* Section II.

³⁴ See *infra* Section III.B.

³⁵ See *infra id.*

³⁶ See *infra* Section III.C.

³⁷ See *infra* Section IV.

³⁸ See *infra* Section V.

³⁹ See *infra* Section VI.

⁴⁰ See, e.g., Diane Kanon, *Will the Truth Set Them Free? No, But the Lab Might: Statutory Responses to Advancements in DNA Technology*, 44 ARIZ. L. REV. 467 (2002); Adam Liptak, *Study Suspects Thousands of False Convictions*, N.Y. TIMES, Apr. 19, 2004, at A15; Joyce Purnick, *19 Years Late, Freedom Has A Bitter Taste*, N.Y. TIMES, Oct. 3, 2005, at B1.

wrongfully convicted take many forms, from investigating potentially false confessions to locating previously unidentified witnesses.⁴¹ However, post-conviction DNA testing can provide by far the most concrete and imminently verifiable demonstration of innocence.⁴² Although DNA evidence is by no means infallible,⁴³ “the progress in the technology of DNA testing which occurred in the 1990s now makes it possible to obtain conclusive results in cases in which previous testing provided inconclusive results.”⁴⁴ The Innocence Project, based at Cardozo Law School, was one of the first and is by far one of the most high-profile legal clinics of its kind.⁴⁵ Its founders, Barry Scheck and Peter Neufeld, opened the clinic in 1992, and have since handled many of the high-profile cases discussed in the national media, including the five men convicted and later exonerated in the Central Park Jogger case.⁴⁶ In total, the work of the Innocence Project has brought about 163 exonerations.⁴⁷ The Innocence Project only deals with cases of “actual innocence” in which “post-conviction DNA testing of evidence can yield conclusive proof of innocence.”⁴⁸ The term “actual innocence” is used to distinguish cases of wrongful conviction, in which a defendant may have committed the crime but was convicted using evidence that should have been excluded or for other procedurally invalid reasons, from those in which prisoners are factually innocent of the crimes for which they are serving prison sentences.⁴⁹ Factually innocent defendants did not

⁴¹ Jan Stiglitz, Justin Brooks & Tara Shulman, *The Hurricane Meets the Paper Chase: Innocence Projects New Emerging Role in Clinical Legal Education*, 38 CAL. W. L. REV. 413, 431 n.3 (2002).

⁴² *Id.*; see also The Innocence Project—About Us, <http://www.innocenceproject.org/about/index.php> (last visited Apr. 21, 2007) (explaining that the Project is able only to accept applicants for whom DNA testing has the potential to provide conclusive proof of innocence).

⁴³ Courts have recognized the fallibility of such evidence. In *Schwartz v. State*, “experts acknowledged that DNA testing could produce a ‘false negative,’ where a DNA match is not declared when one in fact exists. Contradictory expert testimony was offered concerning whether a ‘false positive,’ could result where the wrong individual is identified as the contributor of the DNA sample.” Anna M. Franceschelli, *Motions for Post-conviction DNA Testing: Determining the Standard of Proof Necessary in Granting Requests*, 31 CAP U.L. REV. 243, 260 (2003) (quoting *Schwartz v. State*, 447 N.W.2d 422, 426 (Minn. 1989)).

⁴⁴ *Id.* at 244.

⁴⁵ Hans Sherrer, *Barry Scheck, Peter Neufeld & Jim Dwyer's Actual Innocence: When Justice Goes Wrong and How to Make It Right*, JUSTICE: DENIED 2001 (book review), available at <http://www.justicedenied.org/actualinnocencereview.htm>.

⁴⁶ Robert D. McFadden & Susan Saulny, *A Crime Revisited: The Decision, 13 Years Later, Official Reversal in Jogger Attack*, N.Y. TIMES, Dec. 6, 2002, at A1.

⁴⁷ The Innocence Project—About Us, *supra* note 42.

⁴⁸ *Id.*

⁴⁹ BARRY SCHECK, PETER NEUFELD & JIM DWYER, ACTUAL INNOCENCE: WHEN JUSTICE

commit the crimes of which they are accused. Wrongfully convicted defendants may very well have committed the crimes of which they are accused, but may also have been the victim of prosecutorial misconduct, police brutality, or judicial error.⁵⁰

The Cardozo Innocence Project relies on volunteer law students and attorneys to review hundreds of cases of people who say they have been falsely convicted, usually of rape or murder, and, when appropriate, to arrange for DNA tests that may support their claims of innocence.⁵¹ Although the Cardozo Innocence Project is one of the most prolific and high-profile in the country, the concept of the innocence project was actually originated by Centurion Ministries.⁵² Centurion Ministries was

[f]ounded in 1983 by former corporate executive turned Christian minister James McCloskey . . . [and] only takes on cases where an inmate has been sentenced to either life in prison or death, and where an inmate is completely factually innocent of the crime for which he or she has been convicted.⁵³

Since the founding of Centurion Ministries,⁵⁴ similar projects have been created throughout the country, many in association with law school clinics.⁵⁵ Although many of the exonerations reported in the popular media have been achieved with the assistance of Cardozo Innocence Project attorneys, state statutes opened the door for post-conviction testing petitions to be filed pro se.⁵⁶ Additionally, a number of state's attorney's offices have initiated their own internal investigation and review of cases in which DNA evidence played a role.⁵⁷

GOES WRONG AND HOW TO MAKE IT RIGHT xvi (2000).

⁵⁰ *Id.*

⁵¹ Innocence Projects in the US, <http://www.truthinjustice.org/ips.htm> (last visited Apr. 21, 2007).

⁵² Matthew D. Sharp, *The Need for An Innocence Network in Texas*, 7 SCHOLAR 257, 260 (2005).

⁵³ *Id.* (citing Centurion Ministries, <http://www.criminaljustice.org/public.nsf/Freeform/CenturionMinistries?OpenDocument> (last visited Apr. 21, 2007)).

⁵⁴ Centurion Ministries, *supra* note 53.

⁵⁵ Medwed, *supra* note 3, at 1098 n.4; *see, e.g.*, Brooklyn Law School: Academic Program (Second Look Clinic), <http://www.brooklaw.edu/academic/courses/description/?course=116> (last visited Apr. 21, 2007); California Western—California Innocence Project, <http://www.cwsl.edu/main/default.asp?nav=cip.asp&body=cip/home.asp> (last visited Apr. 21, 2007); Mid-Atlantic Innocence Project, <http://www.exonerate.org/> (last visited Apr. 21, 2007).

⁵⁶ Axelrad & Russo, *supra* note 21.

⁵⁷ For example, in 2003, the Cook County State's Attorney's Office in Chicago created a DNA Review Unit charged with evaluating the necessity of post-conviction testing in approximately one hundred cases. Jonathan Katz, *County Announces DNA Unit*, NW. IND. TIMES (Munster, Ind.), Feb. 20, 2003, *available at* http://www.nwtimes.com/articles/2003/02/20/news/local_illinois/64607d11523a4b4b86256cd30005dc16.txt. Similar projects have

DNA testing, both at the trial and post-conviction level, is primarily used in cases of rape and murder because those are the cases in which biological material is typically available and can be used to conclusively place a defendant at the scene of the crime and as the violator of the victim.⁵⁸ In 1987, British Scientist Dr. Alec J. Jeffreys used DNA for the first time as forensic evidence to exclude a suspect in a rape case.⁵⁹ Later in 1987, DNA evidence was used to obtain a conviction in the United States, when a Circuit Court in Florida convicted Tommy Lee Andres of rape after DNA tests matched his DNA from a blood sample with that of semen traces found in a rape victim.⁶⁰ Since that 1987 case, DNA evidence has become widely used at the state level, and every U.S. jurisdiction now admits some type of DNA evidence.⁶¹

Post-conviction testing, which is sought by a petitioner after all other avenues of appeal have been exhausted, is usually requested “not only in cases in which DNA testing was never done, but also in cases in which a newer, more sensitive technology may now be able to furnish a conclusive answer.”⁶² Technological improvements and the discovery of faulty or inaccurate laboratory work “now make[] it possible to obtain conclusive results in cases in which previous testing provided inconclusive results.”⁶³ In 1996, the National Institute of Justice (NIJ) issued a report profiling twenty-eight men whose innocence had been proven using DNA technology after they were convicted.⁶⁴ In response to the report, then-Attorney General Janet Reno “requested that the Institute establish a National Commission on the Future of DNA Evidence to identify ways to maximize the value of DNA in our criminal justice system.”⁶⁵ Since the 1996 NIJ report, thirty-nine states have passed into law statutes providing for post-

been created in prosecutor’s offices across the country, including the Miami Dade State Attorney’s Office, *see* MiamiSAO.com—The Justice Project, <http://www.miamisao.com/services/justiceproject/index.html> (last visited Apr. 21, 2007), and the Office of the St. Louis Circuit Attorney. *See* Telephone Interview with Edmund Postawko, Assistant Circuit Attorney, Office of the St. Louis Circuit Attorney, in St. Louis, Mo. (November 14, 2006).

⁵⁸ Franceschelli, *supra* note 43, at 243.

⁵⁹ EDWARD CONNORS ET AL, U.S. DEP’T OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL 4 (1996).

⁶⁰ Franceschelli, *supra* note 43, at 246 (citing *Andrews v. State*, 533 So. 2d 841, 842-43 (Fla. Dist. Ct. App. 1989)).

⁶¹ *Id.* at 243 (citing POSTCONVICTION DNA TESTING, *supra* note 21, at 1).

⁶² *Id.* at 244 (quoting POSTCONVICTION DNA TESTING, *supra* note 21, at 2).

⁶³ *Id.* at 244.

⁶⁴ POSTCONVICTION DNA TESTING, *supra* note 21, at iii.

⁶⁵ *Id.*

conviction DNA testing,⁶⁶ and in 2004, Congress passed the Justice for All Act (JFAA) which made such testing available to those convicted of federal crimes.⁶⁷

The history of forensic DNA evidence demonstrates the vital role DNA can play in determining a defendant's innocence or guilt. However, it should also always be remembered that "DNA alone does not prove guilt or innocence, as DNA is only one piece of the evidence used in a criminal trial against the defendant."⁶⁸ As Judge Keller, author of the Texas Court of Criminal Appeals' majority opinion that denied petitioner Roy Criner a new trial on the basis of post-conviction DNA testing results, explained, "'Just like the absence of fingerprints right here [on this chair] doesn't show that I didn't touch [the] chair,' the absence of a defendant's DNA at a crime scene 'can't show that he didn't do it.'"⁶⁹ Because of the subtle nature of DNA evidence's role in the evidentiary determination of guilt, and because courts and attorneys have finite resources, applications for testing must be selectively screened before being granted. The variety of approaches to the application screening process is discussed below.

III. SCREENING POST-CONVICTION TESTING PETITIONS

A. OVERVIEW

Since there are a variety of methods by which a prisoner seeking post-conviction DNA testing may obtain a test (*pro se*, with representation, or at the prosecutor's behest), it is worthwhile to briefly explain the types of testing application screening processes before discussing each in detail. First, there are the screening processes imposed by state statutes and by judicial interpretation of those statutes, which a petitioner seeking a court grant of a test must pass.⁷⁰ These are relevant to petitioners who are *pro se* as well as those who are represented, but who have not elected to have testing of biological evidence performed by an independent, non-state

⁶⁶ Axelrad & Russo, *supra* note 21 (as of June 2005).

⁶⁷ Justice for All Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260 (2004); Memorandum from Sarah Tofte from the Innocence Project on JFAA Support for State Post-Conviction DNA Testing Access Statutes to innocence network members (Dec. 8, 2004), *available at* http://www.innocenceproject.org/docs/JFAA_Memo.pdf.

⁶⁸ Franceschelli, *supra* note 43, at 245.

⁶⁹ Karen Christian, *And the DNA Shall Set You Free: Issues Surrounding Post-conviction DNA Evidence and the Pursuit of Innocence*, 62 OHIO ST. L.J. 1195, 1199 (2001) (citing Interview by Ofra Bikel with Judge Sharon Keller, Tex. Court of Criminal Appeals (transcript available at Frontline, The Case for Innocence, <http://www.pbs.org/wgbh/pages/frontline/shows/case/interviews/keller.html>).

⁷⁰ See, e.g., *infra* notes 91-113 and accompanying text.

laboratory.⁷¹ Petitioners who are represented have had their petitions for testing screened either by innocence project representatives, a screening process which itself has a number of levels of scrutiny, or by the prosecutors reevaluating the case.⁷²

Those cases handled under the supervision and guidance of innocence project and clinic representatives hopefully provide a best case scenario study of the application screening process.⁷³ Many innocence project clinics are primarily, if not exclusively, devoted to evaluating requests for post-conviction DNA testing. Petitioners requesting retesting are asked to fill out extensive questionnaires, and their cases are evaluated by law students, faculty supervisors, and practicing attorneys. Memoranda detailing each individual's specific case are assessed by committee before the clinic agrees to provide representation.⁷⁴ Yet, the figures concerning post-conviction, testing-based acquittal rates cited in this Comment's introduction indicate that about half of innocence project-assisted post-conviction testing results in confirmations of guilt.⁷⁵ Even though each of those applications had been subjected to rigorous screening before being accepted by the innocence projects, they still resulted in confirmations of guilt. The following sections will describe in detail the screening processes used by innocence projects and courts and described by state and federal statutes.

It might seem that the evaluative process of prosecutor's offices would be the most rigorous, but a number of factors make that untrue. First, many of the petitions being evaluated by the prosecutor's office are petitions that have already been filed with the court and have been brought to the attention of the office only because a claim of actual innocence is being made, creating a redundancy in the screening process.⁷⁶ Second, the prosecutor's office does not have the same breadth of resources devoted to the evaluation of these petitions as an independent agency would.

For example, Illinois Assistant State's Attorney Robert Hovey, who supervises the testing of genetic evidence for the Cook County State's Attorney's Office, employs two attorneys devoted to evaluating genetic evidence, but those attorneys do not specialize in petitions for post-conviction DNA testing.⁷⁷ Instead, the attorneys' primary focus is the

⁷¹ *Id.*

⁷² *See infra* Section III.B.

⁷³ Telephone Interview with Robert Hovey, *supra* note 17.

⁷⁴ Medwed, *supra* note 3, at 1116-28.

⁷⁵ McQuillan, *supra* note 4.

⁷⁶ *Id.*

⁷⁷ *Id.*

evaluation of DNA evidence used at the trial, rather than post-conviction, level. The standards used by Hovey's unit are fairly general and subjective—if a case seems to have biological evidence suitable for testing, then the case is pursued.⁷⁸ A more detailed examination of the screening process used by innocence projects demonstrates that despite their comparative rigor, subjectivity and imperfection permeate the screening process.

B. INNOCENCE PROJECTS' APPLICATION SCREENING PROCESS

In order to illustrate the screening process used by innocence projects, this section will begin by describing a typical screening process, that of the New England Innocence Project (NEIP). The NEIP does not have the national recognition or extensive resources of the Cardozo Innocence Project, and therefore provides a reasonable sample of the kind of screening possible at innocence projects without the funding of the Cardozo Project. The NEIP, sponsored by Goodwin Procter, LLP, combines the resources of law school and law student support with sponsorship by a private law firm.⁷⁹ The NEIP has a multi-stage screening process, and the results of each stage are independently evaluated by students, attorneys, or faculty members. Because the NEIP has access to such a broad range of resources, it provides a good representative example of innocence projects' screening processes.

Jennifer Chunias, the Project's Executive Coordinator, estimates that the NEIP annually receives around two hundred inquiries from inmates seeking assistance.⁸⁰ Each applicant is required to fill out a ten-page questionnaire detailing the available evidence, procedural history, and facts and circumstances of her case.⁸¹ That questionnaire is reviewed by a project staff attorney, who decides whether or not the petition has sufficient merit to advance to the next stage in the screening process.⁸² If the petition meets the necessary criteria, it is assigned to a law student who works under the supervision of an attorney and a faculty advisor.⁸³ The student prepares a case memo after reviewing the transcripts from the case, the prosecutor's theory of the evidence, the appellate opinions, and the evidence.⁸⁴ The case

⁷⁸ *Id.*

⁷⁹ Telephone Interview with Jennifer Chunias, Executive Coordinator, New England Innocence Project, in Boston, Mass. (Oct. 14, 2005).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

memo is then submitted to the NEIP case committee, which is made up of law professors and attorneys from the New England area.⁸⁵ Only after the case committee approves the application does the process of trying to obtain a test even begin.⁸⁶ Indeed, of the two hundred petitions that the NEIP receives annually, Chunias estimates that less than 10% have actually received committee approval.⁸⁷

Inaccuracy and inadequacy of evaluation permeate even the rigors of the innocence project screening process. In his description of the screening process used by the innocence project at Brooklyn Law School, Daniel Medwed recognizes the necessity of involving students in the process, saying that “[r]egardless of how narrowly a project defines its intake criteria, it will undoubtedly be overwhelmed with inquiries to a point far beyond the capability of faculty supervisors alone to evaluate them adequately.”⁸⁸ Medwed also acknowledges the importance of instinct, derived from experience and lengthy exposure to the criminal justice process, in facilitating a person’s ability to evaluate a claim:

As William Hellerstein often says, drawing on his forty years of criminal defense practice, it is the amount of detail in the inmate’s correspondence, the credibility displayed during the prison interview, and a sense of “smell” that often convinces him that a particular case warrants our services. One of the most fascinating aspects of the innocence project case selection process concerns whether the fresh, eager nostrils of clinic students are well-equipped to bear primary responsibility for this smell test.⁸⁹

Ultimately, the untested instincts of students play a crucial role in the case selection process, and even with extensive supervision, like that employed by the NEIP, the analysis of evidence, interviewing of the prisoner, and evaluation of the totality of circumstances in a case are left in the untried hands of a law student.⁹⁰ The number of inconclusive and guilt-confirming test results reflects the difficulty of discerning a meritorious petition and the need for a more concrete method of evaluation.

C. STATUTORY AND COMMON LAW SCREENING PROCESSES

States’ procedural bases for an application for post-conviction DNA testing, as the 1996 NIJ report observed, can be placed into three categories:

There are basically three different types of jurisdictions in which applications for DNA testing will be made:

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Medwed, *supra* note 3, at 1150.

⁸⁹ *Id.* at 1127.

⁹⁰ *Id.* at 1135-50.

- States such as New York and Illinois, which have statutes permitting postconviction DNA testing.
- Jurisdictions where, by case law, postconviction DNA testing requests are permitted based on due process grounds.
- Jurisdictions where newly discovered evidence claims are time barred and applications are made for access to the evidence for the purpose of obtaining executive clemency.⁹¹

Although the threshold procedural requirements for seeking an application can be readily categorized, “a review of various statutes reveals no consensus as to the appropriate standards to allow post-conviction DNA testing.”⁹² Statutes vary greatly in the degree of specificity given in the standards necessary for a petitioner to be granted post-conviction testing. Some require only that the testing of biological evidence has the potential to indicate wrongful conviction, rather than factual innocence.⁹³ Others have lengthy lists of evidentiary requirements and mandate that the evidence must demonstrate actual innocence,⁹⁴ rather than inconclusive proof of guilt or wrongful conviction.⁹⁵

Below is a list of the elements most commonly included in state statutes.⁹⁶ Some states incorporate as few as two of the review criteria,⁹⁷

⁹¹ POSTCONVICTION DNA TESTING, *supra* note 21, at 48.

⁹² Franceschelli, *supra* note 43, at 249.

⁹³ See Heidi C. Schmitt, *Post-Conviction Remedies Involving the Use of DNA Evidence to Exonerate Wrongfully Convicted Prisoners: Various Approaches Under Federal and State Law*, 70 UMKC L. REV. 1001, 1012 (2002) (“The states vary regarding the level of showing that a prisoner must meet. For example, some states require that the testing must show results ‘materially relevant’ to the defendant’s claim of innocence, while others require DNA testing to show a ‘reasonable probability’ that the verdict or sentence would have been more favorable to the petitioner.”); *see, e.g.*, 2003 CONN. PUB. ACTS 242 (“[T]he Court shall order DNA testing if it finds that: . . . (1) A reasonable probability exists that the requested testing will produce DNA results which would have altered the verdict or reduced the petitioner’s sentence if the results had been available at the prior proceedings leading to the judgment of conviction.”).

⁹⁴ *See, e.g.*, COLO. REV. STAT. §§ 18-1-411-18-1-416 (2006).

⁹⁵ Axelrad & Russo, *supra* note 21; *see also* Schmitt, *supra* note 93, at 1010.

⁹⁶ These criteria were distilled from a comprehensive review of all thirty-nine states’ post-conviction DNA testing statutes. Although there are statutory anomalies (see the Louisiana example discussed *infra* note 110 and accompanying text), this list represents the most frequently occurring statutory elements.

⁹⁷ *See, e.g.*, IDAHO CODE ANN. §§ 19-4901-4902 (2006).

(d) The trial court shall allow the testing under reasonable conditions designed to protect the state’s interests in the integrity of the evidence and the testing process upon a determination that:

- (1) The result of the testing has the scientific potential to produce new, noncumulative evidence that would show that it is more probable than not that the petitioner is innocent; and
- (2) The testing method requested would likely produce admissible results under the Idaho

while some, such as New Jersey, incorporate, with the exception of the admissibility requirement, every criterion listed below.⁹⁸

Evidentiary Criteria:

1. The evidence is still in existence and is in a condition that allows DNA testing to be conducted;⁹⁹
2. The evidence was not previously subjected to DNA testing;¹⁰⁰
3. If the evidence was previously tested, the results of any previous DNA testing were inconclusive and subsequent scientific developments would likely produce a definitive result;¹⁰¹
4. If the DNA evidence still exists, the results of testing would have been admissible at trial;¹⁰²
5. The evidence to be tested was subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect.¹⁰³
 - a. More specifically: A law enforcement agency collected biological evidence pertaining to the offense and retains “actual or constructive possession” that allows for reliable DNA testing. “Actual or constructive possession” means the biological evidence is maintained or stored on the premises of the law enforcement agency or at another location or facility under the custody or control of the law enforcement agency.¹⁰⁴

rules of evidence.”). It should be noted that Idaho does have chain of custody and previous testing requirements not explicitly listed in the “court shall allow the testing” section of the statute.

Id. § 4902(d). It should be noted that Idaho does have chain of custody and previous testing requirements not explicitly listed in the “court shall allow the testing” section of the statute.

⁹⁸ N.J. STAT. ANN. § 2A:84A-32A (West 2006).

⁹⁹ See, e.g., CAL. PENAL CODE § 1405 (West 2006); GA. CODE ANN. § 5-5-41 (2006); R.I. GEN. LAWS §§ 10-9.1-11-12 (2006).

¹⁰⁰ See, e.g., CAL. PENAL CODE § 1405; GA. CODE ANN. § 5-5-41; R.I. GEN. LAWS §§ 10-9.1-11-12.

¹⁰¹ See, e.g., FLA. STAT. §§ 925.11, 943.3251 (2006).

¹⁰² See, e.g., IDAHO CODE ANN. §§ 19-4901-4902.

¹⁰³ See, e.g., MONT. CODE ANN. §§ 46-21-110, 53-1-214 (2006).

¹⁰⁴ See, e.g., COLO. REV. STAT. §§ 18-1-411-416 (2006).

Review Criteria for Petition:

1. A reasonable probability exists that either:
 - a. The petitioner's verdict or sentence would have been more favorable if the results of the DNA testing had been available at the trial leading to the judgment of conviction;
 - b. DNA testing will provide exculpatory evidence;¹⁰⁵
2. The testing requested employs a scientific method generally accepted within the relevant scientific community;¹⁰⁶
3. The testing has the scientific potential to produce non-cumulative evidence materially relevant to the defendant's assertion of actual innocence;¹⁰⁷
4. The identity of the perpetrator of the crime was, or should have been, a significant issue in the case;¹⁰⁸
5. The motion is not made solely for the purpose of delay.¹⁰⁹

Although these criteria provide the basic framework around which all the statutes are structured, there is still a great deal of variation. For example, in addition to the "reasonable probability" requirement, Louisiana's statute dictates that there must be "an articulable doubt based on competent evidence . . . as to the guilt of the petitioner."¹¹⁰ This statutory language seems to shift the burden slightly, requiring that the petitioner's guilt be uncertain before the question of DNA testing is raised. By contrast, Nebraska lessens the petitioner's burden by eliminating the requirement that the identity of the perpetrator was a significant issue in the case.¹¹¹

Depending on the state, there is also variation in the language of the "reasonable probability" requirement, which mandates that the testing be "reasonably probable" to have influenced the verdict or demonstrated the petitioner's actual innocence. In Illinois, for example, the evidence must simply be "materially relevant to the defendant's assertion of actual innocence even though the results may not completely exonerate the defendant."¹¹² The material relevance requirement is a lower evidentiary

¹⁰⁵ See, e.g., CAL. PENAL CODE § 1405.

¹⁰⁶ See, e.g., VA. CODE ANN. § 19.2-327.1 (2006).

¹⁰⁷ See, e.g., UTAH CODE ANN. §§ 78-35a-301-302 (2006).

¹⁰⁸ See, e.g., W. VA. CODE § 15-2B-14 (2006).

¹⁰⁹ See, e.g., VA. CODE ANN. § 19.2-327.

¹¹⁰ LA. REV. STAT. ANN. § 15:571.4 (2006).

¹¹¹ NEB. REV. STAT. §§ 29-4119-4122 (2006).

¹¹² 725 ILL. COMP. STAT. 5/116-3 (2006).

(b) The defendant must present a prima facie case that . . .

standard than that of reasonable probability. In a state like Illinois with a material relevance standard in place, DNA testing that reveals the presence of DNA from someone other than the petitioner, or DNA in addition to that of the petitioner, would be admissible as being materially relevant. However, such evidence probably would not meet the “reasonable probability” of establishing innocence requirement. Hence, in a state such as Louisiana, the post-conviction testing results might have little impact on the petitioner’s case. In yet another evidentiary permutation, some states require both that the evidence be materially relevant to the petitioner’s identity and create a reasonable probability that the outcome of the petitioner’s case would have been altered.¹¹³ Ultimately, the crux of these statutes is the need for the court to determine whether or not the test is likely to prove that the petitioner is innocent. The same subjectivity of determination that plagued the innocence projects’ screening processes exists in this statutory language.

The problem of the standards’ subjectivity has been barely ameliorated by courts’ interpretation of the statutes’ plain language.¹¹⁴ As with the statutory language discussed above, the primary difference in courts’ reasoning seems to be based on the determination of whether “that evidence would be ‘likely’ to produce a different verdict at trial, or that the evidence is potentially exculpatory.”¹¹⁵ Even in states such as South Dakota, where

(2) the evidence to be tested has been subject to a chain of custody sufficient to establish that such evidence has not been substituted, tampered with, replaced, or altered in any material aspect.

(c) The trial court shall allow the testing upon a determination that:

(1) the result of the testing has the scientific potential to produce new, noncumulative evidence materially relevant to the defendant’s assertion of actual innocence even though the results may not completely exonerate the defendant;

(2) the testing requested employs a scientific method generally accepted within the relevant scientific community.

Id.

¹¹³ See, e.g., IND. CODE §§ 35-38-7-1-19 (2006).

¹¹⁴ See below discussion and accompanying notes 115-123.

¹¹⁵ Christian, *supra* note 69, at 1213 (“Aside from the similarities cited by the Kansas court, there does appear to be some difference between the states regarding the significance a court should attach to a DNA testing result that shows the defendant’s DNA does not match the DNA sample found at the crime scene. In Pennsylvania, the standard appears more rigorous as DNA evidence must ‘definitively establish [the] Appellant’s innocence.’ This language may suggest that Pennsylvania courts will require a heightened showing from defendants before post-conviction testing will be available. A New York defendant may stand a better chance than a Pennsylvania defendant in receiving DNA testing, because the New York statute requires that the defendant show only that there is ‘reasonable probability’ that test results would produce a verdict favorable to him, instead of showing that the DNA evidence would ‘definitively establish’ his innocence. At the least, the varying language

the court has attempted to establish a three-part test or guideline, the test does not go beyond the language incorporated into the statute. The Supreme Court of South Dakota only recently articulated its standard for when post-conviction DNA testing may take place.¹¹⁶ The first part of the court's test required that any DNA evidence and test results must meet the standard for scientific reliability established by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹¹⁷ The second part of the test required the defendants to show that favorable test results would "most likely produce an acquittal in a new trial."¹¹⁸ The third part of the test stated that testing should not be permitted if it forced an unreasonable burden upon the state.¹¹⁹

As the Kansas Court of Appeals in *Mebane v. State*¹²⁰ recognized, "tests developed by the states share some similarities: testing is usually permitted where the crime involved only one perpetrator and the prosecution's evidence was weak or at least open to reasonable doubt."¹²¹ Essentially, the lone pragmatic guideline that emerges from the common law is that cases that involve multiple perpetrators in which it is unclear that the petitioner's DNA was deposited at the scene of the crime do not rise to the necessary standard of proof.¹²² However, the evaluation of the weakness of the State's case and the reasonable probability of the petitioner's guilt or innocence being established by the evidence are still left to the subjective determination of the trial court.¹²³

used in the statutes and in the common law demonstrates that a defendant's right to DNA testing is not absolute and that the language states choose in setting these standards plays a critical role in a defendant's ability to prove his innocence.") (internal citations omitted).

¹¹⁶ *Id.* at 1210 (discussing *Jenner v. Dooley*, 590 N.W.2d 463 (S.D. 1999)).

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 1211 (citation omitted).

¹¹⁹ *Id.* at 1211-12 (citing *Jenner*, 590 N.W.2d at 472).

¹²⁰ 902 P.2d 494, 497 (Kan. Ct. App. 1995).

¹²¹ Christian, *supra* note 69, at 1212-13 (discussing *Mebane*, 902 P.2d 494) ("Other states, when deciding whether to grant a prisoner access to DNA testing, also expressed that DNA post-conviction testing was more suitable where certain fact patterns existed, such as where there was a single perpetrator and other evidence presented at trial was doubted. See *Jenner*, 590 N.W.2d at 472 (stating that post-conviction testing is 'most suitable' where 'the identity of a single perpetrator is at issue'); *In re Washpon v. N.Y. State Dist. Attorney*, 625 N.Y.S.2d 874, 878 (N.Y. Sup. Ct. 1995) (using the New York standard of reasonable probability and indicating that there were not multiple assailants and that DNA tests would be significant because the victim said she had not had sexual relations with anyone else the night of the rape); *Sewell v. State*, 592 N.E.2d 705, 708 (Ind. App. 1992) (declaring that DNA testing should be used 'when the State's proofs are weak, [and] when the record supports at least a reasonable doubt of guilt') (citation omitted).").

¹²² *Id.*

¹²³ *Id.* at 1213.

D. FEDERAL STATUTORY SCREENING PROVISIONS

Although this Comment focuses on state-based solutions to the post-conviction testing problem, some mention should be made of the federally devised methods of petition screening. As mentioned in Section II of this Comment, the JFAA was recently signed into law by Congress.¹²⁴ The JFAA provides increased fiscal incentives for states to create post-conviction DNA testing programs,¹²⁵ and was signed into law on October 30, 2004. Incorporated into the JFAA is the Innocence Protection Act, another piece of congressional legislation which, among other things, grants any inmate convicted of a federal crime the right to petition a federal court for DNA testing to support a claim of innocence. An inmate seeking testing must show that evidence subject to DNA testing and relating to the crime exists.¹²⁶ Either the evidence must not yet have been tested, or the petitioner must be seeking a new or improved type of testing, which could "resolve an issue not resolved by previous testing."¹²⁷ The court will grant the petitioner's motion if it determines that the testing can produce "new, non-cumulative evidence" that is material to the petitioner's innocence.¹²⁸ These provisions are essentially indistinguishable from those of the state statutes, and do little to illuminate the means by which the court may evaluate the probable results of the post-conviction testing.¹²⁹

¹²⁴ See *supra* note 67.

¹²⁵ The JFAA provides:

Bonus Grants to States to Ensure Consideration of Legitimate Claims of Actual Innocence (Section 413). This section reserves these program grant funds for states that: (1) make post-conviction DNA testing available to any person convicted of a State crime; (2) allow post-conviction relief if such testing excludes the defendants; and (3) preserve evidence in relation to State cases.

See Memorandum from Sarah Tofte, *supra* note 67, at 2.

Additionally, the Kirk Bloodsworth Actual Innocence Grant Program authorizes five million dollars per year for five years to provide grants to states for post-conviction DNA testing. *Id.*

¹²⁶ Innocence Protection Act of 2001, S. 486, 107th Cong. § 2291(d)(1)(D) (2001).

¹²⁷ *Id.* § 2291(d)(1)(B).

¹²⁸ *Id.* § 2291(d)(1)(D).

¹²⁹ Although a fairly wide range of evidentiary criteria are incorporated both into common law and statutory standards for petition evaluation, none of these standards has altered the fundamental necessity of a highly subjective evaluation of each individual's case. More effective petition evaluation standards could potentially reduce the number of petitions granted that ultimately affirm the guilt of the petitioner, which waste public resources and reduce the speed with which the petitions of the truly innocent may be evaluated.

IV. PROPOSED STATUTORY STANDARDS FOR EVALUATING POST-CONVICTION DNA TESTING PETITIONS

The statutory schemes handling screening petitions vary enormously in precision, specificity, and comprehensiveness. While it would not provide a perfect solution in and of itself, a more uniform and rigorous screening process could make major advances towards preventing the problem of frivolous petitioning. The outline for one such scheme has already been researched and described at length in a report issued by the National Commission on the Future of DNA Evidence.¹³⁰

In its 1999 report, the Commission laid out a system of categorization of the cases in which a request for post-conviction DNA testing had been made.¹³¹ Category 1 includes:

cases in which both the prosecutor and defense counsel concur on the need for DNA testing. In such a case, if the parties cooperate, it should be possible to make the necessary arrangements without recourse to a court and without demanding payment for DNA testing when the inmate is indigent.¹³²

Category 2 pertains to those instances in which

exclusionary test results will not be determinative of innocence, although they may help an inmate obtain a new trial, a pardon, commutation, or clemency. There also are cases in which the prosecutor and defense counsel cannot agree on whether an exclusion would amount to a demonstration of innocence, would establish reasonable doubt of guilt, or would merely constitute helpful evidence.¹³³

The report suggests that Category 2 cases would have to be decided with “the assistance of a judicial officer . . . to determine whether, and under what conditions, testing should be conducted.”¹³⁴ In other words, the decision to perform a DNA test would be a subjective evaluation by the court.

Category 3 contains cases in which there is biological evidence, but because of the present state of evidence or technology, testing will be inconclusive and so should not be granted by the court.¹³⁵ Category 4 includes cases in which it is impossible to conduct testing because the crime scene samples were never collected, were destroyed, cannot be found despite the best efforts of the State, or were “preserved in such a way that

¹³⁰ See POSTCONVICTION DNA TESTING, *supra* note 21.

¹³¹ *Id.*

¹³² *Id.* at 3.

¹³³ *Id.* at 3-4.

¹³⁴ *Id.* at 3.

¹³⁵ *Id.* at 5.

[they] cannot be tested.”¹³⁶ Category 5 contains cases in which the claim of innocence is clearly false; for example, in a case in which the trial transcript “discloses . . . evidence that makes the petitioner’s claim meaningless, as in a burglary conviction where petitioner was apprehended at the scene of the crime.”¹³⁷

These categories provide more concrete, or at least more explicit, differentiation between the cases for post-conviction testing than do most of the state statutes. For example, the NEIP has been able to create a policy of only taking on cases that fall within Categories 1 and 2.¹³⁸ While state statutes may not have specifically referenced a system of categories, these categories clearly inform the statutory language by invoking an ultimate reliance on the subjective and sometimes inaccurate evaluation of evidence by the court, which can result in granting testing to guilty petitioners and refusing testing to those who may be innocent.¹³⁹ An attempt to render the court’s screening process more rigorous by incorporating this category system into state statutory formulations could provide clearer guidance to the courts. However, most of the cases that would be questionable or problematic would fit into Category 2. As a result, these cases would place the onus of subjective evidentiary evaluation on the shoulders of the court, which would do nothing to advance the goal of clearer guidelines. The implementation of the category system would merely shift the responsibility for this gut instinct evaluation from individual prosecutors or innocence project agents to a judge.

Despite these potential difficulties, there are a few possible alternatives for making the evidentiary standards imposed by statutes more rigorous. First, while the category system would not provide a perfect solution, it would give courts some simple ground rules. Cases in which there is biological evidence available that has never been subjected to DNA testing should be granted testing. Also, cases previously subject to testing through procedures now technologically outdated and which lack other incontrovertible evidence of guilt, such as the burglar’s apprehension at the scene of the crime, should be granted testing as Category 1 cases. Finally, under the tests articulated in the NEIP guidelines, cases in which a sample

¹³⁶ *Id.* at 6.

¹³⁷ *Id.*

¹³⁸ Telephone Interview with Jennifer Chunias, *supra* note 79.

¹³⁹ See, e.g., LA. REV. STAT. ANN. § 15:571.4 (2006) (providing that the court has the responsibility to determine whether a “reasonable probability” exists that the test will make the petitioner’s guilt more or less likely).

of biological evidence is too small to yield accurate results should not be granted testing.¹⁴⁰

For those cases that belong in Category 2, the New Jersey statutory formulation would go the furthest in establishing a bright line evidentiary standard that might ameliorate the problem of arbitrary, subjective determination of which petitions have merit and which do not. Under the New Jersey model, the court would require the availability of biological evidence and the reasonable probability of the probative value of testing.¹⁴¹ The New Jersey model would also require a demonstration that the identity of the defendant was a significant issue at trial, a *prima facie* showing that the evidence sought to be tested is material to the issue of the convicted person's identity, and finally, that the motion not be made purely for the sake of delay.¹⁴² A statute that incorporated the category system of analysis, the evidentiary requirements described in the New Jersey statute,¹⁴³ and a prohibition on the advancing of a motion purely for the sake of delay¹⁴⁴ would better assist courts in conducting case by case evaluations.

However, exclusive reliance on a solution targeted at reforming the application screening process presents a number of problems, rendering necessary a more comprehensive solution in addition to the incorporation of these statutory requirements. First, innocence projects can devote individual attention, even if it is the attention of a law student rather than an attorney, to conducting witness interviews and personally speaking with the defendant. State criminal justice systems are already so intensely resource deprived that no statutory revision can create the kind of resources that the government would need in order to screen with that sort of thoroughness.¹⁴⁵

¹⁴⁰ Inconclusive test results are often the product of insufficiently large DNA samples. Telephone Interview with Robert Hovey, *supra* note 17. Each strand of DNA contains thirteen loci, which are the identifying markers that render DNA effective identification tools. *Id.* If a DNA sample is too small, then it may only have one or two discernable loci, which would be analogous to having one digit of a six digit license plate. *Id.* The single digit of the license plate would, if entered into a database of state license plate numbers, bring up thousands of "matches." *Id.* Similarly, if only two of the strand's thirteen loci are identifiable, the evidence is essentially useless for purposes of identifying a single individual as the source of the DNA. *Id.*

¹⁴¹ N.J. STAT. ANN. § 2A:84A-32A (West 2006).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ However, it is important to note that the prohibition on motions for the sake of delay is not tied to any sanction. The "delay" element of the statute merely provides grounds on which the court may base its refusal to grant the motion, but does not penalize the individual filing the petition.

¹⁴⁵ John B. Oakly, *Legislating Federal Crime and Its Consequences: The Myth of Cost-*

Second, subjectivity of evaluation may very well be an inescapable element of the evaluation process for post-conviction testing petitions. While the proposal described above might provide some resolution to this problem as it arises during the screening process, eliminating the subjectivity of evidentiary standards is impossible to achieve. Some of the generalities of the standards employed by prosecutors' offices can probably be explained by a lack of resources, but the subjectivity may in large part be an inherent part of the endeavor. The fact that the common law, state statutes, innocence projects, and state prosecutors have all failed to create a precise system for determining who should or should not be granted a test indicates very strongly that such a system is not possible. As Medwed's description of the importance of instinct and experience in evaluating a case indicates, the merit of an individual petitioner's application is peculiar to the details and circumstances of that particular case.¹⁴⁶ An attempt to create a uniform standard more precise than the "reasonable probability"¹⁴⁷ that evidence would have changed the outcome of the trial would require that the facts of each case in question be uniform. Even the New Jersey statute, with eight criteria for evidentiary evaluation, ultimately hinges on the reasonable probability that results will be favorable to the defendant.¹⁴⁸ The most any attempt to reform the screening process could accomplish would be to narrow the range of cases in which tests could be granted, but even that attempt would not eliminate the need for subjective evidentiary evaluation.

Third, a more stringent application process carries the risk of failing to exonerate an innocent person who cannot meet a heavier evidentiary burden. As Medwed has observed,

Too rigid a line between inmate requests that qualify for consideration and those that are immediately ousted would fail to account for the subjectivity inherent in the case selection process and the fact that innocence cases are often messy and ill-suited to categorization. When it comes down to it, intake criteria are useful guides but should not be taken as gospel; any project would be hard-pressed to abandon a convincing case of innocence. Ultimately, the deft screener must be mindful that valid claims

Free Jurisdictional Reallocation, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 52, 62 (1996) ("State courts are failing in the face of violent crime not for lack of competence but for lack of resources. Dissatisfaction with the administration of the criminal justice system by state courts is attributable to the inability of local taxation systems to fund state courts and prison systems adequately.").

¹⁴⁶ See Medwed, *supra* note 3, at 1127.

¹⁴⁷ See, e.g., LA. REV. STAT. ANN. § 15:571.4 (2006).

¹⁴⁸ N.J. STAT. ANN. § 2A:84A-32A.

may fall outside the scope of the project and that accommodations should sometimes be made¹⁴⁹

The phrase “reasonable probability”¹⁵⁰ so often invoked in state statutes provides the necessary flexibility to enable courts to create exceptions and weigh the evidence in each case. The elimination of that flexibility could, by creating the risk of eliminating actually innocent petitioners, subvert the purpose of having post-conviction DNA testing in the first place.

Fourth, even if a more rigorous screening process could be effectuated without creating the risk of barring innocent petitioners from receiving a test, it would not necessarily reduce the number of applications that flood the offices of innocence projects and court clerks, nor would it avoid the crowding of prosecutors’ desks. Instead, it would simply reduce the number of those petitioners who are ultimately granted tests. In order to be effective, a proposal to change the system of granting post-conviction testing must deter guilty petitioners from seeking testing in the first place while not discouraging innocent petitioners.

V. PAYMENT FOR TESTING

In cases involving biological evidence, there are expenses associated with identifying the availability of biological material, getting approval to conduct testing, and the costs of testing itself.¹⁵¹ Also, “while some jurisdictions bear those costs eventually, in many, the incarcerated individual must often ‘front’ the costs for the tests or have counsel do so.”¹⁵² Of the thirty-nine states with statutes in place to provide testing, only Maryland, Missouri, and Utah make the cost of testing contingent on whether the test confirms the petitioner’s guilt.¹⁵³ If the results of the DNA testing confirm the person’s guilt, then the person is liable for any reasonable costs incurred when conducting the DNA test, including but not limited to the cost of the test.¹⁵⁴ The thirty-six remaining states place the onus of payment on solvent petitioners or, in the case of indigent petitioners, on the state.¹⁵⁵ This formulation inverts the logical incentive structure of DNA retesting petitions. Rather than punishing petitioners who

¹⁴⁹ Medwed, *supra* note 3, at 1113.

¹⁵⁰ See Christian, *supra* note 69, at 1213.

¹⁵¹ Ellen Yankiver Suni, *Ethical Issues for Innocence Projects: An Initial Primer*, 70 UMKC L. REV. 921, 925 n.19 (2002).

¹⁵² *Id.*

¹⁵³ Axelrad & Russo, *supra* note 21.

¹⁵⁴ MD. CODE ANN., CRIM. PROC. § 8-201 (LexisNexis 2006); MO. REV. STAT. § 547.035 (2006); UTAH CODE ANN. § 78-35a-301 (2006).

¹⁵⁵ Axelrad & Russo, *supra* note 21.

are solvent by requiring them to pay for the tests, states could use payment for procedural and testing costs as a means of penalizing defendants who seek tests that ultimately confirm their guilt.¹⁵⁶

The NEIP already recognizes the value of payment as another means of screening petitions.¹⁵⁷ Even after a client's application has been reviewed by an attorney and a law student and has passed the screening of the evaluation committee, the NEIP still requires that the petitioner provide some of the funding for the test.¹⁵⁸ In part, this requirement¹⁵⁹ exists because the NEIP sends the biological evidence from its cases to independent, rather than state, laboratories, and so state funding is not available.¹⁶⁰ But, the requirement also provides an additional filter, namely that a guilty petitioner may be more hesitant to seek a test if he has to fund it.¹⁶¹

There are at least three objections to requiring that petitioners pay for testing. The first is that in some cases, it may be physically impossible for a petitioner to fund the test. Given the expense of DNA testing, which may run from \$2,500 to \$5,000 for a single test,¹⁶² requiring payment could prove cost-prohibitive for indigent petitioners, and so such a measure would unfairly disfavor these petitioners. As a result, insolvent petitioners who might very well be innocent could be denied testing purely because they could not pay for it. This payment provision would make solvency, rather than the likeliness of the innocence of the petitioner, the determining factor in the granting of a testing petition. A requirement of advance payment could also jeopardize the exoneration of innocent petitioners simply because those petitioners may also be indigent, and therefore unable to pay. Utah answered this objection by making payment retroactive—only in the event of a guilt-confirming test must a petitioner pay the testing costs.¹⁶³ While Utah's scheme avoids the problem of barring the access of the

¹⁵⁶ As discussed in Section IV, *supra*, the inescapable problem with requiring insolvent petitioners to pay is that they are, by definition, insolvent, and are therefore incapable of paying.

¹⁵⁷ Interview with Jennifer Chunias, *supra* note 79.

¹⁵⁸ The remainder of the funding comes from private donor or law firm contributions. *Id.*

¹⁵⁹ See Yankiver Suni, *supra* note 151, at 925 ("Note that, since this [requiring the client to pay for the cost of testing] is an 'expense of litigation,' doing so does not run afoul of Model Rule 1.8(e). See MODEL RULES OF PROF'L CONDUCT R. 1.8(e) (1983) (prohibiting provision of 'financial assistance to a client in connection with pending or contemplated litigation' except for advancing court costs and expenses of litigation).").

¹⁶⁰ Interview with Jennifer Chunias, *supra* note 79.

¹⁶¹ *Id.*

¹⁶² Teresa Johnson, *Orange County's Innocence Project*, ORANGE COUNTY LAW., Dec. 18, 2001, at 19.

¹⁶³ UTAH CODE ANN. § 78-35a-301(8) (2006).

innocent but poor, it does nothing to resolve the problem of indigent petitioners who, guilty or not, are unable to pay for the test retroactively.

Second, there may be constitutional objections to such a requirement. In other contexts, such as the pre-trial funding of potentially exculpatory testing, requiring payment from petitioners violates the Fourteenth Amendment's due process requirements. In *Ake v. Oklahoma*,¹⁶⁴ the Supreme Court reasoned that "an indigent defendant had a due process right to the service of a psychiatric expert when the expert's testimony would be 'a significant factor in [the] defense.'"¹⁶⁵ The Court further held because "the defendant might have a reasonable chance of success" to prove his innocence with the testimony of a psychiatric witness, "in such a circumstance, where the potential accuracy of the jury's determination is so dramatically enhanced, and where the interests of the individual and the State in an accurate proceeding are substantial, the State's interest in its fisc must yield."¹⁶⁶ The major distinction here is that the *Ake* holding applies to the pre-trial, rather than post-conviction, funding of potentially exculpatory evidence.¹⁶⁷ Similarly, *Little v. Streater*¹⁶⁸ "has relevance to the payment issue because it recognizes the constitutional significance of a technological

¹⁶⁴ 470 U.S. 68, 83 (1985).

¹⁶⁵ *Id.* at 82-83.

¹⁶⁶ *Id.* at 83.

¹⁶⁷ See POSTCONVICTION DNA TESTING, *supra* note 21, at 11 ("A great deal of case law exists on the subject of a petitioner's right to biological evidence under the *Brady v. Maryland* precedent. In *Brady v. Maryland*, the Supreme Court held that a defendant has a constitutional right at or before trial to be informed of exculpatory evidence in the hands of the State. 373 U.S. 83 (1963). A number of courts have extended *Brady* to requests for DNA testing even when the request is made after trial and even though it is potentially exculpatory evidence that is being sought. In *Arizona v. Youngblood*, the petitioner claimed that his conviction should be vacated because the State before trial had destroyed rectal swabs containing sperm which could have demonstrated his innocence if subjected to serological testing. 488 U.S. 51 (1988). Although the Supreme Court found that the conviction would not be overturned without proof that the swabs were destroyed in bad faith, nothing in the opinion suggests that petitioner would not have been entitled to testing if the swabs now existed. These Supreme Court decisions provide an avenue for access to testing even when no formal discovery procedures exist as part of the post-conviction statutory scheme in that jurisdiction."). The *Brady* analysis has been used as a basis for the constitutional right of petitioners to test biological evidence after conviction; it has never been extended to a constitutional right to state funding for such testing. See also *Sewell v. State*, 592 N.E.2d 705, 707-08 (Ind. Ct. App. 1992) ("Advances in technology may yield potential for exculpation where none previously existed. The primary goals of the court when confronted with a request for the use of a particular discovery device are the facilitation of the administration of justice and the promotion of the orderly ascertainment of truth.").

¹⁶⁸ 452 U.S. 1 (1981).

advance that can definitively alter fact determinations.”¹⁶⁹ In *Little*, the Court held that a man being sued in a paternity action had a right to state funding for a paternity test because, “unlike other evidence that may be susceptible to varying interpretation or disparagement, blood test results, if obtained under proper conditions by qualified experts, are difficult to refute.”¹⁷⁰ Like paternity tests, DNA tests can provide the strongest and most persuasive scientific evidence currently available.¹⁷¹ Again, however, the pre-trial versus post-conviction distinction applies; paternity testing does not occur in the post-conviction context, and so *Little*’s finding in favor of state-funded paternity testing may not provide a constitutional basis for funding post-conviction testing. As of yet, no court has answered the question of whether a petitioner, indigent or otherwise, has a due process right to state funding of post-conviction DNA tests.

Finally, such a requirement may not even be an effective deterrent. Despite its mandate that petitioners advance at least part of the costs of the tests, the NEIP has still handled a significant number¹⁷² of cases in which the guilt of the petitioners was confirmed by the test. The fact that a significant number of the NEIP’s clients have their guilt confirmed by testing when they have been required to front the costs indicates that payment is clearly not a significant deterrent to the guilty seeking testing. Twenty-five hundred dollars may seem like a relatively insignificant potential cost if a petitioner believes that she has even the slightest chance of obtaining freedom, even if only due to a technical error in the testing. Requiring the petitioner to pay necessarily relies on negotiating the monetary value of liberty, and a person serving a forty-five year sentence may very well consider money far less valuable than an overturned conviction. The good time penalty scheme proposed below attempts to avoid this problem by dealing in the currency of liberty, using freedom as the basis for the testing petition incentive structure.

VI. GOOD TIME PENALTIES

All fifty states have statutes providing for a system of good time credits, based on the concept that inmates may be rewarded for their good

¹⁶⁹ POSTCONVICTION DNA TESTING, *supra* note 21, at 18 (discussing *Little*, 452 U.S. 1).

¹⁷⁰ *Id.* (citing *Little*, 452 U.S. at 14).

¹⁷¹ See *supra* Section II.

¹⁷² Interview with Jennifer Chunias, *supra* note 79 (Chunias stated that “under five” of the cases dealt with by the NEIP have resulted in confirmations of guilt. While this figure may not seem like a significant number, it becomes more significant when considered in light of the fact that only six cases of the NEIP have resulted in exoneration.).

behavior in prison by a reduction in their sentences.¹⁷³ Good conduct can include a variety of things, such as participating in educational, substance abuse, or counseling programs in prison or complying with prison regulations.¹⁷⁴ The reduction in sentence time is governed by a set schedule. Some states base the amount of credit granted in proportion to the time served and the conduct for which the prisoner is being rewarded. For example, in Virginia, "consideration for Class I credit shall be given to persons who perform in assignments requiring a high degree of trust, extra long hours or specialized skills."¹⁷⁵ Class I carries the most favorable ratio of time served to credit given, "at a rate of thirty days credit for each thirty days served," and is "reserved for persons whose initiative, conduct and performance in their assignments are exemplary."¹⁷⁶ Class II, by contrast, provides credit "at a rate of twenty days credit for each thirty days served" and is allotted to "persons whose initiative, conduct and performance in their assignments are satisfactory" and "persons who require moderate supervision in their assignments and whose assignments require responsibility in the care and maintenance of property."¹⁷⁷

Other states eliminate the evaluation of the conduct for which the prisoner is being rewarded by instead measuring the allotment of sentencing credit in proportion to the time served.¹⁷⁸ Another version of the good time statutes grants time in proportion to both the time served and the type of offense for which the prisoner was incarcerated. For example, in the State of Washington, an inmate convicted of a Class A felony may not be given good time credit in an amount that exceeds 15% of the total sentence, while those convicted of lesser crimes may be credited up to a third of the total sentence.¹⁷⁹

In addition to providing a scheme under which good time sentencing may be provided, state statutes also describe grounds for the revocation of good time credit. Offenses resulting in the forfeiture of good time credits range in severity from escape or battery of a correctional officer to the failure to report to an educational program.¹⁸⁰ Some states place the responsibility for promulgating specific guidelines governing forfeiture of

¹⁷³ See, e.g., VA. CODE ANN. § 53.1-201 (2006). For a detailed discussion of various states' approaches to good time penalties, see James B. Jacobs, *Sentencing by Prison Personnel: Good Time*, 30 UCLA L. REV. 217 (1982).

¹⁷⁴ See, e.g., Jacobs, *supra* note 173.

¹⁷⁵ VA. CODE ANN. § 53.1-200.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ See, e.g., DEL. CODE ANN. tit. 11, § 4381 (2006).

¹⁷⁹ WASH. REV. CODE § 9.92.151 (2006).

¹⁸⁰ See, e.g., LA. REV. STAT. ANN. § 15:571.4 (2006).

good time credits in the hands of the Department of Corrections. Nevada's forfeiture statute, for example, says only that "[t]he [Parole] Board shall adopt regulations governing the award, forfeiture and restoration of credits pursuant to this section."¹⁸¹

Of the thirty-nine states with post-conviction DNA testing statutes in place, only one specifically penalizes petitioners whose test results confirm their guilt—Missouri.¹⁸² Missouri applies the statute used to punish frivolous suits to petitioners implicated by the results of a post-conviction DNA test. Under Missouri law,

If the results of the DNA testing confirm the person's guilt, then the person filing for DNA testing under section 547.035, RSMo, shall:

- (1) Be liable for any reasonable costs incurred when conducting the DNA test, including but not limited to the cost of the test. Such costs shall be determined by the court and shall be included in the findings of fact and conclusions of law made by the court; and
- (2) Be sanctioned under the provisions of section 217.262, RSMo [statute punishing frivolous suits].¹⁸³

Although twelve other states have legislation in place designed to sanction prisoners for the filing of frivolous actions with the courts, none of them have an explicit statutory provision for sanctioning inmates implicated by post-conviction DNA testing.¹⁸⁴ Missouri's frivolous suit statute leaves

¹⁸¹ NEV. REV. STAT. § 209.446(5) (2006).

¹⁸² See MO. REV. STAT. § 650.058(1)-(2) (2006).

¹⁸³ *Id.* § 650.058(2).

¹⁸⁴ Lynn Branham, *Of Mice and Prisoners: The Constitutionality of Extending Prisoners' Confinement for Filing Frivolous Lawsuits*, 75 S. CAL. L. REV. 1021, 1081 nn.69-70 (2002); see DEL. CODE ANN. tit. 10, § 8805 (2006) (authorizing the forfeiture of good time credits for filing a factually frivolous action or a legally frivolous action when a pro se plaintiff, acting with "due diligence," should have found "well settled law" confirming a claim's frivolousness); FLA. STAT. § 944.28(2)(a) (2006) (authorizing forfeiture for bringing a frivolous claim, lawsuit, or appeal); 730 ILL. COMP. STAT. 5/3-6-3(d) (2006) (requiring prison officials to hold a disciplinary hearing to revoke good conduct credits when a court found a prisoner's complaint filed against the state or state officials to be frivolous); KY. REV. STAT. ANN. § 197.045(5)(a) (West 2006) (requiring the Department of Corrections to develop regulations defining the amount of good time credits to be forfeited for filing a factually frivolous action and specifying the effect of such a filing on the prisoner's future ability to earn such credits); MINN. STAT. § 244.035(b) (2006) (requiring the Department of Corrections to develop sanctions, which may include the loss of good time credits, for filing a frivolous claim); MISS. CODE ANN. § 47-5-138(3) (West 2006) (requiring the forfeiture of accrued good time credits upon receipt of a final court order dismissing a prisoner's lawsuit as frivolous or for failure to state a claim for which relief can be granted); N.Y. CORRECT. LAW § 803(1)(d) (McKinney 2006) (directing the withholding of good time allowances after a judicial finding that a prisoner filed a frivolous claim or action); OKLA. STAT. tit. 57, § 566(C)(3) (2006) (authorizing the revocation of "earned credits" if a judge finds that a

the determination of a suit's frivolousness in the hands of the court, and imposes good time credit deductions only after the court finds that the offender has violated the statute.¹⁸⁵ While a hearing is appropriate and even necessary for the sort of subjective determination of whether or not a petitioner has "unreasonably expanded or delayed a judicial proceeding,"¹⁸⁶ or "brought an action or claim with the court solely or primarily for delay or harassment,"¹⁸⁷ such a hearing is totally unnecessary in the instance of guilt-confirming DNA tests. The "false, frivolous or malicious"¹⁸⁸ nature of the petition is self-evident—a petitioner filing a request for testing is cognizant of his own guilt or innocence, and a guilty petitioner who solicits the court for redress of his case does so knowing that the only way in which a post-conviction test will benefit him is if there is some sort of error or evidentiary problem and the test mistakenly indicates his innocence.

As thirty-eight of the thirty-nine state statutes now stand, the indigent, guilty petitioner has nothing to lose by seeking a test. Even in those states that require payment from solvent petitioners, the cost of seeking a test is purely monetary, and the possible gain is invaluable. State statutory codes should, by all means, adopt provision for post-conviction DNA testing. But both those states with post-conviction statutes in place and those who have yet to promulgate such laws should adopt a statute sanctioning guilty petitioners by forfeiting their good time credit.

An obvious objection to this proposal is that it would have no consequences for a petitioner who has accumulated no good time credit. But although good time credit may have originally been conceived as a system of reward, due to bureaucratic time and resource constraints,¹⁸⁹

[T]ime credits have become automatic; individual decision-making goes only to the question of forfeiture. Like many incentives for good behavior inside and outside of

cause of action was frivolous); S.C. CODE ANN. § 24-27-300 (2006) (authorizing an extension of the inmate's imprisonment term if the inmate has had three or more actions or appeals dismissed sua sponte for frivolousness unless the prisoner faced an "imminent danger" of "great bodily injury" when he or she filed the action or appeal); TENN. CODE ANN. § 41-21-816 (2006) (requiring the forfeiture of good conduct credits upon the receipt of a final court order dismissing a claim or lawsuit as frivolous if the prisoner previously filed a frivolous or malicious claim or lawsuit); TEX. GOV'T CODE ANN. § 498.0045 (Vernon 2006) (requiring the forfeiture of good-conduct time upon receipt of a court order dismissing a lawsuit as frivolous); W. VA. CODE ANN. § 25-1A-6 (2006) (authorizing the forfeiture of good time credits when a court finds a civil action to be frivolous).

¹⁸⁵ MO. REV. STAT. § 217.262(1).

¹⁸⁶ *Id.* § 217.262(1)(3).

¹⁸⁷ *Id.* § 217.262(1)(2).

¹⁸⁸ *Id.* § 217.262(1)(1).

¹⁸⁹ Jacobs, *supra* note 173, at 218, 224.

prison, rewards come to be seen as entitlements and their denial as punishment. Good time, therefore, has come to be administered as a system of punishment.¹⁹⁰

Today, in fact, most prisons dole out good time credit in a lump sum at the beginning of prisoner's sentence, and so revocation, not reward, is the incentive structure of the good time credit system.¹⁹¹

Incorporating the good time credit incentive structure into the post-conviction testing system would not require the breaking of new statutory ground or the promulgation of heretofore unrecognized penal measures. The infrastructure for penalizing guilty petitions is already in place; every state that provides for post-conviction testing also has a system for allocating and revoking good time credit.¹⁹² This proposal¹⁹³ requires only that the two systems be integrated, and that the incentive structure of the good time credits be applied to petitions for post-conviction DNA testing.¹⁹⁴

¹⁹⁰ *Id.* at 225 ([States'] power to reduce a sentence mirrors their power to lengthen it; in practice, good time is usually administered as a system of punishment rather than reward.).

¹⁹¹ *Id.*

¹⁹² Axelrad & Russo, *supra* note 21.

¹⁹³ One possible objection to this plan is that it carries no disciplinary weight with inmates who have not accumulated any good time credit. There are a few ways to address this problem. One would be again to follow the Missouri model. Under Missouri law, the sixty day penalty can either be deducted from a prisoner's good time credit or it can simply be added to the existing sentence. MO. REV. STAT. § 217.262(1). Another way of dealing with the mechanism would be to add time to the sentence according to the same scale that time is added. If a state has in place a system whereby thirty days are deducted for every thirty days served with good behavior, then thirty days may be deducted for every thirty day period from the time the petition was filed with the court until the time that the petition was granted and the test results indicating guilt were filed.

¹⁹⁴ A second objection to this proposal concerns those petitioners serving life without parole, consecutive life sentences, or those who have been sentenced to death. For these petitioners, good time credit will not carry the same weight as those serving finite sentences. This objection certainly carries some weight. For example, of the 174 men assisted by the Cardozo Innocence Project since its founding, 57 were sentenced to life without parole, death, or multiple, consecutive life sentences. See The Innocence Project, <http://www.innocenceproject.org/> (last visited Apr. 21, 2007), for detailed descriptions of these case profiles. While an in-depth analysis of the incentive structure in place in the penal system for such prisoners is outside of the scope of this Comment, it should be noted that even prisoners serving indefinite or capital sentences are subject to a system of rewards and punishments, such as access to gym facilities, incarceration location, etc. The same incentives currently in place to control the behavior of life without parole and death row inmates could be applied to post-conviction testing petitioners serving such sentences. For further discussion of privileges used to discipline life without parole and death row inmates, see Julian H. Wright, Jr., "Life-Without-Parole: An Alternative to Death or Not Much of a Life at All?," 43 VAND. L. REV. 529, 564 (1990) ("While the life-without-parole inmate has significantly less chance of normal release than other inmates, maximum security measures already in place in most prisons can control inmate behavior so that LWOP inmates do not pose a qualitatively different security threat than other prisoners. Measures such as loss of

Good time credit carries a great deal of weight with prisoners, so its allocation or revocation is a very effective disciplinary tool.¹⁹⁵ The Supreme Court recognized as much in *Wolff v. McDonnell*,¹⁹⁶ writing that “[t]he deprivation of good time is unquestionably a matter of considerable importance. The State reserves it as a sanction for serious misconduct, and we should not unrealistically discount its significance.”¹⁹⁷ Since such an effective disciplinary tool already exists, it is only logical to apply it to those petitioners whose unnecessary DNA tests torment the victims of their crimes, waste already stretched resources, and thwart efforts of the genuinely innocent to seek release.

VII. CONCLUSION

Innocence projects, courts, and prosecutors receive far more petitions for testing than can be granted.¹⁹⁸ Even those petitioners who do succeed in getting biological evidence subjected to DNA testing often wait for years to achieve those results,¹⁹⁹ in part because guilty petitioners absorb an enormous amount of the system’s resources.²⁰⁰

privileges and isolation are useful in controlling the behavior of all types of inmates.”); see also Jim Stewart & Paul Lieberman, “*What Is This New Sentence that Takes Away Parole?*,” 11 STUDENT LAW. 14, 15 (1982).

¹⁹⁵ See *infra* notes 197-199 and accompanying text.

¹⁹⁶ 418 U.S. 539 (1974).

¹⁹⁷ *Id.* at 561.

¹⁹⁸ For example, the innocence project operated by Duquesne University’s Cyril H. Weicht Institute of Forensic Science and Law has received 350 inquiry letters from inmates since August 2004. Telephone Interview with Maria Comas, Manager of Academic and Student Servs., The Cyril H. Weicht Inst. of Forensic Sci. & Law, in Pittsburgh, Pa. (Oct. 13, 2005). The Institute is working towards its first exoneration this year. *Id.* After eliminating those inquiries that do not meet certain basic requirements (such as being within the correct jurisdiction), the NEIP handles two hundred inquiries per year, and “take far fewer than they end up rejecting.” Interview with Jennifer Chunias, *supra* note 79. The project has been in existence since 2001, and has been involved with six exonerations. *Id.* Chunias estimates that the project attorneys spend a total of 3,000-4,000 hours per year working with petitioners. *Id.* To provide a frame of reference, a common billable hour requirement for large law firms is 2,000 hours.

¹⁹⁹ In states without statutory provision for post-conviction DNA testing, the process can take a year, if not longer, from the filing of a petition to the return of the test results. Interview with Jennifer Chunias, *supra* note 79. The time frame of the total application process is even longer: Chunias estimates that it can take six months to a year and a half until a candidate is even accepted by the project. *Id.*

²⁰⁰ Chunias personally counsels her clients that a test confirming his or her guilt may have negative ramifications for that prisoner’s chances at parole. *Id.* However, because there are no absolute statutory requirements of the loss of good time credit or consultation with a prisoner’s parole board, that threat is abstract at best and meaningless at worst.

A solution is necessary. The screening process is already highly rigorous, and the subjectivity of evidentiary evaluation may be an unavoidable element of the post-conviction DNA testing process.²⁰¹ A more selective screening process might eliminate potentially innocent applicants and also does nothing to alleviate the burden of initial screening.²⁰² Even requiring advance payment for the test, a solution more directly targeted at discouraging guilty petitioners from seeking testing, presents, at best, an imperfect solution and might also risk compromising the applications of actually innocent petitioners.²⁰³ The good time forfeiture method does not carry this risk. It uses the same currency with which guilty men seeking post-conviction testing already gamble—freedom. As the system now stands, a guilty man can only gain by filing a petition, and the potential gain has such enormous value that not betting on the slim chance of a test producing a faulty result is incomprehensible. If anything, it is amazing that every inmate in the country has not yet sought post-conviction DNA testing. The proposed solution to this problem is simple, just, and would be effective. To refuse to implement it is to needlessly persecute victims seeking resolution, to burden an overburdened system, and to compromise the freedom of innocent people.

²⁰¹ See *supra* Section III.

²⁰² *Id.*

²⁰³ See *supra* Section IV.