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DON'T BELIEVE EVERYTHING YOU READ: A REVIEW OF MODERN "POST-CONVICTION" DNA TESTING STATUTES

KATHY SWEDLOW*

I. INTRODUCTION

Since 1993, over one hundred individuals have been exonerated through the use of post-conviction DNA testing, and more individuals are being exonerated daily.[1] The vast majority of these exonerations have occurred in the absence of any sort of statutory or judicial guides as to when and under what circumstances such testing should occur.

Due in large part to these exonerations, over two dozen different jurisdictions around the United States have enacted statutes to allow convicted prisoners access to DNA testing.[2] Generally speaking, these statutes set forth circumstances under which testing may be requested and standards by which requests for testing should be evaluated and by which relief should be granted. There is no doubt that these statutes are revolutionary: they create a realistic hope for some of the "wrongfully convicted,"[3] erect brand new legal

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1. For a complete list of these individuals, and summaries of their cases, *see* http://www.innocenceproject.org.

2. ARIZ. REV. STAT. § 13-4240 (2002); ARK. CODE ANN. §§ 16-112-124 to -129 (Michie 2001); CAL. PENAL CODE § 1405 (West 2002); DEL. CODE ANN. tit. 11, § 4504 (2001); D.C. CODE ANN. §§ 4031-4035 (2001 & Supp. 2002); FLA. STAT. ch. 925.11(1)(a) (2001); IDAHO CODE § 19-2719 (Michie 2002) (procedures for capital cases only); IDAHO CODE § 19-4902 (Michie 2002); 725 ILL. COMP. STAT. § 5/116-3 (2002); IND. CODE §§ 35-38-7-1 to -19 (2001); LA. CODE CRIM. PROC. ANN. art. 926.1 (2002); ME. REV. STAT. ANN. tit. 15, § 2137 (West 2001); MD. CODE ANN., CRIM. PROC. § 8-201 (2001); MICH. COMP. LAWS § 770.16 (2002); MINN. STAT. § 590.01 (2002); MO. REV. STAT. § 547.035 (2002); NEB. REV. STAT. § 29-4117 to -4125 (2001); N.J. STAT. ANN. 2A:84A-32a (West 2002); N.M. STAT. ANN. § 31-1A-1 (Michie 2001); N.Y. CRIM. PROC. LAW § 440.30 (Consol. 2001); N.C. GEN. STAT. § 15A-269 (2002); OKLA. STAT. tit. 22, §§ 1371, 1371.1 (2002); OKLA. STAT. tit. 22, § 1372 (2001); S.B. 667, 2001 Leg., 71st Sess. (Or. 2001); TENN. CODE ANN. §§ 40-30-401 to -413 (2002); TEX. CODE ANN. CRIM. PROC. art. 64.03 (2002); UTAH CODE ANN. §§ 78-35a-301 to -304 (2001); VA. CODE ANN. § 19.2-327.1 (2001); WASH. REV. CODE § 10.73.170 (2002); WISC. STAT. § 974.07 (2002).

3. As used in this Article, "wrongfully convicted" refers to those individuals who are fac-

avenues for relief, and demand a new level of accuracy from the criminal justice system.

However, at the same time, many of these statutes have apparently been drafted and enacted without consideration of how they will interact with "traditional" post-conviction remedies, which are dominated by harsh procedural rules and which often function to deny petitioners substantive review. As a result of this contradiction, those who seek to litigate DNA-innocence cases with these "new" post-conviction statutes will need to become aware of the pitfalls of "traditional" post-conviction litigation, for two primary reasons: to ensure that these new statutes serve the purposes behind their enactment and to protect the defendant's rights as fully as possible, so that traditional avenues of relief are not forever foreclosed.

This Article is organized around the basic parameters of, and sequential steps associated with, the various DNA testing statutes currently in existence.[4] Beginning with the preliminary issues of who may seek relief and when a petition for testing may be filed, this Article addresses major trends and themes associated with the new testing statutes, and discusses some of the more obvious ways in which the testing statutes may clash with traditional post-conviction remedies. In addition, the Article explores ways in which some of the apparently more confining language of these testing statutes may be expanded.[5]

II. PREREQUISITES TO FILING[6]

A. Who May File

All of the new statutes delineate who may file a petition for testing[7] and, while some statutes enumerate the specific crimes or class(es) of felonies for

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tually innocent of the crimes for which they have been convicted.

4. Due to the number of testing statutes and the differences between them, this Article does not attempt to address every aspect of every statute; instead, the discussion within this Article is restricted to those instances where the testing statutes will potentially clash with traditional post-conviction remedies. Additionally, not every testing statute is given in-depth treatment. For example, the Oklahoma statute establishes a DNA Forensic Testing Program within the Oklahoma Indigent Defense System and requires that its staff prioritize testing claims. OKLA. STAT. tit. 22, §§ 1371, 1371.1 (2002). However, the Oklahoma statute does not set forth standards for testing in the same way as other testing statutes, and so the Oklahoma statute is only discussed herein to the extent it is similar to other statutes.

5. Readers are also encouraged to review other practical sources, including United States Department of Justice, Post-Conviction DNA Testing: Recommendations for Handling Requests (1999), *available at* http://www.ncjrs.org/txtfiles1/nij/1776.26.txt.

6. Only one statute does not contemplate filing a request for testing in court. *See* WASH. REV. CODE § 10.73.170(1) (2002) (request for testing to be submitted to the county prosecutor).

7. ARIZ. REV. STAT. § 13-4240(A) (2002) ("a person who was convicted of and sentenced for a felony offense . . ."); ARK. CODE ANN. §§ 16-112-124 & 125 (Michie 2001) ("a person convicted of a crime . . ."); CAL. PENAL CODE § 1405(a) (West 2002) ("a person who was convicted of a felony . . ."); DEL. CODE ANN. tit. 11, § 4504(a) (2001) ("a person con-

which a petitioner must be convicted in order to file,[8] generally speaking, petitioners seeking DNA testing will have been convicted[9] of some sort of major felony.[10]

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victed of a crime . . ."); D.C. CODE ANN. § 4033 (2001 & Supp. 2002) (referring to "conviction" or "adjudication" of a "crime of violence"); FLA. STAT. ch. 925.11(1)(a) (2001) ("a person who was tried and found guilty of committing a crime . . ."); IDAHO CODE § 19-2719 (Michie 2002) (referring to capital convictions only); IDAHO CODE § 19-4901 (Michie 2002) (referring to "any person who has been convicted of, or sentenced for, a crime . . ."); 725 ILL. COMP. STAT. § 5/116-3 (2002) (referring to a "defendant"); IND. CODE § 35-38-7-1 (2001) (petitions for relief may only be filed by defendants convicted of murder, and Class A, B, and C felonies); LA. CODE CRIM. PROC. ANN. art. 926.1(A)(1) (2002) ("a person convicted of a felony . . ."); ME. REV. STAT. ANN. tit. 15, § 2137 (West 2001) ("[a] person convicted of a crime under the laws of this State that carries the potential punishment of imprisonment of at least 20 years . . ."); MD. CODE ANN., CRIM. PROC. § 8-201(b) (2001) ("a person who is convicted of a violation of Article 27 § 387, § 407, § 408, § 409, § 410, § 411, § 462, § 463, § 464, or § 46A of the Code ... ."); MICH. COMP. LAWS § 770.16(1) (2002) ("a defendant convicted of a felony . . ."); MINN. STAT. § 590.01 (2002) ("a person convicted of a crime . . ."); MO. REV. STAT. § 547.035(1) (2002) ("A person in the custody of the department of corrections . . ."); NEB. REV. STAT. § 29-4120(1) (2001) ("a person in custody pursuant to the judgment of a court . . .");N.J. STAT. ANN. 2A:84A-32a(a) (West 2002) (referring to "[a]ny person who was convicted of a crime" . . .); N.M. STAT. ANN. § 31-1A-1(A) (Michie 2001) ("a person convicted of a criminal offense . . ."); N.Y. CRIM. PROC. LAW § 440.30(1) (Consol. 2001) (referring to "a defendant"); N.C. GEN. STAT. § 15A-269(a) (2002) (referring to "a defendant"); OKLA. STAT. tit. 22, § 1371.2 (2002) ("[a]n indigent person convicted of . . . any felony offense . . ."); S.B. 667 § (1)(a), 2001 Leg., 71st Sess. (Or. 2001) (referring to "conviction for aggravated murder" or "felony as defined in the rules of the Oregon Criminal Justice Commission"); TENN. CODE ANN. § 40-30-403 (2002) ("a person convicted of and sentenced for the commission of first degree murder, second degree murder, aggravated rape, rape, aggravated sexual battery or rape of a child, the attempted commission of any of these offenses, any lesser included offense of these offenses, or, at the direction of the trial judge, any other offense . . ."); TEX. CODE ANN. CRIM. PROC. art. 64.03 (2002) (referring to "convicted person"); UTAH CODE ANN. § 78-35a-301(2) (2001) ("a person convicted of a felony offense . . ."); VA. CODE ANN. § 19.2-327.1(A) (2001) ("any person convicted of a felony . . ."); WASH. REV. CODE § 10.73.170(1) (2002) ("a person in this state who has been convicted of a felony"); WISC. STAT. § 974.07(2) (2002) (referring to conviction of a "crime," adjudication of delinquency, or a person found not guilty by reason of mental disease or defect).

8. D.C. CODE ANN. § 4033(a) (2001 & Supp. 2002) (referring to person convicted of "crime of violence," as defined in D.C. CODE ANN. § 23-1331(4)); IDAHO CODE § 19-2719 (Michie 2002) (referring to capital convictions only); IND. CODE § 35-38-7-1 (2001) (stating that petitions for relief may only be filed by defendants convicted of murder, and Class A, B, and C felonies); MD. CODE ANN., CRIM. PROC. § 8-201(b) (2001) ("a person who is convicted of a violation of Article 27 § 387, § 407, § 408, § 409, § 410, § 411, § 462, § 463, § 464, or § 46A of the Code . . ."); S.B. 667 § (1)(a), 2001 Leg., 71st Sess. (Or. 2001) (referring to "conviction for aggravated murder" or "felony as defined in the rules of the Oregon Criminal Justice Commission"); TENN. CODE ANN. § 40-30-403 (2002) ("a person convicted of and sentenced for the commission of first degree murder, second degree murder, aggravated rape, rape, aggravated sexual battery or rape of a child, the attempted commission of any of these offenses, any lesser included offense of these offenses, or, at the direction of the trial judge, any other offense . . .").

9. Only two statutes make a distinction between convictions and juvenile adjudications. *See* D.C. CODE ANN. § 4033(a)(1) (2001 & Supp. 2002); *and* WISC. STAT. § 974.07(2) (2002).

10. Some of the statutes cast the issue of "who may file" in terms of a substantive showing for testing. *See e.g.*, MO. REV. STAT. § 547.035 (2002) (explaining that a "person in the custody of the department of corrections claiming that forensic DNA testing will demonstrate the person's innocence of the crime . . . may file a . . . motion . . . seeking such testing . . .").

Nonetheless, four distinct categories of individuals may be excluded from testing under certain situations, despite a felony conviction. First, while some of the new statutes do not specifically bar petitioners who have pleaded guilty from requesting testing,[11] the vast majority do exclude such petitioners[12]—despite extant DNA exonerations after guilty pleas and despite the Supreme Court's express recognition that innocent individuals can and do plead guilty[13]—and only a handful of these statutes specifically include

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However, for the purposes of this Article, the question of "who may file" is treated separately from the substantive requirements for testing and relief.

11. D.C. CODE ANN. §§ 4031-4035 (2001 & Supp. 2002); IND. CODE §§ 35-38-7-1 to -19 (2001); NEB. REV. STAT. § 29-4117-4125 (2001); N.Y. CRIM. PROC. LAW § 440.30 (Consol. 2001); N.C. GEN. STAT. § 15A-269 (2002); TENN. CODE ANN. §§ 40-30-401 to -409 (2002); VA. CODE ANN. § 19.2-327.1 (2001); WASH. REV. CODE § 10.73.170 (2002). *See also* OKLA. STAT. tit. 22, §§ 1371-1372 (2001) (establishing DNA Forensic Testing Program within the Oklahoma Indigent Defense System, but no discrete standards given for prioritization of claims).

12. ARIZ. REV. STAT. § 13-4240(C)(1)(a) (2002) (referring to "verdict"); ARK. CODE ANN. §§ 16-112-125(b)(1) (Michie 2001) (requiring petitioner to present prima facie proof that, *inter alia*, "identity was an issue in the trial"); DEL. CODE ANN. tit. 11, § 4504(a)(3) (2001) (requiring petitioner to present prima facie proof that, *inter alia*, "identity was an issue in the trial"); FLA. STAT. ANN. § 925.11(1)(a) (2001) (referring to "a person who has been tried and found guilty." *See also* Amendment to Florida Rules of Criminal Procedure Creating Rule 3.853, 2001 WL 1276878 at *4-5 (Fla. Oct. 18, 2001) (Anstead, J., concurring in part and dissenting in part) (discussing statute's bar on petitioners who pleaded guilty); IDAHO CODE § 19-4902(c)(1) (Michie 2002) (requiring petitioner to present prima facie proof that, *inter alia*, "identity was an issue in the trial"); 725 ILL. COMP. STAT. § 5/116-3(b)(1) (2002) (requiring petitioner to present prima facie proof that, *inter alia*, "identity was the issue in the trial"); LA. CODE CRIM. PROC. ANN. art. 926.1(B)(1) (2002) (referring to evidence "introduced at trial"); ME. REV. STAT. ANN. tit. 15, § 2138(4)(E) (West 2001) (requiring petitioner to present prima facie proof that, *inter alia*, "identity of the person . . . was at issue during the person's trial"); MD. CODE ANN., CRIM. PROC. § 8-201(c)(4) (2001) (requiring petitioner to present prima facie proof that, *inter alia*, "identity was an issue in the trial"); MICH. COMP. LAWS ANN. § 770.16(3)(b)(iii) (2002) (requiring petitioner to present prima facie proof that, *inter alia*, "identity of the defendant as the perpetrator of the crime was at issue during his or her trial"); MINN. STAT. § 590.01(1a)(2)(b)(1) (2002) (requiring petitioner to present prima facie proof that, *inter alia*, "identity was an issue in the trial"); MO. REV. STAT. § 547.035(4) (2002) (motion for testing must allege, *inter alia*, that "identity was an issue at trial); N.J. STAT. ANN. 2A:84A-32a(a)(1)(a) (West 2002) (petitioner to explain, *inter alia*, "why the identity of the defendant was a significant issue in the case"); N.M. STAT. ANN. § 31-1A-1(C)(3) (Michie 2001) (requiring petitioner to present prima facie proof that, *inter alia*, "identity was an issue in the initial trial"); S.B. 667 § (1)(b)(A)(i), 2001 Leg., 71st Sess. (Or. 2001) (non-mentally retarded defendant must demonstrate, *inter alia*, that "identity . . . was at issue in the trial"); UTAH CODE ANN. § 78-35a-301(2)(c) (2001) (petitioner must assert, *inter alia*, a "theory of defense, not inconsistent with theories previously asserted at trial").

13. North Carolina v. Alford, 400 U.S. 25 (1970) (defendant who protests his innocence may voluntarily plead guilty, where defendant is represented by competent counsel and record evinces his guilt). *See also* Richard A. Leo & Richard J. Ofshe, *Criminal Law: The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429 (1998) (quantitative study of false confessions) *and* GILSI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS, CONFESSIONS AND TESTIMONY (1996) (discussing psychological testing techniques to reveal false confessions and pleas).

petitioners who are no longer in custody[17] or those who seek to challenge one conviction while serving a sentence for a second conviction, regardless of whether the second conviction is related or unrelated.[18] While some form of "custody" is normally a jurisdictional prerequisite in traditional post-conviction litigation,[19] a good argument can be made that these testing statutes should not be similarly restricted, insofar as many of these statutes were enacted to correct systemic problems within the criminal justice system. In any event, in those jurisdictions where the testing statute is silent concerning custody, litigators may wish to be aware of their individual state's post-conviction requirements regarding custody.

B. Timing of Filing

While traditional post-conviction practice generally contemplates that a petitioner will pursue relief only after the conclusion of direct appeal,[20] many of the new statutes allow a petitioner to seek relief at any time after conviction[21] or sentencing,[22] and only a minority of statutes anticipate that a petitioner will seek relief at the conclusion of direct appeal.[23]

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or grant a new trial or correct the sentence or make other disposition as appropriate"); NEB. REV. STAT. § 29-4120 (2001) (court to make determination for testing based upon review of "exculpatory evidence relevant to the claim that the person was wrongfully convicted or sentenced"); S.B. 667, 2001 Leg., 71st Sess. (Or. 2001) ("There is a reasonable probability that the testing will produce exculpatory evidence that would establish the innocence of the person of . . . conduct, if the exoneration of the person of the conduct would result in a mandatory reduction in the person's sentence").

17. *See e.g.*, S.B. 667 § 1(b), 2001 Leg., 71st Sess. (Or. 2001) (petition may be filed by convicted person no longer in custody). For a more complete discussion of the "custody" requirement and its evolution, *see* JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 359-401 (4th ed. 2001).

18. Maine appears to be the only jurisdiction which has directly addressed this issue in its testing statute. ME. REV. STAT. ANN. tit. 15, § 2137 (West 2001) (petitioner must be in actual execution of sentence for challenged conviction, or be facing execution of sentence in the future).

19. LIEBMAN & HERTZ, *supra* note 17.

20. Exceptions to this practice may be found in those jurisdictions which follow some sort of "unitary review" scheme, whereby a defendant pursues his direct appeal and his state post-conviction remedies at the same time. *See, e.g.*, Calderon v. Ashmus, 523 U.S. 740, 743 n.1 (1998) ("It is undisputed here that California is a unitary review State, which is a State that allows prisoners to raise collateral challenges in the course of direct review of the judgment, such that all claims may be raised in a single state appeal.") (statutory citations omitted).

21. D.C. CODE ANN. §§ 4031-4035 (2001 & Supp. 2002); LA. CODE CRIM. PROC. ANN. art. 926.1 (2002); MD. CODE ANN., CRIM. PROC. § 8-201 (2001); MINN. STAT. § 590.01 (2002); MO. REV. STAT. § 547.035 (2002); NEB. REV. STAT. § 29-4117 to -4125 (2001); N.C. GEN. STAT. § 15A-269 (2002); TEX. CODE ANN. CRIM. PROC. art. 64.03 (2002); UTAH CODE ANN. §§ 78-35a-301 to -304 (2001); VA. CODE ANN. § 19.2-327.1 (2001); WISC. STAT. § 974.07 (2002).

22. ARIZ. REV. STAT. § 13-4240 (2002); CAL. PENAL CODE § 1405 (West 2002); FLA. STAT. ch. 925.11 (2001); IDAHO CODE § 19-4901 (Michie 2002); 725 ILL. COMP. STAT. § 5/116-3 (2002); IND. CODE §§ 35-38-7-1 to -19 (2001); LA. CODE CRIM. PROC. ANN. art.

them.[14] Only one state, Missouri, appears to both include and exclude petitioners who have pleaded guilty.[15]

Second, many statutes refer only to individuals who seek complete exoneration, leaving aside those petitioners who may not assert their actual innocence but who instead seek to reduce or mitigate their sentencing exposure.[16] Third and fourth, few of the current statutes address the situation of

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14. CAL. PENAL CODE § 1405(c)(1)(A) (West 2002) (requiring petitioner to demonstrate why "identity . . . was, or should have been, a significant issue in the case"). *See also id.* § 1405(e) (stating that petition for testing shall be "heard by the judge who conducted the trial, or accepted the convicted person's plea of guilty or nolo contendere"); D.C. CODE ANN. § 4033(b)(4) (2001 & Supp. 2002) (requiring petitioner to explain, *inter alia*, "how the DNA evidence would help establish that the applicant is actually innocent despite having been convicted at trial or having pled guilty"); S.B. 667 § (1)(b)(A)(ii), 2001 Leg., 71st Sess. (Or. 2001) (petition for testing by petitioner who pleaded guilty will only be considered when petitioner was documented as mentally retarded at the time the crime was committed); TEX. CODE ANN. CRIM. PROC. art. 64.03(b) (2002) ("[a] convicted person who pleaded guilty or nolo contendere in the case may submit a motion under this chapter . . .").

15. *Compare* MO. REV. STAT. § 547.035(2)(4) (2002) (requiring petitioner to present prima facie proof that, *inter alia*, "identity was an issue in the trial"), *with id.* § 547.035(5) (after court issues order to show cause why motion for testing should not be granted, which necessarily requires showing that "identity was an issue in the trial," court reporter may be directed to prepare the transcript of the movant's guilty plea).

16. *Compare* D.C. CODE ANN. §§ 4031-4035 (2001 & Supp. 2002) (no reference to mitigation or reduction of sentence); DEL. CODE ANN. tit. 11, § 4504 (2001) (also not referencing mitigation or reduction of sentence); IDAHO CODE §§ 19-2719, 19-4901 (Michie 2002) (also lacking above references); 725 ILL. COMP. STAT. § 5/116-3 (2002) (also lacking references); LA. CODE CRIM. PROC. art. 926.1 (2002) (no reference to mitigation or reduction of sentence); ME. REV. STAT. ANN. tit. 15, § 2137 (West 2001) (no reference); MICH. COMP. LAWS § 770.16 (2002) (no reference); MO. REV. STAT. § 547.035 (2002) (same references lacking); N.J. STAT. ANN. 2A:84A-32a (West 2002) (also no reference); N.M. STAT. ANN. § 31-1A-1 (Michie 2001) (no references); N.Y. CRIM. PROC. LAW § 440.30 (Consol. 2001) (also lacking reference); N.C. GEN. STAT. § 15A-269 (2002) (lacking same reference); OKLA. STAT. tit. 22, §§ 1371.1, 1371.2 (2002) (similar references missing); TENN. CODE ANN. §§ 40-30-401 to -409 (2002) (also lacking references); TEX. CODE ANN. CRIM. PROC. art. 64.03 (2002) (same references lacking); UTAH CODE ANN. §§ 78-35a-301 to -304 (2001) (no reference to mitigation or reduction of sentence); VA. CODE ANN. § 19.2-327.1 (2001) (also lacking references); WASH. REV. CODE § 10.73.170 (2002) (also no reference); *and* WISC. STAT. § 974.07 (2002) (no references to mitigation or reduction of sentence); *with* ARIZ. REV. STAT. § 13-4240(C)(1)(a) (2002) (referring to "reasonable probability that . . . the petitioner's verdict or sentence would have been more favorable"); ARK. CODE ANN. §§ 16-112-124(a) (Michie 2001) (proceeding to secure relief may be commenced to "discharge the petitioner or resentence the petitioner or grant a new trial or correct the sentence"); CAL. PENAL CODE § 1405(c)(1)(B) (West 2002) (referring to explanation of how the "requested DNA testing would raise a reasonable probability that the convicted person's verdict or sentence would be more favorable"); D.C. CODE ANN. § 4033(b)(1) (2001 & Supp. 2002) (referring to "actual innocence"); FLA. STAT. ch. 925.11(2)(a)(3) (2001) (referring to "statement that the sentenced defendant is innocent and how the DNA testing requested by the petition will exonerate the defendant of the crime for which the defendant was sentenced or will mitigate the sentence received by the defendant for that crime"); IND. CODE § 35-38-7-8(4)(B) (2001) (referring to a "reasonable probability . . . that the petitioner would not have received as severe a sentence for the offense"); MD. CODE ANN., CRIM. PROC. § 8-201(a)(3)(iii) (2001) (referring to "mitigating evidence relevant to a claim of a convicted person of wrongful conviction or sentencing"); MINN. STAT. § 590.01 (2002) (proceeding to secure relief may be commenced to "vacate and set aside the judgment and to discharge the petitioner or to resentence the petitioner

At first blush, this might not seem to be problematic: many of the current exonerations occurred years after the prisoner had exhausted his traditional legal remedies, and so it may seem inconsequential whether the request for testing be filed after conviction, sentencing, or direct appeal. However, in a case with a recent conviction, disastrous problems can arise if the petitioner's traditional rights are not protected during the pursuit of DNA testing.

For example, under the Tennessee testing statute, a petition for testing may be filed any time after sentencing.[24] Tennessee law also mandates that notices of appeal be generally filed within thirty days of the date of entry of judgment from which appeal is taken,[25] and that state post-conviction petitions be filed within one year of the date the defendant's conviction becomes final, or one year from the date in which to seek direct appeal expires.[26] At the same time, it is clear that the Tennessee Rules of Criminal Procedure contemplate only three types of post-trial motions in criminal cases: motions in arrest of judgment, motions for acquittal, and motions for a new trial.[27]

Given these constraints, it is possible to imagine a scenario where a motion for DNA testing is filed directly after sentencing and, during the course of litigation, the time limits for filing a direct appeal and/or state post-conviction petition expire. If the motion for testing is ultimately denied—because, for example, the evidence was destroyed—it is unclear whether that motion will toll the time for filing a notice of appeal under the court rules, especially given the fact that a motion for testing is not contemplated by the Tennessee Rules of Criminal Procedure as a post-trial motion.

These issues become even more complex when the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") is inserted into the equation. Under the AEDPA, petitioners are required to file their federal habeas corpus

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926.1 (2002); ME. REV. STAT. ANN. tit. 15, § 2137 (West 2001); MICH. COMP. LAWS § 770.16 (2002); NEB. REV. STAT. § 29-4117 to -4125 (2001); N.J. STAT. ANN. 2A:84A-32a (West 2002); OKLA. STAT. tit. 22, §§ 1371, 1371.1, 1371.2 (2002); S.B. 667, 2001 Leg., 71st Sess. (Or. 2001); TENN. CODE ANN. §§ 40-30-401 to - 409 (2002); WASH. REV. CODE § 10.73.170 (2002). *See also* IDAHO CODE § 19-4901 (Michie 2002) (capital petitioner must file legal or factual challenge within forty-two days of date of sentencing).

23. ARK. CODE ANN. §§ 16-112-124 to -129 (Michie 2001); DEL. CODE ANN. § 4504 (2001); IDAHO CODE § 19-4902 (Michie 2002); MINN. STAT. § 590.01 (2002); N.M. STAT. ANN. § 31-1A-1 (Michie 2001); N.Y. CRIM. PROC. LAW § 440.30 (Consol. 2001).

24. TENN. CODE ANN. § 40-30-403 (2002).

25. TENN. R. APP. PROC., Rule 4(a) (2001). However, Rule 4(a) makes clear that notices of appeal are "not jurisdictional and the filing of such document may be waived in the interest of justice." *Id. See also* DAVID LOUIS RAYBIN, TENNESSEE CRIMINAL PRACTICE AND PROCEDURE § 33.105 (1985 & 2002 Supp.).

26. TENN. CODE ANN. § 40-30-202(a) (2002). The Tennessee Code clearly states that the statute of limitations for filing a traditional post-conviction petition "shall not be tolled for any reason." *Id. But see* Williams v. State, 44 S.W.3d 464 (Tenn. 2001) (recognizing the "unambiguous" language of § 40-30-202(a), but remanding for evidentiary hearing on issue of whether post-conviction petition was untimely filed due to "possible misrepresentation of [prior] counsel" concerning mandatory appellate process).

27. RAYBIN, *supra* note 25, § 33.1 (discussing three types of motions).

petitions within one year of the date their convictions become final.[28] However, while this one-year time limit may be statutorily tolled during the pendency of any "properly filed application for State post-conviction or other collateral review,"[29] no court has yet spoken to the issue of how these new DNA testing statutes will be considered under the AEDPA. While a strong argument can be made that these new statutes are "applications . . . for other collateral review" within the meaning of section 2244(d)(2)—and that requests for testing filed in state court would statutorily toll AEDPA's one-year statute of limitations—that argument is predicated upon the assertion of a federal constitutional error within the state-filed request for DNA testing.[30] In other words, absent assertion of federal constitutional error within the motion for testing, the AEDPA time limits will not be statutorily tolled, and the petitioner will lose review of his claims in federal court.

Maine is the only jurisdiction with a statute drafted to directly address some of these problems. Under the Maine statute, a petitioner may request testing at any time after sentencing,[31] which means that the petitioner may have a direct appeal or state post-conviction petition pending at the time he requests testing—or, because of jurisdictional time bars associated with these legal vehicles, he may be required to file a direct appeal or state post-conviction, in order to preserve his rights. At the same time, Maine's testing statute mandates that the motion for testing will be "automatically stayed" pending resolution of a direct appeal or state post-conviction petition, unless a court directs otherwise.[32] While this presumption favoring exhaustion of traditional remedies over testing is less than ideal for the factually innocent prisoner—because it forces him to remain incarcerated for a longer period of time—the "automatic stay" provisions will at least preserve that prisoner's rights to traditional litigation.

C. Time Limits on Filing

Some of the new statutes mimic traditional post-conviction statutes insofar as they place time limits on the filing of applications for testing, i.e., they impose time limits based upon either the date of conviction or the date

28. 28 U.S.C. § 2244(d)(1)(A) (2002).

29. *Id.* § 2244(d)(2).

30. Austin v. Mitchell, 200 F.3d 391 (6th Cir. 1999). *See also* Elliot v. Dewitt, 10 Fed. Appx. 311 (6th Cir. 2001).

31. The Maine statute allows two classes of sentenced prisoners to request DNA testing: those who have been convicted and are currently serving the sentence for that conviction, and those who are serving a sentence for a conviction but who seek to challenge a separate conviction, the sentence for which is to be served in the future. *See* ME. REV. STAT. ANN. tit. 15, § 2137 (West 2001).

32. ME. REV. STAT. ANN. tit. 15, § 2138(12) ("Exhaustion") (West 2001). If the petitioner has a direct appeal pending, this request must be presented to the Supreme Judicial Court. *Id.* If the petitioner has a state post-conviction petition pending, this request must be presented to the judge to whom the post-conviction petition is assigned. *Id.*

the petitioner's conviction becomes final.[33] While a larger number of statutes impose no limits at all—allowing a petitioner to pursue relief under the statute at any time, assuming he is otherwise eligible[34]—a handful of these new statutes contain sunset provisions, which provide that all applications for testing must be filed by a date certain.[35] Finally, some jurisdictions ap-

33. DEL. CODE ANN. tit. 11, § 4504(a) (2001) (petition "may not be filed more than 3 years after the judgment of conviction is final"); FLA. STAT. ch. 925.11(1)(b)1 (2001). Under the Florida statute, the petition testing may be filed:

> [w]ithin 2 years following the date that the judgment and sentence in the case becomes final if no direct appeal is taken, within 2 years following the date that the conviction is affirmed on direct appeal if an appeal is taken, within 2 years following the date that collateral counsel is appointed or retained subsequent to the conviction being affirmed on direct appeal in a capital case . . . .

Id.

IDAHO CODE § 19-4902(a) (Michie 2002) ("An application may be filed at any time within one (1) year from the expiration of the time for appeal or from the determination of an appeal or from the determination of a proceeding following an appeal, whichever is later . . ."); LA. CODE CRIM. PROC. ANN. art. 926.1(A)(1) & (2) (2002) (person convicted of a non-capital felony must file petition by August 31, 2005, but capital petitioners may file "at any time"); UTAH CODE ANN. § 78-35a-301 to -304 (2001).

34. ARIZ. REV. STAT. § 13-4240(A) (2002) (no discussion of time limits); ARK. CODE ANN. §§ 16-112-125 (Michie 2001) (same); CAL. PENAL CODE § 1405 (West 2002) (same); D.C. CODE ANN. §§ 4031-4035 (2001 & Supp. 2002) (same); 725 ILL. COMP. STAT. § 5/116-3 (2002) (same); IND. CODE §§ 35-38-7-1 to -19 (2001) (same); LA. CODE CRIM. PROC. ANN. art. 926.1(A)(1) & (2) (2002) (person convicted of a non-capital felony must file petition by August 31, 2005, but capital petitioners may file "at any time"); MD. CODE ANN., CRIM. PROC. § 8-201 (2001) (no discussion of time limits); MINN. STAT. § 590.01(1) (2002) (same); MO. REV. STAT. § 547.035 (2002) (same); NEB. REV. STAT. § 29-4117 to -4125 (2001) (same); N.J. STAT. ANN. 2A:84A-32a (West 2002) (same); N.Y. CRIM. PROC. LAW § 440.30 (Consol. 2001) (same); N.C. GEN. STAT. § 15A-269 (2002) (same); TENN. CODE ANN. §§ 40-30-401 to -409 (2002) (same); TEX. CODE ANN. CRIM. PROC. art. 64.03 (2002) (same); VA. CODE ANN. § 19.2-327.1 (2001) (same). *See also* People v. Rokita, 736 N.E.2d 205 (Ill. App. Ct. 2000). In *Rokita*, the court discussed Illinois testing statute and explained,

> [t]here is no language in section 116-3 indicating any legislative intent to impose a time limit for filing a motion for forensic testing. Had the legislature wished to impose a time limit on the filing of a section 116-3 motion, it could easily have done so. It is not the prerogative of this court to read into the statute limitations that the legislature chose not to include.

Id. at 213.

See also WISC. STAT. § 974.07 (2002) (no discussion of time limits).

35. FLA. STAT. ch. § 925.11(1)(b)(1) (2001) (petition for testing must be filed by October 1, 2003); IDAHO CODE § 19-2719 (Michie 2002) (petitions from capital prisoners to be filed within forty-two days of date of sentencing or by July 1, 2002, whichever is later); LA. CODE CRIM. PROC. ANN. art. 926.1(A)(1) (2002) (petitions in non-capital cases must be filed by August 31, 2005); MICH. COMP. LAWS § 770.16(1) (2002) (petition for testing "shall be filed not later than January 1, 2006"); N.M. STAT. ANN. § 31-1A-1(H) (Michie 2001) (petition "shall" be filed "prior to July 1, 2002" and no applications shall be accepted after that date); OKLA. STAT. tit. 22, § 1371 (2002) ("Oklahoma Indigent Defense System DNA Forensic Testing Program to continue until July 1, 2005"); S.B. 667, 2001 Leg., 71st Sess. (Or. 2001) (motion for testing must be filed "no later than 48 months after the effective date" of the statute); WASH. REV. CODE § 10.73.170(1) (2002) (requests to be filed "[o]n or before December 31, 2004;" after January 1, 2005, requests for testing must be raised at trial or on direct appeal).

pear to have adopted a hybrid approach, requiring evaluation of the particular statute's use after a particular period of time has elapsed.[36]

D. Appointment of Counsel

Most statutes expressly provide for the appointment of counsel,[37] but many do not have similar within-statute provisions.[38] However, regardless of

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These sunset provisions are patently ridiculous, and pose a very real barrier for relief. Consider the comments of the Cardozo Innocence Project regarding its own experiences in investigating cases, presented in response to Florida's proposed two-year sunset provision, which was eventually enacted: "In general, unless the inmate is fortunate enough to have a post-conviction attorney (and virtually none of the non-capital clients do), at least a year and a half is spent gathering enough information so we can first *begin* a meaningful evaluation process." Comments of the Innocence Project, filed August 15, 2001, at 4 (emphasis in original), *available at* http://www.flcourts.org/pubinfo/summaries/briefs/01/01-363/ Filed_ (08-15-2001)_ InnocenceProject.pdf.

36. ME. REV. STAT. ANN. tit. 15, § 2138(15) (West 2001). The Maine statute does not provide time limits, but

> [b]eginning January 2003 and annually thereafter, the Department of Public Safety shall report on post-conviction DNA analysis to the joint standing committee of the Legislature having jurisdiction over criminal matters. The report must include the number of postjudgment of conviction analyses completed, costs of the analyses and the results. The report also may include recommendations to improve the postjudgment of conviction analysis process.

Id.

See also S.B. 667 §5, 2001 Leg., 71st Sess. (Or. 2001) (setting forth six criteria by which the statute is to be periodically evaluated).

37. ARIZ. REV. STAT. § 13-4240(E) (2002) (counsel may be appointed for indigent prisoner "at any time" during proceedings); ARK. CODE ANN. § 16-112-125 (Michie 2001) (indigent prisoner "who desires to pursue the remedy" within the statute may request appointment of counsel); CAL. PENAL CODE § 1405(b)(3)(a) (West 2002) (counsel shall be appointed for indigent prisoner whose initial pleading meets certain minimal standards); D.C. CODE ANN. § 4033(e)(2) (2001 & Supp. 2002) (court may appoint counsel for indigent petitioner); FLA. STAT. ch. 925.11(2)(6)(e) (2001) (counsel may be appointed to assist indigent defendant if petition proceedings to hearing and if court finds such assistance necessary); IND. CODE § 35-38-7-11 (2001) (counsel may be appointed to an indigent defendant "at any time" during the proceedings); ME. REV. STAT. ANN. tit. 15, § 2138(3) (West 2001) (counsel may be appointed "at any time" for indigent defendant); MICH. COMP. LAWS § 770.16(7) (2002) (counsel shall be appointed to file motion for new trial only after testing exonerates petitioner); MO. REV. STAT. § 547.035(6) (2002) (counsel shall be appointed if hearing is convened on petition); NEB. REV. STAT. §§ 29-4117 to -4122 (2001) (court shall appoint counsel upon demonstration that DNA testing "may be relevant" to claim of wrongful conviction); N.J. STAT. ANN. 2A:84A-32a(b)(1) (West 2002) (court shall appoint counsel for indigent prisoner who requests testing); N.C. GEN. STAT. § 15A-269(c) (2002) (court shall appoint counsel to indigent petitioner); OKLA. STAT. tit. 22, §§ 1371-1372 (2001) (authorizing Oklahoma Indigent Defense System to investigate claims of wrongful conviction); S.B. 667 § 4, 2001 Leg., 71st Sess. (Or. 2001) (creating mechanisms for the appointment of counsel); TENN. CODE ANN. § 40-30-407 (2002) ("Appointment of counsel for indigents"); UTAH CODE ANN. § 78-35a-302 (2001) (appointment of counsel governed by §§ 78-35a-109(1) & (2)); WISC. STAT. § 947.07(11) (2002) (court to appoint counsel to indigent petitioner).

38. DEL. CODE ANN. § 4504 (2001) (statute refers to testing and relief procedures only); IDAHO CODE § 19-2719 (Michie 2002) (same); 725 ILL. COMP. STAT. § 5/116-3 (2002)

Swedlow: Don't Believe Everything You Read: A Review of Modern "Post-Convi

whether a particular statute provides for counsel or not, the mere fact that most petitioners will be seeking relief after the expiration of their direct appeal rights means that any right to counsel will necessarily be curtailed. The recent Illinois case of *People v. Love*[39] demonstrates how and why.

In *Love*, the petitioner sought DNA testing under the Illinois testing statute five years after his original conviction and one year after the conclusion of his state post-conviction proceedings.[40] Despite the fact that the Illinois statute has no provision for the right to counsel, the trial court appointed counsel to assist Love.[41] At a hearing on Love's motion for testing, at which Love was not present, the State argued that all of the blood evidence had been destroyed and that regardless, the issue of the destruction of the blood evidence had been previously litigated on direct appeal and in the previous post-conviction proceedings.[42] When asked by the court whether a factual hearing needed to be convened to determine whether the blood evidence had been destroyed, Love's appointed counsel acquiesced, and the petition was dismissed.[43]

On appeal, Love argued that his appointed counsel had been ineffective for not requesting a hearing.[44] However, the appellate court disagreed, finding that because Love had no constitutional right to counsel, he had no accompanying right to the effective assistance of counsel.[45] Moreover, because the Illinois testing statute did not even confer a statutory right to counsel, Love was not even entitled to a "reasonable level of assistance;" instead, all that Love was entitled to was the mere appointment of counsel, which he had received.[46]

(same); LA. CODE CRIM. PROC. art. 926.1 (2002) (same); MD. CODE ANN., CRIM. PROC. § 8-201 (2001) (same); MINN. STAT. § 590.01 (2002) (same); N.M. STAT. ANN. § 31-1A-1 (Michie 2001) (same); N.Y. CRIM. PROC. LAW § 440.30 (Consol. 2001) (same); TEX. CODE ANN. CRIM. PROC. art. 64.03 (2002) (same); VA. CODE ANN. § 19.2-327.1 (2001) (same); WASH. REV. CODE § 10.73.170 (2002) (same).

39. People v. Love, 727 N.E.2d 680 (Ill. App. Ct. 2000).

40. *Id.* at 681-82.

41. *Id.* at 682.

42. *Id.*

43. *Id.* Appointed counsel filed a motion for reconsideration "but made no argument in the motion or at the hearing;" the motion was denied. *Id.*

44. *Id.* at 683.

45. *Id.* at 682-83. *See also* Murray v. Giarratano, 492 U.S. 1, 10 (1989) (finding no right to counsel for death row inmates in postconviction proceedings); *and* Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) (holding the right to counsel does not apply further than during defendant's trial and right to first appeal). For a complete discussion of procedural due process and Sixth Amendment arguments in support of a right to counsel in post-conviction proceedings, *see* HERTZ & LIEBMAN, *supra* note 17, at 324-57 (discussing *Coleman*, *Murray*, and *Finley* in detail); Daniel Givelber, *Symposium Gideon—A Generation Later: The Right to Counsel in Collateral, Post-Conviction Proceedings*, 58 MD. L. REV. 1393 (1999).

46. *Love*, 727 N.E.2d at 683 (citing, *inter alia*, Bounds v. Smith, 430 U.S. 817 (1977)). While it is well established that counsel may not be deemed ineffective on post-conviction review, the Utah and Virginia testing statutes expressly state that a petitioner cannot claim ineffectiveness of his appointed post-conviction counsel. UTAH CODE ANN. § 78-35a-109(3)

Similar problems can arise even when the petition for testing is filed during a time when the petitioner retains his Sixth Amendment rights. For example, in Nebraska, a petitioner may file his petition for testing at any time after conviction.[47] While the Nebraska statute provides a statutory right to counsel for a petitioner requesting testing,[48] counsel's appointment prior to the time when the petitioner's conviction becomes final will presumably be subject to Sixth Amendment effectiveness considerations.[49]

However, what happens if the petition is dismissed before testing is ever ordered due, as the petitioner in *Love* alleged, to an error on the part of counsel? While the Nebraska testing statute is silent regarding the filing of successive testing petitions, Nebraska law makes clear that successive petitions filed under the traditional post-conviction statute will not be entertained "unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time the movant filed the prior motion;"[50] in other words, traditional successive petitions will be considered only under exceptional circumstances.[51] Thus, the only chance of success—defined in terms of access to testing—for this petitioner may be either to hope that his direct appeal rights have been preserved so that he can request testing during those proceedings, or to hope that the court will consider a successive petition for testing.

III. PREREQUISITES TO TESTING

A. Standards for Testing

All of the statutes delineate standards for testing; the difference between the statutes rests mainly on how many different types of demonstrations the petitioner is required to make: depending on the jurisdiction, he may have to make as few as three, or as many as eight. Additionally, some statutes mandate testing upon a specific showing by the petitioner only, and others con-

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(2001); VA. CODE ANN. § 19.2-327.1(G) (2001).

47. NEB. REV. STAT. § 29-4120 (2001).

48. *Id.* § 29-4122.

49. *Finley*, 481 U.S. at 555 ("We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions . . . and we decline to so hold today. Our cases establish that the right to appointed counsel extends to the first appeal of right, and no further.") (citing Johnson v. Avery, 393 U.S. 483, 488 (1969)).

50. State v. Hunt, 634 N.W.2d 475, 480 (Neb. 2001) (citations omitted).

51. *See, e.g.*, State v. Parmar, 639 N.W.2d 105, 110 (Neb. 2002).

> The Nebraska Postconviction Act . . . is available to a defendant to show that his or her conviction was obtained in violation of his or her constitutional rights. . . . However, the need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity. . . . The act specifically provides that a "court need not entertain a second motion or successive motions for similar relief on behalf of the same prisoner."

Id. (statutory and case citations omitted).

template testing after a specific showing by the petitioner followed by additional findings by the court.[52]

1. Materiality

All the statutes require some sort of demonstration of materiality by the petitioner, or a materiality finding by the court, prior to the issuance of an order for testing. The statutes differ, however, in the proof that a petitioner must offer to demonstrate materiality.[53]

For example, the majority of statutes rest the materiality showing on a demonstration that the testing will produce "new" and "noncumulative" evidence.[54] Under this version of materiality, the petitioner will have to show an enhancement in technology or that some item of evidence was collected during the crime investigation, but was never tested at the time of the original conviction.

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52. *Compare, e.g.*, N.M. STAT. ANN. § 31-1A-1 (Michie 2001) (setting forth eight items that petitioner must be prove by clear and convincing evidence, and two separate findings that must be made by the court as a prerequisite to testing), *with* MICH. COMP. LAWS § 770.16 (2002) (court shall order testing if petitioner offers proof as set forth in statute; court is not required to make any additional findings as a prerequisite to ordering testing).

53. Some statutes employ several standards at the same time. *See, e.g.* N.J. STAT. ANN. 2A:84A-32a(d)(4) (West 2002) (use of materiality standard); *id.* § (d)(5) (results of testing must raise a "reasonable probability" that motion for new trial would be granted, assuming results favorable to the petitioner).

54. ARK. CODE ANN. §§ 16-112-125(c)(1)(B) (petitioner to make prima facie presentation that, *inter alia*, "the testing has the scientific potential to produce new noncumulative evidence materially relevant to the defendant's assertion of actual innocence"); DEL. CODE ANN. tit. 11, § 4504(a)(5) (2001) (petitioner to make prima facie presentation that, *inter alia*, "the requested testing has the scientific potential to produce new noncumulative evidence materially relevant to the person's assertion of actual innocence"); D.C. CODE ANN. § 4033(d) (2001 & Supp. 2002) (court to order testing upon finding that, *inter alia*, "there is a reasonable probability that testing will produce new non-cumulative evidence . . ."); IDAHO CODE § 19-4902(d)(1) (Michie 2002) (court to permit testing upon finding that, *inter alia*, "testing has the scientific potential to produce new noncumulative evidence that would show that it is more probable than not that the petitioner is innocence"); 725 ILL. COMP. STAT. § 5/116-3(c)(1) (2002) (court to allow testing upon finding that, *inter alia*, "the testing has the scientific potential to produce new noncumulative evidence materially relevant to the defendant's assertion of actual innocence"); MINN. STAT. § 590.01.1a(c)(2) (2002) (petitioner to make prima facie presentation that, *inter alia*, "the testing has the scientific potential to produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence"); NEB. REV. STAT. § 29-4120(5) (2001) (court shall order testing upon finding that, *inter alia*, "testing may produce noncumulative evidence relevant to the claim that the person was wrongfully convicted or sentenced"); N.M. STAT. ANN. § 31-1A-1(D)(1) (Michie 2001) (court to grant testing upon finding that, *inter alia*, testing "has the scientific potential to produce new, noncumulative evidence material to the petitioner's assertion of innocence . . ."); UTAH CODE ANN. § 78-35a-301(2)(e) (2001) (petitioner must allege, *inter alia* that "the evidence that is the subject of the request has the potential to produce new, noncumulative evidence that will establish the person's innocence"); VA. CODE ANN. § 19.2-327.1(A)(iii) (2001) (petitioner may submit application for testing if, *inter alia*, "the testing is materially relevant, noncumulative, and necessary and may prove the convicted person's actual innocence").

Other statutes describe materiality as just that: materiality.[55] Presumably, this definition is identical to the familiar standard under *Brady v. Maryland* and its progeny: that evidence is material when it establishes a "reasonable probability" of a different outcome.[56]

In contrast, to obtain testing in Arizona, Tennessee, Texas, and Wisconsin, a petitioner is required to demonstrate materiality by showing that he would not have been *prosecuted* for the offense in question—an odd requirement, especially in light of the fact that the prisoner is required to make this showing before testing can be ordered, rather than after the test results exonerate him.[57] Moreover, given the high rate of confessions, statements, and eyewitness identification in DNA exoneration cases, it is difficult to imagine how a petitioner requesting testing could make such a showing if he faces any opposition from a prosecutor.[58] Luckily, however, all of the stat-

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55. IND. CODE §§ 35-38-7-8(1)(A)-(B) (2001) (petitioner must present prima facie proof that "the material sought to be tested is material to identifying [him] as the perpetrator of . . . or accomplice to . . . the offense that resulted in [his] conviction"); ME. REV. STAT. ANN. tit. 15, § 2138(4)(A) (West 2002) (petitioner must present prima facie evidence that "the material sought to be analyzed is material to the issue of the person's identity as the perpetrator of, or accomplice to, the crime that resulted in the conviction"); MD. CODE ANN., CRIM. PROC. § 8-201(c)(5) (2001) (court shall order testing if it determines that, *inter alia*, "a reasonable probability exists that the DNA test has the scientific potential to produce results materially relevant to the petitioner's assertion of innocence"); MICH. COMP. LAWS § 770.16(3)(a) (2002) (court shall order testing after petitioner presents prima facie proof that, *inter alia*, "the evidence sought to be tested is material to the issue of the convicted person's identity as the perpetrator of, or accomplice to, the crime that resulted in the conviction"); N.J. STAT. ANN. 2A:84A-32a(d)(4) (West 2002) ("convicted person" must present prima facie case that, *inter alia*, "the evidence sought to be tested is material to the issue of the convicted person's identity as the offender . . ."); VA. CODE ANN. § 19.2-327.1(A)(iii) (2001) (petitioner may submit application for testing if, *inter alia*, "the testing is materially relevant, noncumulative, and necessary and may prove the convicted person's actual innocence").

56. *See, e.g.*, Strickler v. Greene, 527 U.S. 263, 281 (1999). *See also* Larry A. Yackle, *Congressional Power to Require DNA Testing*, 29 HOFSTRA L. REV. 1173, 1180 (2001) (citing *Strickler*); Christopher P. DelRosso & Samuel F. Ernst, *Thirtieth Annual Review of Criminal Procedure, II. Preliminary Proceedings: Discovery*, 89 GEO. L.J. 1343 (2001) (discussing *Brady* materiality in depth).

57. ARIZ. REV. STAT. § 13-4240(B)(1) (2002) (court shall order testing upon finding that, *inter alia*, "a reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through deoxyribonucleic acid testing"); TENN. CODE ANN. § 40-30-404(1) (2002) (court shall order testing upon finding that, *inter alia*, "[a] reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing"); TEX. CODE ANN. CRIM. PROC. art. 64.03(a)(2)(A) (2002) (court shall order testing upon demonstration by a preponderance that, *inter alia*, "[a] reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing"); WISC. STAT. 974.07(7)(a)(1) (2002) ("It is reasonably probable that the movant would not have been prosecuted, convicted, found not guilty by reason of mental disease or defect, or adjudicated delinquent . . .").

58. The recent exoneration of Bruce Godschalk in Pennsylvania demonstrates just why this standard is so problematic. Even after two DNA tests exonerated Godschalk, who had falsely confessed to two rapes, Montgomery County District Attorney Bruce Castor initially refused to consent to Godschalk's release, explaining that he had "no scientific basis" to disagree with the test results, but that he placed more trust in his "detective and [the] tape-

utes which make use of this standard also provide for an alternative demonstration: that the petitioner would not have been *convicted* of the offense in question, a far less onerous standard.[59] Regardless of which materiality standard is used, it is notable that many of these statutes describe the materiality showing in terms of a "reasonable probability."[60] This is identical to the

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recorded confession." "Therefore," according to Castor, "the results must be flawed until someone proves . . . otherwise." *See, e.g.*, Sara Rimer, *Convict's DNA Sways Labs, Not a Determined Prosecutor*, N.Y. TIMES, Feb. 6, 2002, at A14.

59. ARIZ. REV. STAT. § 13-4240(B)(1) (2002) (court shall order testing upon finding that, *inter alia*, "a reasonable probability exists that the petitioner would not have been prosecuted *or convicted* if exculpatory results had been obtained through deoxyribonucleic acid testing") (emphasis added); CAL. PENAL CODE § 1405(c)(1)(B) (West 2002) (petitioner must explain why, *inter alia*, "in light of all of the evidence, how the requested DNA testing would raise a reasonable probability that the convicted person's verdict or sentence would be more favorable if the results of DNA testing had been available at the time of the conviction"); FLA. STAT. ch. 925.11(2)(f)(3) (2001) (court to make findings concerning whether, *inter alia*, "there is a reasonable probability that the sentenced defendant would have been acquitted or could have received a lesser sentence if the evidence had been admitted at trial"); MO. REV. STAT. § 547.035 (2002) (petitioner must allege, *inter alia*, that "[a] reasonable probability exists that [he] would not have been convicted if exculpatory results had been obtained through the requested DNA testing."); N.Y. CRIM. PROC. LAW § 440.30(1-a) (Consol. 2001) (court to order testing upon finding, *inter alia*, that "there exists a reasonable probability that the verdict would have been more favorable to the defendant"); N.C. GEN. STAT. § 15A-269(b)(2) (2002) (court to grant testing if, *inter alia*, "[i]f the DNA tested had been conducted on the evidence [at trial], there exists a reasonable probability that the verdict would have been more favorable to the defendant"); S.B. 667, 2001 Leg., 71st Sess. (Or. 2001) ("[t]here is a reasonable probability that the testing will produce exculpatory evidence that would establish the innocence of the person of . . . the offense for which the person was convicted"); TENN. CODE ANN. § 40-30-404(1) (2002) (court shall order testing upon finding that, *inter alia*, "[a] reasonable probability exists that the petitioner would not have been prosecuted *or convicted* if exculpatory results had been obtained through DNA testing") (emphasis added); TEX. CODE ANN. CRIM. PROC. art. 64.03(a)(2)(A) (2002) (court shall order testing upon demonstration by a preponderance that, *inter alia*, "[a] reasonable probability exists that the petitioner would not have been prosecuted *or convicted* if exculpatory results had been obtained through DNA testing") (emphasis added); WISC. STAT. § 974.07(7)(a)(1) (2002) ("It is reasonably probable that the movant would not have been prosecuted, convicted, found not guilty by reason of mental disease or defect, or adjudicated delinquent . . . ."). *See also* LA. CODE CRIM. PROC. ANN. art. 926.1(c)(1) (2002) (referring to "reasonable likelihood that the requested DNA testing will resolve the doubt and establish the innocence of the petitioner"); N.M. STAT. ANN. §§ 31-1A-1(B)(7) & (B)(8) (Michie 2001). Under the New Mexico statute, a petitioner must prove by clear and convincing evidence that, *inter alia*,

> the evidence he wants the court to order DNA testing upon will be highly likely to produce evidentiary results that would have been admissible at petitioner's initial trial; and if the evidence he wants the court to order DNA testing upon had been admitted at the petitioner's original trial, a reasonable judge or jury would not have been able to find him guilty beyond a reasonable doubt.

Id.

See also WASH. REV. CODE § 10.73.170(2) (2002) (requiring prosecutor to determine whether testing would "demonstrate innocence on a more likely than not basis").

60. The Texas statute intermingles the "reasonable probability" standard with the proof by a preponderance standard. *See* TEX. CODE ANN. CRIM. PROC. art. 64.03(a)(2)(A) (2002). Accordingly, it is unclear how the *Strickland*-like prejudice standard would apply to Texas cases, given that the *Strickland* Court expressly rejected proof by a preponderance. *See infra*

prejudice standard set forth in *Strickland v. Washington*:[61] a reasonable probability that confidence in the outcome of the trial has been undermined.[62]

B. Chain of Custody

In one form or another, virtually all of the statutes require proof of an unbroken chain of evidence, with some statutes placing the burden directly

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note 62.

61. 466 U.S. 668, 691-92 (1984). *See also* Williams v. Taylor, 529 U.S. 362 (2000) (affirming *Strickland* test, including prejudice standard, for ineffective assistance of counsel claims).

62. Strickland v. Washington, 466 U.S. 668, 691-92 (1984). *See also* Williams v. Taylor, 529 U.S. 362 (2000) (affirming *Strickland*'s two-pronged test). In attempting to draw an appropriate line for the prejudice inquiry, the *Strickland* Court first rejected the suggestion that prejudice be found when the defendant showed "that the errors had some conceivable effect on the outcome of the proceeding." *Strickland*, 466 U.S. at 693 (explaining that, "virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding") (citations omitted). In the Court's eyes, this definition was both "inadequate" and unworkable, because it provides no metric by which to assess the magnitude of attorney error. *Id.* at 693 ("Since any error, if it is indeed an error, 'impairs' the presentation of the defense, the proposed standard is inadequate because it provides no way of deciding what impairments are sufficiently serious to warrant setting aside the outcome of the proceeding.").

The Court likewise rejected the outcome determinative test—that the defendant show that counsel's deficient performance more likely than not altered the outcome—finding it "not quite appropriate." As the Court explained, this "high standard" "presupposes that all the essential elements of a presumptively accurate and fair proceeding were present in the proceeding whose result is challenged." *Id.* at 694 (citing United States v. Johnson, 327 U.S. 106, 112 (1946)). In other words, because a petitioner who asserts a claim of ineffective assistance of counsel is essentially asserting a lack of reliability in the proceedings, a test which presupposes the reliability of the proceedings cannot suffice.

Thus, the Court settled on a definition of prejudice that addressed these concerns, borrowing from the materiality standard for claims made under *Brady v. Maryland*, 373 U.S. 83 (1963). As the Court explained, a defendant must demonstrate "a *reasonable probability* that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Continuing, the Court explained that "a reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Inherent in this definition is the principle that a defendant need not demonstrate prejudice by, for example, a preponderance of the evidence. Indeed, *Strickland*—and later *Williams*—expressly so stated. As the Court explained in *Williams*,

> If a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be "diametrically different," "opposite in character or nature," and "mutually opposed" to our clearly established precedent because we held in *Strickland* that the prisoner need only demonstrate a "reasonable probability that . . . the result of the proceeding would have been different."

Williams, 529 U.S. at 406 (citing *Strickland*, 466 U.S. at 694). *See also Strickland*, 466 U.S. at 694 ("The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.").

upon the petitioner[63] and others merely requiring the court to make its own, independent determination.[64] While most of the statutes envision a chain of

63. ARK. CODE ANN. § 16-112-125(b)(2) (Michie 2001) (petitioner must present prima facie case that, *inter alia*, "[t]he evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material aspect"); DEL. CODE ANN. § 4504(a)(4) (2001) (petitioner must present prima facie case that, *inter alia*, "the evidence to be tested has been subject to a chain of custody sufficient to establish that the evidence has not been substituted, tampered with, degraded, contaminated, altered or replaced in any material aspect"); IDAHO CODE § 19-4902(c)(2) (Michie 2002) (petitioner must present prima facie case that, *inter alia*, "[t]he evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material aspect"); 725 ILL. COMP. STAT. § 5/116-3(b)(2) (2002) (petitioner must present prima facie case that, *inter alia*, "[t]he evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material aspect"); ME. REV. STAT. ANN. tit. 15, § 2138(4)(C) (2001) (petitioner must present prima facie case that, *inter alia*, "[t]he evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in a material way"); MINN. STAT. § 590.01(1)(A)(b)(2) (2002) (petitioner must present prima facie case that, *inter alia*, "the evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in a material aspect"); N.M. STAT. ANN. § 31-1A-1(C)(4) (Michie 2001) (petitioner must prove by clear and convincing evidence that, *inter alia*, "the evidence he wants the court to order DNA testing upon was secured and preserved by the law enforcement agency investigating the case"); UTAH CODE ANN. § 78-35a-301(2)(a) & (b) (2001) (petition must allege, *inter alia*, that the "evidence has been obtained regarding the person's case which is still in existence and is in a condition that allows DNA testing to be conducted . . . [and] the chain of custody is sufficient to establish that the evidence has not been altered in any material respect"); VA. CODE ANN. § 19.2-327.1(A)(ii) (2001) (petitioner must allege that "the evidence has been subjected to a chain of custody sufficient to establish that the evidence has not been altered, tampered with, or substituted in any way"). *See also* NEB. REV. STAT. § 29-4120 (2001) (stating that a petitioner may request testing of biological material which "[i]s in the actual or constructive possession or control of the state or is in possession or control of others under circumstances likely to safeguard the integrity of the biological material's original physical composition").

64. ARIZ. REV. STAT. § 13-4240(B)(2) (2002) (court to find as a prerequisite to testing that, *inter alia*, "[t]he evidence is still in existence and is in a condition that allows deoxyribonucleic acid testing"); CAL. PENAL CODE § 1405(f)(1) (West 2002) (court to find as a prerequisite to testing that, *inter alia*, "[t]he evidence to be tested is still available and in a condition that would permit the DNA testing requested in the motion."); D.C. CODE ANN. § 4033(c) (2001 & Supp. 2002) (court to make finding that, *inter alia*, the evidence is in the "actual or constructive possession of the District of Columbia or the United States, or has been retained by any other person or entity under conditions sufficient to establish it has not been substituted, tampered with, replaced or altered in any materia respect . . ."); FLA. STAT. ch. 925.11(2)(f)(2) (2001) (court to find as a prerequisite to testing that, *inter alia*, "whether there exists proof to establish that the evidence has not been materially altered . . ."); LA. CODE CRIM. PROC. ANN. art. 926.1(C)(3) (2002) (court to find as a prerequisite to testing that, *inter alia*, "[t]he evidence to be tested is available and in a condition to permit DNA testing"); MD. CODE ANN., CRIM. PROC. § 8-201(c)(3) (2001) (court to find as a prerequisite to testing that, *inter alia*, "the scientific evidence to be tested has been subjected to a chain of custody . . . that is sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material aspect"); N.J. STAT. ANN. 2A:84A-32a(d)(2) (West 2002) (court to find as a prerequisite to testing that, *inter alia*, "the evidence to be tested has been subjected to a chain of custody . . . that is sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material aspect"); S.B. 667, 2001 Leg., 71st Sess. (Or. 2001); TENN. CODE ANN. § 40-30-404(2) (2002) (court to order testing upon finding, *inter alia*, that

custody to be established and found prior to testing, Michigan requires that the petitioner establish chain of custody as part of the motion for relief, i.e., after testing has been performed and after testing exonerates the petitioner.[65] Both the Missouri and North Carolina statutes are silent concerning chain of custody issues;[66] however, the Missouri statute does require that the petitioner allege under oath that the evidence to be tested is available and was secured in relation to the crime for which testing is requested.[67]

In those jurisdictions where the petitioner bears the burden of demonstrating chain of custody as part of his pleading requirements, it is unclear how that burden can be met by a person who, by definition, has no access to the biological material he seeks to test. While one case from Illinois, *People v. Savory*,[68] suggests that a petitioner should use his subpoena powers and/or should seek stipulations and affidavits from relevant state actors in order to show the chain of custody, this may not be a feasible solution in those instances where state actors are hostile to or skeptical of petitioner's claim.[69]

Because those statutes which place the burden on the petitioner cast the burden in terms of a *pleading* requirement, the ordinary post-conviction petitioner—whose conviction became final years before he contemplated filing a motion for testing—will lack the jurisdiction of the court prior to the filing of his pleading to invoke his subpoena power. And, assuming state actors, for whatever reasons, are unwilling to enter into stipulations or sign affidavits regarding chain of custody issues, as the *Savory* Court suggested, it is unclear how the petitioner will be able to meet his burden.[70]

"[t]he evidence is still in existence and in such a condition that DNA analysis may be conducted"); TEX. CODE ANN. CRIM. PROC. art. 64.03(a)(1)(A)(i) & (ii) (2002) (court to order testing upon finding, *inter alia*, that "the evidence still exists and is in a condition making DNA testing possible . . . and has been subjected to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material aspect"). *See also* IND. CODE § 35-38-7-8(2)(B) (2001) (requiring court to find, if the sample is in the possession of a "person" who is not the state or the court, that "a sufficient chain of custody for the evidence exists to suggest that the evidence has not been substituted, tampered with, contaminated, or degraded in any material aspect").

65. MICH. COMP. LAWS § 770.16(7)(b) (2002). Thus, in Michigan, a petitioner requesting testing must establish by clear and convincing evidence that the evidence is "available" for testing, and the chain of custody determination is reserved for the subsequent motion for new trial, assuming testing exonerates. *Id.* §(3)(b)(i).

66. *See generally* MO. REV. STAT. § 547.035 (2002); N.C. GEN. STAT. § 15A-269 (2002).

67. MO. REV. STAT. §§ 547.035(2)(1) & (2)(2) (2002).

68. People v. Savory, 722 N.E.2d 220 (Ill. App. Ct. 1999), *aff'd on other grounds*, 756 N.E.2d 804 (2001). As with many other statutes, the Illinois testing statute requires that the petitioner present a prima facie case that, *inter alia*, "the evidence to be tested was subject to a chain of custody . . . ." 725 ILL. COMP. STAT. § 5/116-3(b)(2) (2002).

69. *But see* United States Department of Justice, *supra* note 5, at 31-42 (recommending, *inter alia*, that "[t]he prosecutor should make every effort at cooperation and coordination with defense counsel once counsel is retained [or appointed]").

70. *See also* People v. Franks, 752 N.E.2d 1274 (Ill. App. Ct. 2001) (pleading requirements will be strictly construed); People v. Urioste, 736 N.E.2d 706, 710-11 (Ill. App. Ct. 2000) (same). For suggestions on maintenance of the chain of custody during testing, see United States Department of Justice, *supra* note 5, at 49-50.

C. Testing Which Was "Not Available" at the Time of Conviction

Many of these statutes allow for testing upon some sort of demonstration by the petitioner that such testing was "not available" at the time of trial or original conviction.[71] While "not available" can refer to the actual existence of the scientific technology—and indeed, some of these statutes restrict the definition of "not available" to such a meaning[72]—other definitions may be equally plausible.[73] For instance, testing may not be available to a

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71. ARIZ. REV. STAT. § 13-4240(C)(1)(a) (2002) (court may order testing upon finding, *inter alia*, that "[t]he petitioner's verdict or sentence would have been more favorable if the results of deoxyribonucleic acid testing had been available at the trial . . ."); ARK. CODE ANN. § 16-112-124(a)(1) (Michie 2001) (petitioner must claim, *inter alia*, that "[s]cientific evidence not available at trial establishes [his] actual innocence"); DEL. CODE ANN. § 4504(a)(2) (2001) (motion for testing may be granted if, *inter alia*, [t]he evidence was not previously subjected to testing because the technology was not available at the time of trial"); 725 ILL. COMP. STAT. § 5/116-3(a) (2002). Under the Illinois testing statute,

> A defendant may make a motion . . . for the performance . . . of . . . testing on evidence . . . which was not subject to the testing which is now requested because the technology for the testing was not available at the time of trial.

Id. See also MD. CODE ANN., CRIM. PROC. § 8-201(c)(1)(i) (2001) (requiring finding by court that, *inter alia*, "the scientific identification evidence was not previously subjected to the DNA testing that is requested for reasons beyond the control of the petitioner . . ."); MICH. COMP. LAWS § 770.16(3)(b)(ii) (2002) (court shall order testing if petitioner presents prima facie case that, *inter alia*, "[t]he identified biological material . . . was not previously subjected to DNA testing or, if previously tested, will be subject to DNA testing technology that was not available when the defendant was convicted . . ."); MINN. STAT. § 590.01(1a)(2) (2002) (motion for testing may be made by an individual if "the evidence [in question] was not subject to testing because . . . the testing was not available as evidence at the time of the trial . . ."); VA. CODE ANN. § 19.2-327.1(1)(i) (2001) (allowing request for testing from petitioner where, *inter alia*, "the evidence was not known or available . . ."); WISC. STAT. § 974.07(2)(c) (2002) ("[t]he evidence . . . may now be subjected to another test using a scientific technique that was not available and not utilized at the time of the previous testing . . .").

72. FLA. STAT. ch. 925.11(2)(A)(2) (2001) (petition for testing must include, *inter alia* statement that, "the evidence was not previously tested for DNA or a statement that the results of any previous DNA testing were inconclusive and that subsequent developments in DNA testing techniques would likely produce a definitive result . . ."); IND. CODE § 35-38-7-8(3)(B)(i) (2001) (petitioner must make prima facie demonstration that, *inter alia*, "[t]he evidence sought to be tested . . . was tested, but the requested DNA testing and analysis will . . . provide results that are reasonably more discriminating and probative of the identity of the perpetrator or accomplice . . ."); MD. CODE ANN., CRIM. PROC. § 8-201(c)(1)(ii) (2001) (requiring finding by court that, *inter alia*, "the type of DNA test being requested is different from tests previously conducted and would have a reasonable likelihood of providing a more probative result than tests previously conducted . . ."); MINN. STAT. § 590.01(1a)(2) (2002) (motion for testing may be made by an individual if "the evidence [in question] was not subject to testing because . . . the technology for the testing was not available at the time of the trial . . ."); NEB. REV. STAT. § 29-4120(1)(c) (2001) (request for testing must allege that biological material at issue "was not previously subject to DNA testing or can be subject to retesting with more current DNA techniques that provide a reasonable likelihood of more accurate and probative results."); N.M. STAT. ANN. § 31-1A-1 (Michie 2001); WISC. STAT. § 974.07(2)(c) (2002) ("[t]he evidence . . . may now be subjected to another test using a scientific technique that was not available and not utilized at the time of the previous testing . . .").

73. *But compare* 725 ILL. COMP. STAT. § 5/116-3(a) (2002) (generic definition of "not

particular defendant because his counsel ineffectively failed to request such testing[74] or because the trial court refused to release funding for the requisite tests. Or, testing may not have been geographically available to the defendant, insofar as the local laboratory in question may not have had the capabilities to perform the most sophisticated testing.[75]

Currently, only a handful of testing statutes have mechanisms which appear to address the potential for multiple meanings of "not available." For example, in Maryland, testing may be ordered if the petitioner demonstrates either that "the scientific identification evidence was not previously subjected to the DNA testing that is requested for reasons beyond [his] control" or that "the type of DNA test being requested is different from tests previously conducted and would have a reasonable likelihood of providing a more probative result than tests previously conducted . . ."[76] Minnesota employs a similar standard, allowing a motion when "the evidence [in question] was not subject to testing because the technology for the testing was not available at the time of the trial or the testing was not available as evidence at the time

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available"), *with* People v. Barksdale, 762 N.E.2d 669 (Ill. App. Ct. 2001) (defining lack of availability in terms of scientific feasibility); People v. Franks, 752 N.E.2d 1274 (Ill. App. Ct. 2001) (same); People v. Rokita, 736 N.E.2d 205 (Ill. App. Ct. 2000) (same). *See also* Arleen Anderson, *Responding to the Challenge of Actual Innocence Claims After* Herrera v. Collins, 71 TEMP. L. REV. 489, 505 (1998). Anderson discusses the Illinois testing statute and explains:

> [I]t must be shown that the evidence was not subjected to the testing requested because the technology for such testing was not available at the time of trial. If, for example, the defendant chose for strategic reasons not to have the testing done at the time of trial, this remedy is unavailable to him.

Id. (footnote omitted).

74. Additionally, given the promise of these statutes—to ferret out truth through the use of DNA technology—a plausible argument can be made that the meaning of "not available" should also include consideration of systematic problems with indigent defense within the state. To that end, it is instructive that none of the thirty-eight states which currently allow for imposition of capital punishment meet the "opt-in" requirements under the AEDPA. *See* 28 U.S.C. § 2261(b) (2002) ("This chapter is applicable if a State establishes by statute, rule of its court of last resort, or by another agency authorized by state law, a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners . . ."). For a complete discussion of the AEDPA opt-in litigation, see Burke W. Kappler, *Small Favors: Chapter 154 of the Antiterrorism and Effective Death Penalty Act, The States, and the Right to Counsel*, 90 J. CRIM. L. & CRIMINOLOGY 467, 489-516 (2000). For additional discussion, see Cristina Stummer, *To Be Or Not To Be: Opt-In Status Under the Antiterrorism and Effective Death Penalty Act*, 25 VT. L. REV. 603 (2001) (addressing connection between compensation of counsel and reliability of results within context of Chapter 154); Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not For the Worst Crime But For the Worst Lawyer*, 103 YALE L. REV. 1835 (1994) (discussing overall systematic sources underlying inadequate representation in capital cases).

75. For example, see the definitions of "not available" set forth in the District of Columbia and Virginia testing statutes, which link availability to the ability of local government laboratories to perform such testing. D.C. CODE ANN. § 4033(a)(3)(A) (2001 & Supp. 2002); VA. CODE ANN. § 19.2-327.1(A)(i) (2001).

76. MD. CODE ANN., CRIM. PROC. § 8-201(c)(1)(i) & (ii) (2001).

of the trial."[77] To obtain testing in Missouri, a petitioner must demonstrate, *inter alia*, that "[t]he evidence was otherwise unavailable to *both* the movant and the movant's trial counsel at the time of trial,"[78] a construction which appears to prevent any claim that the evidence was unavailable due to ineffective assistance of counsel. In Utah, testing may not be ordered in any case DNA evidence was not presented at trial for "tactical reasons."[79] Finally, in the District of Columbia and in Virginia, the meaning of "not available" is linked to the geographic availability of such testing.[80]

D. Identity as an Issue at Trial

While no statute currently has an express exclusion of defendants who have pleaded guilty, many require the petitioner to prove, as a prerequisite to testing, that "identity was an issue at trial."[81] This provision logically includes those petitioners who claim that they were not present at the scene or

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77. MINN. STAT. § 590.01(1a)(2) (2002).

78. MO. REV. STAT. § 547.035(2)(3)(c) (2002) (emphasis added). This definition does not appear to preclude claims that the evidence was unavailable due to an adverse trial court ruling, or insufficient defense finding.

79. UTAH CODE ANN. § 78-35a-301(4) (2001).

80. D.C. CODE ANN. § 4033(a)(3)(A) (2001 & Supp. 2002) (evidence in question was "not previously subjected to DNA testing because DNA testing was not readily available in criminal cases in the District of Columbia at the time of conviction or adjudication as a delinquent"); VA. CODE ANN. § 19.2-327.1(A)(i) (2001). The Virginia statute requires petitioner to show,

> the evidence was not known or available at the time the conviction became final in the circuit court or the evidence was not previously subjected to testing because the testing procedure was not available at the Division of Forensic Sciences at the time the conviction became final in the circuit court.

Id.

81. IDAHO CODE § 19-4902(c)(1) (Michie 2002) (requiring petitioner to present prima facie proof that, *inter alia*, "identity was an issue in the trial"); ME. REV. STAT. ANN. tit. 15, § 2138(E) (2001) (requiring petitioner to present prima facie proof that, *inter alia*, "identity of the person . . . was at issue during the person's trial"); MD. CODE ANN., CRIM. PROC. § 8-201(c)(4) (2001) (requiring petitioner to present prima facie proof that, *inter alia*, "identity was an issue in the trial"); MICH. COMP. LAWS § 770.16(3)(b)(iii) (2002) (requiring petitioner to present prima facie proof that, *inter alia*, "identity of the defendant as the perpetrator of the crime was at issue during his or her trial"); MINN. STAT. § 590.01(1a)(2)(b)(1) (2002) (requiring petitioner to present prima facie proof that, *inter alia*, "identity was an issue in the trial"); MO. REV. STAT. § 547.035(4) (2002) (motion for testing must allege, *inter alia*, that "identity was an issue at trial); N.M. STAT. ANN. § 31-1A-1(C)(3) (Michie 2001) (requiring petitioner to present prima facie proof that, *inter alia*, "identity was an issue in the initial trial"); S.B. 667 § (1)(b)(A)(i), 2001 Leg., 71st Sess. (Or. 2001) (non-mentally retarded defendant must demonstrate, *inter alia*, that "identity . . . was at issue in the trial"); UTAH CODE ANN. § 78-35a-301(2)(c) (2001) (petitioner must assert, *inter alia*, a "theory of defense, not inconsistent with theories previously asserted at trial"); N.J. STAT. ANN. 2A:84A-32a(a)(1)(a) (West 2002) (petitioner to explain, *inter alia*, "why the identity of the defendant was a significant issue in the case"). *See also* 725 ILL. COMP. STAT. § 5/116-3(b)(1) (2002) (requiring petitioner to present prima facie proof that, *inter alia*, "identity was *the* issue in the trial") (emphasis added).

who present certain kinds of antagonistic defenses,[82] but would logically exclude petitioners who claim, for example, the defense of consent to a rape charge.[83]

IV. PRE-TESTING CONSIDERATIONS

A. Discovery

In the normal course of litigation, a petitioner can file his petition and then request discovery of the materials necessary to amplify his claims. However, in the context of post-conviction requests for DNA testing, the opposite appears to be true: of the testing statutes in existence, not one makes mention of discovery, or even appears to contemplate that such a request may be filed. Thus, even in those jurisdictions in which a petitioner has the burden of demonstrating a chain of evidence,[84] it is unclear what mechanism a petitioner may invoke to meet his burden.[85]

Regardless, petitioners should note that many of these testing statutes are codified as sub-parts of traditional post-conviction statutes; accordingly, an argument can be made that a petitioner requesting testing enjoys the same right to discovery under relevant state law as afforded to a traditional post-conviction petitioner. Moreover, in all post-conviction proceedings, the state has a duty to disclose exculpatory evidence, even in the absence of any specific request for such material.[86] And, given the recent recognition of a "due process right of access to . . . genetic material for the limited purpose of DNA testing,"[87] petitioners may now argue that the right to discovery as-

82. People v. Urioste, 736 N.E.2d 706, 713-15 (Ill. App. Ct. 2000) (identity was at issue at trial where defendant, who was charged with murder arising from a fatal car accident, claimed both that his car had been stolen and the act had been committed by another, and that the state could not prove causation).

83. Gregory W. O'Reilly, *Second Chance for Justice: Illinois' Post-Trial Forensic Testing Law*, 81 JUDICATURE 114 (Nov./Dec. 1997) (discussing "identity was an issue at trial" provision in Illinois statute). Regardless, as all of the statutes with this requirement, save one, cast the identity showing as "*an* issue," petitioners who may have presented antagonistic defenses at trial are not precluded from seeking testing because identity was not the *only* issue raised at trial. *See Urioste*, 736 N.E.2d at 713-15.

84. *See supra* notes 63-70 and accompanying text.

85. Prior to the enactment of the statutes discussed in this article, many petitioners relied on the theories underlying *Brady v. Maryland* to gain access to information required for a testing request. *See, e.g., Developments in the Law: Confronting the New Challenges of Scientific Evidence*, 108 HARV. L.R. 1557 (1995).

86. Imbler v. Pachtman, 424 U.S. 409, 427 n.25 (1976) ("[A]fter a conviction the prosecutor also is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction.") (citing MODEL CODE OF PROF'L RESPONSIBILITY EC 7-13 (1969) and American Bar Association Project on Standards for Criminal Justice, *Prosecution and Defense Function* § 3.11 (Approved Draft 1971)); Moore v. Kemp, 809 F.2d 702, 730 (11th Cir. 1987) (remanding for evidentiary hearing on claim of *Brady* violation; state court's failure to disclose exculpatory evidence after *in camera* hearing violated defendant's right to due process).

87. Godschalk v. Montgomery County Dist. Attorney's Office, 177 F. Supp. 2d 366

sumes constitutional dimensions, even in the face of the testing statute's silence regarding discovery.

B. Preservation of Evidence

At the heart of all of these DNA cases is the biological evidence. However, many of these statutes fail to adequately address the issue of evidence preservation, to the petitioner's detriment.[88]

Generally speaking, these new statutes follow four main approaches to preservation, with several statutes hybridizing these approaches.[89] First, and as a baseline, some statutes do not even contemplate preservation, which presumably means that the petitioner must expressly request preservation upon filing his request for testing.[90] Second, in those instances where some sort of preservation is contemplated, the state can be required to preserve the evidence retroactively,[91] quasi-retroactively,[92] prospectively,[93] or prospec-

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(E.D. Pa. 2001). Bruce Godschalk was the one hundred and second wrongfully convicted prisoner released from incarceration. For a case profile, see http://www.innocenceproject.org (last visited Apr. 6, 2002).

88. The Supreme Court has twice held that the State has no obligation to preserve evidence. Arizona v. Youngblood, 488 U.S. 51 (1988) (absent demonstration of bad faith, failure to preserve biological evidence did not violate defendant's due process rights); California v. Trombetta, 467 U.S. 479 (1984) (due process does not require State to preserve breathalyzer samples). *See also generally Developments in the Law: Confronting the New Challenges of Scientific Evidence, supra* note 85 (discussing preservation issues, *Youngblood*, and *Trombetta* in the absence of a state testing statute).

89. *E.g.*, ARIZ. REV. STAT. § 13-4240(H) (2002) (prospective preservation upon filing of petition for testing with sanctions provisions for "intentional" destruction of evidence after court-ordered preservation); ARK. CODE ANN. § 12-12-1103 (Michie 2001) (prospective preservation for sexual and "violent" offenses only, with permissive destruction after notice to defendant and petition to court; statute also provides for criminal penalties for failure to comply with any aspect of preservation provision); CAL. PENAL CODE § 1417.9 (West 2002) (prospective preservation with permissive destruction after notice to defendant and petition to court and criminal penalties for failure to comply with preservation mechanisms; preservation statute expires on January 1, 2003); FLA. STAT. ch. 925.11(4) (2001) (quasi-retroactive preservation; evidence may be destroyed after certain time provisions expire and after notice to defendant and other relevant parties); IND. CODE § 35-38-7-14 (2001) (prospective preservation upon filing of petition for testing, with "appropriate sanctions" to be imposed if state actor destroys evidence after court-ordered preservation); LA. CODE CRIM. PROC. ANN. art. 926.1(H)(3), (4) & (6) (2002) (prospective application upon filing a request for testing in non-capital cases and mandatory retroactive preservation in all capital cases; no criminal or civil liability on any state actor who destroys evidence "[e]xcept in the case of willful or wanton misconduct or gross negligence"); MD. CODE ANN., CRIM. PROC. §§ 8-201(i) & (j) (2001) (quasi-retroactive preservation mechanism with destruction after notice to defendant, any attorney of record, and local Public Defender; defendant may stop destruction by filing objections with convicting court and securing court order).

90. DEL. CODE ANN. tit. 11, § 4504 (2001) (no preservation mechanism); 725 ILL. COMP. STAT. § 5/116-3 (2002) (same); N.J. STAT. ANN. 2A:84A-32a (West 2002) (same); N.Y. CRIM. PROC. LAW § 440.30 (Consol. 2001) (same).

91. *E.g.*, LA. CODE CRIM. PROC. ANN. art. 926.1(H)(4) (2002) (mandatory retroactive preservation in capital cases only).

92. As used in this Article, "quasi-retroactively" refers to a non-absolute form of retroac-

tively after the petitioner files his request for testing.[94] Third, and in spite of any requirement for preservation, the state may be permitted to destroy biological evidence after meeting certain surreal requirements.[95] Finally, in certain circumstances, the state may be penalized for destruction of evidence in violation of the statute.[96]

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tive preservation which requires state actors to preserve evidence in those cases where a petition for testing *may* be filed in future. Presumably, these state actors will have far more restrictive views as to what will be a viable case than a defense attorney. *See, e.g.*, FLA. STAT. ch. 925.11(4) (2001) (state must maintain physical evidence in any case where "postsentencing testing of DNA *may* be requested . . .") (emphasis added); ME. REV. STAT. ANN. tit. 15, § 2137(14) (West 2001) ("Effective October 15, 2001, the investigating law enforcement agency shall preserve any biological evidence identified during the investigation of a crime or crimes for which any person *may* file a postjudgment of conviction motion for DNA analysis under this section.") (emphasis added); MD. CODE ANN., CRIM. PROC. § 8-201(i) (2001) (requiring state to preserve evidence for three years after imposition of sentence).

93. ARK. CODE ANN. § 12-12-1103 (Michie 2001) (requiring preservation of "any physical evidence" secured during the prosecution of any "sex offense" or "violent offense"); D.C. CODE ANN. § 4034(a) (2001 & Supp. 2002) (requiring evidence be preserved for "5 years or as long as any person incarcerated in connection with that case or investigation remains in custody, whichever is longer . . .").

94. ARIZ. REV. STAT. § 13-4240(H) (2002) ("If a petition is filed pursuant to this section, the court shall order the state to preserve during the pendency of the proceeding all evidence in the state's possession or control that could be subjected to deoxyribonucleic acid testing."); CAL. PENAL CODE § 1417.9(b)(2)(A) (West 2002) (petitioner can prevent destruction of evidence by filing motion for testing); IND. CODE § 35-38-7-14 (2001) ("If a petition for DNA testing an analysis is filed under this chapter: (1) the court shall order the state to preserve during the pendency of the proceedings all evidence in the state's possession or control that could be subjected to DNA testing an analysis . . .").

95. CAL. PENAL CODE §§ 1417.9(b)(2)(A), (B) & (C) (West 2002) (permitting destruction after notice to defendant, any counsel of record, the local public defender and prosecutor, and the Attorney General; defendant may prevent destruction by (A) filing a petition for testing under § 1405, (B) by requesting that the material not be destroyed due because a motion under § 1405 will be filed within one hundred and eighty (180) days, or (C) by filing a "declaration of innocence" within one hundred and eighty (180) days of the judgment of conviction); FLA. STAT. ch. 925.11(1)(b) & (4) (2001) (linking time that evidence must be preserved to the time restrictions on filing of petition for testing; when time has expired, state may destroy evidence after notice to defendant, any counsel of record, prosecuting attorney, and the Attorney General; defendant may prevent destruction either sending state a copy of a petition for DNA testing or requesting that evidence be preserved because timely petition for testing will be filed in future); MD. CODE ANN., CRIM. PROC. § 8-201(j) (2001) (permitting destruction after notice to defendant, any attorney of record, and local Public Defender; defendant may stop destruction by filing objections with convicting court and securing court order).

96. ARIZ. REV. STAT. § 13-4240(H) (2002) ("[I]f evidence is intentionally destroyed after the court orders its preservation, the court may impose appropriate sanctions, including criminal contempt, for a knowing violation."); ARK. CODE ANN. § 12-12-1103 (Michie 2001) (class A misdemeanor for violation of any aspect of preservation provision); D.C. CODE ANN. § 4034(d) (2001 & Supp. 2002). The District of Columbia statute provides,

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

Id. See also IND. CODE § 35-38-7-14(3) (2001) ("appropriate sanctions" to be imposed if state

While a statute that provides preservation mechanisms is quite obviously more desirable than one which does not, it is unclear how these preservation mechanisms, as currently drafted, will substantively affect post-conviction innocence cases. The most obvious question underlying these preservation provisions is whether they really work: if a state actor is inclined to destroy evidence, will a statute mandating preservation really prevent him from taking action?[97]

Second, given the loopholes in the quasi-retroactive and prospective-upon-filing preservation approaches—which are included in a handful of the current statutes—the issue of "bad faith" destruction will rarely, if ever, arise.[98] For example, under one interpretation of the quasi-retroactive preservation statutes, the state is only required to preserve evidence in those cases which *it* deems potentially viable. If the prosecutor stands by his case and orders destruction of the evidence, he may well be in full compliance with the statute.[99] Even more disturbing are those jurisdictions where the state is only required to preserve evidence after the petitioner has filed his request for testing; theoretically, all evidence in these jurisdictions could be destroyed in one fell swoop.

Moreover, the obvious loopholes associated with the preservation approaches currently in existence underscores the need for careful planning be-

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actor destroys evidence after court-ordered preservation); LA. CODE CRIM. PROC. ANN. art. 926.1(H)(6) (2002) (no criminal or civil liability on any state actor who destroys evidence "[e]xcept in the case of willful or wanton misconduct or gross negligence").

97. By raising this question, it is not the intention of the author to paint all prosecutors or state actors with a wide, "bad faith" brush. However, prosecutorial misconduct does occur, and it would be naive to assume that it does not.

98. Arizona v. Youngblood, 488 U.S. 51 (1988) (absent demonstration of bad faith, failure to preserve biological evidence by state actors prior to the time of trial did not violate defendant's due process rights). Larry Youngblood was eventually exonerated in August of 2000. *See also* People v. Barksdale, 762 N.E.2d 669 (Ill. App. Ct. 2001).

> Because *Youngblood* requires that a defendant show that potentially exculpatory evidence was destroyed in bad faith . . . *prior to his conviction*, we find that a defendant should also be held to the same showing . . . in order to establish a violation of his due process rights when new, potentially exculpatory evidence is destroyed *after his conviction*.

Id. at 683 (emphasis in original).

99. *But see* People v. Cress, 2002 WL 272733 (Mich. Ct. App. Feb. 26, 2002). Cress was convicted in 1985 of the 1983 rape and murder of Patricia Rosansky. However, since the time of Cress' conviction, a second individual—Michael Ronning—has admitted his involvement in the crime. Ronning's potential involvement in Rosanky's murder was brought to the attention of Cress' prosecutors by police investigators, who nonetheless signed an order for the destruction of evidence in Cress' case. After years of litigation, and following *Youngblood*, the Michigan Court of Appeals recently granted Cress a new trial, and ordered that his jury be instructed that if it determines the evidence in question was destroyed in bad faith, "it may infer that the destroyed, potentially exculpatory evidence would have been favorable to [Cress]." *Id.* While Cress' case provides some hope for petitioners in jurisdictions without preservation mechanisms, his case is also unique because of Ronning's confession and the unwavering support of the retired police officer who took Ronning's confession and relayed it to Cress' prosecutors.

tween traditional and new post-conviction remedies, because without such planning, a prisoner may be left without any evidence to test and without any statutory vehicle by which to challenge his conviction and/or sentence.

C. Laboratories

In general, the testing statutes follow three approaches to laboratories: those which mandate the use of state labs,[100] those which contemplate the use of private labs,[101] and those which are ambiguous as to whether state or private lab may be used.[102]

While the most obvious problem associated with the use of state laboratories is the fact that so many of the recent exonerations are linked to abuse within government laboratories—begging the question of why a petitioner would want to pursue testing at a government facility—there are other problems as well. First and foremost, what if a state lab lacks the capabilities and/or talent to perform the testing in question? Insofar as the District of Columbia and Virginia link the meaning of "not available" to laboratory capabilities,[103] petitioners may want to make in-court inquiries of their state lab facilities before blindly agreeing to have a state laboratory perform the testing. Second, petitioners will certainly want to investigate the lab's accreditation—not only that the lab is accredited, but what that accreditation actually means.

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100. FLA. STAT. ch. 925.11 (2001); ME. REV. STAT. ANN. tit. 15, § 2137 (West 2001).

101. ARIZ. REV. STAT. § 13-4240(F) (2002) ("the court shall select a laboratory that meets the standards of the deoxyribonucleic acid advisory board to conduct the testing . . ."); CAL. PENAL CODE § 1405 (West 2002); IND. CODE §§ 35-38-7-1 to -19 (2001); LA. CODE CRIM. PROC. ANN. art. 926.1 (2002); MD. CODE ANN., CRIM. PROC. § 8-201 (2001); MICH. COMP. LAWS § 770.16 (2002); NEB. REV. STAT. §§ 29-4117 to -4125 (2001); S.B. 667, 2001 Leg., 71st Sess. (Or. 2001); TENN. CODE ANN. § 40-30-410 (2002) (selected lab must meet standards adopted in 42 U.S.C. § 14131); TEX. CODE ANN. CRIM. PROC. art. 64.03 (2002); UTAH CODE ANN. §§ 78-35a-301 to -304 (2001).

102. DEL. CODE ANN. tit. 11, § 4504 (2001); MINN. STAT. § 590.01 (2002); N.M. STAT. ANN. § 31-1A-1 (Michie 2001); TENN. CODE ANN. §§ 40-30-401 to -409 (2002).

103. D.C. CODE ANN. § 4033(a)(3)(A) (2001 & Supp. 2002) (evidence in question was "not previously subjected to DNA testing because DNA testing was not readily available in criminal cases in the District of Columbia at the time of conviction or adjudication as a delinquent"); VA. CODE ANN. § 19.2-327.1(A)(i) (2001). In explaining the meaning of "not available, the Virginia statute contemplates that

> the evidence was not known or available at the time the conviction became final in the circuit court or the evidence was not previously subjected to testing because the testing procedure was not available at the Division of Forensic Sciences at the time the conviction became final in the circuit court.

Id.

D. Costs of Testing

Cost is an issue addressed by most, but not all, of the testing statutes.[104] Under most schemes, the petitioner is required to pay the cost of testing, unless he is indigent. Notably absent from the vast majority of statutes, however, are separate appropriations provisions to pay for the cost of testing for indigent prisoners; in fact, only a handful of states appear to have enacted appropriations to pay for testing.[105] Moreover, given that in many states,

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104. *Compare* ARIZ. REV. STAT. § 13-4240(D) (2002) (if testing is ordered, "court shall order the method and responsibility for payment, if necessary . . . [including requiring] the petitioner to pay the costs of testing . . ."); CAL. PENAL CODE § 1405(i)(1) (West 2002) (costs "to be borne by the state or the applicant, as the court may order in the interests of justice," but noting that cost of re-testing may not be imposed on the petitioner); DEL. CODE ANN. tit. 11, § 4504(e) (2001) ("The cost of DNA testing . . . shall be borne by the state or the applicant, as the court may order in the interests of justice, if it is shown that the applicant is not indigent and possesses the means to pay."); D.C. CODE ANN. § 4033(e)(1) (2001 & Supp. 2002) (costs to be paid by the District of Columbia if petitioner is indigent; otherwise, costs to be borne by petitioner); FLA. STAT. ch. 943.3251(2) (2001) (cost of testing to be assessed against petitioner, unless he is indigent); IDAHO CODE § 19-4902(f) (Michie 2002) (cost of testing to be assessed against petitioner, unless he is indigent); IND. CODE § 35-38-7-10 (2001) (court to order payment of costs associated with testing; no mention of finding of indigency by the court); ME. REV. STAT. ANN. tit. 15, § 2138(7) (2001) (cost of testing to be assessed against petitioner, unless he is indigent); MD. CODE ANN., CRIM. PROC. § 8-201(g)(1) & (2) (2001) (cost of testing to be assessed against petitioner, unless he is indigent; if testing exonerate, costs to be assessed against the state); MICH. COMP. LAWS § 770.16(5) (2002) (cost of testing to be assessed against petitioner, unless he is indigent); MINN. STAT. § 590.05 (2002) ("Indigent Prisoners"); NEB. STAT. § 29-4121 (2001) (addressing issue of costs); N.J. STAT. ANN. 2A:84A-32a(g) (West 2002) (petitioner to pay costs associated with testing; no mention of finding of indigency by the court); N.M. STAT. ANN. § 31-1A-1(F) (Michie 2001) ("The district court may order the petitioner to pay for the expense of the DNA testing."); N.C. GEN. STAT. § 15A-269 (2002) ("The defendant shall be responsible for bearing the cost of any DNA testing . . . unless the court determines the defendant is indigent, in which event the State shall bear the costs."); S.B. 667 § (5)(a) & (b), 2001 Leg., 71st Sess. (Or. 2001) (petitioner to pay for testing unless counsel is appointed; appointment of counsel predicated upon finding of indigency); TENN. CODE ANN. § 40-30-406 (2002) (payment borne by State or petitioner, depending on substantive findings as set forth in §§ 404 and 405); TEX. CODE ANN. CRIM. PROC. art. 64.03(d) (2002) (costs to be borne by petitioner if state lab, or lab under contract to state, is not used for testing); UTAH CODE ANN. § 78-35a-301(8) (2001) (cost of testing to be assessed against petitioner, unless he is indigent; if testing fails to exclude, indigent petitioner ma be forced to reimburse State); WISC. STAT. § 974.07(12)(a) (2002) (costs to be borne by petitioner, unless indigent); *with* ARK. CODE ANN. §§ 16-112-124 to -129 (Michie 2001) (no mention of payment of costs, but requiring testing to be performed by the State Crime Laboratory); 725 ILL. COMP. STAT. § 5/116-3 (2002) (no mention of payment of costs); LA. CODE CRIM. PROC. ANN. art. 926.1 (2002) (same); MO. REV. STAT. § 547.035 (2002) (same); N.Y. CRIM. PROC. LAW § 440.30 (Consol. 2001) (same); VA. CODE ANN. § 19.2-327.1 (2001) (same); WASH. REV. CODE § 10.73.170 (2002) (same).

105. CAL. PENAL CODE § 1405(i)(2) (West 2002) ("In order to pay for the State's share of any testing costs, the laboratory . . . shall present its bill for services to the superior court for approval and payment. It is the intent of the Legislature to appropriate funds for this purpose in the 2000-01 Budget Act."); D.C. CODE ANN. § 23-1322(8) (2001 & Supp. 2002) (adopting Fiscal Impact Statement); LA. CODE CRIM. PROC. ANN. art. 926.1(K) (2002) ("There is hereby created in the state treasury a special fund designated as the DNA Testing Post-Conviction Relief for Indigents . . ."); TENN. CODE ANN. § 40-30-413 (2002) ("Payment

prosecutions are handled on a county-wide level, a statute which mandates that the "state" pay for testing may face real problems when bills for testing come due.

V. STANDARDS FOR RELIEF

Surprisingly, less than half of the testing statutes address the issue of what should and will happen when testing exonerates.[106] In those jurisdictions where the testing statute is silent regarding relief, a petitioner will presumably make some sort of request for relief after the testing exonerates him. However, it is unknown whether the petitioner will be required to make an additional evidentiary showing, as is required under the Maine and Michigan statutes, or whether some other set of requirements will be imposed.[107]

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for analysis from criminal injuries compensation fund").

106. ARIZ. REV. STAT. § 13-4240(K) (2002) (if results are favorable, court shall order a hearing "and make any further orders that are required pursuant to this article or the Arizona Rules of Criminal Procedure"); DEL. CODE ANN. tit. 11, § 4504(b) (2001) (petitioner may file motion for new trial); D.C. CODE ANN. § 4035 (2001 & Supp. 2002) ("Motion to vacate a conviction or grant a new trial on the ground of actual innocence"); FLA. R. CRIM. PROC. 3.853(d)(2) (West 2002) (post-conviction petition, filed pursuant to traditional post-conviction statute and which alleges innocence on the basis of testing which exonerates, "shall be treated as raising a claim of newly-discovered evidence and the time periods set forth in rules 3.850 and 3.851 shall commence on the date that the written test results are provided to the court, the movant, and the prosecuting authority . . ."); IND. CODE § 35-38-7-19 (2001) (describing procedures to be followed when testing results are "favorable" to petitioner); ME. REV. STAT. ANN. tit. 15, §§ 2138(8)(B)(1), (2) & (3) (2001) (describing additional evidentiary showings to be made by petitioner, if testing is favorable); MD. CODE ANN., CRIM. PROC. § 8-201(h)(2)(i) & (ii) (2001) (if testing is favorable to petitioner, court to either re-open traditional post-conviction proceedings, or, if traditional post-conviction was never pursued by petitioner, court to open new proceedings); MICH. COMP. LAWS §§ 770.16(7)(a), (b) & (c) (2002) (describing additional evidentiary showings to be made by petitioner, if testing is favorable); MO. REV. STAT. § 547.037 (2002) (describing show cause procedures for granting relief); NEB. STAT. § 29-4123(2) & (3) (2001) (describing procedures for petitioning for grant of relief; if court denies relief, petitioner may request relief pursuant to traditional post-conviction remedies); TENN. CODE ANN. § 40-30-412 (2002) (court to conduct "hearing" is test results are favorable to petitioner); UTAH CODE ANN. § 78-35a-303 (2001) (setting forth procedures when test results are favorable to petitioner); VA. CODE ANN. § 19.2-327.2 (2002) (describing issuance "writ of actual innocence," effective November 15, 2002); WISC. STAT. § 974.07(10)(a) (2002) (setting forth procedures when test results are favorable to petitioner).

107. Under the Michigan statute, a petitioner is required to show—in addition to the demonstrations necessary to obtain testing in the first instance:

> (a) That only the perpetrator of the crime or crimes for which the defendant was convicted could be the source of the identified biological material.
>
> (b) That the identified biological material was collected, handled, and preserved by procedures that allow the court to find that the identified biological material is not contaminated or is not so degraded that the DNA profile of the tested sample of the identified biological material cannot be determined to be identical to the DNA profile of the sample initially collected during the investigation . . .
>
> (c) That the defendant's purported exclusion as the source of the identified bio-

For example, to obtain testing under the California statute, a petitioner must meet two substantive pleading requirements: he must explain "why the identity of the perpetrator was, or should have been, a significant issue in the case" and why, "in light of all the evidence, how the requested DNA testing would raise a *reasonable probability* that [his] verdict or sentence would be more favorable if the results of the DNA testing had been available at the time of the conviction."[108] This showing is certainly far lower than the requirements of the Maine and Michigan statutes, which require, *inter alia*, a demonstration that "*only* the perpetrator of the crime" could be the source of the biological material.[109] One can imagine a factual scenario where the petitioner could meet the California "reasonable probability" standard but not the more stringent "only the perpetrator" standard, which begs the question of the type of demonstration a California petitioner be required to make after testing excludes him? Certainly, the State would be expected to argue that the petitioner prove something more than a "reasonable probability."

Moreover, what will be the legal avenue for pursuing such a remedy—traditional post-conviction or some sort of common law writ? If the petitioner seeks relief under traditional post-conviction remedies, will his post-testing petition for relief be considered a successive petition? While a strong argument can be made that it will not, the arguments presented by the State of Illinois in *People v. Barksdale*[110] and *People v. Rokita*[111] demonstrate that such successor arguments may well arise under such scenarios.

Finally, regardless of whether the testing statute in effect has mechanisms for requesting relief or not, there is an issue as to how any post-testing request for relief will interact with traditional post-conviction's wary view of free-standing claims of actual innocence.[112] While the Court in *Herrera* recognized the possibility of such claims, they are—at least in the context of traditional post-conviction remedies—hopelessly mired in complex procedural rules.[113] Thus, in those jurisdictions with testing statutes which do not

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logical material, balanced against the other evidence in the case, is sufficient to justify the grant of a new trial.

MICH. COMP. LAWS §§ 770.16(7)(a), (b) & (c) (2002).

The requirements under the Maine statute are materially identical. *See* ME. REV. STAT. ANN. tit. 15, §§ 2138(8)(B)(1), (2) & (3) (2001).

108. CAL. PENAL CODE §§ 1405(c)(1)(A) & (B) (West 2002) (emphasis added).

109. MICH. COMP. LAWS § 770.16(7)(a) (2002) (emphasis added); ME. REV. STAT. ANN. tit. 15, § 2138(8)(B)(1) (2001).

110. 2001 WL 1665125 (Ill. App. Ct. Dec. 31, 2001). *See infra* note 123.

111. 736 N.E.2d 205 (Ill. App. Ct. 2000). *See infra* note 123.

112. Herrera v. Collins, 506 U.S. 390, 401 (1993) ("Few rulings would be more disruptive of our federal system than to provide for federal habeas review of freestanding claims of actual innocence.").

113. *E.g.*, Larry Yackle, *Congressional Power to Require DNA Testing*, 29 HOFSTRA L. REV. 1173, 1183 (2001) (discussing *Herrera* and explaining that "most precedents understand the Constitution chiefly to protect innocent people indirectly—by demanding that criminal prosecutions adhere to federal procedural safeguards meant to avoid erroneous convictions in the first place."); Vivian Berger, Herrera v. Collins*: The Gateway of Innocence for Death-*

delineate a specific showing for a grant of relief, petitioners should be aware of the traditional post-conviction's view of innocence, lest those requirements be imposed.

VI. RETESTING, REHEARING, AND APPEAL

In spite of shocking revelations about the state serologists in West Virginia,[114] Oklahoma, and Illinois, and in spite of the fact that many testing statutes require use of state laboratories,[115] no testing statute expressly allows a petitioner to petition for re-testing once he is included by the initial testing.[116] However, in a handful of jurisdictions, the state is allowed to move for re-testing when the petitioner is excluded: in some instances, the State must make some sort of showing before re-testing is ordered,[117] but in other instances, re-testing is mandatory upon request by the State.[118] While no statute provides for re-testing upon motion by the petitioner, a few statutes provide that a petitioner may move for rehearing after an adverse result.[119]

VII. SUCCESSIVE PETITIONS

In the realm of post-conviction law, a "successive" petition is any petition filed under the same statute and after the first petition. While only some of the extant testing statutes contemplate the filing of successive petitions,[120]

Sentenced Prisoners Leads Nowhere, 35 WM. & MARY L. REV. 943 (1994) (reviewing procedural complexities associated with *Herrera* and claims of innocence made in habeas cases).

114. Matter of Investigation of West Virginia State Police Crime Laboratory, Serology Div., 438 S.E.2d 501, 503 (W. Va. 1993).

115. FLA. STAT. ch. 925.11 (2001); ME. REV. STAT. ANN. tit. 15, § 2137 (West 2001).

116. IND. CODE § 35-38-7-18(1) (2001) (mandating dismissal of petition if "results of the post-conviction DNA testing and analysis are not favorable to the person who was convicted of the offense"); ME. REV. STAT. ANN. tit. 15, § 2138(8)(A) (2001) ("If the results of the DNA analysis are inconclusive or show that the person is the source of the evidence, the court shall deny any motion for a new trial."); MD. CODE ANN., CRIM. PROC. § 8-201(h)(1) (2001) ("If the results of the post-conviction DNA testing are unfavorable to the petitioner, the court shall dismiss the petition."); MICH. COMP. LAWS § 770.16(6) (2002) (mandating denial of motion for new trial if test results are "inconclusive or show that the defendant is the course of the identified material");

117. *E.g.*, IND. CODE §§ 35-38-7-1 to -19(1) (2001) (retesting upon showing of "good cause" by prosecutor).

118. ME. REV. STAT. ANN. tit. 15, § 2138(9) (2001) (court "shall" order retesting upon motion by State); MICH. COMP. LAWS § 770.16(8) (2002) (court "shall" order retesting upon motion by State).

While the California statute make no express provision for re-testing by the state, it is clearly contemplated within the statute. CAL. PENAL CODE § 1405(i)(1) (West 2002) ("[T]he cost of any additional testing to be conducted by the district attorney or Attorney General shall not be borne by the convicted individual.").

119. FLA. STAT. ch. 925.11(3)(c) (2001) ("The sentenced defendant may file a motion for rehearing of any order denying relief within 15 days of service of the order denying relief.").

120. ARK. CODE ANN. §§ 16-112-128(5)(d) (Michie 2001) (providing for dismissal of successive petitions "if the issues raised in it have previously been decided by the Court of

and under what circumstances, there has been a growing trend in traditional post-conviction law to eliminate the availability of successive petitions.[121] Thus, even though the majority of the testing statutes do not speak to successive petitions, traditional post-conviction concepts may inform the manner in which courts will address them.

For example, what happens when the first testing petition is considered a successive petition, simply because the petitioner has sought traditional post-conviction relief in the past? While case law from Illinois indicates that a testing petition filed under these circumstances will not be considered successive, the holdings in these cases rest on the fact that DNA testing was "not available" at the time of the traditional post-conviction filings.[122] Accordingly, in a case with a shortened time frame—i.e., one where DNA test-

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Appeals or The Supreme Court in the same case . . ."); IDAHO CODE § 19-2719(5)(b) (Michie 2002) ("A successive post-conviction pleading . . . shall be deemed facially insufficient to the extent it alleges matters that are cumulative or impeaching or would not, even if the allegations were true, cast doubt on the reliability of the conviction or sentence"); *id.* § 19-2719(5)(c) ("A successive post-conviction pleading . . . shall be deemed facially insufficient to the extent it seeks retroactive application of new rules of law").

121. While a state-by-state history of successive petition litigation is beyond the scope of this Article, the basic trends are described in LIEBMAN & HERTZ, *supra* note 17, at 1259-1346 (§ 28, "Successive Petitions"); Larry W. Yackle, *The Figure in the Carpet*, 78 TEX. L. REV. 1731, 1740-42 (2000) (discussing evolution of treatment of successive petitions from Warren Court through Rehnquist Court).

122. *See* People v. Barksdale, 762 N.E.2d 669 (Ill. App. Ct. 2001); People v. Rokita, 736 N.E.2d 205 (Ill. App. Ct. 2000). Read together, these cases demonstrate how traditional post-conviction concepts will inform and affect motions for testing. In *Barksdale*, for example, the appellant challenged the denial of his motion for testing of evidence collected as part of his 1972 convictions for rape, deviate sexual assault, and aggravated kidnapping. Barksdale had pursued his direct appeal, and an unsuccessful state post-conviction petition. Thereafter, in 2000, he filed a second post-conviction petition *pro se*, requesting testing of certain biological material. *Barksdale*, 762 N.E.2d at 672. While it is unclear if Barksdale invoked the Illinois testing statute in his filing, 725 ILL. COMP. STAT. § 5/116-3, the substance of his request appears to have been enough to alert the court that § 116-3 applied to his request. *See Barksdale*, 762 N.E.2d at 672. Regardless, the trial court dismissed. On appeal, the State argued that Barksdale's petition for testing was really a successive petition, barred by Illinois state law governing traditional post-conviction filings. *Id.* at 674-75. The appellate court disagreed; however, much of the court's opinion is premised on the fact that DNA testing would not have been "available" to Barksdale at the time his first traditional post-conviction petition was filed. *See id.* at 676.

Rokita is not dissimilar. In *Rokita*, the petitioner was convicted in 1994 and thereafter, unsuccessfully pursued his direct appeal and traditional post-conviction remedies. In April 1999, Rokia requested "PCR" testing under § 116-3, failing to further specify the type of testing requested in his pleadings. *Rokita*, 736 N.E.2d at 208. Despite clarifying at an evidentiary hearing that he was seeking STR-based PCR testing, which the state conceded was not available at the time of Rokita's trial, the trial court dismissed the petition because of its finding that testing would not ultimately exonerate Rokita and its apparent belief in his guilt. *Id.* The court also expressed concern that "Rokita was utilizing § 116-3 to in an effort to file a second postconviction petition and that defendants might continually seek DNA testing under section 116-3 each time a new DNA test was developed, resulting in a lack of finality to their convictions." *Id.* On appeal, the court reversed, finding that the type of testing sought by Rokita, STR-based PCR testing, had not been available at the time of trial and that testing was accordingly warranted. *Id.* at 213.

ing was "available" but inexplicably not pursued at the time the petitioner seeks traditional post-conviction review—a strong argument can be made that the motion for testing is in actuality a successive petition.

Successor issue may also be invoked when a petitioner fails to meet pleading standards and then later files a proper petition. In *People v. Franks*,[123] for example, the petitioner failed to allege—as required by the Illinois statute—that the testing was "not available" at the time of his original trial.[124] As a result, his petition was dismissed. On appeal, the Illinois Appellate Court held that the petitioner's motion was "wholly insufficient" to satisfy the statute's pleading requirements, and affirmed the trial court's dismissal.[125] Distinguishing *People v. Rokita*,[126] in which the state had conceded the lack of availability of certain testing at a hearing on the petitioner's motion, the *Franks* court made clear that a petition that fails to meet prima facie pleading requirements will be properly dismissed. While there is no indication that the petitioner in *Franks* ever tried to file a second motion for testing, the language in *Rokita* and *Barksdale* regarding successive petitions underscores the need for petitioners to be cautious in filing their pleadings.[127]

VIII. OTHER FORMS OF TESTING

Most, but not all, of the current statutes are limited specifically to DNA testing; however, some statutes also make mention of post-conviction testing of fingerprints.[128] Given recent challenges to the admissibility of fingerprint testimony, it is unclear how this latter class of statute may fare in the future.[129]

IX. CONCLUSION

Clearly, there is no such thing as a perfect testing statute. Partly, this is due to the extraordinary factual complexity of criminal cases, i.e., a testing statute may work wonderfully for one petitioner, but may prevent another

123. 752 N.E.2d 1274 (Ill. App. Ct. 2001).

124. *Franks*, 752 N.E.2d at 1275-76 (citing 725 ILL. COMP. STAT. § 5/116-3 (2002)).

125. *Franks*, 752 N.E.2d at 1276.

126. *Rokita*, 736 N.E.2d 205.

127. This concern is especially true in those jurisdictions where the testing statute is codified as part of the State's traditional post-conviction statute.

128. ARK. CODE ANN. § 16-112-125 (Michie 2001); IDAHO CODE § 19-2719 (Michie 2002); 725 ILL. COMP. STAT. § 5/116-3 (2002); MINN. STAT. § 590.01 (2002); NEB. STAT. §§ 29-4117 to -4125 (2001) (referring to "DNA or similar forensic testing"); VA. CODE ANN. §19.2-327.1 (2001) (referring to "new scientific investigation of any human biological evidence"); WASH. REV. CODE § 10.73.170 (2002); WISC. STAT. § 974.07 (2002).

129. United States v. Llera Plaza, 179 F. Supp. 2d 492 (E.D. Pa. 2002), *vacated*, 188 F. Supp. 2d 549 (E.D. Pa. 2002).

petitioner from even filing his request.[130] However, the lack of perfection in the extant testing statutes is largely attributable to their inability to address the complexities of state and federal post-conviction law. Petitioners seeking testing will thus want to familiarize themselves with relevant post-conviction law, both within their respective states and federally, to ensure that the trappings of traditional post-conviction litigation do not bar their opportunities both under the testing statutes, and in traditional post-conviction.

130. Amendment to Florida Rules of Criminal Procedure Creating Rule 3.853, 2001 WL 1276878 at * 4-5 (Fla. Oct. 18, 2001) (Anstead, concurring and dissenting, discussing how exonerated defendant Jerry Frank Townsend would not be able to avail himself of the Florida testing statute, given its ban on petitions from defendants who pleaded guilty).