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## The Fight for Post-Conviction DNA Testing is Not Yet Over: An Analysis of the Eight Remaining Holdout States and Suggestions for Strategies to Bring Vital Relief to the Wrongfully Convicted

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# THE FIGHT FOR POST-CONVICTION DNA TESTING IS NOT YET OVER: AN ANALYSIS OF THE EIGHT REMAINING “HOLDOUT STATES” AND SUGGESTIONS FOR STRATEGIES TO BRING VITAL RELIEF TO THE WRONGFULLY CONVICTED

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The vigilant search for truth is the hallmark of our criminal justice system. Our methods of investigation, rules of criminal procedure, and appellate process are designed to ensure that the guilty are apprehended and convicted while the innocent are protected. But while ours is a system to be cherished, it is not a perfect system, and those of us charged with the administration of justice have a responsibility to seek its continued improvement.<sup>1</sup>

*In the last decade, access to post-conviction DNA testing has been made increasingly available via state and federal laws. These laws have played an important role in enhancing the integrity and accuracy of our criminal justice system. However, eight states remain that have failed to pass post-conviction DNA testing statutes. This Comment reviews the various legal avenues that are available to convicted felons who wish to seek post-conviction DNA testing, highlighting their deficiencies. It then begins a new avenue of scholarship, analyzing the eight states' legal and political landscapes in an attempt to identify whether, where, and why the obstacles to enactment of a post-conviction DNA testing statute lie. Finally, it suggests strategies for overcoming these obstacles, and advocates for the*

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<sup>1</sup> NAT'L COMM'N ON THE FUTURE OF DNA EVIDENCE, U.S. DEP'T OF JUSTICE, POSTCONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS iii (1999), available at <http://www.ncjrs.gov/pdffiles1/nij/177626.pdf> [hereinafter FUTURE OF DNA EVIDENCE] (message from Attorney General Janet Reno in the preface).

*passage of meaningful post-conviction DNA testing laws in each of these states.*

## I. INTRODUCTION

On the morning of April 26, 1981, approximately forty-five minutes before sunrise, an intruder entered the apartment of a Caucasian thirty-seven-year-old Dallas woman.<sup>2</sup> Armed with a butcher knife he had taken from her kitchen, the intruder proceeded to the sleeping woman's bedroom.<sup>3</sup> He climbed on top of her, holding the butcher knife over her head. Following a brief struggle, in which the woman's thumb, neck, and backside were slashed, the woman was vaginally raped.<sup>4</sup> The entire incident lasted less than twenty minutes and occurred under a cloak of pre-dawn darkness, the room illuminated only by what the victim described as a "little light" from a window and a digital clock radio.<sup>5</sup>

In the hours following the rape, the police questioned the victim and took her to the hospital to have the physical evidence of the rape preserved. Due to the darkness of the room when the rape occurred, it was difficult for the victim to give a detailed description of the assailant; ultimately, she described him as a "black male, just kind of average build . . . somewhere in his twenties."<sup>6</sup> Further probing yielded the following descriptors: ". . . wasn't real light skinned," but "couldn't tell if he was 'real dark skinned'"; "he didn't have a real wide nose"; "he had pretty regular [facial] features."<sup>7</sup> When asked to go through a photo array of possible perpetrators, the victim dismissed a photo of a man named Larry Fuller. Nonetheless, in a second photo array shown to the victim days later, another photo of Mr. Fuller was included; he was the only man whose photo appeared in both photo arrays. After considering Mr. Fuller's second photo, the victim identified him as the rapist.<sup>8</sup>

At the time of the incident, thirty-two-year-old Mr. Fuller was living with his girlfriend and her two young children.<sup>9</sup> He had served two tours of duty in Vietnam, where he received an Air Medal for taking care of his crew, and was honorably discharged in 1971. Prior to being drafted, Mr. Fuller had attended Dallas Baptist College; upon his return, he enrolled in

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<sup>2</sup> Motion for a Favorability Finding, *State v. Fuller*, F81-08431-NP (Tex. 2006) (Petr.'s Br. 1).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 2.

<sup>5</sup> *Id.* at 3.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 6.

<sup>9</sup> *Id.* at 7.

the Dallas Art Institute. In April 1981, Mr. Fuller was pursuing a career in art and had worked in several service jobs. He had no record of sex crimes.<sup>10</sup>

Four months later—following a two-day trial and a mere thirty-five minutes of jury deliberations—Mr. Fuller was convicted of aggravated rape and sentenced to fifty years in prison.<sup>11</sup> He received the maximum sentence allowed, following the State's argument that he "[could not] be rehabilitated, because the first step to being rehabilitated is to admit that you have made a mistake and that you need help."<sup>12</sup> Mr. Fuller, maintaining his innocence, refused to make such a confession. He was convicted on the basis of the victim's eyewitness testimony.<sup>13</sup>

For twenty-five years, Mr. Fuller maintained his innocence. Following his 1999 release on parole, he contacted the Innocence Project for help. Mr. Fuller finally cleared his name on October 31, 2006, his innocence publicly proclaimed by a state judge. With the support of the Innocence Project and local counsel, Mr. Fuller petitioned for access to post-conviction DNA testing—a petition made possible with the enactment of a Texas post-conviction DNA testing statute in 2001.<sup>14</sup> While the State opposed his petition, the judge ultimately granted his request, and sophisticated DNA analysis excluded him as the perpetrator of this heinous crime. At age fifty-seven, a victorious Larry Fuller walked out the doors of the 203rd Judicial Courthouse in Dallas, Texas, as a vindicated man.<sup>15</sup>

Mr. Fuller is one of thirteen people proven innocent by DNA evidence in Dallas County over the last five years.<sup>16</sup> Nationwide, 214 convicted

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<sup>10</sup> *Id.* at 4.

<sup>11</sup> *Id.* at 12; see also Innocence Project, *Tenth Dallas County Man in Just Five Years Is Proven Innocent Through DNA Evidence*, Oct. 31, 2006, [http://www.innocenceproject.org/docs/Fuller\\_Release.pdf](http://www.innocenceproject.org/docs/Fuller_Release.pdf).

<sup>12</sup> See Motion for a Favorability Finding, *supra* note 2, at 12 (quoting the State's argument at trial, T. 203-04).

<sup>13</sup> The victim's eyewitness testimony was supplemented by a confusing presentation of DNA evidence that—in actuality—indicated that no one could be excluded as a potential assailant. See Motion for a Favorability Finding, *supra* note 2, at 10.

<sup>14</sup> TEX. CODE CRIM. PROC. ANN. art. 64 (Vernon 2003). This statute passed without a single opposing vote. Act of April 5, 2001, ch. 2, 2001 Tex. Sess. Law Serv. (West).

<sup>15</sup> See Anabelle Garay, *DNA Clears Man of 1981 Rape Conviction*, WASH. POST, Nov. 1, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/31/AR2006103101118.html?referrer=emailarticle> ("Both the assistant district attorney and state District Judge Lana McDaniel apologized to Fuller; neither were involved in the original case. The judge said she felt sick to her stomach over all the time he spent in prison for a crime he didn't commit.").

<sup>16</sup> Innocence Project, *Dallas County Cases Where DNA Has Proven Innocence*, <http://www.innocenceproject.org/Content/342.php> (last visited Nov. 12, 2007).

felons have been exonerated by DNA testing.<sup>17</sup> These exonerations are victories for our criminal justice system: they free the innocent, correct miscarriages of justice that undermine public confidence in the criminal justice system, and allow the pursuit of the real perpetrators of these heinous crimes to commence.<sup>18</sup> However, wrongful convictions leave many victims in their wake. Most obviously, they claim years—if not the lives—of the individuals who have been convicted.<sup>19</sup> The average length of time served by individuals who have been exonerated is twelve years.<sup>20</sup> Beyond the burden of time served, once innocence has been established and the innocent victim has been freed, re-entry into society often poses considerable difficulties.<sup>21</sup> A 2002 Associated Press study of exonerated

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<sup>17</sup> Innocence Project, Facts on Post-Conviction DNA Exonerations, <http://www.innocenceproject.org/Content/351.php#> (last visited Mar. 10, 2008).

<sup>18</sup> Indeed, in eighty-two of the 214 exonerations listed by the Innocence Project, the post-conviction DNA testing identified the actual perpetrator. *Id.* A prime example is the case of Maryland resident Kirk Bloodsworth, who was sentenced to death in 1985 after having been convicted of sexual assault, rape, and first-degree premeditated murder. In June 1993, Mr. Bloodsworth was freed on the basis of post-conviction DNA testing results. NAT'L INST. OF JUSTICE, 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 35-37 (1996) [hereinafter CONVICTED BY JURIES]. Ten years later, the true perpetrator was identified by a positive DNA match in state and federal DNA databases. That perpetrator, Kimberly Shay Ruffner, pled guilty to the crime on May 20, 2004. See The Justice Project, The Problem: A Broken System—Kirk Bloodsworth, <http://www.thejusticeproject.org/press/bloodsworth/index.html> (last visited Sept. 12, 2007).

<sup>19</sup> In the recent case of Sedley Alley, a Tennessee man claiming he had been wrongfully convicted of a capital offense was put to death before he could secure post-conviction DNA testing. See Press Release, Innocence Project, Citing Chicago Tribune Series Showing an Innocent Man Was Executed, Lawyers for Sedley Alley Ask Tennessee Supreme Court for Stay of Execution and DNA Testing (June 26, 2006) (on file with author). In another case, Earl Washington came within nine days of execution before his innocence was established via post-conviction DNA testing. See The Justice Project, The Problem: A Broken System—Earl Washington, Jr., <http://www.thejusticeproject.org/problem/cases/earl-washington-jr.html> (last visited Dec. 6, 2006). In yet another case, Frank Lee Smith died of cancer on death row in Florida before he could learn that DNA testing exonerated him. Sydney Freedberg, *DNA Clears Inmate Too Late*, ST. PETERSBURG TIMES, Dec. 15, 2000. In addition, once exonerated, life for the wrongfully convicted does not necessarily return to normalcy. See *infra* note 21.

<sup>20</sup> Innocence Project, Facts on Post-Conviction DNA Exonerations, [http://www.innocenceproject.org/docs/DNAExonerationFacts\\_WEB.pdf](http://www.innocenceproject.org/docs/DNAExonerationFacts_WEB.pdf) (last visited Dec. 24, 2007).

<sup>21</sup> See Sharon Cohen & Deborah Hastings, *For 110 Inmates Freed by DNA Tests, True Freedom Remains Elusive*, ASSOCIATED PRESS, May 28, 2002. A 2002 Associated Press study looked at 110 inmates who had been exonerated by DNA testing and analyzed the impact of these wrongful convictions on the individuals' personal relationships, professional potential, economic wellbeing, and mental health. The results showed the devastating impact a conviction—even if it has been proven to be a wrongful conviction, and the individual has been declared innocent—can have on these victims of the criminal justice system.

individuals found that their professional and economic successes were often stunted because imprisonment occurred during “critical wage-earning years when careers . . . are built”; their marriages were often ruined and family relationships, if not destroyed, became strained; and despite their absolution, opportunities for professional advancement remained elusive.<sup>22</sup> Family members and friends are also victims of wrongful convictions because they suffer as they watch someone they know to be innocent fall prey to a flawed system of “justice.” Finally, and most relevant to the public and our law enforcement community, are the men, women and children whose livelihoods are endangered as the true criminals remain at-large, free to strike again.

DNA evidence is a leading cause of exonerations.<sup>23</sup> However, post-conviction access to DNA testing has not always been available. In 1997, Illinois became the first state in the nation to enact a statute granting convicted felons access to post-conviction DNA testing.<sup>24</sup> Over the past ten

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<sup>22</sup> *Id.*

<sup>23</sup> A study of 340 exonerations between 1989 and 2003 found that 42% occurred as a result of DNA testing. Samuel R. Gross et al., *Exonerations in the United States: 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 524 (2005). The authors emphasized that “the false convictions that come to light are the tip of an iceberg.” *Id.* at 531. The FBI reports the primary suspect was excluded based on DNA test results in 26% of the rape and rape/homicide cases in which DNA testing was performed at the request of state and local authorities. Barry C. Scheck, *Barry Scheck Lectures on Wrongful Convictions*, 54 DRAKE L. REV. 597, 601 (2006). This powerful statistic has been echoed by at least one other crime lab:

Of the more than 700 DNA cases processed by the lab, 59 percent resulted in the inclusion of a suspect and 25 percent excluded a suspect. These figures demonstrate the power of DNA not only to associate an individual with a crime but also to exclude an individual from a crime.

See DNA Testing & Justice, Georgia Bureau of Investigation, available at <http://www.state.ga.us/gbi/fsdna.html> (last visited Sept. 12, 2007). While the leading cause of wrongful convictions is eyewitness misidentification, there are numerous other contributors to wrongful convictions, including false confessions. See Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA Age*, 82 N.C. L. REV. 891 (2004). DNA exonerations have given us tremendous insight as to the fallibility of eyewitness identification and the prevalence of false confessions. Despite the proven unreliability of these types of evidence, judges and juries still overwhelmingly tend to believe them. For a greater exploration of this phenomenon, see *id.* Other factors that have been identified as contributing to wrongful convictions include tunnel vision, flawed witness identification procedures, jailhouse snitch testimony, police and prosecutorial misconduct, forensic error or fraud, and inadequate defense counsel. See BARRY SCHECK ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGFULLY CONVICTED (2000). For further discussion of the interplay between these factors, see Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291 (2006).

<sup>24</sup> 725 ILL. COMP. STAT. ANN. 5/116-3 (West 2003).

years, forty-one other states<sup>25</sup> and the federal government have followed suit.<sup>26</sup> While the individual statutes have varied, their passage provides a crucial means to correct the growing recognition of our criminal justice system's fallibility. Nonetheless, eight states remain seemingly impervious to the groundswell of support for post-conviction DNA testing: Alabama, Alaska, Massachusetts, Mississippi, Oklahoma, South Carolina, South Dakota, and Wyoming.

There are a variety of factors that have resulted in these states' inability—or unwillingness—to pass post-conviction DNA testing legislation. While there has been a tremendous focus on post-conviction DNA statutes in academic and advocacy literature, no attention has been paid to the holes that remain: those states that have yet to pass specific post-conviction DNA testing statutes. This Comment initiates that avenue of

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<sup>25</sup> For purposes of this statement, Oklahoma will be included in the "forty-one other states" that passed post-conviction DNA statutes. Oklahoma did pass what could be categorized as a post-conviction DNA statute in 2001. OKLA. STAT. ANN. tit. 22, § 1371.1 (West 2006). The statute created a DNA Forensic Testing Program within the Oklahoma Indigent Defense System to assist indigent defendants who wished to secure post-conviction DNA testing to support claims of factual innocence. *Id.* However, this law contained a sunset provision which caused it to expire on July 1, 2005; it was neither temporarily extended nor made permanent. A handful of other states initially enacted post-conviction DNA testing statutes that contained sunset provisions, but subsequently passed temporary and/or permanent extensions. See FLA. STAT. ANN. § 925.11 (West 2006) ("Postsentencing DNA Testing" law enacted in 2001 with a two-year sunset provision; the statute was later extended to 2005, and with the enactment of H.B. 61—signed on June 23, 2006 by Florida Governor Jeb Bush—convicted felons' right to access post-conviction DNA testing was made permanent).

<sup>26</sup> Pub. L. No. 108-405, 118 Stat. 2260 (2004); ARIZ. REV. STAT. ANN. § 13-4240 (2002); ARK. CODE ANN. § 16-112-202 (2002); CAL. PENAL CODE § 1405 (West 2002); COL. REV. STAT. ANN. § 18-1-413 (West 2003); CT. GEN. STAT. § 54-102kk (2003); DEL. CODE ANN. tit. 11, § 4504 (2002); D.C. CODE ANN. § 22-4133 (LexisNexis 2002); FLA. STAT. ANN. § 925.11 (West 2006); GA. CODE ANN. § 5-5-41 (West 2003); IDAHO CODE ANN. §§ 19-2719, 19-4902 (2002); 725 ILL. COMP. STAT. ANN. § 5/116-3 (West 2002); IND. CODE ANN. §§ 35-38-7-1 to 19 (West 2002); KAN. STAT. ANN. § 21-2512 (2001); KY. REV. STAT. ANN. § 422.285 (West 2002); LA. CODE CRIM. PROC. ANN. art. 926.1 (2002); ME. REV. STAT. ANN. tit. 15, § 2137 (2001); MD. CODE ANN., CRIM. PROC. § 8-201 (West 2002); MICH. COMP. LAWS ANN. § 770.16 (West 2002); MINN. STAT. ANN. § 590.01 (West 2002); MO. ANN. STAT. § 547.035 (West 2002); MONT. CODE ANN. § 46-21-110 (2003); NEB. REV. STAT. ANN. §§ 29-4117 to 4125 (LexisNexis 2002); N.H. REV. STAT. ANN. § 651-D:2 (2004); HAWAII REV. STAT. ANN. §§ 844D-121 to 133 (2006); N.J. STAT. ANN. § 2A:84-32a (West 2002); N.M. STAT. ANN. §§ 31-1a-1 to 2 (LexisNexis 2002); N.Y. CRIM. PROC. LAW § 440.30 (McKinney 2002); N.C. GEN. STAT. § 15a-269 (2002); N.D. CENT. CODE § 29-32.1-15 (2005); OHIO REV. CODE ANN. §§ 2953.71-2953.83 (West 2003); ORE. REV. STAT. ANN. T. 14, Ch. 138 Prec. 138.005 (West 2003); 42 PA. CONS. STAT. ANN. § 9543.1 (West 2002); R.I. GEN. LAWS §§ 10-9.1-11 to 12 (2002); TENN. CODE ANN. §§ 40-30-301 to 313 (2002); TEX. CODE CRIM. PROC. ANN. art. 64.03 (Vernon 2001); UTAH CODE ANN. §§ 78-35a-301 to 304 (2002); 13 VT. STAT. ANN. §§ 5561 to 5570 (2007); VA. CODE ANN. § 19.2-327.1 (West 2002); WASH. REV. CODE § 10.73.170 (2002); WIS. STAT. § 974.07 (2001).

scholarship. Part II of this Comment chronicles the DNA exoneration movement, providing a brief overview of the enactment of state and federal post-conviction DNA testing legislation. Part III discusses the alternative legal avenues that prisoners within these states can explore in attempting to gain post-conviction DNA testing. In so doing, it reveals the severe deficiencies of our federal legal system for handling these state claims and underscores the primary importance of enacting state post-conviction DNA statutes.<sup>27</sup> Part IV identifies the remaining eight states that have failed to pass post-conviction DNA testing statutes, and discusses the legal, political and social obstacles each state has faced in its efforts—some strenuous, some minimal—to enact post-conviction DNA testing legislation. Finally, Part V suggests ways in which these last remaining states may be encouraged to pass statutes guaranteeing access to post-conviction DNA testing—a crucial step in the larger effort to improve our criminal justice system, make our communities safer, correct injustices suffered by innocent victims, and continue in our “vigilant search for truth.”<sup>28</sup>

## II. BACKGROUND

### A. THE ENACTMENT OF STATE AND FEDERAL STATUTES AUTHORIZING DNA TESTING IN POST-CONVICTION CRIMINAL PROCEEDINGS

In 1979, an Illinois man named Gary Dotson was convicted of aggravated kidnapping and rape, and was sentenced to twenty-five to fifty years imprisonment.<sup>29</sup> While serving the sixth year of his sentence, the victim recanted her testimony and confessed to having fabricated the entire incident.<sup>30</sup> When Mr. Dotson attempted to vacate his sentence, the trial judge proclaimed the alleged victim more believable in her original claim than in her recantation and denied Mr. Dotson’s motion for a new trial. Two years later, after his lawyer was able to secure DNA testing that was not available at the time of trial, the results excluded the possibility that Mr. Dotson could have committed the alleged crime,<sup>31</sup> demonstrating for the first time the value that DNA analysis could provide in correcting a miscarriage of justice.

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<sup>27</sup> The alternative means to secure post-conviction DNA testing include § 1983 relief, habeas corpus relief, and the submission of general state post-conviction petitions.

<sup>28</sup> See FUTURE OF DNA EVIDENCE, *supra* note 1.

<sup>29</sup> Innocence Project, Case Profile: Gary Dotson, [http://www.innocenceproject.org/case/display\\_profile.php?id=01](http://www.innocenceproject.org/case/display_profile.php?id=01) (last visited Sept. 12, 2007).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*



The interest in DNA analysis and the role it could play in law enforcement efforts began to gain momentum. In 1996, the National Institute of Justice released a study which documented twenty-eight cases of wrongfully convicted individuals who had been proclaimed innocent and released from prison on the basis of post-conviction DNA testing.<sup>32</sup> Attorney General Janet Reno responded to the study by creating a National Commission on the Future of DNA Evidence; included as part of this Commission was a Post-Conviction Issues Working Group (“Working Group”) which was convened with the goal of creating a list of recommendations for ways in which the wrongfully convicted could secure quick access to relief. After three years of meetings, deliberations, and hearings, the Working Group published a report that synthesized what they had discussed and made recommendations on the future use of DNA testing in post-conviction appeals.<sup>33</sup> While the recommendations had no binding authority on legislatures or law enforcement officials, their impact was quickly felt: whereas prior to its release only two states had passed post-conviction DNA testing statutes,<sup>34</sup> eight states enacted post-conviction DNA statutes in 2000<sup>35</sup> and, to date, a total of forty-two states and the federal government have enacted laws authorizing post-conviction DNA testing.<sup>36</sup>

#### B. THE NECESSARY COMPONENTS OF A STATE POST-CONVICTION DNA TESTING STATUTE

The enactment of state post-conviction DNA testing statutes has not been uniform, and the statutes themselves are not identical in their substance. A typical post-conviction DNA testing statute first identifies who may file and under what time constraints he must file. Deceptively simple, these two statutory components have the potential to deny meaningful relief—and negate the entire goal of the law—if not drafted broadly enough. Setting appropriate guidelines for who may file for post-conviction DNA testing requires a delicate balancing act to ensure that the

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<sup>32</sup> CONVICTED BY JURIES, *supra* note 18.

<sup>33</sup> FUTURE OF DNA EVIDENCE, *supra* note 1.

<sup>34</sup> *Id.* at 10 n.2 (stating that the first two states to enact postconviction DNA testing laws were Illinois and New York).

<sup>35</sup> The eight states are Arizona, California, Delaware, Florida, Michigan, Oklahoma, Tennessee, and Washington. See DNA Resource, 2000 Post-Conviction Bills, <http://www.dnaresource.com/documents/2000PostConvictionBills.pdf> (last visited Dec. 24, 2007).

<sup>36</sup> See *supra* note 26.

law is neither overbroad nor under-inclusive.<sup>37</sup> State post-conviction DNA statutes commonly require identity to have been at issue at trial,<sup>38</sup> and the petitioner typically must have been convicted of a major felony.<sup>39</sup> Some state laws include statutes of limitations beyond which petitioners may no longer file claims, while others grant a blanket, non-time-barred right.<sup>40</sup> Some states appoint post-conviction counsel, others do not.<sup>41</sup> The next step for a petitioner who meets the filing requirements is to determine whether the evidence to be tested is material and reliable (whether there has been a documented “chain of custody”).<sup>42</sup> If the evidence fails to meet either of these standards, the petitioner is out of luck. In cases where the evidence is too small, or degraded, or otherwise fails to comply with the statutory requirements, the petitioner has no recourse.<sup>43</sup> Finally, some statutes

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<sup>37</sup> The concerns that post-conviction DNA testing statutes are overbroad and will “open[] the floodgates” have thus far failed to materialize. While all currently available evidence is anecdotal, no state has reported a floodgate crisis. In fact, the willingness of states to extend or eliminate sunset provisions implies quite the contrary: that the system can withstand the cases it is receiving. One reason for this could be overly stringent filing requirements; another explanation is that the number of post-conviction DNA testing cases is dwindling as time goes by, thanks to the increased use of post-arrest/pre-trial DNA testing. This area needs to be explored to ensure that access is being provided to all who need it.

<sup>38</sup> The “identity at issue” requirement, a controversial topic, necessarily prevents petitioners who confessed or pleaded guilty at trial from pursuing post-conviction DNA testing. However, studies have consistently shown that wrongful convictions are often based on false confessions and false pleadings. As the awareness of these phenomena has grown, so too has the momentum to amend post-conviction DNA testing statutes to ensure that they do not disqualify the truly innocent—including those who falsely confessed or pleaded guilty at trial—from obtaining relief. See Kathy Swedlow, *Don’t Believe Everything You Read: A Review of Modern “Post-Conviction” DNA Testing Statutes*, 38 CAL. W. L. REV. 355 (2002); see also Daina Borteck, *Pleas for DNA Testing: Why Lawmakers Should Amend State Post-Conviction DNA Testing Statutes to Apply to Prisoners Who Pled Guilty*, 25 CARDOZO L. REV. 1429 (2004).

<sup>39</sup> Swedlow, *supra* note 38, at 357.

<sup>40</sup> *Id.* at 363-64. Statutes of limitations on post-conviction DNA testing claims have been criticized as unfairly restrictive because of the time it takes to marshal the resources necessary to prepare a filing.

<sup>41</sup> *Id.* at 364-66.

<sup>42</sup> *Id.* at 367-71. Discrepancies also exist between state laws in assigning the burden of proof regarding the reliability of the DNA evidence. Assigning the burden of proof to the petitioner can be an impossibly high hurdle to overcome, further limiting meaningful access to justice for innocent individuals. Post-conviction DNA testing advocates are uniform in their desire to assign the burden of proving evidentiary reliability and “chain of custody” to the state.

<sup>43</sup> This problem has led to an increased push at the state level to improve the processes currently in place for collecting, preserving, and storing DNA evidence. In addition, there have been reports of instances where evidence was deliberately destroyed; while these incidents are believed to be anomalies, reforms are being promoted to ensure compliance with petitioners’ preservation requests. See Nat’l Comm’n on the Future of DNA Evidence,

specify who will perform the testing, who will pay for it, and the subsequent standards for relief.<sup>44</sup>

The Innocence Project has drafted a model post-conviction DNA testing statute that combines successful provisions of various state laws with additional provisions that would further the administration of justice for the wrongfully convicted.<sup>45</sup> This model legislation addresses: (1) who may file,<sup>46</sup> (2) standards to be used by the courts in determining when to order a post-conviction DNA test,<sup>47</sup> (3) the “chain of custody” requirement to ensure the reliability of the DNA evidence that is being sought,<sup>48</sup> (4) appointment of counsel, (5) preservation of evidence requirements,<sup>49</sup> (6) laboratory choice and payment responsibilities,<sup>50</sup> (7) appellate procedures and instructions on the adjudication of successive DNA testing petitions,<sup>51</sup> and (8) the means with which to provide relief if the DNA testing returns in the petitioner’s favor.<sup>52</sup> It reflects a “best practices” version of many existing state post-conviction DNA testing statutes and addresses critics’ concerns about “opening the floodgates” and draining resources by ensuring that access is limited to the legally meritorious cases. Further, it provides a uniform relief statute for innocent victims of the criminal justice system,

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Proceedings (July 25, 1999), available at <http://www.ojp.usdoj.gov/nij/topics/forensics/events/dnamtgtrans6/trans-c.html>.

<sup>44</sup> Swedlow, *supra* note 38, at 381-84.

<sup>45</sup> AN ACT CONCERNING ACCESS TO POST-CONVICTION DNA TESTING (Innocence Project, Model Legislation 2006), available at [http://www.innocenceproject.org/docs/Model\\_Statute\\_Postconviction\\_DNA.pdf](http://www.innocenceproject.org/docs/Model_Statute_Postconviction_DNA.pdf).

<sup>46</sup> *Id.* at 2. This component of the statute is perhaps most important, and includes:

- A. Persons currently incarcerated, serving a sentence of probation, or who have already been released on parole;
- B. Persons convicted on a plea of not guilty, guilty, or *nolo contendere*; and/or
- C. Persons who have finished serving their sentences.

<sup>47</sup> *Id.* Among other things, this provision specifically allows for DNA testing to be provided to petitioners for whom there is a reasonable probability that they would have “received a lesser sentence if favorable results had been available through DNA testing at the time of the original prosecution,” not just individuals who would not have been convicted at all had the test results been available at time of trial.

<sup>48</sup> *Id.* at 3. Notably, the model statute does not mention who should bear the burden of proving that the “chain of custody” requirement has been met. Instead, the model statute presumes that the evidence would satisfy the requirement if it has been in the custody of “law enforcement, other government officials or a public or private hospital,” absent evidence to the contrary.

<sup>49</sup> *Id.* at 6 (requiring the retention of forensic evidence in criminal cases regardless of whether a post-conviction DNA testing motion has been filed).

<sup>50</sup> *Id.* at 6-7.

<sup>51</sup> *Id.* at 7.

<sup>52</sup> *Id.* 8-9.

and gives the states a template that can immediately begin a discussion on enacting this crucial legislation.

### III. ALTERNATIVE MEANS TO SECURE POST-CONVICTION DNA TESTING ARE UNPREDICTABLE AND INCONSISTENT, AND UNDERSCORE THE NEED FOR STATE STATUTES

State statutes are not the sole means by which state petitioners can pursue access to post-conviction DNA testing. As discussed in this Part, petitioners may explore a limited number of other avenues to secure post-conviction DNA testing. The brightest beacon of hope for petitioners outside the relief provided by state DNA testing statutes lies in § 1983 petitions.<sup>53</sup> However, while these alternate strategies may occasionally prove fruitful, their inconsistent application and infrequent success underscores the vital importance of state statutes.<sup>54</sup> Although federal recourse occasionally serves as an emergency parachute, state statutes are the most successful vehicle through which state petitioners may appeal their conviction. They provide a central and irreplaceable means for wrongfully convicted felons to establish their innocence.

#### A. HABEAS CORPUS AND § 1983 PETITIONS

Habeas petitions have become increasingly inaccessible to convicted felons. Indeed, the U.S. Supreme Court's rulings in *Schlup v. Delo*<sup>55</sup> and

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<sup>53</sup> 42 U.S.C. § 1983 (2006).

<sup>54</sup> See *Harvey v. Horan*, 278 F.3d 370 (4th Cir. 2002) (rejecting petitioner's assertion that a constitutional right to post-conviction forensic evidence for DNA testing purposes exists); see also *Grayson v. King*, 460 F.3d 1328, 1342 (11th Cir. 2006) ("We decline Grayson's invitation to create . . . a new, broad constitutional right of post-conviction access of all convicts to the evidence used to convict them."); *Alley v. Key*, 2006 WL 1313364 (6th Cir. May 14, 2006); *Bradley v. Pryor*, 305 F.3d 1287 (11th Cir. 2002). But see *Harvey v. Horan*, 285 F.3d 298, 304 (4th Cir. 2002) (arguing that there exists a limited constitutional right to post-conviction access to forensic evidence for DNA testing purposes); *Osborne v. Alaska*, 445 F. Supp. 2d 1079 (D. Ala. 2006); *Wade v. Brady*, 2006 WL 3051770 (D. Mass. Oct. 27, 2006); *Moore v. Lockyer*, 2005 WL 2334350 (N.D. Cal. Sept. 23, 2005) (holding that: (1) to permit the state to deny a convicted defendant access to evidence that could prove his or her innocence for no reason whatsoever would violate due process, and (2) the due process right to obtain access to DNA evidence should be limited); *Godschalk v. Montgomery County*, 177 F. Supp. 2d 366 (E.D. Pa. 2001). The resolution of this split could significantly change the landscape of post-conviction DNA testing; however, this discussion is outside the scope of this comment.

<sup>55</sup> 513 U.S. 298, 327 (1995) (holding that prisoners asserting innocence as a gateway to defaulted claims must establish that, in light of new evidence, "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt").

*Herrera v. Collins*<sup>56</sup> seem to have virtually foreclosed the possibility of a successful actual innocence claim on habeas corpus grounds.<sup>57</sup> The possibility exists that the recent ruling in *House v. Bell* may offer a ray of hope for habeas petitioners with actual innocence claims.<sup>58</sup> In a narrowly tailored decision that suggested its limited applicability, the Court reversed the lower court's decision and allowed the petitioner to proceed with his procedurally defaulted constitutional claims.<sup>59</sup> However, the impact of this decision on future habeas petitioners is unclear. While some advocates hailed the decision as evincing an evolving willingness of the Court to recognize the value of DNA as a check on the criminal justice system, other practitioners and scholars questioned the broader applicability of the ruling in light of an otherwise consistent trend to the contrary in U.S. Supreme Court habeas rulings.<sup>60</sup>

Perhaps more viable than habeas corpus relief, § 1983 petitions have provided state prisoners with greater success in securing access to post-conviction DNA evidence for testing purposes. However, the success rate depends in large part on the jurisdiction and the court weighing the petition.<sup>61</sup> The U.S. Supreme Court has yet to rule on this issue. In a

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<sup>56</sup> 506 U.S. 390, 417 (1993) (noting that “in a capital case a truly persuasive demonstration of ‘actual innocence’ made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief *if there were no state avenue open to process such a claim*”) (emphasis added).

<sup>57</sup> For further discussion on the evolution of habeas law, see *Habeas Relief for State Prisoners*, 35 GEO. L.J. ANN. REV. CRIM. PROC. 853 (2006); see also SCOTT CHRISTIANSON, INNOCENT: INSIDE WRONGFUL CONVICTION CASES 27, (2004); Nicholas Berg, *Turning a Blind Eye to Innocence: The Legacy of Herrera v. Collins*, 42 AM. CRIM. L. REV. 121 (2005); Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35 (2005).

<sup>58</sup> 126 S. Ct. 2064 (2006).

<sup>59</sup> *Id.* at 2086 (“[A]lthough the issue is close, we conclude that this is the rare case where—had the jury heard all the conflicting testimony—it is more likely than not that no reasonable juror viewing the record as a whole would lack reasonable doubt.”).

<sup>60</sup> See Mark Hansen, *DNA Evidence Cited in High Court Ruling—Expect More Innocence Claims to Come, Experts Say*, 24 A.B.A. J. E-REPORT 2 (June 16, 2006) (“[I]t has a legal significance that goes beyond this particular case: This was the first case to come before the court with DNA evidence not available at the time of the conviction that appears to support a claim of innocence.”); see also Harry A. Silvergate & Philip G. Cormier, *House v. Bell—Restoring Habeas Corpus*, 28 NAT’L L.J. 48 (Aug. 2, 2006) (“[O]n June 12, in *House v. Bell*, the U.S. Supreme Court took a step toward redeeming the promise of law to punish only the guilty.”). But see Mark Hansen, *Doubt and DNA: In a Case About New Evidence, High Court Looks to the Future of Innocence Claims*, 92-SEP A.B.A. J. 14 (2006) (“To some legal observers, the [*House v. Bell* decision] is an inconsequential case that breaks new ground and has little, if any, precedential value.”).

<sup>61</sup> Federal circuit courts are in disagreement as to whether post-conviction claims for access to biological evidence are cognizable under § 1983. Four circuit courts have granted prisoners’ requests. See *McKithen v. Brown*, 481 F.3d 89 (2d Cir. 2007); *Savory v. Lyons*,

dangerous development, even in cases where courts have affirmed prisoners' rights to access biological evidence via § 1983 petitions, limitations are being imposed which completely negate access to this federal recourse. The November 2006 ruling issued by the Seventh Circuit in the case of *Savory v. Lyons* provides an example which, if followed by other courts, could significantly hinder the pursuit of justice.<sup>62</sup>

In 1977, at age fourteen, Johnnie Lee Savory was convicted of murder in Peoria, Illinois.<sup>63</sup> He was re-tried in 1981 and was once again convicted of murder. Mr. Savory pursued every available line of appeal—direct appeal, state post-conviction proceedings, federal habeas corpus review, writ of mandamus, executive clemency—and was denied every time.<sup>64</sup> When Illinois passed its post-conviction DNA testing statute, Mr. Savory petitioned for testing and was again denied.<sup>65</sup> Armed with this record of forcefully and relentlessly maintaining his innocence, Mr. Savory filed a § 1983 claim seeking access to the physical evidence used at trial in order to perform DNA analyses. The Seventh Circuit affirmed the district court's Rule 12(b)(6) dismissal of the case, citing the Illinois statute of limitations on personal injury as the basis for denying Mr. Savory relief.<sup>66</sup> The court held that the state circuit court's denial of Mr. Savory's post-conviction DNA testing request in 1988 marked the starting point of a two-year statute of limitations period, making his § 1983 petition—dated 2005—untimely.<sup>67</sup> Additionally, the Seventh Circuit explicitly rejected the notion that equitable tolling should apply to Mr. Savory's case, warning that § 1983 claims would remain indefinitely available to prisoners under such criteria.<sup>68</sup>

This holding has grave implications for all prisoners—especially prisoners in “holdout states,” where federal recourse is the only means available for securing post-conviction access to DNA testing. It marks a

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469 F.3d 667 (7th Cir. 2006); *Osborne v. Dist. Attorney's Office for the 3d Judicial Dist.*, 423 F.3d 1050 (9th Cir. 2005); *Bradley v. Pryor*, 305 F.3d 1287 (11th Cir. 2002); *see also* *Wade v. Brady*, 460 F. Supp. 2d 226, 237 (D. Mass. 2006) (“[Section] 1983 is an entirely appropriate medium for plaintiff to raise his claim for access to DNA testing.”); *Derrickson v. Del. County Dist. Attorney's Office*, No. 04-1569, 2006 WL 2135854, at \*8 (E.D. Pa. July 26, 2006) (same). Three circuit courts have denied prisoners' § 1983 requests. *See* *Harvey v. Horan*, 278 F.3d 370 (4th Cir. 2002); *Boyle v. Mayer*, 46 Fed. Appx. 340 (6th Cir. 2002); *Kutzner v. Montgomery County*, 303 F.3d 339 (5th Cir. 2001).

<sup>62</sup> 469 F.3d 667 (7th Cir. 2006) (rehearing denied).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 669.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 672-75.

<sup>67</sup> *Id.* at 674-75.

<sup>68</sup> *Id.*

restrictive shift in federal court jurisprudence that could completely limit federal relief for state prisoners, either standing alone or if adopted more broadly.<sup>69</sup>

B. THE INNOCENCE PROTECTION ACT, AS EMBEDDED IN THE JUSTICE FOR ALL ACT OF 2004<sup>70</sup>

The Innocence Protection Act (“IPA”) was enacted as Title IV of H.R. 5107, the Justice for All Act of 2004. It created a new criminal code provision<sup>71</sup> granting access to post-conviction DNA testing for federal inmates who could demonstrate that “the testing of the specific evidence may produce new material evidence that would . . . raise a reasonable probability that the applicant did not commit the offense.”<sup>72</sup> It also created a grant program to help states cover the costs of post-conviction DNA testing,<sup>73</sup> with the goal of removing economic impediments to justice in states with pre-existing post-conviction DNA testing statutes, as well as those where budgetary constraints had prevented them from passing such laws.

Enactment of this bill was a lengthy process, and the final language was a considerably diluted version of its original draft. The Innocence Protection Act was first introduced by Senator Patrick Leahy in 2000,<sup>74</sup> and created an expansive Fourteenth Amendment due process right to post-conviction DNA testing with no statute of limitations. Initially presented as

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<sup>69</sup> Ironically, the only ray of hope this ruling provides for prisoners in states without post-conviction DNA testing statutes is that the court denied Mr. Savory’s continuing violation doctrine and equitable tolling arguments because he had already been denied post-conviction access to DNA testing based on the Illinois post-conviction DNA testing law. The court started the two-year statute of limitations stopwatch on the date of those rulings. This raises the question of how the federal courts would deal with prisoners whose § 1983 petitions followed a state court’s denial of post-conviction DNA testing under *general* state post-conviction statutes. It is unclear whether that would be considered a “start time” for statute of limitations purposes. Regardless, even assuming that all prisoners in the “holdout states” were excluded from the statute of limitations test enunciated by the Seventh Circuit, they would still be subject to the varying applications of § 1983, which—as stated before—do not provide a reliable means to access DNA evidence. The notion that the pursuit of justice in these cases could be thwarted by a statute of limitations is something that has been uniformly rejected in all state post-conviction DNA testing statutes.

<sup>70</sup> Pub. L. No. 108-405, 118 Stat. 2260 (2004).

<sup>71</sup> 18 U.S.C. § 3600 (2006).

<sup>72</sup> *Id.*

<sup>73</sup> 42 U.S.C. §§ 14136(e), 14136 (2006). The new program is entitled “Kirk Bloodsworth Post-Conviction DNA Testing Grant Program” and authorizes annual appropriations of \$5,000,000 between 2005-2009. *Id.*

<sup>74</sup> S. 2083, 106th Cong. (2000) (reintroduced with minor changes and additional cosponsors as S. 2690, 106th Cong. (2000)). A companion bill was introduced in the House of Representatives by Congressman William Delahunt. *See* H.R. 4167, 106th Cong. (2000).

a death penalty reform act, it managed to build on the momentum of Illinois Governor George Ryan's death penalty moratorium; Governor Ryan was even called in as a star witness during the House Judiciary Committee hearing on the legislation.<sup>75</sup> However, when it became apparent that this strategy was provoking strong opposition from prominent pro-death penalty members of the House and Senate Judiciary Committees, the bill sponsors agreed to strip the death penalty-related provisions out of the bill.<sup>76</sup> In 2003, another compromise was reached: in order to secure Senate Judiciary Committee Chairman Orrin Hatch's support for the bill, Senator Leahy agreed to remove the language that created a new constitutional right to post-conviction DNA testing. The bill appeared prime to pass with Senator Hatch and other key Senate Judiciary Committee members on board. However, the Administration was unhappy with the legislation and released a letter opposing the bill, which emboldened Senator Jon Kyl—a Judiciary Committee member with reservations about the legislation—to oppose its passage.<sup>77</sup> A combination of compromise, politics, and strategy secured the passage of the Innocence Protection Act; it was ultimately attached to Senator Kyl's victim assistance bill, the Justice for All Act of 2004, and was signed into law on October 30, 2004.<sup>78</sup>

To be certain, the Innocence Protection Act plays an important role in providing wrongfully convicted felons with a means to proclaim—and prove—their innocence. However, it is inherently limited by its application only to federal prisoners; there are no new legal avenues for state petitioners to seek justice because the constitutional due process language did not survive the rounds of compromise. The federal law does potentially assist state petitioners in two ways: (1) it provides funding for states to defray the costs of post-conviction DNA testing under pre-existing state statutes, provided they comply with certain requirements, and (2) it incentivizes the “holdout states” to enact post-conviction DNA testing legislation by providing financial support for the implementation of new DNA testing procedures.<sup>79</sup> Whether the full effects of this financial assistance will be felt depends on numerous factors, including whether state laws comply with the requirements for federal funding, how and whether concerns over state sovereignty will impact the full utilization of this grant program, and whether the funds allocated to the grant program will be sufficient to cover the requests being submitted by the states. Despite these hurdles, the

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<sup>75</sup> Ronald Weich, *The Innocence Protection Act of 2004: A Small Step Forward and a Framework for Larger Reforms*, 29-MAR. CHAMPION 28 (2005).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> See *supra* note 73.



Innocence Protection Act provides an important intangible benefit by proclaiming—at the federal level—that post-conviction DNA testing is of great import in validating the work of our nation’s criminal justice system. To that extent, it can be used by advocates at the state level to push for change by providing additional evidence that convictions are not always correct, and that, as a result, legal recourse must be provided to ensure that the wrongfully convicted may prove their innocence.

### C. GENERAL STATE POST-CONVICTION STATUTES

All states provide general post-conviction remedies as part of their state rules of criminal procedure.<sup>80</sup> However, this post-conviction relief is general and limited, and does not easily conform to the needs—or realities—of cases where DNA testing may help prove a petitioner’s innocence. State post-conviction remedies often impose statutes of limitations that pose problems for petitioners whose original trials—which either lacked DNA testing or lacked a sufficient level of sophistication in DNA testing—may have taken place many years ago.<sup>81</sup> In addition, the definition of “newly discovered material facts” in state post-conviction petitions may not be sufficiently expansive to cover DNA evidence that was once tested, but should be tested again using new tests with greater accuracy.<sup>82</sup> Forensic evidence requiring DNA testing is widely recognized as a unique circumstance that requires a unique solution; general post-conviction relief does not suffice.<sup>83</sup>

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<sup>80</sup> DONALD E. WILKES, JR., *STATE POSTCONVICTION REMEDIES AND RELIEF: WITH FORMS* (2006).

<sup>81</sup> Holly Schaffter, *Postconviction DNA Evidence: A 500 Pound Gorilla in State Courts*, 50 *DRAKE L. REV.* 695, 697-98 (2002).

<sup>82</sup> *Id.* at 704.

<sup>83</sup> Forty-two states and the federal government have recognized this in their passage of specific post-conviction DNA testing statutes. Scholars have also called for specific DNA testing statutes. See Jason Borenstein, *DNA in the Legal System: The Benefits Are Clear, The Problems Aren’t Always*, 3 *CARDOZO PUB. L. POL’Y & ETHICS J.* 847 (2005); Borteck, *supra* note 38; Seth F. Kreimer & David Rudovsky, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, 151 *U. PA. L. REV.* 547 (2002); Scheck, *supra* note 23; Swedlow, *supra* note 38; Benjamin Vetter, *Habeas, Section 1983, and Post-Conviction Access to DNA Evidence*, 71 *U. CHI. L. REV.* 587 (2004).

IV. EIGHT STATES HAVE YET TO PASS POST-CONVICTION ACCESS TO DNA TESTING STATUTES<sup>84</sup>

Eight states have not yet enacted legislation that provides convicted felons with access to post-conviction DNA testing. A closer look at these eight states shows that they logically fall into three categories. The first group, Basket A: The Uniquely Situated States, is comprised of Massachusetts and Alaska. In contrast to the other “holdout states,” these two states have readily identifiable, state- and situation-specific dynamics that have influenced their (in)action on legislation. The second group, Basket B: The Red States, includes Alabama, Mississippi, Oklahoma, and South Carolina. Considerable literature—from academics, the American Bar Association, and other law-related organizations—has addressed the difficulties that criminal defendants encounter in these four states. The conservative “law and order” culture in these states, combined with the inadequate provision of resources for defendants in the criminal justice system, make these states specifically hostile toward reform efforts like post-conviction DNA testing. These tremendous and fundamental shortcomings make Basket B a critically important target in a campaign to enact state post-conviction access to DNA testing. The third category, Basket C: The Long-Shot States, includes South Dakota and Wyoming. The fact that these states are “long shots” does not mean that they are necessarily hostile toward the idea of post-conviction DNA testing. Rather, the structure of their legislatures poses an initial—though not insurmountable—obstacle toward enactment of legislation. A perceived lack of urgency surrounding this issue is a shared characteristic of Basket C states; however, complacency does not justify the continued imprisonment of innocent individuals, and these states should be targeted vigorously for legislative reform.

## A. BASKET A: THE UNIQUELY SITUATED STATES—MASSACHUSETTS AND ALASKA

*1. Massachusetts*

The political landscape in Massachusetts raises serious questions about its status as a member of the eight remaining “holdout states.”

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<sup>84</sup> For purposes of this Comment, Oklahoma will be included in the analysis of states that have yet to pass post-conviction DNA testing statutes because, even though it had previously passed its own law, that law was allowed to expire. For information on the Oklahoma law, see *supra* note 25.

Massachusetts has not had a single execution since 1947,<sup>85</sup> and the most recent effort to reinstate the death penalty there failed by nearly a two-to-one margin in the State legislature.<sup>86</sup> In the 2006 midterm election, Democratic candidates swept the U.S. House and Senate seats with overwhelming majorities,<sup>87</sup> and the Democratic gubernatorial nominee won with an impressive 56% of the vote, while his GOP opponent received only 35%.<sup>88</sup> Interestingly, post-conviction access to DNA testing even emerged as an issue in the gubernatorial race.<sup>89</sup> Despite the sharp sound byte of the attack ad, all of the gubernatorial candidates in Massachusetts—including the candidate who ran the ad—disclosed their support for a post-conviction DNA-testing statute.<sup>90</sup>

The legal environment in Massachusetts paints a similarly welcoming picture. In the past ten years, nine individuals have been exonerated by DNA evidence in the state of Massachusetts.<sup>91</sup> A 2001 New England Law Review article written by an Assistant District Attorney in the Homicide

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<sup>85</sup> Death Penalty Information Center, State by State Information, <http://www.deathpenaltyinfo.org/state> (last visited Sept. 12, 2007).

<sup>86</sup> In 2005, then-Governor Mitt Romney made it a top priority of his administration to reinstate what was, he claimed, a “foolproof” death penalty statute. That effort failed on the floor of the Massachusetts House of Representatives, with a vote of 100-53. See Death Penalty Information Center, Recent Legislative Activity News and Developments—Previous Years, <http://www.deathpenaltyinfo.org/article.php?&did=1729> (last visited Sept. 12, 2007).

<sup>87</sup> In the 2006 midterm elections, five Democratic House candidates ran unopposed, and the remaining five House races saw Democrats win between 65-91% of the votes in their respective districts. Senator Ted Kennedy was re-elected with 69% of the vote. See WashingtonPost.com, Massachusetts Elections, <http://www.washingtonpost.com/wp-srv/politics/elections/2006/ma.html> (last visited Sept. 12, 2007).

<sup>88</sup> *Id.*

<sup>89</sup> The issue was raised in GOP candidate Kerry Healey’s negative campaign ads (“smear ads”) designed to paint her opponent as soft on crime. In TV advertisements, Healey directed public attention to an incident in 1983 during which Deval Patrick—the Democratic candidate, and now newly elected governor—supported a convicted rapist’s efforts to obtain post-conviction DNA testing; the DNA test returned positive, confirming the convicted man’s guilt. The advertisement narrated, “If Deval Patrick had his way, a thug who bound a 59-year-old woman and repeatedly raped her over the course of eight hours . . . would be free.” See Kerry Healey Ad—WRKO John Depetro Show, <http://www.youtube.com/watch?v=hpdULf2D83g> (last visited Nov. 19, 2007); see also Will Haygood, *A Long Way From Home*, WASH. POST, Oct. 25, 2006, at C1; Kerry Healey Campaign Ad, <http://www.youtube.com/watch?v=V2b64RSE26w> (last visited Nov. 12, 2007).

<sup>90</sup> The way in which it was used—in a smear ad—played on a misperception that DNA testing is a *bad* thing, and that it will free rapists and murderers. How widespread this misperception is among the American public has not been quantified; however, it indicates an area that should be focused on in post-conviction DNA testing campaigns: public education.

<sup>91</sup> Innocence Project, News and Information: Massachusetts, <http://www.innocenceproject.org/news/state.php?state=MA> (last visited Nov. 12, 2007).

Division of the Suffolk County District Attorney's office, the largest district attorney's office in New England,<sup>92</sup> publicly proclaimed his office's belief in the exculpatory potential of DNA evidence, stating "if we are going to rely on [DNA] as a tool to procure convictions, then we should be equally as enthusiastic about its value in identifying wrongfully convicted defendants. . . . [T]he government should not be in the business of impeding a defendant's access to the testing . . . ."<sup>93</sup> State and federal court judges have expressed their support for post-conviction DNA testing, and as recently as October 2006, a federal district court opinion explicitly found a due process right to DNA testing.<sup>94</sup> Why, then, has a state statute failed to make its way to the governor's desk?<sup>95</sup>

Simply put, it has not had to. Defense attorneys have discovered alternate avenues through which to attempt to secure post-conviction DNA testing for their clients, in both state and federal courts.<sup>96</sup> Further, members of the largest district attorney's office in the state have publicly proclaimed their interest in working with petitioners and defense attorneys to secure

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<sup>92</sup> See Suffolk County District Attorney's Office, Welcome, <http://www.mass.gov/dasuffolk/welcome.html> (last visited Nov. 29, 2006).

<sup>93</sup> Mark Lee, *The Impact of DNA Technology on the Prosecutor: Handling Motions for Post-Conviction Relief*, 35 NEW ENGLAND L. REV. 663, 664 (2001).

<sup>94</sup> *Wade v. Brady*, 460 F. Supp. 2d 226, 229 (D. Mass. 2006). In his opinion, Judge Gertner endorsed the extension of *Brady v. Maryland*'s coverage of pre-trial disclosure obligations to the post-conviction context, concluding:

DNA testing is different. Because DNA testing can exonerate the defendant, the government may only legitimately deny access to testing if it has a compelling reason to do so. To hold otherwise would subordinate the pursuit of justice to an arid obsession with procedure. Where DNA evidence can prove that a miscarriage of justice was perpetrated by an earlier verdict, our interest in fundamental fairness and the integrity of the criminal justice system require that DNA testing be allowed. . . . I find that a Due Process right to DNA testing does exist.

*Id.* at 231.

<sup>95</sup> Post-conviction DNA testing legislation was introduced in the 2005-2006 legislative session but died in committee. See S.B. 1241, 2005 Leg., Reg. Sess. (Mass. 2005); see also S.B. 941, 2005 Leg., Reg. Sess. (Mass. 2005); H.B. 1768, 2005 Leg., Reg. Sess. (Mass. 2005).

<sup>96</sup> Specifically, defense attorneys have sought access to post-conviction DNA testing through Massachusetts Rule of Criminal Procedure 30, the general post-conviction relief statute, which states that "[t]he trial judge upon motion in writing may grant a new trial at any time if it appears that justice may not have been done." MASS. R. CRIM. PRO. 30(b) (2001). Furthermore, attorneys have turned to the federal courts to make § 1983 petitions (as in the case of *Brady*, 460 F. Supp. 2d at 226; see *supra* note 94). Section 1983 relief was explored further *supra*, in Part III, but it is important to note here that the § 1983 petitions have arisen only after state court relief has been exhausted. The insufficiency of this general post-conviction relief further emphasizes the need for specific DNA testing state statutes.

post-conviction DNA testing.<sup>97</sup> The combination of these factors likely removes the sense of urgency that is necessary to propel a bill through the legislative process.<sup>98</sup> Another factor to consider, one common to all states and political issues, is the breadth of needs and interests to which politicians must respond. Post-conviction DNA testing may be important to some legislators, but, as with any piece of legislation, its trajectory is impacted by the presence of other legislative priorities—internally, with the individual member’s legislative agenda, or within the larger party caucus—or, in some cases, unexpected emergencies.<sup>99</sup> From a politician’s perspective, expending energy to push this type of legislation through could be an impractical use of time, resources, and political capital when there are other interests that need attention.

It remains a question whether this concern is valid when the legislation has broad popular support and would thus need minimal attention. On the one hand, less work is required to shepherd a popular bill through the lawmaking process than a bill that requires consensus-building or contains controversial provisions. On the other hand, broadly supported legislation has a tendency to become a moving target, a vehicle on which to attach numerous other provisions—relevant or not—that each legislator has been trying to pass independently. This “Christmas tree” concern, as it is sometimes called, could be alleviated by a carefully constructed rule of consideration which would limit the amount of debate and types of amendments that could be offered to the bill. It is no easy task to pass legislation, either at the state or federal level. However, legislation with as

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<sup>97</sup> See *supra* note 93. It is important to clarify that while this assertion was made by members of the District Attorney’s office, no formal office policy has been issued on this matter.

<sup>98</sup> This factor is qualified by the exception, as noted at *supra* note 96, of the inadequacy of general state post-conviction relief in DNA testing cases.

<sup>99</sup> The Big Dig is an example of an issue that managed to usurp a considerable amount of time and legislative attention over the past year in Massachusetts. Significantly over budget and completed years later than projected, the transportation infrastructure project was finally nearing completion when some concrete ceiling panels fell and killed a thirty-eight-year-old woman who was driving through the Ted Williams Tunnel in July 2006. The cause of the panels’ drop seems to have been faulty bolts; after the accident, further investigation resulted in the closure of various tunnels, citing the same concerns. See Scott Helman, *Big Dig Poses Opportunity and Risk for Romney*, BOSTON GLOBE, July 16, 2006, available at [http://www.boston.com/news/traffic/bigdig/articles/2006/07/16/big\\_dig\\_role\\_poses\\_opportunity\\_and\\_risk\\_for\\_romney](http://www.boston.com/news/traffic/bigdig/articles/2006/07/16/big_dig_role_poses_opportunity_and_risk_for_romney); Raja Mishra & Sean P. Murphy, *Legislators Consider Holding Public Hearings*, BOSTON GLOBE, July 20, 2006, available at [http://www.boston.com/news/traffic/bigdig/articles/2006/07/20/legislators\\_consider\\_holding\\_public\\_hearings](http://www.boston.com/news/traffic/bigdig/articles/2006/07/20/legislators_consider_holding_public_hearings); Raja Mishra & Sean P. Murphy, *Mass. Crisis of Confidence*, BOSTON GLOBE, July 12, 2006, available at [http://www.boston.com/news/traffic/bigdig/articles/2006/07/12/mass\\_crisis\\_of\\_confidence](http://www.boston.com/news/traffic/bigdig/articles/2006/07/12/mass_crisis_of_confidence). See generally Big Dig Ceiling Collapse: Special Report, [http://www.boston.com/news/specials/big\\_dig\\_ceiling\\_collapse](http://www.boston.com/news/specials/big_dig_ceiling_collapse) (last visited Dec. 24, 2007).

much support and momentum behind it as a post-conviction DNA testing statute seemingly has in Massachusetts—where politicians, judges, defenders, and even some prosecutors support the policy—should be able to transcend these procedural hurdles. Given the stakes—the lives and livelihoods of innocent victims sitting in Massachusetts jails and the safety of the communities that remain vulnerable to freely roaming perpetrators—the procedural obstacles to enacting legislation must be overcome.

## 2. Alaska

Alaska's current involvement in a wrongful conviction proceeding with a petitioner seeking access to post-conviction DNA testing classifies it as a "uniquely situated" state.<sup>100</sup> The Alaska legislature made efforts to propel a post-conviction DNA testing bill through the legislative process,<sup>101</sup> but the state actively inserted itself into the deliberations and successfully thwarted passage in the 2005-2006 legislative session. Looking ahead, the state's involvement in *Osborne v. Alaska* is likely the biggest obstacle to enactment of a state post-conviction DNA testing statute in Alaska.<sup>102</sup>

The state has a vested interest in opposing the enactment of a post-conviction DNA statute because of its role in *Osborne v. Alaska*.<sup>103</sup> This case generated considerable media attention and involved a horrific incident in which a woman was kidnapped, physically and sexually assaulted, and left lying in the snow on the side of the road by her attackers.<sup>104</sup> William Osborne, a co-defendant in the trial, was convicted of two counts of first-degree sexual assault, one count of kidnapping, and one count of first-degree assault and received a twenty-six-year sentence. He has continued to maintain his innocence through ineffective assistance of counsel claims, arguing that DNA technology that could have exonerated him at trial was

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<sup>100</sup> *Osborne v. Alaska*, 445 F. Supp. 2d 1079 (2006) [hereinafter *Osborne II*].

<sup>101</sup> H.B. 325, 2006 Leg., Reg. Sess. (Alaska 2006). This bill saw active committee consideration, but renewed opposition from the Alaska Attorney General's office in the waning days of the 2005-2006 legislative session forced further delays, constructively killing the bill.

<sup>102</sup> Ironically, the case provides a phenomenal example of an additional benefit of a post-conviction DNA testing statute: it would eliminate the costly litigation that the state has undertaken to oppose this procedural request, thereby saving the state—and the state's resident taxpayers—unnecessary expenditures that could more effectively be spent on ensuring that guilty criminals are found and brought to justice.

<sup>103</sup> *Osborne v. Alaska*, 110 P.3d 986 (2005) [hereinafter *Osborne I*] (denying petitioner post-conviction access to DNA testing); *Osborne II*, 445 F. Supp. 2d at 1079 (reversing state supreme court decision and finding a constitutional right to post-conviction access to DNA evidence for testing purposes).

<sup>104</sup> *Osborne I*, 110 P.3d at 989.

not pursued; those claims have been rejected.<sup>105</sup> He has also sought post-conviction access to DNA testing in state court; that appeal has been denied.<sup>106</sup> Mr. Osborne finally found success after filing a § 1983 petition in the federal district court of Alaska, in which the district court explicitly rejected the Alaska state court's holding, noting "[t]hat decision . . . is not binding upon this Court."<sup>107</sup> Further, the district court relied on Judge Luttig's concurrence in *Harvey v. Horan*<sup>108</sup> in holding "there *does* exist, under the unique and specific acts presented, a very limited constitutional right to the testing sought."<sup>109</sup> The court went on to conclude that "equity and fundamental notions of fairness argue in favor of the relief Plaintiff seeks; especially, when considered in the appropriate context, e.g., the Government has no legitimate interest in punishing the innocent."<sup>110</sup>

This case polarized the state of Alaska, both in the legislature and at the administrative level. While there was a relatively strong push by key legislators to shepherd a post-conviction DNA testing bill through the legislative process,<sup>111</sup> the state prosecutors and Attorney General's office have been a continuing—and forceful—presence in the deliberations.<sup>112</sup> It is interesting to note that Alaska is the only state that has shown a genuine, heated disagreement over proposed post-conviction legislation. Its involvement in *Osborne v. Alaska* may very well play a focal role in that anomaly.

The opponents to post-conviction DNA testing laws in Alaska have primarily focused on two arguments: finality and floodgates. To make the case on finality, the state engaged victims' rights groups to make emotional appeals and question why the legislature would want to re-open painful and traumatic cases that have been "closed," in some cases, for many years.<sup>113</sup>

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<sup>105</sup> *Osborne II*, 445 F. Supp. 2d at 1082.

<sup>106</sup> *Osborne I*, 110 P.3d at 994 (affirming his conviction and rejecting the existence of a post-conviction right to DNA testing).

<sup>107</sup> *Osborne II*, 445 F. Supp. 2d at 1081.

<sup>108</sup> 285 F.3d 298, 325 (4th Cir. 2002) (Luttig, J., concurring).

<sup>109</sup> *Osborne II*, 445 F. Supp. 2d at 1081.

<sup>110</sup> *Id.*

<sup>111</sup> H.B. 325, 2006 Leg., Reg. Sess. (Alaska 2006). The House Judiciary Committee voted the bill out of committee on April 12, 2006, after extensive hearings and meetings. However, after unsuccessful attempts to amend the bill on the floor of the House, and with continuing opposition from the Alaska Attorney General's office, the bill was withdrawn from consideration on April 28, 2006. See Alaska State Legislature, Bill History/Action for 24th Legislature, [http://www.legis.state.ak.us/basis/get\\_bill.asp?session=24&bill=HB325](http://www.legis.state.ak.us/basis/get_bill.asp?session=24&bill=HB325) (last visited Sept. 12, 2007).

<sup>112</sup> See Alaska State Legislature, Committee Minutes, Apr. 5, 2006, [http://www.legis.state.ak.us/basis/get\\_single\\_minute.asp?session=24&beg\\_line=00491&end\\_line=00986&time=1342&date=20060405&comm=JUD&house=H](http://www.legis.state.ak.us/basis/get_single_minute.asp?session=24&beg_line=00491&end_line=00986&time=1342&date=20060405&comm=JUD&house=H).

<sup>113</sup> *Id.*

While this is clearly a difficult emotional hurdle, it is rationally easy to rebut: victims would want to know that the true perpetrators of these heinous crimes are in prison and not sitting safely at home, planning to act again.

The administrative efficiency (“floodgates”) argument is similarly easy to rebut: an appropriately drafted post-conviction statute will include procedural requirements that limit the types of cases that would be considered to ensure meaningful access to justice while preventing frivolous lawsuits. While the evidence is currently limited to anecdotes, none of the forty-two states with post-conviction DNA testing statutes have reported a floodgates effect.<sup>114</sup>

Each state objection is met with an even more compelling reason to pass a post-conviction DNA testing statute in Alaska. Nevertheless, the state has used effective delay tactics to stymie progress on the bill.<sup>115</sup> Alaska seems to have backed itself into a corner from which it will not likely emerge until the resolution of *Osborne*. However, state legislators should continue to push for progress. While emotions are running high, a public education campaign on the content and impact of post-conviction DNA testing statutes may placate victims’ rights groups—especially if it makes them understand that their safety and the interests of justice are, in fact, two of the statute’s chief goals. The federal question as to whether there is a constitutional right to post-conviction forensic evidence for DNA testing purposes will likely take considerably longer to be resolved, especially since many of the differing opinions are still at the district court level.<sup>116</sup> Thus, a state post-conviction statute is both crucial and urgent.

#### B. BASKET B: THE RED STATES—ALABAMA, MISSISSIPPI, OKLAHOMA, AND SOUTH CAROLINA

Basket B contains states that are politically and socially conservative. They all have large death row populations,<sup>117</sup> and they have each carried out at least one execution since 2006.<sup>118</sup> This makes it especially important that post-conviction DNA testing statutes are enacted in these states.

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<sup>114</sup> See *supra* note 37.

<sup>115</sup> This practice, unfortunately, is common among all legislatures, both state and federal.

<sup>116</sup> See *supra* note 61.

<sup>117</sup> Death Penalty Information Center, <http://www.deathpenaltyinfo.org> (last visited Sept. 12, 2007) (numbering the death row populations at 191 in Alabama, sixty-seven in Mississippi, ninety-three in Oklahoma, and seventy-one in South Carolina).

<sup>118</sup> Death Penalty Information Center, Number of Executions by State and Region Since 1976, <http://www.deathpenaltyinfo.org/article.php?scid=8&did=186> (last visited Nov. 12, 2007).



### 1. Alabama<sup>119</sup>

From a criminal justice perspective—and certainly from the perspective of a defendant who has been charged with a crime in the state of Alabama—convincing the legislature that DNA testing is the first reform to enact may be the largest difficulty in campaigning to enact a post-conviction DNA testing statute. While there is a litany of shortfalls in the Alabama criminal justice system, a quick glance at the statistics reveals: (1) Alabama has the unique distinction of being the only state without a statewide public defender office among all the states without post-conviction statutes;<sup>120</sup> (2) in the past ten years, Alabama's death row population has doubled, and, in the past few years, Alabama has sentenced more people to death per capita than any other state in the nation;<sup>121</sup> (3) nearly 22% of death row inmates originally received a life imprisonment verdict at trial that was later overridden by the trial judge;<sup>122</sup> (4) there are currently 195 people on Alabama's death row;<sup>123</sup> and (5) death row prisoners challenging their convictions and sentences in state or federal collateral proceedings have no right to counsel.<sup>124</sup> Furthermore, state law limits the amount that lawyers appointed to represent death row prisoners in post-conviction proceedings can be paid to a maximum of \$1000.<sup>125</sup>

As evidence of the culture of the Alabama criminal justice system, one needs to look only at the state's reaction to the two DNA exonerations that have taken place there. Ronnie and Dale Mahan were convicted of kidnapping and rape in 1986 and exonerated by DNA testing twelve years later.<sup>126</sup> Throughout the exoneration process, the state prosecutor strongly

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<sup>119</sup> As of the date of the author's submission, Alabama has scheduled the execution of a death row inmate who insists on his innocence and has requested post-conviction DNA testing. Thomas Arthur has enlisted the help of the Innocence Project and others to lobby the Alabama Legislature and Governor in hopes of securing this testing. Thus far, their efforts have been unsuccessful. However, this high-profile case may stimulate a change in the sentiments of Alabama policymakers. See Thomas Arthur Fight for Life, <http://www.thomasarthurfightforlife.com/home.html> (last visited Apr. 3, 2008); see also Innocence Project, Response to Governor's Request for DNA Post-Conviction Testing, Nov. 5, 2007, [http://www.thomasarthurfightforlife.com/images/Arthur\\_IP\\_Response\\_To\\_Governors\\_Request\\_for\\_DNA\\_Post-Conviction\\_Testing.pdf](http://www.thomasarthurfightforlife.com/images/Arthur_IP_Response_To_Governors_Request_for_DNA_Post-Conviction_Testing.pdf).

<sup>120</sup> See EQUAL JUSTICE INITIATIVE, THE DEATH PENALTY IN ALABAMA (2007), <http://eji.org/eji/files/deathpenaltyAL.pdf>.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> Innocence Project, Case Profile: Ronnie Mahan, <http://www.innocenceproject.org/Content/203.php> (last visited Oct. 24, 2007); Innocence Project, Case Profile: Dale Mahan, <http://www.innocenceproject.org/Content/204.php> (last visited Oct. 24, 2007).

resisted what the science suggested: the Mahan brothers' innocence. Indeed, following the DNA results that excluded Ronnie and Dale as possible perpetrators, the prosecutor changed the story of the crime two separate times as a way to maintain the Mahan brothers' guilt.<sup>127</sup> Even after submitting additional evidence for DNA testing—with results that again excluded the Mahan brothers—the prosecutor was ready to retry the case under yet a different theory. A newspaper interview with the prosecutor in the case quoted him as saying, “These sons of bitches are guilty as sin . . . . There’s no question in my mind. This is not a case of innocence . . . . These two bastards are guilty. I just can’t prove it.”<sup>128</sup>

Compound this with the constraints of the Alabama legislature—which pays its members \$10 per legislative day<sup>129</sup> and is in session for a maximum of thirty days for every 105 calendar days<sup>130</sup>—and the prospects of passing a post-conviction DNA testing statute become even more grim. However, it is precisely because of this “law and order” culture that the legislature must pass a post-conviction statute.

The judicial community has weighed in multiple times on this issue. In the recent case of *Barbour v. Alabama*, both the majority and the dissent cited the need for specific post-conviction DNA testing procedures in the state of Alabama.<sup>131</sup> While the majority opinion merely asserted the court’s belief that “such guidelines should, in fact, be established in order to exonerate those who have been wrongfully convicted, particularly defendants in capital-murder cases in which the death penalty has been imposed,”<sup>132</sup> Judge Baschab’s dissent set forth explicit guidelines that he “strongly urge[d]” the Alabama Supreme Court and legislature to consider.<sup>133</sup> He further indicated a desire to engage in case-by-case reviews on the basis of his proffered guidelines until official legislative action commenced, proclaiming that “such petitioners should not be left without a remedy simply because the Legislature and/or the Alabama Supreme Court have not yet addressed this situation.”<sup>134</sup> In another case, larger questions

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<sup>127</sup> Steve Mills & Maurice Possley, *Crimes Go Unsolved as DNA Tool Ignored: Genetic Profiles in Rapes, Slayings Not Sent to FBI*, CHI. TRIB., Oct. 26, 2003, at C1 (noting that “prosecutors changed their theory to one in which the rapists had not ejaculated”).

<sup>128</sup> *Id.*

<sup>129</sup> See McDOWELL LEE, ALABAMA’S LEGISLATIVE PROCESS, S. 3 (Ala. 2007), available at [http://www.legislature.state.al.us/misc/legislativeprocess/legislativeprocess\\_ml.html](http://www.legislature.state.al.us/misc/legislativeprocess/legislativeprocess_ml.html).

<sup>130</sup> *Id.*

<sup>131</sup> 903 So. 2d 858 (Ala. Crim. App. 2004), *reh’g denied*, 2004 Ala. Crim. App. LEXIS 276 (Ala. Crim. App. Aug. 13, 2004), *cert. denied* (Jan. 7, 2005).

<sup>132</sup> *Id.* at 867-68.

<sup>133</sup> *Id.* at 872-73 (Baschab, J., dissenting).

<sup>134</sup> *Id.* at 873 (Baschab, J., dissenting).

about the denial of access to DNA evidence constituting a violation of due process were raised.<sup>135</sup>

The most recent case regarding post-conviction access to DNA evidence in the federal courts with jurisdiction over Alabama is the Eleventh Circuit opinion in *Grayson v. King*.<sup>136</sup> In that case, the petitioner was denied his post-conviction relief motion in state court and brought a § 1983 action seeking post-conviction DNA evidence for testing purposes.<sup>137</sup> In this case of first impression for the court, the Eleventh Circuit rejected the notion of a broad due process right of post-conviction access to DNA evidence under either *Brady v. Maryland* or *Mathews v. Eldridge*.<sup>138</sup> Perhaps leaving room for hope in future cases, the holding clarified,

[T]oday we need not and do not decide whether there can *ever* be a post-conviction right of access to the type of biological evidence [petitioner] seeks for DNA testing . . . . Nor do we question the unparalleled accuracy and surpassing importance of DNA testing in identifying and/or excluding suspects of violent crime."<sup>139</sup>

Given the widely recognized shortcomings of the criminal defense system in Alabama, the current controversy surrounding Thomas Arthur's scheduled execution,<sup>140</sup> and the judicial support for a state post-conviction DNA testing law, it is clearly time for the legislature to act. State Senator Hank Sanders introduced a post-conviction DNA testing bill during the 2005-2006 legislative session that was left to die in the Judiciary Committee.<sup>141</sup> Senator Sanders has introduced a DNA testing bill this session; it should be pushed forcefully through to the Governor's desk.<sup>142</sup>

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<sup>135</sup> *Dowdell v. Alabama*, 854 So. 2d 1995 (Ala. Crim. App. 2002) (Shaw, J., concurring in result) ("I call upon either or both of those bodies [the Alabama Legislature and the Alabama Supreme Court] to study this important issue carefully and to implement procedures governing post-conviction DNA testing in Alabama. I believe that the failure to implement such procedures may raise serious due-process concerns in certain cases . . . and may necessitate federal court intervention in certain cases.").

<sup>136</sup> 460 F.3d 1328 (11th Cir. 2006).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 1338, 1342.

<sup>139</sup> *Id.* at 1342.

<sup>140</sup> See *supra* note 119.

<sup>141</sup> S.B. 28, 2006 Leg. Reg. Sess. 2006 (Ala.); see also Alabama State Bar, 2006 Regular Session Senate Bills, <http://www.alabar.org/members/legislative-report/files/REPORT-SENATE-02172006.pdf>.

<sup>142</sup> S.B. 127, 2007 Leg. Reg. Sess. 2007 (Ala.); see also Posting of Charlotte A. Clark-Frieson to Project Hope to Abolish the Death Penalty, <http://www.phadp.org/blog/?p=149> (Mar. 22, 2007, 10:28 EST).

## 2. Mississippi

Like Alabama, Mississippi is a politically conservative state with a “law and order” criminal justice culture. In the 2006-2007 session of the Mississippi legislature, a state senator and former police officer introduced post-conviction DNA testing legislation, and the Policy Director of the Innocence Project testified at a Judiciary Committee hearing on the bill.<sup>143</sup> Unfortunately, the late timing caused the bill to languish in committee, and it expired at the end of the legislative session.<sup>144</sup> Providing a sliver of hope to state prisoners, the Supreme Court of Mississippi has indicated a favorable stance toward providing them with access to post-conviction DNA testing under the general state post-conviction statute.<sup>145</sup> However, reliance on court opinions gives judges unilateral discretion over prisoners’ rights to DNA testing; this option is certainly preferable to no recourse at all, but it is still inferior to the uniformity and enforceability of an explicit state law. With a political environment that has not explicitly opposed legislation, and the combination of a public education campaign with the promise of federal funds to cover the cost of administering the new law, it seems as though Mississippi could be convinced to enact legislation in the coming session.

One other relatively unique and notable factor that influences the perceived urgency of legislation is Mississippi’s status as one of the few states in which no wrongfully convicted prisoners have been exonerated by DNA evidence.<sup>146</sup> This is often favorably viewed as evidence that the Mississippi criminal justice system only imprisons the guilty, but this viewpoint is tempered by the experience of other states where exonerations have taken place. In those exonerations, judges or juries found the defendants guilty beyond a reasonable doubt, and appellate courts affirmed

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<sup>143</sup> S.B. 2901, 2005 Leg., Reg. Sess. 2005 (Miss.).

<sup>144</sup> *Id.*

<sup>145</sup> *Brewer v. Mississippi*, 819 So. 2d 1165, 1168 n.1 (Miss. 2000) (“Where there has been a sufficient showing, this Court has ordered that a convict have access to and chain-of-custody deliverance of physical evidence for DNA testing.”).

<sup>146</sup> Innocence Project, Exonerations by State, <http://www.innocenceproject.org/know/state.php?state=MS> (last visited Sept. 12, 2007). However, it is important to note that there have been wrongful convictions in Mississippi; those have revealed an intensely hostile environment toward the correction of justice. For example, consider the case of Mississippi resident Cedric Wills, who was charged with rape in June 1994. See Rebecca McQuillan, *Freedom After They Threw Away the Key*, *HERALD* (Glasgow, Scot.), Sept. 15, 2007, available at <http://www.theherald.co.uk/news/focus/display.var.1690983.0.0.php>. DNA testing excluded Mr. Wills as the perpetrator, so the prosecutors abandoned the rape charge in favor of a related murder charge. *Id.* The exculpatory DNA evidence was not allowed at trial; neither was ballistics evidence. *Id.* Mr. Wills was convicted of murder on the basis of eyewitness testimony proffered by the victim’s family. *Id.* He spent nine years wrongfully imprisoned until he was exonerated in March 2006. *Id.*

these convictions—in some cases citing “overwhelming evidence” in the record of the defendant’s guilt—but DNA evidence later vindicated the convicted defendants. Justifying inaction on state legislation with “overwhelming evidence” thus rings hollow. It would be a tremendous victory if Mississippi had only imprisoned the truly guilty, but that cannot be ascertained without a state post-conviction DNA testing statute. While the overriding hope is for exonerations not to occur and for the results of the criminal justice system to be consistently upheld, the existing laws regarding new evidence fail to contemplate the power of DNA testing that exists today, twenty-plus years after a crime was committed.<sup>147</sup> Rather than taxing the resources of the courts, attorneys, and law enforcement officers, the State should create a fair and standard procedure to deal with these claims. The environment in Mississippi, while not necessarily welcoming, is not overtly hostile, and could be ripe for activism in the coming legislative session.

### 3. Oklahoma

Oklahoma has received considerable media attention over its exonerations in recent years. Author John Grisham focused his latest book—the first nonfiction book he has written—on the case of Oklahoma resident Ron Williamson, and thus provided a boost for the popularity of enacting a post-conviction DNA testing statute.<sup>148</sup> In 1988, Mr. Williamson was sentenced to death for the rape and murder of a twenty-one-year-old Oklahoma woman.<sup>149</sup> Mr. Williamson was charged with the crime five years after its actual commission and convicted largely on the testimony of a man named Glenn Gore.<sup>150</sup> After Mr. Williamson served eleven years in prison and came within five days of execution, DNA testing exonerated him and identified Glenn Gore as the perpetrator of the crime.<sup>151</sup>

Oklahoma had eight DNA exonerations within eight years.<sup>152</sup> In the most recent exoneration, a wrongfully convicted man served twenty years in prison for a crime he did not commit; when physical evidence was finally subjected to DNA testing, the real perpetrator—a man who was already

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<sup>147</sup> See *supra* note 82.

<sup>148</sup> JOHN GRISHAM, *THE INNOCENT MAN: MURDER AND INJUSTICE IN A SMALL TOWN* (2006).

<sup>149</sup> Innocence Project, Case Profile: Ron Williamson, <http://www.innocenceproject.org/Content/295.php> (last visited Oct. 24, 2007).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> See Innocence Project, Exonerations by State, <http://www.innocenceproject.org/know/state.php?state=OK> (last visited Nov. 12, 2007).

incarcerated for a different rape—was identified.<sup>153</sup> Given this empirical evidence, there can be no doubt that the state of Oklahoma would benefit from a post-conviction DNA testing statute. Mr. Grisham's novel, which sought to raise the profile of wrongful convictions and the need for post-conviction DNA testing,<sup>154</sup> could be useful in rallying public support for legislation. The importance of state legislation is further highlighted by Oklahoma's active use of capital punishment: since 1990, eighty-six prisoners have been executed, including three prisoners in 2007.<sup>155</sup> Seven innocent prisoners have been freed from death row, and two additional prisoners received executive clemency.<sup>156</sup> These cases alone beg for a state post-conviction statute to serve as a further check on the proven fallibility of Oklahoma's criminal justice system.

#### 4. South Carolina

The political, legal, and criminal justice system in South Carolina is very similar to that of Oklahoma. The state has executed thirty-six prisoners since 1976, and currently hosts a death row population of sixty-seven prisoners.<sup>157</sup> In 2006, one prisoner was executed.<sup>158</sup> However, the political environment is slightly more hostile to the notion of a state post-conviction DNA testing statute. As is the case with its peers in Basket B, convincing South Carolina politicians to enact a post-conviction DNA law will require building public support, highlighting the one exoneration that has taken place in South Carolina as evidence of the need for this justice-ensuring security measure,<sup>159</sup> and using the federal funds provided in the Justice for All Act as further enticement to enact a statute.

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<sup>153</sup> Innocence Project, Case Profile: Calvin Lee Scott, <http://www.innocenceproject.org/Content/258.php> (last visited Oct. 24, 2007).

<sup>154</sup> See Interview by Editorial Staff, Amazon.com, with John Grisham, <http://www.amazon.com/Innocent-Man-Murder-Injustice-Small/dp/0385517238> (last visited Sept. 12, 2007).

<sup>155</sup> See Death Penalty Information Center, Execution Database (by State), <http://www.deathpenaltyinfo.org/executions.php> (last visited Dec. 10, 2007) (select "OK" from State drop down menu).

<sup>156</sup> See Death Penalty Information Center, State by State Information, <http://www.deathpenaltyinfo.org/state> (last visited Sept. 12, 2007) (select "OK" from the drop down menu).

<sup>157</sup> See Death Penalty Information Center, State by State Information, <http://www.deathpenaltyinfo.org/state> (last visited Nov. 12, 2007) (select "SC" from the drop down menu).

<sup>158</sup> *Id.*

<sup>159</sup> Innocence Project, Case Profile: Perry Mitchell, <http://www.innocenceproject.org/Content/220.php> (last visited Oct. 24, 2007).

## C. BASKET C: THE LONG-SHOTS—SOUTH DAKOTA AND WYOMING

Categorized as “long shots,” these states are united by their lack of any particular motivation to pass a post-conviction DNA testing statute. Neither has experienced a post-conviction exoneration to date.<sup>160</sup> Both are death penalty states, though South Dakota has not executed anyone in thirty years, and Wyoming has executed only one person in that time frame; together they have a combined six people on death row.<sup>161</sup>

In addition to a perceived lack of urgency, the structure of the state legislatures is an obstacle for progress. Part-time legislatures and paltry pay pose logistical hurdles to passing legislation. For example, the South Dakota legislature is comprised of seventy House members and thirty-five Senate members; they are each paid \$12,000 over their two years of service.<sup>162</sup> The South Dakota legislature convenes for a total of forty days in odd-numbered years and thirty-five days in even-numbered years.<sup>163</sup> These constraints make passing bills difficult because there is less time for committees to meet and draft bills, hold hearings, and schedule votes, and the dearth of consecutive work days may destroy momentum. Similarly, the Wyoming legislature is comprised of thirty state senators and sixty state representatives.<sup>164</sup> Each member is paid \$150 per legislative day, and the legislature works a maximum of sixty days over the two-year session: up to forty days in the odd-numbered year (a “general session”), and the remaining days in the even-numbered year (the budget session).<sup>165</sup>

The lack of any high-profile post-conviction exonerations does not remove the necessity of enacting legislation in both of these long-shot states. To help secure passage of a post-conviction DNA testing bill, advocates will likely have to provide constant and focused support to the

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<sup>160</sup> As mentioned earlier, this does not mean that miscarriages of justice have not occurred in these states. Fighting this incorrect public perception is one of the activities that must be undertaken as part of the effort to pass state post-conviction DNA legislation.

<sup>161</sup> See Death Penalty Information Center, *State by State Information*, <http://www.deathpenaltyinfo.org/state> (last visited Sept. 12, 2007) (select “Wyoming” and “South Dakota” from the drop down menu).

<sup>162</sup> See National Conference of State Legislatures, *Legislator Compensation 2007*, [http://www.ncsl.org/programs/legismgt/about/07\\_legislatorcomp.htm](http://www.ncsl.org/programs/legismgt/about/07_legislatorcomp.htm) (last visited Nov. 12, 2007).

<sup>163</sup> See National Conference of State Legislatures, *2006 Session Calendar*, Dec. 15, 2006, <http://www.ncsl.org/programs/legismgt/about/sess2006.htm>; see also National Conference of State Legislatures, *2007 Legislative Session Calendar*, Nov. 12, 2007, <http://www.ncsl.org/programs/legismgt/about/sess2007.htm>.

<sup>164</sup> See National Conference of State Legislatures, *Population and Legislative Size*, [http://www.ncsl.org/Programs/legismgt/about/Legis\\_Size\\_Chart2.htm](http://www.ncsl.org/Programs/legismgt/about/Legis_Size_Chart2.htm) (last visited Nov. 19, 2007).

<sup>165</sup> See National Conference of State Legislatures, *Legislator Compensation 2007*, Mar. 2007, [http://www.ncsl.org/programs/legismgt/about/07\\_legislatorcomp.htm](http://www.ncsl.org/programs/legismgt/about/07_legislatorcomp.htm).

members of the relevant committees during the brief window of time that the legislatures are in session. This would entail drafting and revising legislation, garnering the support of stakeholder groups within these states, calculating the financial benefit these states could receive through the Justice for All Act, and showing how significantly the benefit to the state and its citizens would exceed the alleged costs of a new law.<sup>166</sup>

#### V. THE FUTURE OF POST-CONVICTION DNA TESTING LAWS IN THE HOLDOUT STATES

Over the last seventeen years, there have been 214 exonerations in thirty-one states across the nation.<sup>167</sup> Each exoneration forces the public—including lawmakers, law enforcement officials, and voters—to question the presumptive infallibility of the criminal justice system. These questions have led to studies, a volume of academic literature, and a public campaign to provide convicted felons with post-conviction access to DNA testing. The success of these campaigns has been nearly uniform,<sup>168</sup> with forty-two

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<sup>166</sup> In the year prior to this publication, Vermont enacted a post-conviction DNA testing bill. Vermont would clearly have fallen into Basket C: like South Dakota and Wyoming, its legislature is small, comprised of thirty state senators and 150 state representatives. See National Conference of State Legislatures, Population and Legislative Size, [http://www.ncsl.org/Programs/legismgt/about/Legis\\_Size\\_Chart2.htm](http://www.ncsl.org/Programs/legismgt/about/Legis_Size_Chart2.htm) (last visited Nov. 19, 2007). Vermont legislators are elected to two-year terms, and the legislature is in session for sixteen weeks per calendar year (from January to April). Members are paid \$589 per week during session. See National Conference of State Legislatures, Legislator Compensation 2007, Mar. 2007, [http://www.ncsl.org/programs/legismgt/about/07\\_legislatorcomp.htm](http://www.ncsl.org/programs/legismgt/about/07_legislatorcomp.htm). However, while the same time constraints exist, Vermont's political dynamic—an active third-party system—sets it apart from both South Dakota and Wyoming. On January 23, 2007, the Vermont Senate and House Judiciary Committees convened hearings on a newly introduced post-conviction DNA testing bill. Stephen Saloom, the policy director from the Innocence Project, accompanied an exoneree from neighboring Massachusetts, Dennis Maher, in testifying before the Judiciary Committees. Thanks to the coordination of national and local advocates, the bill was enacted into law on May 30, 2007. See Vermont Legislative Bill Tracking System, Current Status of a Specific Bill or Resolution—2007-2008 Legislative Session, <http://www.leg.state.vt.us/database/status/summary.cfm?Bill=S%2E0006&Session=2008> (last visited Nov. 19, 2007).

<sup>167</sup> Innocence Project, <http://www.innocenceproject.org> (last visited Mar. 10, 2008) (noting the success in thirty-one states and the District of Columbia).

<sup>168</sup> "Success," as used here, references a big-picture, macro-policy-level success as reflected in the broad adoption of state and federal statutes providing post-conviction access to DNA testing. This author recognizes the various shortcomings of many of the state statutes, including many of the factors which lead courts to deny DNA testing to worthy defendants.



states and the federal government adopting statutes regarding post-conviction access to DNA testing.<sup>169</sup>

However, the work is not yet done. As long as innocent people continue to be victimized by wrongful convictions, the criminal justice system has a duty to continue improving. The public deserves this, and the principles of justice demand it. There is no question that our criminal justice system is flawed; as new information becomes available to correct these flaws, states must be willing to take responsibility for their mistakes and adopt measures to ensure that they do not persist.

Changing the status quo is not always an easy process, even when all parties are united in their support. Indeed, a common theme among each of the eight holdout states is the allocation of resources issue: whether and when to expend political capital to promote legislation. The costs of *not* enacting state laws are tremendous, and include the cost to continue litigating these cases in the state and federal courts,<sup>170</sup> the costs incurred by the state—and, therefore, all taxpayers—to continue housing innocent victims in overcrowded prisons,<sup>171</sup> the intangible cost of allowing true criminals to remain at large within communities, and the immeasurable cost of taking someone's livelihood—if not life—away from them by wrongfully imprisoning them.<sup>172</sup> No matter which viewpoint you adopt—that of the exoneree, law enforcement official, politician, victim, or taxpaying citizen—a post-conviction DNA testing statute in any of the holdout states would be invaluable.

Procedural barriers and political complications must be met with continuing vigilance. Creative solutions must be reached to pass these vital pieces of legislation. If moving a standalone bill through the legislature is not viable, the language could be offered as an amendment to another bill. Building public support can often be an extremely valuable way to shepherd legislation through an otherwise thorny process; in some states, it may be well worth the effort to engage in a public education campaign to build

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<sup>169</sup> See *supra* note 26. It should be noted that while the statutes generally follow the same basic framework, differences in details result in significantly disparate impacts, and the population eligible to receive post-conviction relief varies tremendously between states.

<sup>170</sup> This may prove to be another way to encourage the legislatures in these holdout states to effect change; the courts in some of these states have already weighed in, in their opinions, on the need for state post-conviction DNA testing statutes. Perhaps the courts' willingness to advocate for administrative efficiency via legislative enactment will resonate with the legislatures.

<sup>171</sup> See Dorothy Roberts, *The Social and Moral Costs of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271 (2004); see also The Prison Policy Initiative, <http://www.prisonpolicy.org/index.html> (last visited Sept. 12, 2007).

<sup>172</sup> See Fernanda Santos & Janet Roberts, *Putting a Price on a Wrongful Conviction*, N.Y. TIMES, Dec. 2, 2007, Week in Review, at 4.

momentum for legislation. To succeed—and enact legislation—there needs to be a winning combination of timing, political will, and public support. The failure of these eight holdout states to enact legislation is not necessarily indicative of a lack of desire; indeed, their inability to pass laws informs the way a post-conviction enactment campaign must proceed if it is to succeed in its efforts—and proceed they must, for the furtherance of justice and the safeguarding of our society.

