

“And the DNA Shall Set You Free”: Issues Surrounding Postconviction DNA Evidence and the Pursuit of Innocence

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Exonerations of incarcerated defendants—even defendants on death row—through the use of DNA testing has pushed the issues surrounding postconviction DNA testing to the forefront. During the last ten years, DNA testing has become more sophisticated and accurate so that it has the scientific potential to conclusively prove whether a defendant’s DNA matches DNA evidence found at a crime scene. For this reason, many defendants have requested postconviction testing in order to appeal their criminal convictions. These requests, however, have sometimes been refused by prosecutors and courts who cite the importance of finality in criminal jurisprudence, the burden on the judiciary when reopening cases, and the evidentiary weight of DNA as reasons why the requests should be refused. The resistance of the judiciary and prosecutors is compounded by the fact that only a small minority of states have statutes that permit incarcerated defendants to request and receive access to postconviction DNA testing. Federal legislation has been proposed to remedy this issue and a small minority of states have adopted language to permit this testing, provided that certain requirements are met. The author contends that an ad hoc, case-by-case approach to postconviction testing requests must be abandoned in favor of statutes that allow defendants to request this testing and receive a hearing if the results are favorable. The interests of finality, while important, should not be permitted to trump DNA evidence which can conclusively prove identity.

I. INTRODUCTION

Meet prisoner Roy Wayne Criner. Criner was incarcerated in a Texas prison from May 1, 1990, until August 15, 2000, following a conviction for rape and a sentence of ninety-nine years.^[1]

The crime for which Criner was convicted—aggravated sexual assault—was gruesome.^[2] A young girl, Deana Ogg, had been murdered, and there was evidence that sexual intercourse had occurred right before or after her death.^[3] Ultimately, Deana “died from blunt force trauma to the head and from multiple stab wounds to the neck” from a screwdriver.^[4] The suspicion of law enforcement investigators turned to Roy Criner after Criner told three friends that he had picked up a young hitchhiker on the way to work and had sex with her.^[5] While all three friends remember Criner telling them that he had had sex with a young hitchhiker, their recollections then vary as to what exactly occurred between Criner and the “hitchhiker.”^[6] Despite clear differences in the statements that the friends supplied to police regarding what Criner had told them about the rape, and despite the lack of physical evidence connecting Criner to the crime scene and to the victim, Criner was convicted and sentenced to ninety-nine years in prison.^[7]

During Criner’s imprisonment, significant scientific advances made DNA testing more sophisticated and accurate.^[8] Criner’s defense attorneys decided that Criner’s best bet for overturning his conviction was DNA testing, which could potentially show that Criner was not the source of the DNA evidence found at the crime scene and, therefore, that Criner did not commit the rape and murder of Deana Ogg.^[9] The attorneys’ instincts were correct—the DNA tests proved that the semen found in the victim did not belong to Roy Criner.^[10] Criner, as well as his family, rejoiced and expected that he would soon be released from prison because the DNA samples did not match and showed irrefutably that Criner could not have left the DNA found at the crime scene.^[11]

Criner served an additional two years in prison after DNA tests showed he was not the source of the crime-scene DNA.^[12] Even though DNA tests excluded Criner as the source of the semen found in the victim’s body, a majority of the Texas Court of Criminal Appeals, as well as the prosecutors who tried the Criner case, did not believe that this DNA evidence was conclusive as to Criner’s innocence.^[13] The appeals court, who heard Criner’s motion for a new trial to consider the DNA evidence, explained that the non-match between Criner’s DNA and the DNA found in the victim “doesn’t mean that he didn’t have sex with her.”^[14]

Fortunately, Roy Criner obtained a pardon from then-Texas Governor, George W. Bush, and was released from prison on August 15, 2000.^[15] As inconceivable as Roy Criner’s experience may seem, it represents a problem that courts in the United States are currently experiencing. Although a prisoner may show that his DNA does not match DNA found at the crime scene, it may not be sufficient for a new trial or to overturn the conviction.^[16] The possibility of a pardon, while freeing Roy Criner, does not detract from the importance of providing postconviction DNA testing and relief. As Judge Keller, author of the Texas Court of Criminal Appeals’ majority opinion that denied Roy Criner a new trial, explained, “[j]ust like the absence of fingerprints right here [on this chair] doesn’t show that I didn’t touch [the] chair,” the absence of a defendant’s DNA at a crime scene “can’t show that he didn’t do it.”^[17] Roy Criner’s case illustrates the difficulties prisoners first face when petitioning to have their DNA evidence matched against DNA found at the crime scene, as well as the difficulties again faced when petitioning the court for a new trial. It also shows the differences that exist among courts regarding what the appropriate relief or solution must be when a prisoner’s DNA is not consistent with DNA found at a crime scene. While the Texas Court of Criminal Appeals in Roy Criner’s case decided that this new evidence did not merit a new trial, other courts have determined that a non-match will result in a new trial or the reversal of a conviction.^[18]

This article explores the difficulties that confront courts and prisoners alike when dealing with exculpatory DNA evidence discovered after the defendant has been convicted. Part II will discuss the obstacles prisoners must surmount to obtain postconviction DNA testing and the different state standards for either permitting or denying prisoner testing. Part III will discuss the various issues that determine whether exculpatory, postconviction DNA evidence will be successful in freeing a prisoner, such as finality in criminal adjudications, the weight of DNA evidence, and burdens of proof placed on a defendant when appealing a conviction due to newly discovered, exculpating DNA evidence. Part IV will discuss the federal legislative response, the reaction to it, and whether this legislation would make a difference for other criminal defendants like Roy Criner. Finally, Part V argues that while the proposed federal legislation is a step in the right direction, any legislation must include a uniform threshold that mandates a new trial based on newly discovered evidence once defendants meet a certain standard.

II. THE LACK OF UNIFORMITY IN STATE AND JUDICIAL RESPONSES TO REQUESTS FOR POSTCONVICTION DNA TESTING

Obtaining postconviction DNA testing was the first hurdle Roy Criner faced in proving his innocence of the sexual assault and murder of Deana Ogg. After serving seven years of his ninety-nine-year prison sentence, Criner's DNA was tested against the DNA found in the victim at the crime scene.^[19] While Criner was granted access to the DNA evidence found at the crime scene so that it could be tested against his own DNA, other states and prosecutors have blocked prisoners' access to this testing.

Across the country, states are split in their response to prisoner requests for DNA testing. New York and Illinois were the first two states to tackle the postconviction DNA issue and both established uniform policies for when prisoners were permitted to test DNA. Recently, other states have followed either the approach taken by New York or the one by Illinois when drafting their own statutory standards.^[20]

This section explores the critical, first hurdle that stands between a defendant and his proof of innocence and evaluates the statutory standards for postconviction testing. The New York and Illinois statutes will frame the discussion of statutory approaches to DNA testing as these states were the first to provide, statutorily, for postconviction DNA testing. The various common law standards of states that have not yet enacted legislation providing postconviction DNA testing are then evaluated. Even if testing is obtained, and the results show that the prisoner's DNA does not match DNA found at the crime scene, Roy Criner's situation makes clear that the prisoner's future remains uncertain because some courts do not believe that DNA evidence necessarily proves innocence in cases where a prisoner's DNA and crime scene DNA do not match.

A. Statutory Approaches to Postconviction DNA Testing

Although DNA testing and evidence has become increasingly prevalent in criminal investigations, only a small minority of states have enacted statutes to provide for postconviction DNA testing.^[21] New York and Illinois, as the first two states to provide postconviction DNA testing to criminal defendants by statute, have provided blueprints for other states to follow when adopting their postconviction DNA testing statutes.

Even though Illinois, New York, and a few other states have formed statutes, these statutes do not provide blanket access to DNA testing for prisoners. Instead, the statutes have been crafted to allow postconviction DNA testing only in certain circumstances. For example, New York developed its law to only apply to those defendants who were convicted before 1996.^[22] Presumably, this date was established to include only those defendants who were tried before DNA evidence was widely used in criminal trials.^[23] The New York statute also makes an important distinction: while an inmate must show that it is reasonably probable that the verdict would have been more favorable to the defendant if the tests had been available at trial, the court is not required to find that the tests would likely *exonerate* the defendant.^[24]

The statutes, as mentioned previously, do not provide unilateral access to testing for all inmates. The New York approach, for example, allows a defendant convicted after 1996 to obtain an order from the court directing DNA testing only if the defendant has shown that it is reasonably probable that the test results would be favorable to the defendant.^[25] This reasonable probability requirement prompted a New York court in *People v. Tookes* to call the statute an “inartfully drawn statute [that] is confusing regarding the circumstances in which such relief should or must be granted.”^[26] The court ultimately concluded that the appropriate standard was one where the test results carried a “reasonable potential for exculpation.”^[27] After closely examining the facts of the case, including other scientific tests such as blood and saliva samples, the court decided that the DNA tests would not have made a difference in the trial court’s verdict to convict.^[28]

The Illinois approach to postconviction DNA testing, like New York’s, limits access to testing to those prisoners who were convicted *before* genetic testing was available at trial.^[29] In addition, the defendant must establish a prima facie case that the identity of the perpetrator was at issue in the trial that resulted in his conviction.^[30] The court must then determine that the testing has the “scientific potential” to produce new evidence that is “materially relevant” to the defendant’s innocence.^[31] The critical language in this statute, which may pose a bar to DNA testing for defendants, is “materially relevant.”^[32] In *People v. Gholston*, an appellate court in Illinois explained that in order to meet this standard, a defendant must present evidence, which is new, material, and “of such conclusive character” that “it would probably change the result on retrial.”^[33] The *Gholston* court found that the test offered very little, if any, exculpatory potential because the defendant had been convicted of a rape in which there were multiple defendants who had participated in the sexual assault.^[34] As there was more than one attacker who could have contributed DNA to the DNA found on the victim, a test that established that the defendant’s DNA did not match the DNA found at the crime scene would not be conclusive.^[35] Similar to the New York court in *Tookes*, the Illinois court made a close assessment of the facts presented to the trial court and concluded that a non-match of DNA samples from the crime scene and from the defendant would not be material to the inmate’s innocence.^[36] For this reason, the conviction was not reversed at retrial.^[37]

Although states that establish DNA testing rights for prisoners by statutory law may provide a more consistent foundation for testing, some commentators have criticized the initial statutes enacted by Illinois and New York for what they perceive as a limited approach to DNA testing for inmates.^[38] For example, New York’s statute has been criticized for not accounting for advances in forensic technology, which may be different from DNA testing, and for not providing sufficient direction to the courts if the testing produces exculpatory results.^[39] Further, the 1996 cut-off test for access to DNA testing has been questioned for being too strict.^[40] The Illinois statute faced criticism as well for what some perceived as the narrow scope of the statute^[41] and its potential to launch a flood of prisoner appeals for testing.^[42]

Perhaps in response to the inherent limits of these statutes, criminal defense attorneys have called for national legislation permitting access for all inmates to DNA testing, an access unfettered by threshold requirements such as “reasonable probability” and “material relevance.”^[43] In addition to urging other states to adopt statutes similar to the New York statute,^[44] some attorneys are recommending federal legislation to guarantee inmates the same kind of access to DNA testing as the New York and Illinois statutes provide.^[45]

After examining the language of the New York and Illinois statutes and the case law interpreting these statutes, it is clear that a state statute granting DNA testing to prisoners is in no way a guarantee that prisoners will receive testing upon request. In fact, there are considerable thresholds a prisoner must meet before a court will grant the order for the testing. Although these

statutes are a necessary first step, defense attorneys still call for the passage of DNA testing statutes for inmates who could not take advantage of DNA testing at the time of their trial.^[46]

B. *Common Law Standards for DNA Testing*

Only a small minority of states have passed statutes mandating DNA testing for prisoners if certain thresholds were met, and the remaining states have varying standards as to when DNA samples from crime scenes will be released to compare them against an inmate's DNA. For those states without postconviction DNA testing statutes, the decision to allow DNA testing for prisoners rests with prosecutors; if the prosecutors do not consent to the testing, defense attorneys can then ask the courts to order this testing.^[47]

Clearly, a prosecutor's disposition towards releasing DNA evidence may be the first hurdle an inmate must surmount to obtain DNA testing. One Louisiana defendant, throughout the first eight years of his imprisonment for rape, repeatedly asked both state and federal judges to order a DNA test to compare his DNA sample against DNA evidence found on the victim.^[48] These requests, however, fell on deaf ears, and the local sheriff's and district attorney's offices blocked his attempts to gain this testing.^[49] The prosecutors, in response, maintain that their decision to deny the defendant access to a rape kit for testing was strongly supported by the state's statute of limitations on postconviction appeals.^[50] In addition to arguing that such testing is "procedurally barred" by a statute limiting appeals after a certain time period, the prosecutors also believe that re-opening cases after they have been adjudicated conflicts with the goal of finality in criminal trials.^[51]

If a prosecutor declines to release DNA evidence found at a crime scene, the option left to a defendant is petitioning a court and requesting an order for postconviction testing.^[52] Most petitions are constructed in one of two ways: a motion for a trial based on newly discovered evidence or as a result of a habeas petition.^[53] If the defendant decides to proceed under a motion for newly discovered evidence, some obstacles will arise. First, many states and jurisdictions have statutes, that set time limits dictating when these motions for newly discovered evidence must be filed.^[54] If a prisoner's appeal falls outside this time limit, his motion may be "procedurally barred." Although the 1980 Uniform Postconviction Procedure Act suggests a general purpose standard of "the interests of justice" for determining when newly discovered evidence, and therefore access to testing, must be granted,^[55] different standards have evolved through common law for determining when access to testing should be granted by courts to prisoners.

Despite the recommendation of the Uniform Postconviction Procedure Act, individual states have developed a variety of different standards that prisoners must satisfy in order to gain access to DNA testing. The standards indicate that while some states are more amenable to DNA testing, other states require the defendants to make more of a showing before testing will be ordered. For example, in some states the standard is that the evidence, in this situation DNA testing, would provide "conclusive proof" that the verdict would have been different had that evidence been presented at trial.^[56] This standard seems to be more stringent than the New York provision, which requires a defendant to show that had DNA testing been available at the trial, it is reasonably probable that the verdict would have been "more favorable" to the defendant.^[57] Although Kansas has not passed a statute to mandate postconviction testing in certain circumstances, its supreme court has developed a rule that is similar to the New York statute.^[58] The Kansas court does not require conclusive proof of an acquittal or a different verdict, but requires only that a defendant show that evidence would be "likely" to produce a different verdict at trial, or that the evidence is *potentially* exculpatory.^[59]

The Supreme Court of South Dakota only recently formed its standard for when postconviction DNA testing may take place.^[60] The court created a three-part test or guideline.^[61] The first part of the test required that any DNA evidence and test results must meet the standard for scientific reliability established by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*^[62] Because DNA testing meets the *Daubert* standard, if DNA testing had been available to the defendant at trial, the first part of the South Dakota test would be satisfied.^[63] The second part of the test showed the South Dakota court's concern with judicial resources. Specifically, the court was worried that it would be inundated in habeas petitions each time a new form of testing became available which might shed new light on the defendant's evidence.^[64] Due to this concern, the court required the defendants to show that favorable test results would "most likely produce an acquittal in a new trial."^[65] The third part of the test stated that testing should not be permitted if it forced an unreasonable burden upon the state.^[66] One example that might impose this burden on the state is the expense of testing, especially if the evidence had not been properly preserved or was contaminated.^[67] The court ultimately determined that the weight of the evidence presented against the defendant at trial was "highly persuasive" and, therefore, additional testing would not be conclusive as to the defendant's innocence.^[68]

Again, the South Dakota test, as well as the tests of Indiana and Pennsylvania, contain language regarding what significance to attach to DNA evidence in comparison to other evidence which was presented at trial.^[69] In looking at standards set by South Dakota, Pennsylvania, and New York, it seems that each court has developed a formula to determine what force DNA evidence must have in light of other evidence before DNA testing will be granted to the defendant.^[70] Courts, such as the Kansas Supreme Court, have recognized that a “blanket rule” allowing state-funded DNA testing for all defendants who request it would be too broad.^[71] In addition, tests developed by the states share some similarities: testing is usually permitted where the crime involved only one perpetrator and the prosecution’s evidence was weak or at least open to reasonable doubt.^[72]

Aside from the similarities cited by the Kansas court, there does appear to be some difference between the states regarding the significance a court should attach to a DNA testing result that shows the defendant’s DNA does not match the DNA sample found at the crime scene. In Pennsylvania, the standard appears more rigorous as DNA evidence must “definitely establish [the] Appellant’s innocence.”^[73] This language may suggest that Pennsylvania courts will require a heightened showing from defendants before postconviction testing will be available. A New York defendant may stand a better chance than a Pennsylvania defendant in receiving DNA testing, because the New York statute requires that the defendant show only that there is “reasonable probability” that test results would produce a verdict favorable to him, instead of showing that the DNA evidence would “definitively establish” his innocence.^[74] At the least, the varying language used in the statutes and in the common law demonstrates that a defendant’s right to DNA testing is not absolute and that the language states choose in setting these standards plays a critical role in a defendant’s ability to prove his innocence.

III. THE COURT’S RATIONALE IN DENYING A NEW TRIAL TO DEFENDANTS IN THE FACE OF EXCULPATORY DNA EVIDENCE

After an inmate has been permitted to test his DNA against crime scene samples and the tests have shown that the defendant was not the source of the DNA found at the crime scene, the question remains: what next? In many cases, prosecutors quickly recognize that the defendant was wrongly convicted and release him^[75] or the defendant may be entitled to a new trial on the basis of newly discovered DNA evidence.^[76]

Roy Criner is in contrast to those inmates who have received new trials or been released when DNA tests showed that those convicted did not leave the DNA found on the victim or at the crime scene. The court’s answer to DNA results, which excluded Criner as the donor of semen found on a rape victim was to deny Criner a new trial. If Criner’s petition for a pardon had been rejected, Criner would still be in prison today. While on its face the decision of the Texas Court of Appeals may seem unjustifiable, the argument between the majority and dissent in the Criner opinion highlights several important issues pertaining to postconviction DNA evidence.

Judge Sharon Keller, who authored the majority opinion in the Criner case, explained that Criner did not meet his burden when presenting his habeas corpus petition on the new DNA evidence.^[77] Criner, according to Texas law, had to establish, “unquestionably” that he was innocent^[78] or “establish[] . . . by clear and convincing evidence that no rational juror could have found him guilty.”^[79] By refusing his request for a trial, the majority did not believe that Criner had met this burden; at best, it believed Criner showed that he might be innocent, but he did not “unquestionably establish[]” his innocence with new DNA test results.^[80]

The Criner petition for a new trial after postconviction DNA testing raises several important questions that courts will face when presented with exculpatory DNA evidence. Does the evidence conclusively establish that the defendant is innocent and was wrongly convicted? Or do the tests at best establish only that the defendant *may* be innocent? What weight, in light of other evidence presented at trial, should courts assign to exculpatory postconviction DNA evidence? This Part explores arguments concerning finality of adjudications in criminal cases and whether or not DNA evidence is conclusive proof of innocence. Ideas such as finality and the weight applied to DNA evidence influence the statutory requirements for postconviction testing, as well as the relief provided when test results are favorable to the defendant.

A. *DNA Exculpatory Evidence and Interest of Finality in Criminal Adjudications*

An important principle in criminal adjudications is finality. As Judge Keller explained in defense of her opinion in Criner, “We can’t give new trials to everyone who establishes, after conviction, that they might be innocent. We would have no finality in the criminal justice system, and finality is important.”^[81]

The Supreme Court of South Dakota discussed the importance of finality in criminal adjudications, even when presented with new DNA evidence.^[82] The court explained that a judgment in a criminal trial will “hold little respect” if judgments can

be continuously reopened when a defendant claims he is innocent and asks that evidence be re-examined.^[83] For this reason, the court determined that only in “extraordinary circumstances” should the court permit postconviction scientific testing.^[84]

Even those attorneys who are pushing for increased postconviction DNA testing recognize the reason for finality in the criminal justice system.^[85] Finality is one of the primary reasons that statutes of limitations have been formed to apply time limits on appeals for new trials.^[86] In addition, recognizing the final nature of a criminal adjudication allows inmates to accept their sentences and begin rehabilitation; if an inmate is instead focusing on appeals and petitions to courts for new trials, the retributive and rehabilitative purposes for imprisonment will not be realized.^[87]

The Supreme Court has endorsed these arguments supporting finality in the many habeas corpus petitions sent to the court by prisoners for judicial review. In *Teague v. Lane*,^[88] the Court reviewed a habeas petition from a prisoner convicted of murder. Although this claim did not involve exculpatory postconviction DNA evidence,^[89] the Court’s statements regarding the importance of finality are notable. The Court explained that the “underlying considerations of finality find significant and compelling parallels in the criminal context.”^[90] The reason why finality is significant in a criminal adjudication is to deter criminals,^[91] as well as to establish stability in the criminal justice system so imprisonment and punishment are not tentative and not constantly subject to appeals and new litigation.^[92]

The Court’s rationale in *Teague v. Lane* supporting finality in criminal adjudications finds strong support in Supreme Court precedent relating to habeas petitions filed by criminal defendants. Following *Teague*, the Court again addressed the issue of finality in *McCleskey v. Zant*.^[93] In addition to discussing such important aspects of finality as deterrence,^[94] the Court stated that new trials may not be reliable because witnesses’ memories of an event will not be fresh or the witnesses’ whereabouts may no longer be known.^[95] The Court also indicated that federal habeas petitions that attack state convictions place a court in the awkward position of frustrating state power.^[96] The Court noted that states have the “sovereign power to punish offenders” and “articulate societal norms through criminal law.”^[97] Enforcement of criminal laws has long been recognized as a sovereign and independent power of states, and federal judicial interference with this power might weaken a state’s ability to pass and enforce laws.^[98] Scarce judicial resources were also a concern of the *McCleskey* court.^[99]

Despite the force of these opinions favoring finality over successive appeals and review of criminal convictions, there is an argument that finality principles should bend to accommodate new and advanced DNA testing. The interest in finality and the interest in correcting wrongful convictions collide when they concern postconviction DNA testing. To rebut those arguments of finality, advocates of postconviction DNA testing claim that a court’s priority should be to assure that innocent people are not imprisoned rather than focusing on practical concerns of finality. For example, the South Dakota Supreme Court examined the issue whether a defendant, who had exhausted all his appeals, was entitled to DNA testing.^[100] Attorney Peter Neufeld argued that “what should govern on these questions is not legal precedent, not factual loopholes, but the fundamental obligation of everyone in the criminal justice system to ensure that only the factually guilty suffer in prison.”^[101] Ultimately, the court chose to put an obligation to discover the truth ahead of finality and ordered the DNA testing.^[102] Other courts have endorsed this view as well. When faced with requests for postconviction testing, these courts have determined that learning the truth and making every effort to avoid wrongfully imprisoning a defendant^[103] overrides finality concerns regarding administration of judicial resources.^[104] In addition, courts have cited fundamental fairness as yet another reason that trumps finality concerns when granting postconviction requests for DNA testing or a new trial.^[105]

Considering the importance of finality in judgments, which was recognized by Judge Keller in reference to the Criner case,^[106] DNA’s precision and accuracy in identifying a suspect or perpetrator by the DNA evidence he left at a crime scene presents a compelling question for courts to resolve. Is DNA’s accuracy and precision a compelling reason to relax the court’s long history favoring finality in adjudications? While some courts have released inmates or at least granted new trials after they were presented with DNA tests showing the inmates’ DNA did not match crime scene evidence, other courts have refused to disturb the finality of the original verdicts.

B. DNA Evidence: Compelling Evidence of Innocence or Just Another Piece of Evidence?

The dividing line between the majority and the dissent in Roy Criner's case was the appropriate weight to give newly-discovered DNA evidence.^[107] The majority believed that the DNA evidence discovered after Criner's conviction, which showed that Criner could not be the donor of the semen found in the victim, did not "unquestionably establish[]" Criner's innocence, and therefore Criner was not eligible for a new trial.^[108] At best, the majority believed that the newly discovered DNA evidence, when weighed against other evidence,^[109] showed only "that the victim had sexual relations with someone other than [Criner]."^[110] For this reason, it was impossible for the DNA evidence to persuade a jury that Roy Criner was innocent.^[111]

The dissent, however, found that Criner had met the standard to obtain a new trial because the newly discovered DNA established by clear and convincing evidence that a jury would not convict him in light of the DNA evidence^[112] or that the postconviction DNA evidence "unquestionably establish[ed]" Criner's innocence.^[113] This split in reasoning between the dissenting and majority opinions as to what weight to apply to newly discovered DNA evidence when a defendant requests a new trial is not unique to Roy Criner's case. It is a dividing point in other courts and between prosecutors and defense attorneys.

The view that DNA evidence is less than conclusive and cannot prove innocence is one side of the debate. As Judge Keller explained in regard to the Criner appeal, the newly discovered DNA evidence "did not prove that [Criner] didn't commit the offense. . . . At best, he made some people think that he might be innocent."^[114] This belief is echoed by some law enforcement officials as well as by others who claim that it is untrue that a non-match between a suspect or defendant's DNA and the DNA found on the victim means that the suspect is innocent.^[115] Several reasons are offered to explain how a suspect can still be guilty when his or her DNA does not match DNA found on a victim or at a crime scene, including the use of condoms, the existence of multiple assailants, and the failure to ejaculate in sexual assault cases.^[116] Those who argue that a non-match between a suspect's DNA and crime scene DNA does not prove innocence explain that while a match between crime scene DNA sample and a suspect's DNA is conclusive, the converse—that a non-match between suspect and crime scene DNA points to a suspect's innocence—is not true.^[117] The conclusiveness and dispositive nature of DNA evidence directly corresponds to the circumstances of the crime.^[118]

The minority opinion in *Ex parte Criner* takes exception to the this view. Judge Charles Baird believed that the majority's rationale, that a negative test result in the Criner case meant only that Roy Criner was not the donor of the semen found on the victim but did not necessarily mean that Criner was not the perpetrator, was nonsensical.^[119] While Judge Baird believed that the majority's rationale did not comport with the facts of the case,^[120] he also found DNA evidence "very important and compelling,"^[121] and its greatest advantage was its reliability: "It proves guilt, and it also *establishes innocence*."^[122] The crucial difference, again, between the majority and minority opinions is that the dissenting opinion found postconviction DNA evidence compelling and capable of proving the defendant's actual innocence, while the majority did not feel DNA evidence was sufficient or compelling enough to prove actual innocence.^[123]

The split between the majority and minority opinions in Roy Criner's case represents a split in opinion as to what evidence is considered conclusive evidence. For example, prosecutors may argue that eyewitness testimony, a confession, or other circumstantial evidence presented to the jury at trial and that the jury used to convict a defendant, was conclusive.^[124] In opposition, defense counsel or perhaps a judge, governor, or the prosecutor who decides not to retry a case after postconviction DNA evidence excludes the defendant as the source of DNA evidence, will argue that DNA evidence is more conclusive as to a suspect's guilt than eyewitness testimony or a confession.^[125] This debate regarding the conclusive nature of DNA evidence may revolve around DNA's classification as negative evidence rather than positive evidence.

Judge Keller explained that the postconviction DNA test results that excluded Criner as the donor of the semen found at the crime scene were merely negative evidence.^[126] Positive evidence, unlike negative evidence, identifies whom a specific culprit is and has greater weight than negative evidence.^[127] The DNA evidence presented during Criner's appeal, however, was negative evidence because it could show only that Criner was not the source of semen found on the victim—it could not exclude Roy Criner as the person who committed the rape.^[128] Judge Keller compared DNA evidence to fingerprint evidence when explaining that both forms of evidence are negative evidence. For example, if a suspect's fingerprints were found at a crime scene, it implies that the suspect was at that crime scene at some time. If the suspect's fingerprints were not there, it does not prove that the suspect was not at the crime scene and did not commit the crime.^[129] This view, that DNA evidence is similar to fingerprint evidence, is the basis of the majority's argument in *Ex parte Criner* that DNA evidence cannot be

compelling evidence because it is only negative evidence. Negative evidence is given less weight than positive evidence^[130] and it does not exclude a defendant as the suspect of the crime.

Courts have taken an approach to fingerprint evidence during appeals similar to that which the Texas Court of Appeals took to Criner's postconviction DNA evidence. For example, a defendant was found guilty of homicide for stabbing a woman to death during an aggravated burglary.^[131] The defendant filed a motion for a new trial and claimed that exculpatory evidence existed, including the lack of fingerprint and hair evidence at the scene of the crime, which matched the hair and fingerprints of the defendant.^[132] The court concluded that the lack of hair and fingerprint evidence failed to exculpate the defendant and therefore was not grounds for a new trial.^[133] This conclusion was echoed in an appeal of a drug conviction.^[134] The defendant claimed that newly discovered evidence, fingerprints, found on marijuana wrappers existed, which did not match defendant's fingerprints and could not be matched to any known person.^[135] As with Roy Criner's appeal, the defendant believed that the evidence proved his innocence and excluded him from being the perpetrator of the crime because it showed that he could not have left the fingerprints on the marijuana wrapper.^[136] The court, however, stated that the negative fingerprint evidence was not "significant or material in disproving the elements of the offense" and listed several other possibilities as to how fingerprints not belonging to the defendant could be present and yet the defendant could still be guilty of the drug offense.^[137]

Although negative evidence, such as a non-match between the defendant's DNA and the crime scene DNA, carries less weight than positive evidence, and therefore is characterized as not being dispositive of guilt or innocence, the very nature of DNA evidence suggests that its presence or absence may be more significant than that of other forms of forensic evidence, such as fingerprints. A United States District Court declared that DNA evidence is "a far more accurate and conclusive method of identification" than forensic methods employed twenty years ago at the time of the defendant's trial.^[138] The revolutionary character and accuracy of DNA argue in favor of allowing new trials because this evidence is less subjective and more precise than the forensic procedures courts followed when defendants like Roy Criner were convicted. Even though DNA must be considered in the context of other evidence presented,^[139] DNA "can avoid many miscarriages of justice that might occur without it."^[140] Compared to eyewitness identification, "DNA is overwhelming evidence of identity."^[141] Further, the analogy between DNA and fingerprint evidence may be faulty because DNA testing is, in fact, more accurate than fingerprint testing.^[142] While both may provide negative forms of evidence, DNA's accuracy elevates its standing when determining identity. Fingerprint evidence, for example, links a person circumstantially to a crime scene or weapon, but DNA evidence has the ability to link the suspect "to the crime itself."^[143] In sexual assaults, the fact that semen is found at a crime scene determines what crime has occurred—rape. The power and significance of DNA evidence is proved because it can "spell[] the difference between conviction and acquittal."^[144]

The previous cases addressing the materiality of fingerprint evidence on appeal are similar to the Criner case because all of these cases give less weight to negative evidence and find it to be less conclusive than positive evidence. Judge Keller analogized DNA evidence to fingerprint evidence when she said that, like fingerprint evidence, DNA evidence merely shows that the defendant may be innocent, but it does not show that the defendant did not commit the offense.^[145] Yet, the accuracy of DNA testing demands that DNA evidence be given greater weight than fingerprint evidence. The tension between the majority and minority opinions in *Ex parte Criner* presents several questions regarding the appropriate weight to give DNA evidence, to what degree it is conclusive, and whether DNA is a form of "super evidence" or merely negative evidence. The sharp differences of opinion in *Criner* show that these questions have not been resolved. While DNA evidence does not exist in a vacuum and must be considered in the context of non-DNA evidence presented at trial, a uniform approach must be used when confronting postconviction DNA evidence so that a defendant's innocence is not compromised by the lack of uniformity in testing and post-testing procedures.

IV. FEDERAL RESPONSE TO THE PROBLEMS SURROUNDING POSTCONVICTION DNA EVIDENCE

The different thresholds for obtaining DNA testing, whether common law or statutory, and the disparate responses of courts when faced with exculpatory DNA test results on appeal, have pushed the issue of postconviction DNA testing to the forefront.^[146] The repercussions of this lack of uniformity are that, while some defendants' convictions are reversed after DNA tests prove exculpatory, others, as Roy Criner once was, are left to languish in prison, seemingly without a remedy. This inequity, combined with the exoneration of more than sixty prisoners due to exculpatory postconviction DNA evidence, has prompted a federal response on two fronts. First, the Department of Justice established a commission, which issued a report in September of 1999, entitled *Postconviction DNA Testing: Recommendations for Handling Requests*.^[147] This report was the foundation for federal legislation introduced by Senator Patrick Leahy. Senator Leahy first introduced the Innocence Protection Act^[148] during the 106th Congress, and the Senate Judiciary Committee held hearings to debate the bill.^[149]

Because the Act was not considered before the adjournment of the 106th Congress, Leahy reintroduced it at the start of the 107th Congress with some variation from the original Act.^[150] The most recent version of the Act, as well as the original version, incorporates many of the recommendations of the Justice Department Commission while also proposing a uniform national standard for access to DNA testing and procedures for courts to follow when presented with exculpatory postconviction DNA evidence.

This section first compares the provisions of Senator Leahy's legislation and the reception it has received to the Justice Department's report. This section will also analyze whether the Innocence Protection Act adequately addresses the problems pertaining to exculpatory postconviction DNA evidence and whether the Act would make a difference for the testing requests of defendants like Roy Criner.

A. *The Innocence Protection Act of 2001, S. 486*

As mentioned previously, the impetus for the Innocence Protection Act of 2001 was the Justice Department's *Postconviction DNA Testing Report*.^[151] The Innocence Protection Act, however, is a narrower and more focused approach than the one in the Justice Department report.

Senator Leahy's proposal has two primary parts that address postconviction DNA evidence. First, S. 486 states that federal courts shall grant a defendant's request for postconviction DNA testing when these requirements are met: the DNA evidence must relate to the federal crime for which the defendant was convicted;^[152] the evidence must still be "in existence" and in a suitable condition for testing;^[153] the DNA evidence must not have been previously tested or new DNA testing procedures must exist which will "resolve an issue not resolved by previous testing;"^[154] the testing procedures must be scientifically valid;^[155] and the testing must yield "new, noncumulative, exculpatory evidence *material* to the claim" of the defendant.^[156] In contrast, the *Postconviction DNA Testing Report* suggests only that the court act as a facilitator between the prosecutor and defense counsel when postconviction DNA testing is requested.^[157]

Second, if the DNA testing produces exculpatory results, Senator Leahy's proposal provides that federal courts shall order a hearing and "make such . . . orders as may be appropriate under applicable rules and statutes regarding postconviction proceedings."^[158] While not mandating a specific response to exculpatory test results, the *Postconviction DNA Testing Report* strongly leans toward vacating the defendant's conviction.^[159] If the DNA tests are favorable to the defendant, the report stipulates that the court should be prepared to grant a joint motion or a motion from either party to vacate the conviction.^[160] At the least, the report recommends a new trial in the absence of a motion for dismissal if the court determines it is reasonably probable that the verdict would change in light of this new, exculpatory DNA evidence.^[161]

The Innocence Protection Act's effect on a defendant's appeal is limited to the two sections concerning access to testing and procedures for federal courts that are presented with exculpatory DNA evidence.^[162] Although the *Postconviction DNA Testing Report* contains more thorough procedures for prosecutors, defense counsel, and judges who are faced with postconviction DNA test results, the report does not have the force of law.^[163] So prosecutors and courts are free either to follow the recommendations or to ignore them.

Some of the criticisms concerning the report's clash with the goals of finality and closure in the criminal justice system are also applicable to the Innocence Protection Act.^[164] By ordering federal and state courts to grant DNA testing to prisoners and by requiring federal courts to hold a hearing if the test results are favorable to the defendant, cases will be re-opened. Those opposed to reopening cases where exculpatory DNA evidence is discovered after conviction argue that waiving statutes of limitations so that a new trial can take place wastes scarce judicial resources.^[165] These critics point to evidentiary difficulties such as witnesses' faded memories and deterioration or destruction of evidence used during the trial, which make it difficult for prosecutors to present their cases.^[166]

At first glance, the Leahy legislation appears to remedy a key problem left unsolved by the *Postconviction DNA Testing Report*. Defense attorneys note that prosecutors often withhold their consent to DNA testing.^[167] The problems of prosecutorial discretion, therefore, remain an issue under the *Postconviction DNA Testing Report's* plan, as its provisions are not mandatory. The Innocence Protection Act takes this discretion from prosecutors by creating a uniform national standard for postconviction DNA testing.^[168] If a prisoner meets the requirements of S. 486 and the court determines that the DNA testing may produce noncumulative evidence material to the defendant's claim, the court must order the testing.^[169] This approach circumvents the prosecutor's involvement in the decision to either grant or withhold postconviction testing from prisoners.

To date, political reaction to Senator Leahy's legislation has been favorable. Upon its introduction during the 106th Congress, then-President Clinton indicated that he was "quite favorably disposed toward it,"^[170] and companion legislation has been introduced in the House of Representatives.^[171] Senator Orrin Hatch (Republican, Utah), Chairman of the Senate Judiciary Committee, agreed to study the administration of the death penalty, an issue closely aligned with a prisoner's opportunity to prove his innocence by using postconviction DNA evidence.^[172] It has been noted, however, that the Innocence Protection Act would "represent a significant federal intervention into state judicial procedures, and runs counter to a legislative trend in recent years curtailing the rights of Death Row inmates to reopen their cases."^[173] The media attention and growing concern over wrongful convictions and the sentencing of innocent defendants may counter this criticism and bode well for the passage of the Innocence Protection Act of 2001.

B. *Would S. 486 Free Defendants Like Roy Wayne Criner?*

While defense attorneys have supported a national standard for DNA testing to bring uniformity to the many conflicting state standards, S. 486 is not a guarantee that every defendant who requests postconviction DNA testing will receive it. If the government proves by a preponderance of the evidence that the defendant requested postconviction testing only to “unreasonably delay . . . the administration of justice,”^[174] or if it fails to produce material evidence showing that the defendant did not commit the crime,^[175] the request may be denied. Although Criner was able to gain access to postconviction testing, which proved he was not the donor of semen found on the victim, a court considering a request in a case similar to Criner’s might conclude that the DNA evidence did not produce new evidence “material” to the defendant’s claim that he was wrongfully convicted.^[176] Such a result is not outside the realm of possibility, as shown by Criner’s petition for a new trial due to postconviction DNA evidence. While the standard applied by the Texas Court of Criminal Appeals is different and, arguably, more difficult to meet,^[177] the statute leaves room for a court to consider non-DNA evidence and to determine that testing is not appropriate. If Roy Criner were still imprisoned, it seems likely that testing would be granted, as the crime at issue involved only one perpetrator, and the other evidence presented in his case revolved around conflicting statements Criner made to friends.^[178]

The Innocence Protection Act does not set standards for state courts to use when determining whether a new trial to consider postconviction DNA test results is warranted, but it does provide post-testing procedures for federal courts.^[179] Applying these procedures to Roy Criner’s case,^[180] the court, at the very least, would have to grant a hearing request because the test results were favorable to Criner. In fact, the trial court did order a new trial, but the Texas Court of Criminal Appeals reversed this decision and denied Criner’s request for a new trial.^[181] Under the Innocence Protection Act of 2001, a court has complete discretion to determine the order to enter when test results are favorable to the defendant; the only limit to the court’s action is that the order must be “appropriate under applicable rules and statutes governing post-conviction proceedings.”^[182] At a minimum, the bill might decrease the likelihood that courts will turn a deaf ear to defendants’ petitions for new trials through its mandate that a hearing must be ordered to consider these petitions.

The ramifications of the Innocence Protection Act for Roy Criner and defendants like him are unknown at this early stage. However, S. 486 takes the first important steps toward bringing uniformity and guidelines to postconviction testing and procedural concerns. By bringing a degree of certainty to this process, the Innocence Protection Act of 2001 gives defendants stronger footing when petitioning the courts for access to DNA testing and hearings for consideration of the results.

V. THE NEED FOR GUIDANCE FROM THE JUDICIARY AND THE LEGISLATURE

A. *Standards for Postconviction DNA Testing*

The Innocence Protection Act of 2001 takes an important first step toward providing prisoners with access to postconviction DNA testing. States that have not adopted postconviction DNA testing statutes should follow the federal model of the Innocence Protection Act or codify common law standards in order to reduce uncertainty and disparity in postconviction testing.

The primary issue for a statute providing postconviction DNA evidence is the breadth of the statute. The possibilities range from providing testing access to all prisoners who can show that DNA evidence is related to the crime for which they were convicted, to a narrow statute that provides DNA testing only in a particular set of circumstances. Inherent in this determination is a balancing of finality interests and respect for judicial resources against the wrongful imprisonment of innocent people.

Senator Leahy’s proposal advocates a broad approach to DNA testing and is the correct approach. Under his proposal, prisoners must show the following: that DNA testing is related to the investigation or the prosecution of the prisoner, that DNA evidence still exists in a condition suitable for testing, that either this evidence was not previously tested or that new testing procedures exist which will yield more accurate and precise results, and that DNA testing methods are scientifically valid and have the potential to produce new, noncumulative evidence material to the inmate’s claim of innocence.^[183] If these requirements are not met, or a court finds, for example, that the test results are not material to the defendant’s claim of innocence, the court need not grant the defendant’s application for testing.

Adoption of a narrower and more mechanical approach might not take into account improvements in testing that could yield more accurate results. Another reason why DNA testing should be broadly granted is that postconviction DNA testing will apply only to a limited number of defendants.^[184] Some even suggest that postconviction DNA testing should be available to those defendants who pleaded guilty at trial or who confessed to the crime.^[185] DNA tests are now widely used by law

enforcement to investigate, so it is more likely that DNA will play a role at trial where defendants will have an opportunity to rebut such testimony or use it in their favor. In addition, DNA testing procedures have become cheaper, thus decreasing costs and making tests more readily available.^[186] Even the most expensive testing, which can cost as much as \$5,000, is less expensive than the costs of housing an inmate in a state prison for a year.^[187]

Any postconviction DNA testing statute must consider requiring the preservation of DNA evidence. The Innocence Protection Act provides that DNA evidence related to a defendant's conviction must be preserved while the defendant's request for postconviction testing is evaluated.^[188] If the evidence is tampered with, the Innocence Protection Act allows "appropriate sanctions" for the destruction of evidence.^[189] A preservation requirement, however, has been criticized by those who believe the requirement will be logistically difficult to implement,^[190] and not all states specifically require the preservation of DNA evidence for later, postconviction testing.^[191] While an argument that preserving DNA evidence is unfeasible or burdensome may have merit, allowing postconviction testing while not making efforts to insure the preservation of the evidence seems inconsistent. A right to testing without a preservation requirement provides little opportunity, if any, for a defendant to present persuasive evidence of his or her innocence to the court. If a right to DNA postconviction evidence is to provide a meaningful opportunity to present new evidence of innocence to a court, preservation of crime scene DNA evidence must be required.

The availability of a fair and impartial forum to review requests for postconviction DNA testing is also integral to postconviction testing statutes. Washington, for example, provides that prosecutors will screen all postconviction testing requests to determine which defendants will obtain access to testing.^[192] Having prosecutors who convicted the defendants decide whether those same defendants may receive access to DNA evidence might raise questions about the prosecutor's self-interest and impartiality when evaluating the requests.^[193] To avoid questions about impartiality and misconduct, state statutes should provide for an impartial forum for review of postconviction DNA testing petitions.

As costs for DNA tests are shrinking and the pool of prisoners whose trials took place when DNA testing was not available is decreasing, access to testing should be broadly granted in any legislative proposal. In the interests of justice, testing should be permitted to determine whether a defendant is excluded as the donor of DNA found at a crime scene rather than denied for procedural reasons only because the technology had not been invented at the time of that defendant's trial.

B. *Guidelines for Courts to Follow When Confronted with Postconviction DNA Test Results That Exonerate a Prisoner*

Although the Innocence Protection Act provides post-testing procedures for federal courts if the test results are favorable to the defendant, there is still no guarantee that a defendant will receive a new trial. In Roy Criner's case, the court had to be convinced that he had unquestionably established his innocence, or had shown his innocence by clear and convincing evidence, before a new trial would be granted for consideration of postconviction DNA evidence.^[194] The Texas Court of Criminal Appeals concluded that Criner had not met this burden.^[195] However, other courts presented with exculpatory postconviction DNA evidence have either granted new trials, vacated convictions, or completely exonerated the defendant.^[196] To remedy this inconsistency, a specific standard must be established, either by statute or common law, that provides a threshold prisoners must meet to obtain a new trial where exculpatory postconviction DNA evidence is involved.

Several options exist for increasing the receptiveness of courts to postconviction DNA testing. One option might be to modify state statutes of limitations that prohibit courts from considering prisoners' appeals that are based on newly discovered DNA evidence. For example, in Florida, DNA testing was denied to a defendant because it was procedurally barred on appeal by the state's statute of limitations.^[197] Because DNA evidence is more accurate and precise than other forms of forensic science, such as blood typing and hair testing, courts should accommodate these requests for testing. States could form a specific exception to their statutes of limitation, allowing new trials only on the grounds of either newly discovered evidence or DNA postconviction evidence. Limiting the exception to these grounds should mollify possible concerns about both frivolous appeals and opening the floodgates for requests for new trials. In addition, relaxing time limits for appeals based on postconviction DNA evidence does not present the problems associated with other forms of newly discovered evidence, such as loss of memory associated with eyewitness identification.

A second possibility for reform is the creation of a mandatory threshold that defendants must meet to obtain a new trial for the consideration of postconviction DNA evidence. A possible blueprint for this threshold is presented by the "significant factors" test presented in *Ake v. Oklahoma*.^[198] While *Ake* involved the right of an indigent defendant to a state-provided psychiatrist if the defendant's sanity was likely to be a "significant factor" at trial,^[199] this test could be applicable to a defendant requesting a new trial based on DNA testing. The Court in *Ake* noted that psychiatry plays a "pivotal role" in criminal proceedings.^[200] Similarly, in the last ten years, DNA forensic evidence has come to play a pivotal role in criminal

investigations. Also, just as the assistance of a psychiatrist “may well be crucial to the defendant’s ability to marshal his defense,”^[201] the availability of DNA testing to a defendant whose alleged crime involves DNA evidence, such as semen or blood, would also be crucial to his or her ability to present a defense. And, just as a psychiatrist is not available to an indigent defendant who cannot afford those services, accurate DNA testing has been widely available only for approximately the last ten years, due to recent scientific advances.^[202] For a defendant convicted before DNA testing was widely used in trial, this form of evidence was not available to him, regardless of the diligence with which he prepared and presented his defense.

Given the similarities between a defendant who did not have access to a psychiatrist when sanity was at issue and a defendant who did not have access to DNA testing at trial where physical evidence pertaining to identity was at issue, the *Ake* test could be applied to postconviction DNA testing and requests for new trials based on the results. The potential test could consist of the following requirement: the defendant must demonstrate that DNA testing performed on crime scene evidence would have been a *significant factor* at his trial. In making this determination, a court might consider whether there were multiple assailants, whether DNA evidence from the crime scene was contaminated, and whether the prosecution had used blood evidence or other forensic evidence during its case in chief against the defendant.

For Roy Criner, this standard would have been attainable. In the murder of Deana Ogg for which Criner was convicted, there were not multiple assailants, there was no indication that DNA evidence from the crime scene was contaminated, and during his trial the prosecution presented tests that showed Criner’s blood type was consistent with the semen found at the crime scene. Once any defendant shows that the availability of DNA testing procedures would have been a “significant factor” at trial, a new trial must be provided so that this information can be considered.

A third possibility for reform could be a shift in the burden of persuasion. On appeal, Criner, rather than the state, was required to prove that the new evidence presented unquestionably established his innocence. This is a clear and convincing standard. Due to the court’s interpretation of the significance of DNA evidence, it determined that Criner did not meet this burden. A possible solution for relief based on postconviction DNA evidence is to shift this burden to the state. For example, a defendant first could be required to show that DNA testing would have been a significant factor at trial, or that it is more likely than not that the jury’s determination would have been affected by this evidence. Then, the state, if it chose to fight the defendant’s request for a new trial, would have the burden of showing that this evidence would not be materially relevant at trial, or would not make a substantial difference at trial. A shifting in the burden, for postconviction DNA evidence only, would increase the defendant’s chance of receiving a new trial.

A uniform standard that clearly defines a defendant’s relief when he discovers postconviction DNA evidence is a necessity because it will remedy the inconsistency in courts’ determinations while allowing the courts the discretion to examine whether a new trial would make a difference in the outcome.

VI. CONCLUSION

The issues surrounding postconviction DNA evidence present several thorny and complicated questions for courts and legislators. While the principle of finality is firmly rooted in our criminal justice system, fundamental fairness requires that exceptions be made for DNA testing. DNA testing has the unique quality of conclusively proving identity; furthermore, the DNA evidence found at a crime scene provides strong clues as to what crime has occurred, such as rape. This evidence must not be ignored merely because a defendant’s trial took place before DNA advances in forensic science were made. While DNA evidence is negative in the sense that a test showing a defendant was not the donor cannot conclusively identify the perpetrator, the severity of the sanctions attached to such crimes mandates that a new trial be held where such evidence can be considered together with non-DNA evidence.

The inconsistency among courts’ determinations when confronted with postconviction DNA evidence demands that a uniform approach be adopted to provide relief to defendants. The fact that some courts exonerate defendants while other courts leave defendants to languish in prison when exculpatory DNA results are presented in similar situations proves this issue. The latest proposal, the Innocence Protection Act of 2001, makes an important first step in providing defendants access to testing and new trials where courts and prosecutors have previously turned a deaf ear. Courts and legislatures should not hesitate, however, to form their own guidelines. A uniform threshold standard is needed to provide predictability and certainty to defendants and courts alike when considering appeals based on newly discovered DNA evidence. A new trial is a small price to pay for freeing a defendant who has been wrongfully convicted.

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^[1] *Frontline: The Case for Innocence* (PBS television broadcast, Jan. 11, 2000) (transcript at <http://www.pbs.org/wgbh/pages/frontline/shows/case/etc/script.html>) [hereinafter *Frontline*]. The murder of the victim, Deana Ogg, occurred on

September 27, 1986. *Id.*; see Harry Rice, *Embracing Freedom*, “Some Doors a Man Can’t Open,” *Inmate Pardoned, Freed After 10 Years*, HOUS. CHRON., Aug. 16, 2000, at A1. Criner was released from prison on August 15, 2000, after then-Governor George W. Bush signed his pardon. An eighteen-member parole board had unanimously recommended that Bush pardon Criner after the prosecuting attorney and sheriff supported the pardon. Criner’s attorney, Michael B. Charlton, pointed out that Criner’s experience is an example of the difficulty in overturning an innocent man’s conviction. *Id.*

[2] See *Frontline*, *supra* note 1.

[3] See *Ex parte* Criner, No. 36,856-01, slip op., opinion at 3 (Tex. Crim. App. July 8, 1998). The medical examiner determined that the victim, Deana Ogg, had sexual relations but could not determine whether the intercourse was consensual. *Id.*

[4] *Id.*

[5] *Id.* at 2.

[6] See *Frontline*, *supra* note 1. Roy Criner worked at a logging site in Texas. *Ex parte* Criner, opinion at 2. Criner had left the logging site for a period of time, and returned between 7:30 and 8:00 p.m. *Id.* At 7:15 p.m., the victim’s body was discovered; she was last seen that evening at a convenience store between the hours of 5:30 and 7:00 p.m. *Id.* When Criner returned to the logging site, he “told Jeff Pitts that he had picked up a blond-haired girl,” a hitchhiker, and threatened her with a screwdriver. *Id.* Criner later confessed to Pitts that he had raped the hitchhiker. *Id.* That same evening, Criner told Terry Hooker and Michael Ringo “that he had ‘done something bad[,]’ but that it had ‘turned out alright.’” *Id.* Criner then told Ringo and Hooker that he had picked up a girl hitchhiker and forced her to perform oral sex on him. *Id.* He also said that the hitchhiker was scared and crying and that he had threatened her with a screwdriver if she did not comply. *Id.* He then confessed that he had raped her. *Id.* The three men were not aware of the discovery of the young girl’s body at the time Criner made these statements to them. *Id.*

Almost ten years after Criner’s conviction in 1990, Jeffrey Pitts, Criner’s friend and employer, stated that there was “no possible way” Criner left his job on the day Deana Ogg was murdered. *Frontline*, *supra* note 1. Even though Criner testified at his trial that he was away from the construction site where he worked with Pitts on the day of the murder, Pitts steadfastly maintains that Criner could not have left without being seen by Pitts himself, or a guard at the site. *Id.* In addition, Pitts claims that Criner did a significant amount of work during the time when he was supposedly to be raping and murdering Deana Ogg. *Id.* Pitts said that he brought these comments to the attention of police, but the police ignored them. In addition, Pitts was not called by the defense to testify because, at the time, they felt their case was so strong that they would not need Pitts’s testimony. *Id.*

[7] See *Frontline*, *supra* note 1.

[8] DNA testing in criminal investigations was first used in 1986 in England. See JOE NICKELL & JOHN F. FISCHER, *CRIME SCIENCE: METHODS OF FORENSIC DETECTION* 201–02 (1999). In the United States, DNA evidence was first successfully used in the case *State v. Andrews*, Case No. 87-1565 (Ninth Jud. Cir. Ct., Orange County, Fla. Div. 15, Nov. 6, 1987), a Florida criminal trial for rape in 1987. See Sally E. Renskers, Comment, *Trial by Certainty: Implications of Genetic “DNA Fingerprints,”* 39 EMORY L.J. 309, 314 (1990). Since the Andrews trial, DNA testing has become increasingly precise in comparing separate DNA samples. See generally Randi B. Weiss et al., *The Use of Genetic Testing in the Courtroom*, 34 WAKE FOREST L. REV. 889 (1999) (discussing genetics and different types of DNA testing procedures). DNA testing has played a central role in some of the most sensational trials in American history, such as the O.J. Simpson murder trial. See HARLAN LEVY, *AND THE BLOOD CRIED OUT: A PROSECUTOR’S SPELLBINDING ACCOUNT OF THE POWER OF DNA* 157–88 (1996) (describing the large quantity of DNA evidence used in the Simpson trial). DNA has also been predicted by some to play an increasing role in criminal investigations, including the use of genetic testing to determine whether someone is criminally inclined. See Steven I. Friedland, *The Criminal Law Implications of the Human Genome Project: Reimagining a Genetically Oriented Criminal Justice System*, 86 KY. L.J. 303 (1998) (discussing possible developments of DNA testing and criminal investigation, including the use of DNA testing to show propensity, psychological profiles, and prediction of dangerousness).

[9] *Frontline*, *supra* note 1. Michael Charlton, Criner’s appellate attorney, recounted to Ofra Bikel, in a *Frontline* interview, his explanation to Criner of the risk involved in a DNA test for a prisoner: “If you do this DNA and it comes back and it’s your DNA in that semen, you’ll be in the prison the rest of your life. You’ll never get out.” *Id.*

[10] *Id.*

[11] *Id.* Brenda Verron, Criner’s aunt, told Ofra Bikel that she thought Criner would be home in two weeks after the postconviction DNA testing showed that Criner’s DNA did not match the semen found on the body of Deana Ogg. *Id.*

[12] See Rice, *supra* note 1, at A1. In 1998, DNA tests showed that semen discovered on Deana Ogg’s body did not match Criner’s DNA. *Id.* A new trial, however, was denied by the Texas Court of Criminal Appeals and Criner remained in prison until his pardon on August 15, 2000. *Id.*

[13] See *Ex parte* Criner, opinion at 4. Judge Sharon Keller, who wrote the majority opinion, explained that “the new [DNA] evidence does not establish innocence. The DNA evidence shows merely that the victim had sexual relations with someone other than [Criner] at a time relatively near her death. It does not and cannot exclude the possibility that she also had sexual relations with [Criner].” *Id.* (emphasis added); cf. Paul McKay, *Judge Decides Convict Is Entitled to New Trial: DNA Testing Spurs Criner Case Ruling*, HOUS. CHRON., Jan. 16, 1998, at A29 (reporting that Mike Charlton, Criner’s attorney, took a markedly different view about the significance of DNA evidence). Charlton stated that “‘DNA trumps all other evidence’” and would stand as proof that Criner was wrongly convicted. *Id.* However, the prosecuting attorney in the Criner case, Mike McDougal, took the view that the Texas Court of Appeals ultimately endorsed. *Id.* McDougal stated that, should Criner be granted a new trial due to the new, exculpatory DNA evidence, he would still pursue charges against Criner because the DNA evidence does not prove that Criner did not rape Deana Ogg. *Id.*

[14] *Frontline*, *supra* note 1; see also Interview by Ofra Bikel with Judge Sharon Keller, Texas Court of Criminal Appeals (transcript at FRONTLINE, THE CASE FOR INNOCENCE, <http://www.pbs.org/wgbh/pages/frontline/shows/case/interviews/keller.html> (last visited Apr. 5, 2001)) [hereinafter *Keller Interview*].

[15] See *supra* notes 1 & 12.

[16] See, e.g., *Zeigler v. State*, 654 So. 2d 1162 (Fla. 1995) (holding that defendant was not entitled to a new trial on the basis of newly discovered DNA evidence because defendant did not show that this evidence probably would have resulted in a different verdict at trial); *State v. Hunt*, 457 S.E.2d 276 (N.C. 1995) (affirming the trial court in determining that new, exculpatory DNA evidence did not warrant a new trial because, among other reasons, the absence of defendant's DNA evidence in semen found on the rape victim does not mean he did not rape her); *State v. Avery*, 570 N.W.2d 573 (Wis. Ct. App. 1997) (holding that newly discovered DNA tests did not merit a new trial for a defendant convicted of rape because the defendant did not prove by clear and convincing evidence that it was reasonably probable that the trial court would have reached a different verdict had DNA evidence been introduced).

[17] *Frontline*, *supra* note 1; see also *Keller Interview*, *supra* note 14.

[18] See, e.g., *State v. Saecker*, No. 94-2782, 1995 WL 507607 (Wis. Ct. App. Aug. 8, 1995) (holding that defendant was entitled to a new trial because weak non-DNA evidence consisting of eyewitness testimony, coupled with the DNA evidence, produced a reasonable probability that the result would be different at trial had the DNA evidence been introduced); *State v. Hicks*, 536 N.W.2d 487 (Wis. Ct. App. 1995) (same); *Commonwealth v. Reese*, 663 A.2d 206 (Pa. Super. Ct. 1995) (holding that defendant was entitled to a new trial on the basis of DNA evidence because the jury had not had the opportunity to hear such evidence); *People v. Dabbs*, 587 N.Y.S.2d 90 (Sup. Ct. 1991) (holding that technological advancements made in DNA analysis indicated that defendant could not have committed the rape and therefore warranted vacating his conviction); see also NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUST., PUB. NO. NCJ 161258, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL 34-76 (1996) [hereinafter NAT'L INST. OF JUST.] (detailing the stories of twenty-eight documented cases where convicted defendants, who had served an average of seven years in prison, were exonerated using DNA postconviction evidence).

[19] See *Frontline*, *supra* note 1.

[20] Although states that have adopted postconviction testing statutes have not adopted verbatim the New York or Illinois tests, states have incorporated some of the language of the New York and Illinois statutes.

The Illinois statute has five basic parts. See *infra* notes 29 & 30 and accompanying text. In short, the statute requires that: the evidence to be tested was secured in relation to the trial; the identity of the perpetrator was at issue during the trial; the evidence to be tested was subject to a proper chain of custody so as to insure that it has not been altered or tampered with; the testing results have the scientific potential to produce "new, noncumulative evidence *materially relevant* to the defendant's assertion of actual innocence"; and the testing methods are accepted within the scientific community. 725 ILL. COMP. STAT. 5/116-3 (1999) (emphasis added). States that have adopted postconviction DNA statutes generally require defendants to meet these five requirements. States differ, however, in their language as to whether the tests must produce evidence that is *materially relevant* to the defendant's innocence, the Illinois approach, before testing is permitted, or whether the results need only raise a *reasonable probability* that the verdict or sentence would have been more favorable to the defendant, which is the New York approach. See *infra* note 21 and accompanying text for a discussion of the New York statute.

California and Arizona both adopted the reasonable probability the language of the New York statute. See CAL. PENAL CODE § 1405(a)(1)(B) (West 2000); ARIZ. REV. STAT. ANN. § 13-4240(B)(1) (West 2000). California's statute contains the five elements of the Illinois statute including: the evidence to be tested is available, a proper chain of custody exists, the identity of the perpetrator was at issue at trial, and the form of DNA testing is scientifically valid. CAL. PENAL CODE § 1405(c)(1)-(8) (West 2000). The California statute then adopts the New York language as one of its requirements by stating that the results must raise a *reasonable probability* that the verdict or sentence would have been more favorable with DNA testing. CAL. PENAL CODE § 1405(a)(1)(B) (West 2000) (emphasis added). Arizona also adopts the reasonable probability of the New York statute when it states that a court must order postconviction testing when a reasonable probability exists that the defendant would not have been prosecuted or convicted had the DNA evidence been available. ARIZ. REV. STAT. ANN. § 13-4240(B)(1) (West 2000).

Delaware's and Minnesota's postconviction DNA testing statutes more closely resemble the Illinois approach. See DEL. CODE ANN. tit. 11, § 4504(a)(1)-(6) (West 2000); MINN. STAT. ANN. § 590.01(1)(a)-(c) (West 2000). Both states require that: the evidence to be tested was secured in relation to the trial, the evidence was not previously tested because the technology was not available, identity was at issue at trial, the evidence was subject to a proper chain of custody, and the form of testing is scientifically valid. *Id.* Finally, Delaware and Minnesota follow the Illinois approach by also requiring defendants to show that a DNA test will produce "new, noncumulative evidence *materially relevant* to the defendant's assertion of innocence." DEL. CODE ANN. tit. 11, § 4504(a)(5) (West 2000) (emphasis added); MINN. STAT. ANN. § 590.01(1)(a)(2) (West 2000) (emphasis added).

Two other states, Washington and Oklahoma, have adopted postconviction DNA testing statutes, but neither follows the New York and Illinois approaches. WASH. REV. CODE ANN. § 10.73.170(1)-(2) (West 2000); OKLA. STAT. ANN. tit. 22, § 1371.1(A) (West 2000). Washington state gives total discretion to prosecutors to decide which defendants may obtain postconviction DNA testing. WASH. REV. CODE ANN. § 10.73.170(2) (West 2000). Prosecutors shall screen all testing requests; if the prosecutor determines that there is a "likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis," and the evidence still exists, the testing shall be ordered. *Id.*

Oklahoma provides for testing as part of the Oklahoma Indigent Defendant Defense System ("The Defense System"). OKLA. STAT. ANN. tit. 22, § 1371.1(A) (West 2000). The Defense System has authority to screen and investigate all incarcerated defendants' claims that scientific evidence—DNA evidence—will demonstrate their factual innocence. Factual innocence, according to the statute, requires the defendant to "establish by clear and convincing evidence that no reasonable jury would have found the defendant guilty beyond a reasonable doubt in light of the new evidence." *Id.* The Defense System has sole discretion to determine which defendants may receive DNA testing. Their decisions are not subject to judicial review. *Id.*

[21] See Sharon Cohen & Paul Shepard, *DNA Tests at Center of Emerging Battle between Science, Law Justice System Sometimes Resist Pool*, PLAIN DEALER (Cleveland), Nov. 23, 2000, at 17E (stating that, as of November 2000, only nine states—New York, Illinois, California, Arizona, Oklahoma, Minnesota, Florida, and Washington—have statutes governing requests for postconviction DNA testing); see also *supra* note 20 and *infra* notes 22 & 29 (discussing state statutes). Federal legislation, the Innocence Protection Act of 2001, discussed *infra* Part IV, also points out that only a few states have adopted postconviction testing statutes and that some of these procedures are "unduly restrictive." S. 486 § 101(a)(10) 107th Cong. (2001).

[22] See N.Y. CRIM. PROC. LAW § 440.30(1-a) (McKinney Supp. 2000):

In cases of convictions occurring before January first, nineteen hundred ninety-six, where the defendant's motion requests the performance of a forensic DNA test on specified evidence, and upon the court's determination that any evidence containing deoxyribonucleic acid ("DNA") was secured in connection with the trial resulting in the judgment, the court shall grant the application for forensic DNA testing of such evidence upon its determination that if a DNA test had been conducted on such evidence, and if the results had been admitted in the trial resulting in the judgment, there exists a reasonable probability that the verdict would have been more favorable to the defendant.

See also *Developments in the Law: Confronting the New Challenges of Scientific Evidence*, 108 HARV. L. REV. 1481, 1573 (1995) [hereinafter *Developments in the Law*] (noting that New York was the first state to pass a statute providing postconviction DNA testing to defendants).

[23] See *Developments in the Law*, *supra* note 22, at 1573.

[24] N.Y. CRIM. PROC. LAW § 440.30(1-a) (McKinney Supp. 2000). Again, under the standard set by the New York statute, the defendant must only prove that a "reasonable probability" exists that the verdict would have been favorable to the defendant had the new DNA evidence been introduced at trial. *Id.*; see also *Developments in the Law*, *supra* note 22, at 1573.

[25] See *supra* note 22.

[26] *People v. Tookes*, 639 N.Y.S.2d 913, 915 (Sup. Ct. 1996). The court believed the statute could be read in a number of conflicting ways as to what threshold a prisoner must meet when showing a "reasonable probability" that the testing would have resulted in a verdict more favorable to the defendant. *Id.* The court explained the quandary: "Since the statute requires testing only where the court has determined that the test results probably would have exonerated the defendant, the statute, if read literally, would require the court to know the result of the test before ordering it." *Id.* The court also believed a defendant could make a plausible demand for automatic testing. *Id.*

[27] *Id.* The court stated that when determining whether there is a "reasonable potential for exculpation," the court must consider the postconviction DNA evidence in light of other evidence presented at trial. *Id.*

[28] *Id.* at 916. The defendant's primary argument in *Tookes* was that the victim had fabricated the entire story of the rape. *Id.* at 915. After noting the physical evidence presented in the case, which showed the violence of the rape, and determining that mistaken identity was not an issue because the victim had known the defendant before the rape, the court concluded that DNA testing would not be granted. *Id.* at 915-16. The strength of non-DNA evidence at trial played a critical role in the court's determination. *Id.*

[29] See 725 ILL. COMP. STAT. 5/116-3 (1999). The Illinois statute is similar to the New York statute, but it is more detailed and perhaps more difficult to meet due to the "materially relevant standard":

(a) A defendant may make a motion before the trial court that entered the judgment of conviction in his or her case for the performance of fingerprint or forensic DNA testing on evidence that was secured in relation to the trial which resulted in his or her conviction, but 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. Reasonable notice of the motion shall be served upon the State.

Id. Like the New York testing statute, the Illinois statute offers testing only to those defendants who were convicted before DNA testing was available or widely used in criminal trials. See *id.* Unlike the New York statute, however, Illinois does not set a specific date after which the opportunity for DNA postconviction testing is foreclosed. *Id.*; see also Rhonda Bell, *Time Limit Frustrates Requests for DNA Test; DNA Tests Righting Old Wrongs in Some States*, TIMES-PICAYUNE (New Orleans), Dec. 28, 1999, at A1 (noting that "state law makers [in Illinois] passed a law two years ago that lifts the obstacles for prisoners seeking genetic testing that wasn't available when they went to trial"). A Louisiana defendant, Clyde Charles, requested DNA testing for nine years before his request was granted. *Id.* His attorney, Barry Scheck, stated that Charles's case shows why the adoption of a statute in Louisiana that provides postconviction DNA testing is crucial. *Id.*

[30] 725 ILL. COMP. STAT. 5/116-3(b) (1999). In addition to the first requirements stated in part (a) of the Illinois statute, a defendant must make a prima facie case that: "(1) identity was the issue in the trial which resulted in his or her conviction; and (2) 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 any material aspect." *Id.*

[31] 725 ILL. COMP. STAT. 5/116-3(c) (1999). After the defendant makes this prima facie case, the court shall permit the testing if the court determines both that: "(1) the result of the testing has the scientific potential to produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence; [and] (2) the testing requested employs a scientific method generally accepted within the relevant scientific community." *Id.*

[32] *Id.*

[33] *People v. Gholston*, 697 N.E.2d 375, 378 (Ill. App. Ct. 1998) (explaining that the appropriate definition of material relevance was the one provided by the Illinois Supreme Court in *People v. Washington*, 665 N.E.2d 1330 (1996)). In *Gholston*, the court considered the appeal of Kenneth Gholston, who was convicted for sexual offenses, robbery, aggravated burglary, and conspiracy to commit robbery. *Id.* at 376. All of these charges surrounded the sexual assault of a fifteen-year-old girl. *Id.* In addition to the defendant, eight others were prosecuted and ultimately convicted for their involvement in these crimes. *Id.* Besides the defendant, five others were also charged with sexual crimes relating to the fifteen-year-old girl. *Id.*

[34] *Id.* at 379; *supra* note 29. The fifteen-year-old victim "testified that at least six males sexually assaulted her" on a train platform and forced her to engage in vaginal and anal intercourse. *Gholston*, 697 N.E.2d at 377. Then, she was pushed from the train platform onto the snow near the tracks and was sexually assaulted one last time. *Id.*

[35] *Id.* at 379. The court specifically addressed the issue of multiple attackers. *Id.* One or more of the defendants could have ejaculated during the sexual assault, and there is no indication that Gholston himself ejaculated when he assaulted the victim. *Id.* For this reason, the court determined that "we cannot say that the semen samples collected from the victim . . . must match the defendant in order to prove his guilt." *Id.* In those crimes, however, where there is only one assailant and where the victim testifies that her attacker did ejaculate, the absence of the defendant's semen in the DNA recovered from the victim offers greater exculpatory potential. See *Dabbs v. Vergari*, 570 N.Y.S.2d 765, 768 (Sup. Ct. 1990) ("[A]ny semen

taken from the victim could only belong to her attacker. If DNA testing could exclude that semen as belonging to petitioner, it would strongly impeach the credibility of the victim's identification of petitioner.”).

[36] *Gholston*, 697 N.E.2d at 379–80. The court, in reaching its conclusion that DNA testing would offer little exculpatory evidence, closely examined all the evidence presented. *Id.* The *Gholston* court found the non-DNA evidence presented at trial “overwhelming” and “incriminating.” *Id.* at 379. This evidence included defendant's confession that he was present on the train platform at the time of the victim's assault and his admission of guilt in the battery and robbery charges. *Id.* at 380. The court concluded that the defendant would therefore be “legally responsible for the sexual assault . . . under a theory of accountability.” *Id.* “[B]ased on the totality of the circumstances,” the court felt DNA evidence would make little difference, much less change the result of a trial. *Id.* at 379.

[37] *Id.* at 380.

[38] See *Developments of the Law*, *supra* note 22, at 1573.

[39] See *id.* at 1574 (arguing that the statutory standards set by New York and Illinois should not be limited to DNA testing, but should also take into account advances that produce new testing methods). In addition, statutes should establish procedures for courts to follow when DNA testing exonerates a defendant, should direct that states preserve crime scene forensic samples, and should address what to do if the crime scene DNA sample is destroyed. *Id.*

[40] See *id.*

[41] Supporters as well as opponents of the DNA testing bill have expressed skepticism regarding the Illinois statute. See Christopher Wills, *Inmates Gain Right to Seek DNA Tests But Narrowly Written Law Will Prevent Most Prisoners from Trying*, PEORIA J. STAR, July 26, 1997, at A8 (presenting the belief of Lawrence Marshall, a Northwestern University law professor, that the statute would apply to only dozens of prisoners rather than hundreds). Marshall believed that the requirements a defendant must meet would prevent many prisoners from taking advantage of the DNA testing statute. *Id.* For a discussion of the Illinois statute's requirements, see *supra* notes 25–27 and accompanying text. The law was inspired, in part, by Willie Enoch, a defendant sentenced in 1983 for murder. Wills, *supra*, at A8. Ironically, however, some commentators predicted that Willie Enoch would not be eligible for testing under the Illinois statute, even though it was designed to grant prisoners access to testing, because most of the evidence he wanted tested had not been used against him at trial. *Id.*; see also Edgar Signs Bill Giving Access to DNA Evidence, PANTAGRAPH (Bloomington, Ill.), July 24, 1997, at A6 (giving the explanation of a legal director of a Chicago justice center that the legislation was necessary, but not sufficient, to address the problems of wrongful convictions of death row defendants in Illinois); Gregory W. O'Reilly, *A Second Chance for Justice: Illinois' Post-Trial Forensic Testing Law*, 81 JUDICATURE 114, 117 (1997) (stating that defense attorneys and opponents of the death penalty opposed the Illinois statute because it does not address the sources of wrongful convictions—inadequate counsel, concealed evidence, perjury—and is basically a “feel happy bill” that turns the public's attention from the “fallibility” of the criminal justice system).

[42] See Emily Wilkerson, *House Approves DNA Bill for Inmates to Prove Innocence*, STATE J.-REG., Apr. 16, 1997, at 6 (noting that State Representative James Brosnahan voted against the Illinois statute because he felt defendants had sufficient recourse available through which to request DNA appeals using postconviction motions). In addition, Brosnahan felt that the statute would unleash “a flood—an unbelievable flood—of frivolous lawsuits.” *Id.*; see also O'Reilly, *supra* note 41, at 117 (listing opponents' concerns regarding frivolous appeals, the lack of a time limit within which to request DNA testing, and the use of the statute as a delay tactic by death row prisoners). Further, opponents to postconviction testing also argue that the testing is expensive and that reopening cases upsets the victims as well as taking resources away from solving new cases. See Brooke A. Masters, *DNA Testing in Old Cases Is Disputed; Lack of National Policy Raises Fairness Issue*, WASH. POST, Sept. 10, 2000, at A1.

[43] Adam Cohen, *Innocent after Proven Guilty: More Inmates Are Being Set Free Thanks to DNA Tests—and a Pioneering Law Clinic*, TIME, Sept. 13, 1999, at 26, 28.

[44] *Id.* at 28. Barry Scheck and Peter Neufeld, leaders of the Innocence Project, advocate “systemic change.” *Id.* In addition to asking states to adopt a statute similar to that of New York, Scheck and Neufeld propose that states pay for the testing if the inmate cannot afford it, and they want laws that will require prosecutors to retain evidence as long as the defendant is imprisoned. *Id.*; see also Sydney P. Freedberg, *Inmate Sues to Gain DNA Test in Rape Case*, ST. PETERSBURG TIMES, Nov. 1, 1999, at 3B (describing the case of Wilton A. Dedge, who has been in prison in Florida for eighteen years for rape). Dedge filed a federal suit requesting DNA testing so that he may seek clemency from Florida Governor Jeb Bush. *Id.* Unlike Roy Criner, Dedge has not been able to obtain access to DNA testing. *Id.* A Florida prosecutor is blocking Dedge's request for DNA testing because Florida prosecutors and courts believe reopening cases to consider new DNA testing clashes with finality principles of criminal cases. *Id.*; see *infra* Part III.A. for a discussion of the principles of finality in criminal adjudications. The prosecutor explained to Dedge that his request for DNA testing was procedurally barred because Dedge's time to appeal has expired. Freedberg, *supra*, at 3B. Dedge's attorneys argue that Dedge's situation illustrates the need for legislative action to pass a statute granting DNA testing access to prisoners. *Id.* The dissenting judge in *Dedge v. State* agrees. 723 So. 2d 322, 322 (Fla. Dist. Ct. App. 1999) (Sharp, J., dissenting). In his dissenting opinion, Judge Sharp believed that the DNA testing, given the facts of Dedge's case, “could only mean he was not guilty” if the results were favorable to Dedge, and he believed the majority took “a very harsh reading of the two-year time limit . . . to bar testing.” *Id.* at 324. He provided an emotional statement regarding the stakes in the Dedge request for testing:

One of my worst nightmares as a judge, is and has been, that persons convicted and imprisoned in a “legal” proceeding, are in fact innocent. If there is a way to establish their true innocence on the basis of a highly accurate objective scientific test, . . . in good conscience it should be permitted.

Id.

[45] See Nancy Ritter, *DNA: How Many More Like Cromedy?*, 9 N.J. LAW. 45 (2000) (predicting that legislation granting access to DNA testing for prisoners “might be doomed” because lawyers, and especially criminal defense lawyers, “are not overly popular with lawmakers”); Bell, *supra* note 29, at A1 (arguing that state statutes are needed so that prisoners like Louisiana prisoner Clyde Charles, who requested DNA tests for nine years before his request was granted, may have access to DNA evidence for testing); Cohen, *supra* note 43, at 28 (citing New York and Illinois

statutes as models for states to emulate when forming DNA access statutes, and stating that these statutes should require states to pay for this testing if defendants cannot); Bill Dedman, *Two Men Just the Latest Freed by DNA Evidence*, CINCINNATI ENQUIRER, Apr. 22, 1999, at A15 (using the case of Dennis Fritz—who spent twelve years in prison for a rape conviction and who would still remain there after exhausting his appeals, were it not for DNA testing—to illustrate the necessity of statutes granting access to DNA testing to prisoners); Freedberg, *supra* note 44, at 3B (citing the Dedge case and the advocacy of Dedge’s attorney, Mary Beth Sommers, for statutes as the way to avoid prosecutors and courts who block prisoner access to testing); Sam Fulwood III, *Death Penalty Foes Demand New DNA Test for Executed Man*, L.A. TIMES, Aug. 31, 1999, at A5 (using the case of Joseph O’Dell, who was executed in Virginia in 1997, to illustrate Virginia’s general reluctance to grant DNA testing to prisoners and stating Virginia’s specific refusal to release, after the execution, DNA evidence from O’Dell’s conviction to test against O’Dell’s DNA); Charles T. Jones, *DNA Tests Clear Two Men in Prison, Escapee Sought in Slaying of Waitress*, DAILY OKLAHOMAN (Oklahoma City), Apr. 16, 1999, at 1 (advocating the passage of state statutes in Oklahoma following the release of Dennis Fritz and Ronald Williamson after a wrongful rape conviction).

[46] See NAT’L COMM. ON THE FUTURE OF DNA EVIDENCE, NAT’L INST. OF JUSTICE, U.S. DEP’T OF JUSTICE, PUB. NO. NCJ 177626, POSTCONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS, 2–6 (1999) [hereinafter POSTCONVICTION DNA TESTING REPORT]. While attorneys call for statutes to grant prisoners access to DNA testing, this study, discussed in greater detail in this article in Part IV, recognizes that across-the-board testing for all inmates who request it is not feasible. *Id.* at 2–3. The report recognizes that testing is most conclusive and most likely to be granted where DNA testing renders exclusionary results that exonerate the defendant. *Id.* at 4. Testing is least conclusive and not exculpatory where there are multiple assailants, DNA evidence collected from the crime scene has been lost or destroyed, or where, for example, the defendant has raised a consent defense in a rape case.

[47] See Cohen, *supra* note 43, at 27. Cohen discusses that one of the first jobs of the Innocence Project, once accepting an inmate’s case, is to demand DNA testing from the court. The Innocence Project claims that 60% of the samples it requests for testing result in a favorable outcome for its clients. *Id.* The Innocence Project is the brainchild of Barry Scheck and Peter Neufeld and is a clinic sponsored by the Cardozo School of Law. *Id.* at 26.

[48] See Bell, *supra* note 29, at A1 (describing Clyde Charles’s case). One of Charles’s pleadings to a judge explained that “[b]oth of the defendants herein know that the plaintiff is not guilty of this charge, and their continued refusal to release the rape kit only makes a farce out of the criminal justice system, while the plaintiff is forced to languish his life away in prison.” *Id.*

[49] See *id.*

[50] *Id.*; see also Freedberg, *supra* note 44, at 3B (regarding Dedge case). Like Louisiana prosecutors did to Clyde Charles, Florida prosecutors have denied William Dedge, a defendant who has served eighteen years in prison for rape, access to semen samples obtained from the rape victim to prove he did not commit the rape. *Id.*

[51] *Id.* For a discussion of finality principles at trial, see *infra* Part III.A.

[52] See *Developments in the Law*, *supra* note 22, at 1571 (explaining that because only two states have established a statutory approach to DNA testing for prisoners and because DNA testing in criminal investigations is a new phenomenon developed in the last decade, judges are left with little direction from precedent when determining whether to grant petitions for DNA testing for prisoners, so their decisions are often handled in a discretionary manner).

[53] See *id.* at 1572 (warning that many jurisdictions have statutes of limitation, ranging from twenty-one days to two years after conviction, for when a motion for a new trial based on newly discovered evidence may be made).

[54] See *id.* The dilemma regarding these temporal limitations is that for most defendants the DNA testing procedures were simply not available during the proper window for appeal.

[55] UNIF. POSTCONVICTION PROCEDURE ACT § (1)(a)(5) (1980).

[56] See DONALD E. WILKES, JR., STATE POSTCONVICTION REMEDIES AND RELIEF, 31 (1996).

[57] N.Y. CRIM. PROC. LAW § 440.30(1-a) (McKinney Supp. 2000). See *supra* notes 22 & 24 and Part II.A for a discussion of the New York reasonably probable standard.

[58] See *Mebane v. State*, 902 P.2d 494, 498 (Kan. 1995); see also *Zeigler v. State*, 654 So.2d 1162, 1164 (Fla. 1995) (recognizing a standard, similar to the New York testing standard, that “the new evidence would have probably resulted in a finding of innocence”).

[59] *Mebane*, 902 P.2d at 498. Again, like other state courts, the Kansas Supreme Court weighed the possibility of new, exculpatory DNA evidence against the strength of the evidence already presented at trial against the defendant. If the evidence presented at trial was weak, it is more likely that DNA evidence would have produced a different verdict. *Id.* at 497. In *Mebane*, the defendant was convicted of rape; however, the victim was raped by multiple assailants. *Id.* This fact—that there were multiple semen donors—indicates that DNA testing excluding the defendant as a semen donor is not conclusive. *Id.* The court indicated that when other jurisdictions allowed DNA testing for prisoners, they did so where there was a single perpetrator, which would make “DNA testing determinative of the guilt or innocence of the defendant.” *Id.*

[60] *Jenner v. Dooley*, 590 N.W.2d 463, 472 (S.D. 1999). The court devised this test in 1999 after examining a prisoner’s petition for habeas corpus relief. The defendant was found guilty of second-degree murder; the victim was her three-year-old child. *Id.* at 466. The DNA evidence at issue in the defendant’s petition for habeas relief was blood and hair evidence found at the crime scene. *Id.* South Dakota has recently drafted legislation to codify the *Jenner* standard with one addition. See S. 228, 76th Leg. (S.D. 2001) (codifying the standard in *Jenner* plus adding a fourth requirement in § 2(2) that the defendant must show that he “would be entitled to the testing and that the results would be admissible if the case were being presently tried”).

[61] *Jenner*, 590 N.W.2d. at 472. Other courts have established standards similar to that of South Dakota. Like the South Dakota test, the Pennsylvania test requires courts to examine the trial court record to see if the identity of the perpetrator was at issue. See *Commonwealth v. Robinson*, 682 A.2d 831, 838 (Pa. Super. Ct. 1996). If the court determines that the defendant’s conviction is based largely on identification

evidence presented at trial, the court must then ask whether DNA evidence could “definitely establish [the] Appellant’s innocence.” *Id.* at 838. This requirement was based on the court’s earlier holding in *Commonwealth v. Reese*, 663 A.2d 206, 210 (Pa. Super. Ct. 1995). Finally, if exculpatory evidence exists, a new trial will be granted to the defendant under the Pennsylvania test. *Robinson*, 682 A.2d at 838. The test employed by Pennsylvania mirrors the Indiana test. *See Sewell v. State*, 592 N.E.2d 705 (Ind. App. 1992). The Indiana court had been concerned that DNA testing would produce a flood of petitions from inmates requesting DNA testing. *Id.* at 708. The court in *Sewell* used the same language as the Pennsylvania court later used when it stated that the conviction must rest “largely upon identification evidence” and that the test “could definitely establish the accused’s innocence.” *Id.*

[62] 509 U.S. 579 (1993). The South Dakota Supreme Court pointed to *Daubert* as the standard all scientific evidence must meet for admissibility. *Jenner*, 590 N.W.2d at 472. The test issued in *Daubert* by the Supreme Court is a “reliability” test. 509 U.S. at 590; *see also* 1 EDWARD J. IMWINKELREID ET AL., *COURTROOM CRIMINAL EVIDENCE* 183 (3d ed. 1998). Under *Daubert*, “[a] trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.” 509 U.S. at 589. This test is derived from Rule 702 of the Federal Rules of Evidence. *Id.*; *see also* IMWINKELREID ET AL., *supra* at 185. The trial court operates as a gatekeeper under the *Daubert* test when it determines if scientific evidence is admissible. The court may consider five factors when determining admissibility although meeting all five factors is not necessary for admissibility and the factors are not dispositive. *Daubert*, 509 U.S. at 593. The five *Daubert* factors are the following: (1) whether the scientific tests or evidence “can be (and has been) tested,” (2) whether the scientific theory or method has been subjected to peer review or publication, (3) the error rate of the scientific method or technique, (4) “the existence and maintenance of standards controlling the technique’s operation,” and (5) whether the scientific method is generally accepted in the scientific community. *Id.* at 592–94.

[63] *Jenner*, 590 N.W.2d at 472.

[64] *Id.* The court believed defendants, looking for “another angle on the evidence against them” would use the discovery of new forensic technology to petition the court for a new trial based on newly discovered evidence. *Id.*

[65] *Id.* The court explained that while this standard comported with the requirements of other courts for postconviction DNA testing, it was more stringent than the standard set by a New York court in *Dabbs v. Vergari*, 570 N.Y.S.2d 765 (N.Y. Sup. Ct. 1990). *Id.* In *Dabbs*, the standard a defendant must meet to obtain postconviction testing is that the results would have “high exculpatory potential,” *Dabbs*, 570 N.Y.S.2d at 768 (emphasis added), or must be such that there is a “probability sufficient to undermine confidence in the outcome,” had that evidence been introduced at trial. *Jenner*, 590 N.W.2d at 472. The New York statutory standard, passed five years after *Dabbs*, echoes the language of the *Dabbs* opinion. *See* N.Y. CRIM. PROC. LAW §440.30(1-a) (McKinney Supp. 2000). The language of *Dabbs* and the New York statutory standard, suggest that the New York test is a less stringent standard for defendants to meet than the *Jenner* standard because New York requires only that the test results *might* affect the outcome, whereas *Jenner* mandates that “a favorable result using the latest scientific procedures would *most likely produce an acquittal in a new trial.*” *Jenner*, 590 N.W.2d at 472 (emphasis added). A Maryland court showed the significance of the different language used by courts when it determined whether a new trial was warranted due to newly discovered DNA evidence.

Many of the federal courts incline toward the “probable” standard. . . . Yorke [the defendant] would have us adopt the “might” standard, which he concedes is the minority rule, rather than the “probable” standard, which, he urges, places a severe burden on the defendant. The State [the prosecution], of course, opts for the “probable” standard. . . .

. . . We favor, however, a standard that falls between “probable,” which is less demanding than “beyond a reasonable doubt,” and “might” which is less stringent than probable.

Yorke v. State, 556 A.2d 230, 234–35 (Md. 1989) (stating that the appropriate standard for a new trial based on newly discovered evidence is the evidence “may well have produced a different result, that is, there was a substantial or significant possibility that the verdict . . . would have been affected”).

[66] *Jenner*, 590 N.W.2d at 472.

[67] *Id.* The court believed that the “exorbitant cost” of a test would be grounds to reject a testing request, especially if the test results may not be conclusive in a certain fact situation. *Id.* The court then listed factors that would increase the likelihood of conclusive test results: a single perpetrator; “evidence against a defendant is so weak as to suggest real doubt of guilt”; scientific evidence used at trial has later been questioned; and test results are “virtually dispositive” on the issue of identity. *Id.*

[68] *Id.* The court provided an interesting statement as to the weight of the evidence presented against the defendant at trial and whether the DNA testing would call into question this evidence. The court stated that “[s]imply because a new technology is available to test the evidence does not make [the defendant’s theory that an intruder had killed her child] any more relevant now than it was before.” *Id.*

[69] *See supra* note 61 (discussing the South Dakota, Pennsylvania, and Indiana tests).

[70] *See supra* notes 61–65 and accompanying text.

[71] *See Mebane v. Kansas*, 902 P.2d 494, 497 (Kan. Ct. App. 1995).

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

[73] *Commonwealth v. Robinson*, 682 A.2d 831, 838 (Pa. Super. Ct. 1996); *see also supra* note 61.

[74] N.Y. CRIM. PROC. LAW §440.30(1-a) (McKinney Supp. 2000); *Robinson*, 682 A.2d. at 838.

[75] *See Cohen, supra* note 43, at 26.

[76] See Elizabeth V. LaFollette, Note, *State v. Hunt and Exculpatory DNA Evidence: When Is a New Trial Warranted?*, 74 N.C. L. REV. 1295, 1305 (1996) (stating that “almost all states” presented with defendants whose postconviction DNA test results show that their DNA does not match crime scene DNA grant new trials based on newly discovered evidence when only one attacker or perpetrator is involved).

[77] *Ex parte Criner*, No. 36,856-01, slip. op., opinion at 5 (Tex. Crim. App. July 8, 1998). The court explained that Criner failed to meet the burden established by *Ex parte Elizondo*, 947 S.W.2d 202, 206 (Tex. Crim. App. 1996): a defendant must “demonstrate that the newly discovered evidence renders it probable that the verdict would be different on retrial.” *Ex parte Criner*, opinion at 5. According to this standard, the court in Criner’s case said that it must find that Criner’s exculpatory DNA evidence “would have persuaded a jury of the applicant’s innocence.” *Id.*

[78] *Id.* (internal citation omitted).

[79] *Keller Interview*, *supra* note 14. Judge Keller stated the legal test that Criner must meet to be awarded a new trial where exculpatory, postconviction DNA evidence could be considered, namely, “that no rational juror could have found him guilty.” *Id.*

[80] *Ex parte Criner*, opinion at 5–6 (internal citation omitted). After contemplating Criner’s statements to his friends the night of the murder, see *supra* note 6, the court stated that “it is abundantly clear that the new evidence does not render the State’s case as a whole less persuasive.” *Ex parte Criner*, opinion at 5. Also, this evidence could not have persuaded a jury that Criner was innocent, according to the court, because his statements to his friends “are simply too compelling.” *Id.* at 6.

[81] *Keller Interview*, *supra* note 14. Judge Baird dissented in *Ex parte Criner*, and his views are a sharp contrast from Judge Keller’s argument in support of finality. Judge Baird stated that “[t]he courts have promoted finality over the substance of the claims. It’s better that they be final, than that they be decided right. And of course I think that’s wrong, when an individual’s life or liberty hangs in the balance.” Interview by Ofra Bikel with Judge Charles Baird, Texas Court of Criminal Appeals, (transcript at FRONTLINE, THE CASE FOR INNOCENCE, <http://www.pbs.org/wgbh/pages/frontline/shows/case/interviews/baird.html> (last visited Apr. 5, 2001)) [hereinafter *Baird Interview*]

[82] *Jenner v. Dooley*, 590 N.W.2d 463, 471–72 (S.D. 1999).

[83] *Id.* at 472. The court in *Jenner* addressed finality concerns when it formed requirements that prisoners must meet to obtain postconviction DNA testing. In this context, the court was troubled that finality concerns would be undercut if cases were reopened every time a convict “cries innocence.” *Id.* at 471. For this reason, the court concluded that “[o]nly . . . extraordinary circumstances” will compel DNA postconviction tests. *Id.* at 472. The court did not explicitly define “extraordinary,” but it did give “guidelines” for determining when DNA testing should be permitted. *Id.* For a discussion of the *Jenner* testing standard, see *supra* Part II.B.

[84] *Jenner*, 590 N.W.2d at 472.

[85] See, e.g., Interview by Ofra Bikel with Jim Leibman, Professor of Constitutional Law at Columbia University (transcript at FRONTLINE, THE CASE FOR INNOCENCE, <http://www.pbs.org/wgbh/pages/frontline/shows/case/interviews/liebman.html> (last visited Apr. 5, 2001)). Leibman recognized in the *Frontline* interview that the purpose of finality in criminal trials is to encourage prisoners to focus on rehabilitation rather than repeated appeals and to further a “sense of retribution.” *Id.* Although Leibman acknowledges why finality is necessary, he is critical of finality concerns trumping innocence concerns or wrongful convictions. *Id.*

[86] See *id.*

[87] See *id.*

[88] 489 U.S. 288 (1989).

[89] See *id.* at 293. The prisoner’s habeas petition claimed that the peremptory challenge system was used by the prosecutor to racially discriminate against him during jury selection. The defendant was an African American, and the prosecutor had used all of his peremptory challenges to exclude African American jurors, leaving an all-White jury to try the defendant. *Id.*

[90] *Id.* at 309.

[91] *Id.*

[92] *Id.* The Court referred to a statement from Justice Harlan’s concurrence in *Mackey v. United States*, 401 U.S. 667 (1971), where Justice Harlan stated that “[n]o one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation.” *Id.* at 691.

[93] 499 U.S. 467, 491 (1991). Warren McCleskey was convicted of murder and sentenced to death for his involvement in a robbery that resulted in the killing of an off-duty police officer. *Id.* at 470–71. McCleskey filed several habeas petitions to the court; the subject of this habeas claim was a violation of McCleskey’s Sixth Amendment rights. *Id.* at 472–74. McCleskey claimed that police officers violated his Sixth Amendment right to counsel by deliberately eliciting inculpatory statements in violation of *Massiah v. United States*, 377 U.S. 201 (1964). *McCleskey*, 499 U.S. at 474.

[94] See *Kuhlmann v. Wilson*, 477 U.S. 436, 452–53 (1986) (arguing that successive appeals and review of a criminal conviction undercuts finality and “frustrates the State’s legitimate interest in deterring crime, since the deterrent force of penal laws is diminished to the extent that [a] person[] contemplating criminal activity believe[s] there is a possibility that they will escape punishment through repetitive collateral attacks”).

[95] *McCleskey*, 499 U.S. at 491; see also *Engle v. Isaac*, 456 U.S. 107, 127–28 (1982) (stating that habeas corpus laws “cost society the right to punish admitted offenders” because passage of time and fading of witnesses’ recollections will result in a difficult retrial, perhaps “impossible” and “may reward the accused with complete freedom from prosecution”).

[96] *McCleskey*, 499 U.S. at 491.

[97] *Id.* at 491 (internal quotation marks omitted). The Court stated that it had “taken care” in habeas decisions “to reconfirm the importance of finality.” *Id.* In doing so, it fully appreciated a state’s “independent power” to create criminal laws but acknowledged that the power “means little if the State cannot enforce them.” *Id.*; see also *Murray v. Carrier*, 477 U.S. 478, 487–88 (1986). In *Murray*, the court stated that habeas appeals and

reopening cases are a “reduction in the finality of litigation” and “detract[] from the importance of the trial itself” and “exact[] an extra charge by undercutting the State’s ability to enforce its procedural rules.” *Id.* at 487 (internal citation omitted); *see also* *Reed v. Ross*, 468 U.S. 1, 10 (1984) (arguing that finality is important because of a state’s “interest in the integrity of its rules and proceedings,” which would be thwarted if federal courts constantly reexamined the state’s trials and decisions during habeas review).

[98] *McCleskey*, 499 U.S. at 491.

[99] *Id.* at 492. The Court was concerned that if judicial attention was focused on habeas petitions and requests for new trials, courts would have little or scarce resources to try cases in the first place. On the whole, the Court believed that “[p]erpetual disrespect for the finality of convictions disparages the entire criminal system.” *Id.* The message of concern for judicial resources is found in several Court opinions concerning habeas and appeals of criminal convictions when the Court must weigh the interests of justice and the interests of finality. *See, e.g.*, *Calderon v. Thompson*, 523 U.S. 538, 555–59 (1998) (citing a defendant who had petitioned the court several times for review for almost thirteen years and had received “extensive review” in both state and federal courts and stating that absent a strong showing of actual innocence, “the State’s interests in actual finality outweigh the prisoner’s interest in obtaining yet another . . . review”); *Murray*, 477 U.S. at 487–88 (pointing to the extensive costs imposed on the judiciary in hearing appeals of convictions, such as evidentiary hearings, and burdens on the state and defense counsel alike); *Reed*, 468 U.S. at 10–11 (explaining that a rule limiting postconviction procedures “promotes . . . the accuracy and efficiency of judicial decisions” and “the orderly administration of criminal justice”) (internal citation omitted). For a discussion of the role of finality in criminal law, *see* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963).

[100] *See* BARRY SCHECK ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION, AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 247–48 (2000). Robert Davi was convicted with the murder, burglary, and rape of his estranged wife on November 2, 1990. *See* *Davi v. Class*, 609 N.W.2d 107 (S.D. 2000). A semen stain was found on the victim’s leg and initial DNA testing showed that Davi was a possible donor. *Id.* at 111. After more sophisticated DNA testing became available, Davi requested another DNA test and met the requirements of *Jenner*, discussed *supra* notes 60–66, for obtaining postconviction DNA testing. *Davi*, 609 N.W.2d at 112–13.

[101] *See* SCHECK ET AL., *supra* note 100, at 247.

[102] *Id.* at 248–49. Unfortunately for Davi, the DNA test results again showed that he was the donor of the semen found at the crime scene. *Davi*, 609 N.W.2d at 113. Davi then fought to have these new results excluded from a habeas corpus proceeding, but the Supreme Court of South Dakota determined that “post-conviction DNA test results should be admissible against Davi as well as for him” and that “DNA testing is an equal benefit.” *Id.*

[103] *See In re Dabbs v. Vergari*, 570 N.Y.S.2d 765 (N.Y. Sup. Ct. 1990). The defendant, following a conviction for rape, sought to compel postconviction DNA testing. The court, in granting the defendant’s request, discounted the finality argument as a reason to deny this postconviction request: “Lastly, to deny [the defendant] the opportunity to prove his innocence with such evidence simply to ensure the finality of conviction is untenable.” *Id.* at 769. The court indicated it was granting the petition in order to avoid a “miscarriage[] of justice” associated with errors due to mistaken eyewitness identification. *Id.* (internal citations omitted); *see also* *Dedge v. State*, 723 So. 2d 322, 324 (Fla. Dist. Ct. App. 1998) (Sharp, J., dissenting). The Florida District Court of Appeal denied a defendant’s request for postconviction DNA testing due to a two-year time limit on postconviction appeals. Judge Sharp, in dissent, argued against the use of a procedural time limit to block DNA testing for the defendant. *Id.* at 324. The judge stated that “[i]f there is a way to establish [defendants’] true innocence on the basis of a highly accurate objective scientific test . . . in good conscience it should be permitted.” *Id.* Interests of finality have also been controversial in areas outside DNA postconviction testing, such as federal efforts to limit habeas corpus appeals. For a discussion of this issue, *see* Timothy Finley, *Habeas Corpus—Retroactivity of Post-conviction Rulings: Finality at the Expense of Justice*, 84 J. CRIM. L. & CRIMINOLOGY 975 (1994) (arguing that unreasonable emphasis has been placed on maintaining finality of conviction when limiting the ability of a criminal defendant to bring a successful habeas corpus petition).

[104] *See, e.g.*, *State v. Thomas*, 586 A.2d 250 (N.J. Super. Ct. App. Div. 1991). In this New Jersey case, Bart Thomas was convicted of kidnapping and rape. *Id.* at 250. Thomas petitioned for postconviction DNA testing against the prosecutor’s argument that the defendant’s motion was time-barred. The prosecutor argued that because the defendant made a decision to forgo this testing at trial, he could not have a “second bite of the apple.” *Id.* at 252. The court, however, disagreed in a strong statement that endorsed finality:

The orderly processing of cases through the court is an important value, but it is not the end in itself. It is only the method by which we attempt to achieve the ultimate purpose of the criminal justice system—the fair conviction of the guilty and the protection of the innocent. That is what our constitutional guarantees are all about. Our system fails every time an innocent person is convicted, no matter how meticulously the procedural requirements governing criminal trials are followed. That failure is even more tragic when an innocent person is sentenced to a prison term.

Id. at 253–54.

[105] *See, e.g.*, *Sewell v. State*, 592 N.E.2d 705 (Ind. Ct. App. 1992). In *Sewell*, an Indiana appellate court granted a defendant’s request for a postconviction DNA test despite the state’s arguments that such testing defeated finality principles and would provoke an onslaught of petitions from defendants. The court stated that “we find the analysis of fundamental fairness issues relative to DNA testing persuasive. Advances in technology may yield potential for exculpation where none previously existed.” *Id.* at 708. In addition, the court indicated that one of its “primary goals” is the “orderly ascertainment of the truth.” *Id.*; *see also* *Thomas*, 586 A.2d at 254 (stating that the court “will not elevate form so highly over substance that fundamental justice is sacrificed”).

[106] *Keller Interview*, *supra* note 14.

[107] *See Ex parte Criner*, No. 36,856-01, slip op., opinion at 6 (Tex. Crim. App. July 8, 1998). The Texas Court of Criminal Appeals indicated that DNA evidence “establishes only that the victim had sexual relations with someone that was not [Criner] . . . it is apparent that the new evidence would not have persuaded the jury of [Criner’s] innocence.” *Id.* The dissenting opinion, however, felt that Criner had met the “clear and convincing” standard that “no reasonable juror would have convicted him in light of the newly discovered evidence,” and would remand for a new trial. *Ex parte Criner*, dissenting opinion at 3 (Baird, J., dissenting).

[108] *Ex parte Criner*, opinion at 5. The majority felt that the DNA tests that excluded Criner as the donor found on the victim did not weaken

the state's case. *Id.* Since a jury, the court found, could not be convinced of Criner's innocence, a new trial was not warranted. *Id.*

[109] *Id.* The majority characterized the non-DNA evidence that was presented against Criner at trial as "too compelling" to merit a new trial so that new DNA evidence could be considered. *Id.* at 6. This evidence included "admissions" Criner made to three friends on the night of Deana Ogg's murder. *Id.* at 3. For a detailed description of Criner's admissions, see *supra* note 6 and accompanying text. In addition, no other reports of rape were made within the period of time in which Criner told his friends he had raped or forced oral sex on a hitchhiker; a police officer saw a screwdriver, the murder weapon, in Criner's truck; and Criner changed his story regarding the hitchhiker after he learned of the murder of Deana Ogg. *Ex parte Criner*, opinion at 3; see also *Whitsel v. State*, 525 N.W.2d 860, 863-64 (Iowa 1994) (denying defendant's request for postconviction DNA evidence because even favorable DNA test results would not be exculpatory or change the trial result because the non-DNA evidence presented against the defendant at trial was "so strong," "extensive," and "overwhelming") (internal citations omitted).

[110] *Ex parte Criner*, opinion at 5. The logic of the Texas Court of Criminal Appeals was also adopted by a New York Court when it denied a defendant's request for postconviction DNA testing. See *People v. Kellar*, 640 N.Y.S.2d 908, 910 (N.Y. App. Div. 1996). The court explained that the testing request was denied because the defendant did not show that there was a reasonable probability that the verdict would be favorable to him if DNA tests were performed at trial. Given the facts of the case, the court stated that "a negative result could establish only that the victim had intercourse with a male other than defendant within a period of approximately three days prior to the incident. In our view, such evidence would be probative of little more than the victim's prior sexual activity." *Id.*; see also *Yorke v. State*, 556 A.2d 230, 235 (Md. 1989) (stating that "all the new evidence shows is that [the defendant] 'could not have been the depositor of the semen'" (internal citations omitted).

[111] *Ex parte Criner*, opinion at 6. Criner's burden in his petition for a new trial was that the new DNA evidence "unquestionably establishes" innocence. *Id.* at 5 (internal citations omitted).

[112] *Ex parte Criner*, dissenting opinion at 3 (Baird, J., dissenting). The dissent clearly felt that Criner had met his burden, discussed *supra* note 99, and should be granted a new trial.

[113] *Ex parte Criner*, dissenting opinion at 3, n.4 (Baird, J., dissenting). "[U]nquestionably establishes" is the equivalent of a clear and convincing evidence standard. *Id.* Judge Baird, in dissent, clearly felt that Criner satisfied this burden, especially in light of the DNA evidence that Baird said was "compelling" and "totally exonerates Mr. Criner." *Baird Interview*, *supra* note 81. Baird points to a change in the prosecution's theory as the reason why the DNA evidence was so compelling in Criner's case. When Criner was convicted, the prosecution at trial presented evidence that the semen found on the body of Deana Ogg was consistent with Criner's blood type. *Ex parte Criner*, dissenting opinion at 4 (Baird, J., dissenting). The DNA evidence Criner presented on appeal, however, "excludes applicant as a possible donor of the semen recovered from the victim." *Id.* Baird thought that the prosecution was trying to play the DNA evidence both ways by changing their theory to accommodate the forensic evidence. *Id.*

[114] *Keller Interview*, *supra* note 14. After Criner was pardoned, Keller then stated that "[i]t appears he did not commit the crime he was convicted of." Bruce Hight, *Judge Defends Ruling on Man Now Free on DNA Evidence*, AUSTIN AM.-STATESMAN, Aug. 29, 2000, at A1. Although Keller thought then-Governor Bush "did the right thing" by pardoning Criner, Judge Keller said Criner's case would not change her approach to evaluating appeals. *Id.*

[115] See John Juhala, *False Exclusions?*, 37 JURIMETRICS J. 325, 325 (1997). Juhala is assistant director for the Forensic Science Division of the Michigan State Police. He believed that the exoneration of criminal defendants through DNA evidence "perpetrates the myth that because the DNA types found on the victim do not match the suspect, the suspect is innocent." *Id.* The majority opinion in the Criner case clearly did not accept this myth, but the dissenting opinion's faith in DNA evidence, discussed *supra* note 113, shows the split in opinion regarding the exonerative value of postconviction DNA.

[116] See Juhala, *supra* note 115, at 325. The majority opinion in *Ex parte Criner* believed that the presence of condoms or the defendant's failure to ejaculate were plausible ways to explain the defendant's guilt in a rape charge despite the fact that the defendant's DNA did not match the crime scene DNA evidence. *Ex parte Criner*, opinion at 4; see also *Commonwealth v. Reese*, 663 A.2d 206, 209 (Pa. Super. Ct. 1995). The issue in *Reese* was access to postconviction DNA testing. The state claimed that DNA testing could not render exculpatory results and, therefore, should not be granted because the victim indicated that her attacker was unable to ejaculate during her assault. *Id.* Although the *Reese* court did permit the tests, this case shows that the issue of whether or not an assailant ejaculated will be raised by the state to explain why a non-match between the crime scene DNA and the defendant's DNA does not mean the defendant is not the attacker. Multiple attackers are yet another reason that exculpatory DNA test results are not dispositive of the defendant's innocence. See, e.g., *Mebane v. Kansas*, 902 P.2d 494, 498 (Kan. Ct. App. 1995).

[117] See Juhala, *supra* note 115, at 325-26.

[118] See Kate Marquess, *Defense and Prosecution Put Different Spins on DNA*, CHI. LAW., July 1999, at 6. (noting that the State's Attorney in the Cook County Office believed that while DNA is a valuable tool, "it [is] not dispositive in every case"). The results of a DNA test may be negative, meaning that the crime scene DNA and the suspect's DNA do not match, but the significance of a negative DNA test result depends on the circumstances of the crime. Especially in cases where there are multiple assailants, a negative test result does not imply that a particular suspect did not participate in the crime. *Id.* The facts and circumstances of a crime clearly contribute to the conclusive nature of the DNA. See Ed Godfrey, *DNA Proof Does Not Merit New Rape Trial, Judges Say*, DAILY OKLAHOMAN (Oklahoma City), Apr. 19, 1999, at 1. The defendant, David Johns Bryson, was convicted in 1983 after beating and raping a young woman. Postconviction DNA evidence showed that defendant Bryson's DNA did not match the semen found collected from the victim. Bryson was denied a new trial after the negative DNA result, and the judges who heard Bryson's original trial and his appeal for a new trial found that the evidence, excluding the DNA evidence, against the defendant was overwhelming. The assistant district attorney explained that "[a]ll the DNA evidence proves is he is not the donor of the semen. It does not prove he is not the rapist. There is so much more to this case than just forensics." *Id.*

[119] *Ex parte Criner*, dissenting opinion at 1 (Baird, J., dissenting).

[120] See *supra* note 113. At trial, the prosecution used the semen found at the crime scene as evidence of Criner's guilt because the semen matched Criner's blood type. *Ex parte Criner*, dissenting opinion at 4 n.5 (Baird, J., dissenting). Once confronted with DNA tests that showed

Criner was not the donor of the semen, the prosecution backtracked and said the non-match had no effect on culpability and could be explained by Criner's failure to ejaculate or his use of a condom. *Id.* at 4.

[121] *Baird Interview*, *supra* note 81.

[122] *Id.* (emphasis added).

[123] This split between the majority and dissent is directly related to their assessment of the non-DNA evidence presented against Criner at trial. The majority found Criner's statements to his friends regarding his actions with a hitchhiker on the day of the murder to be "confessions" and highly compelling. *Ex parte Criner*, opinion at 3, 5, 6 n.2. In contrast, the dissent found the non-DNA evidence to be weak and Criner's statements to his friends to be "conflicting extra-judicial statements" that amounted to circumstantial evidence. *Ex parte Criner*, dissenting opinion at 2 n.2 (Baird, J., dissenting).

[124] See Interview by Ofra Bikel with Bennett Gershman, Former Prosecutor (transcript at FRONTLINE, THE CASE FOR INNOCENCE, <http://www.pbs.org/wgbh/pages/frontline/shows/case/interviews/gershman.html> (last visited April 5, 2001)) [hereinafter *Gershman Interview*]. Gershman presents the position that the evidence a jury heard at trial, such as eyewitness testimony and confessions, is conclusive because the jury was able to deliberate and reach a conviction based on that evidence. The fallibility of eyewitness testimony and confessions, however, has been cited as a reason why DNA evidence (which is less subjective) is more conclusive. See generally SCHECK ET AL., *supra* note 100. Scheck and attorneys of the Innocence Project devote an entire chapter to discussing the unreliable nature of eyewitness testimony. *Id.* at 41–77. Scheck cites to experiments and studies that show the fungible nature of memory and the effect of stress on memory. *Id.* at 43–45. Scheck also points to reforms to decrease false identifications including requiring witnesses to rate their certainty at the time of their eyewitness identification and videotaping lineups and photospreads to prevent witnesses from being pressured by law enforcement to make an identification. *Id.* at 176. A separate chapter is devoted to false confessions, and Scheck supports the maintenance of Miranda rights. The chapter also highlights the problems with jailhouse snitches and coercion in confessions. *Id.* at 78–106.

[125] See *Gershman Interview*, *supra* note 124. Again, the argument supporting the conclusive nature of eyewitness testimony and confessions is that the jury has considered this evidence, deliberated, and convicted the defendant.

[126] See *Keller Interview*, *supra* note 14. The non-match between Criner's DNA and the crime scene DNA was negative evidence because it proves only that Criner was not the donor of the semen; it does not prove that he was not the rapist. In similar circumstances, positive evidence is a *match* between a defendant's DNA and semen found at a crime scene; it positively identifies the defendant as the donor, rather than excluding him as a donor.

[127] See 28 AM. JUR. 2D *Evidence* § 318 (1994) (cautioning that "negative evidence is weak and usually not sufficient to overcome positive testimony that the alleged fact did exist"). Negative testimony does not encompass, for example, what a witness heard or saw, but what he did not see or hear. *Id.*; see also 1 CHARLES E. TORCIA, WHARTON'S CRIMINAL EVIDENCE § 95 (14th ed. 1985) (explaining the relevance and admissibility of negative evidence).

[128] See *Ex parte Criner*, No. 36,856-01, slip op., opinion at 4 (Tex. Crim. App. July 8, 1998) (The DNA evidence shows merely that the victim had sexual relations with someone other than [Criner] at a time relatively near her death. It does not and cannot exclude the possibility that she also had sexual relations with [Criner].").

[129] See *Keller Interview*, *supra* note 14.

[130] See, e.g., *State v. DelReal*, 593 N.W.2d 461 (Wis. Ct. App. 1998). The court explained that "negative evidence may not disprove a defendant's guilt, but it certainly has a 'tendency' to make it 'less probable.'" *Id.* at 465. The court noted that defendant's hands had tested negative for gunshot residue. The negative test result was negative evidence, because it could not "conclusively prove" that the defendant was not the shooter. While a negative test result does not rule against admissibility of the test results, it does go toward the weight of the evidence. *Id.*

[131] *State v. Carter*, 888 P.2d 629, 636 (Utah 1995).

[132] *Id.* at 637–38.

[133] *Id.* at 639–40.

[134] *United States v. Durgin*, 444 F.2d 308 (9th Cir. 1971).

[135] *Id.* at 308.

[136] *Id.*

[137] *Id.* at 310. The court in *Durgin* offered several explanations as to why the absence of defendant's fingerprints on the drug wrappers was not material to proving his innocence: the defendant wore gloves when handling the wrapper, the defendant's prints were wiped from the wrapper, or the defendant did not directly handle the drugs, which were found in a suitcase. *Id.* Similarly, the Texas Court of Criminal Appeals stated reasons why Criner could be guilty of Deana Ogg's rape, even though his DNA did not match the semen found at the crime scene, including the defendant's failure to ejaculate and the use of a condom during the rape. *Ex parte Criner*, No. 36,856-01, slip op., opinion at 4 (Tex. Crim. App. July 8, 1998).

[138] *Jenkins v. Scully*, No. CIV-91-298E, 1992 WL 32342, at *1 (W.D.N.Y. Feb. 11, 1992). The defendant was convicted in 1983 of robbery, rape, and sodomy. *Id.* at *1 n.1. The defendant petitioned the court for postconviction DNA testing, which the court ultimately granted. *Id.* at *1–*2.

[139] LEVY, *supra* note 8, at 199. Levy acknowledges that "DNA testing cannot change the system into one where a verdict of guilty or not guilty is preordained by the presence or absence of DNA." *Id.*

[140] *Id.*

[141] *Id.* at 195.

[142] GERALD SHEINDLIN, GENETIC FINGERPRINTING: THE LAW AND SCIENCE OF DNA 29 (1996). The author argues that no

other form of forensic testing, including blood testing, “rivals the . . . accuracy of DNA.” *Id.* He cites the odds of two persons sharing the same DNA code as one in thirty billion, under ideal testing conditions. *Id.* With odds so minute, Judge Sheindlin claims that DNA rivals the power of fingerprint evidence. *Id.* DNA identification has also called into question other forms of forensic identification such as hair or bite evidence. Shirley E. Perlman, *Trials by Errors: How DNA Testing Can Right Injustice*, *NEWSDAY*, July 26, 1999, at A7. For example, a Boston man, Edmund Burke, was arrested for the murder of an elderly woman. *Id.* The primary form of forensic evidence against Burke was bite marks found on the victim’s body. A police report stated that it was determined with “reasonable scientific certainty” that the bites were made by Burke. However, DNA tests determined that the saliva on the bite marks did not match Burke’s DNA. While the police forensic lab declined to comment on the interpretation of bite marks, James Starrs, a professor of forensic science at George Washington University, stated that “jurors need to put nonscientific forensic evidence, such as hair and bite mark comparison, into [proper] perspective. ‘It should be put in its proper place. It deserves some attention as an investigative tool, but it’s given too much of a punch, much more than it deserves. . . . It’s been wrong, wrong, wrong, time and time again.’” *Id.* For a general discussion of different types of forensic evidence, see NICKELL & FISCHER, *supra* note 8.

[143] SHEINDLIN, *supra* note 142, at 29. Sheindlin also indicates that DNA can link serial crimes together by showing if there is more than one culprit or if it is a “copy cat” crime. *Id.*; see also SCHECK ET AL., *supra* note 100, at 119–20 (analyzing the susceptibility of fingerprint evidence for use in framing criminals).

[144] LEVY, *supra* note 8, at 105.

[145] *Keller Interview*, *supra* note 14; see also Juhala, *supra* note 115, at 325–26.

[146] In addition to the introduction of federal legislation by Senator Patrick Leahy, discussed *infra* Part IV.A, the exoneration of incarcerated defendants through postconviction DNA testing has increased the level of debate and discussion surrounding the merits of DNA evidence. For example, the release of more than seventy people from prisons and from death row has prompted debate regarding the appropriate scope of availability of DNA testing to incarcerated defendants. See Masters, *supra* note 42, at A1. Illinois Governor George Ryan’s suspension of executions due to exoneration of death row defendants gave credence to the value of postconviction DNA testing. See *infra* note 148 and accompanying text.

[147] POSTCONVICTION DNA TESTING REPORT, *supra* note 46. Then–U.S. Attorney General Janet Reno was concerned with the rate of postconviction exonerations of innocent defendants due to DNA evidence and commissioned the National Institute of Justice to issue a report. The report detailed twenty-eight wrongful convictions that were brought to light only after the defendants had served prison time. NAT’L INST. OF JUST., *supra* note 18. At the request of Reno, the 1996 report then promoted the creation of the National Commission on the Future of DNA Evidence in 1998, which culminated in the production of the POSTCONVICTION DNA TESTING REPORT.

The report does not have the force of law. Instead, it contains recommendations from a committee comprised of defense attorneys, judges, law professors, and United States Attorneys. The general thrust of the report is to encourage cooperation among prosecutors, courts, and defense counsel when confronted with postconviction evidence. POSTCONVICTION DNA TESTING REPORT, *supra*, at 138. The report also offers laboratory procedures for such things as processing prisoner requests and quality control methods. *Id.* at 59–65. The report generally discusses the biological and legal issues surrounding postconviction DNA evidence. *Id.*

[148] S. 2073, 106th Cong. (2000). The introduction of the Leahy bill coincided with the decision of Illinois Governor George Ryan to suspend executions in Illinois after thirteen prisoners were exonerated. Lynn Sweet, *Death Row Debate Spurs Wave of Bills*, *CHI. SUN-TIMES*, Feb. 13, 2000, at 28 (discussing the growing concern over wrongful convictions, which caused Governor Ryan to suspend Illinois executions and promote Senator Leahy’s bill).

[149] Both the United States House of Representatives and Senate held hearings to debate the Innocence Protection Act during the 106th Congress. See *Post-conviction DNA Testing: Hearings on S. 2073 Before the Senate Committee on the Judiciary*, 106th Cong. (2000); *Innocence Protection Act: Hearings on H.R. 4167, the Innocence Protection Act Before the Subcommittee on Crime of the House Committee on the Judiciary*, 106th Cong. (2000).

[150] To review the original version of the Innocence Protection Act, see S. 2073, 106th Cong. (2000). To review the current version of the Act, see S. 486, 107th Cong. (2001). For a discussion of the differences between the two bills, see *infra* notes 156 & 158 and accompanying text.

[151] S. 486. In the Findings and Purposes sections of the Innocence Protection Act of 2000, the bill specifically cites the findings issued by the U.S. Department of Justice in the POSTCONVICTION DNA TESTING REPORT. *Id.* § 101(a), (b)(1). This section specifically mentions that DNA testing became widely available only after 1994, *id.* § 101(a)(3), and that if DNA testing is not conducted, “there is a significant risk that persuasive evidence of innocence will not be detected.” *Id.* § 101(a)(15). In his statement, entered into the Congressional Record when the first version of the Innocence Protection Act, S. 2073, was introduced, Senator Leahy explained that the number of exonerations represented a “national crisis” and that “DNA testing [has] exposed the fallibility of the legal system.” 106 CONG. REC. S198 (daily ed. Feb. 1, 2000) (statement of Sen. Leahy).

[152] For the requirement, see S. 486 § 2291(a)(1).

[153] For the requirement, see S. 486 § 2291(d)(1)(A).

[154] For the requirement, see S. 486 § 2291(d)(1)(B).

[155] For the requirement, see S. 486 § 2291(d)(1)(C).

[156] S. 486 § 2291(d)(1)(D) (emphasis added). The language of S. 486 § 2291(d)(1)(D) differs from the original version of the Innocence Protection Act, S. 2073 § 2291(c). In the original version, the exculpatory evidence must be “relevant” to the claim that the defendant was wrongfully convicted. The second version, S. 486, may provide a heightened standard when it states that the tests must yield exculpatory results that are *material*, rather than relevant, to the defendant’s claim that he did not commit the crime for which he is convicted.

[157] POSTCONVICTION DNA TESTING REPORT, *supra* note 46, at 51–53. The report recommends that the judiciary hold an informal conference with counsel if postconviction testing could lead to a different result in a case. *Id.* The court’s role according to the report is to help

counsel set the parameters of the testing. *Id.* at 52–53. If exculpatory DNA is obtained from the testing, the report suggests that the court should be ready to grant a joint request to vacate the conviction. *Id.* at 53. Absent a joint request, the court should set an evidentiary hearing if there is a “reasonable probability” of a change in the verdict. *Id.* This “reasonable probability” standard is also applied in S. 2073 § 2791(a)(3) (applying a reasonable likelihood standard). While the report’s suggestions for the courts do not go beyond a facilitator or mediator role, presumably a court could grant orders on more or less than a showing that the verdict would be changed because the report only offers suggestions and does not have the force of law.

[158] S. 486 § 2291(e)(3). Interestingly, the original version of the Innocence Protection Act contained different language on this point. The original version stated that a court presented with favorable results could “enter any order that serves the interests of justice.” S. 2073 § 2291(f)(2)(B). The original version also provided the orders a judge could issue, which included vacating the judgment, discharging a defendant if in custody, resentencing the defendant, and granting a new trial. S. 2073 § 2291(f)(2)(B)(i)–(iv). Like the original version, S. 486 offers “carrot and stick” provisions to encourage state compliance with the postconviction testing procedures by conditioning federal grant money on compliance with the bill’s provisions. S. 486 § 103(a)–(b). To receive grants for such programs that fund DNA analysis, forensic science improvements, drug control, and public safety, the state must certify that it provides postconviction testing in accordance with the Innocence Protection Act. *Id.*; see also Richard Willing, *Bill Aims to Protect Innocent: Leahy Proposing Legislation to Change the Appeals Process*, USA TODAY, Feb. 11, 2000, at 10A (summarizing the provisions of the Leahy bill, including increasing both fees paid to attorneys in death penalty cases and compensation available to unjustly imprisoned defendants).

[159] See POSTCONVICTION DNA TESTING REPORT, *supra* note 46, at 53–54.

[160] *Id.* at 53.

[161] *Id.*

[162] The Innocence Protection Act of 2001 separately addresses postconviction testing requests for prisoners in state custody who are sentenced to death. S. 486 § 104(a). For these capital defendants, a different standard is provided to obtain testing. If the capital defendant shows that the proposed testing has “the scientific potential to produce new, noncumulative evidence material to the claim of the prisoner that the prisoner” did not commit the crime, the court must grant the defendant’s application for testing. S. 486 § 104(a)(1)–(2).

[163] The statement of Janet Reno included at the beginning of the report states that it was requested “to maximize the value of DNA in our criminal justice system.” *Id.* at iii; see also Richard Willing, *Panel Wants No Limits on DNA Appeals: Move Could Reopen Many Closed Cases*, USA TODAY, Sept. 27, 1999, at A1 (explaining that the report does not have the force of law and that Reno planned to use it to shape Department of Justice policy).

[164] Neil A. Lewis, *Panel Urges Reopening DNA Cases, Prosecutors Are Asked to Cooperate If New Evidence Might Overturn Convictions*, AUSTIN AM.-STATESMAN, Sept. 28, 1999, at A5. Critics of the report are concerned that it will spark frivolous appeals. However, since the report does not have the force of law, it could be argued that it will have little effect because there is no way to enforce it in court.

[165] Ronald Bailey, *Unlocking the Cells*, REASON, Jan. 2000, at 50–51. See *supra* Part III.A for a discussion of the importance of finality in conserving judicial resources in the face of appeals and requests for postconviction review.

[166] Bailey, *supra* note 153, at 50–51; *supra* Part III.A. These were also the concerns presented in the following Supreme Court cases: *Calderon v. Thompson*, 523 U.S. 538 (1998), *McCleskey v. Zant*, 499 U.S. 467 (1991), *Teague v. Lane*, 489 U.S. 288 (1989), *Murray v. Carrier*, 477 U.S. 478 (1986), *Reed v. Ross*, 468 U.S. 1 (1984), and *Engle v. Isaac*, 456 U.S. 107 (1982).

[167] See *supra* note 44 and accompanying text (discussing the case of a Florida defendant, William Dedge, whose requests for DNA testing have been ignored by prosecutors who continuously deny his access to DNA crime scene evidence and fight his attempts to gain access to it in the courts).

[168] See *supra* notes 152–55.

[169] See *supra* note 156 and accompanying text.

[170] Ricardo Alonso-Zaldivar & Tyler Marshall, *Clinton Backs Pre-Execution DNA Testing*, L.A. TIMES, Feb. 17, 2000 (quoting then-President Clinton as saying “[t]he people who support the death penalty, it seems to me, have an especially heavy obligation to see that, in cases where it is applied, there is no question of whether the guilt was there”); see also Naftali Bendavid, *Clinton Won’t Follow Illinois on Executions: But President Praises Ryan as “Courageous,”* CHI. TRIB., Feb. 17, 2000, at 1 (explaining that President Clinton did not believe that a federal moratorium on death penalties like the one implemented in Illinois was necessary, in part due to the small number of people on the federal death row). Although President George W. Bush has not issued a formal statement regarding the Innocence Protection Act of 2001, his response to a postconviction request as governor of Texas may provide some insight to his approach. Bush granted a thirty-day reprieve so DNA testing could occur for a Texan prisoner, Ricky Nolen McGinn, just eighteen minutes before he was scheduled to be executed by lethal injection on June 1, 2000. See Amy Dorsett, *McGinn Gets New Execution Date; DNA Grant to Help State and Close Cases*, SAN ANTONIO EXPRESS-NEWS, Aug. 16, 2000, at 1B. It was the first time Bush granted such a reprieve to a death row inmate. *Id.* After DNA tests showed that McGinn’s DNA matched semen found on the victim whom McGinn was convicted of raping and killing. See Steven Swanson, *Results from DNA Testing Keep Texan on Death Row*, CHI. TRIB., Aug. 16, 2000, at 4. Following the incriminating results, Bush stated: “I recommended the reprieve because it was important, in this case, that biological evidence be tested to help determine the defendant’s guilt or innocence on the rape charge.” *Id.* Bush’s willingness to allow postconviction testing in this instance may favor the passage of the Innocence Protection Act. However, as the McGinn case is the only case in which Bush directly dealt with postconviction testing, one can only guess as to his view of the Innocence Protection Act.

[171] Rep. Delahunt in the House of Representatives has introduced the companion legislation to Senator Leahy’s bill in the 106th and 107th Congresses. H.R. 4167, 106th Cong. (1999); H.R. 912, 107th Cong. (2001). The language mirrors Senator Leahy’s bill and will allow a defendant’s motion for postconviction testing in the same circumstances as the Senate version of the Innocence Protection Act. *Id.* Specifically, a court must allow DNA testing if: the evidence still exists and is in suitable condition for testing; the evidence was previously tested or not subject to the requested form of testing; the DNA testing procedures are scientifically valid; and the proposed testing has the “scientific potential to produce new,

noncumulative evidence material to the claim.” H.R. 912 § 2291(d)(1)–(4). The House version also provides the same provisions as S. 486 in regard to postconviction testing for capital defendants and grants monies contingent on a state’s adoption of the postconviction testing procedures provided by the Innocence Protection Act. *See supra* notes 158 and 162; H.R. 912 §§ 103(a), 104(a). The growing national concern over wrongful convictions has led to state legislation as well. Bruce Alpert, *DNA Tests Cost Less than Housing Inmate: Case of La. Man Cleared in Rape Drives Push for Law*, TIMES-PICAYUNE (New Orleans), Feb. 28, 2000, at A1. The drive for legislation in Louisiana was prompted by the situation of Clyde Charles. *Id.* During half of the nineteen years Charles was in prison for rape, his attorneys fought for DNA testing, but were denied. *Id.* In Louisiana, legislation to grant prisoners DNA testing is being supported by a wide-ranging group of legislators and prosecutors. *Id.* New Orleans Parish District Attorney Harry Connick said, “the concept [of the Leahy bill] seems to be a valid one,” especially if it can prevent someone from being wrongfully imprisoned. *Id.* Louisiana State Senator Art Lentini, Chairman of the Judiciary Committee in the State Senate, claimed that a bill is being drafted to provide exemptions of appeal deadlines for certain cases. *Id.* Some states, however, have used DNA to re-open cases in a different way. DeWayne Wickham, *Don’t Use DNA Tests to Excuse Bad Idea*, USA TODAY, Feb. 29, 2000, at A15. Governor George Pataki of New York, while acknowledging that DNA testing is a “scientific miracle for human justice,” has proposed eliminating the deadline for bringing cases in sixteen felony classes. *Id.* Under this proposal, prosecutors would have an indefinite amount of time to charge someone with such crimes as robbery, burglary, assaults, and other types of crimes that now have a five-year statute of limitations in New York. *Id.*

[172] Sweet, *supra* note 148 (indicating that Senator Orrin Hatch, Chairman of the Senate Judiciary Committee, agreed to hold hearings on the administration of the death penalty after Senator Richard Durbin called for the hearings as a response to Illinois Governor Ryan’s moratorium on executions).

[173] Mike Doring, *Senator to Propose Death Row Safeguards*, CHI. TRIB., Feb 10, 2000, at 1 (stating that in regard to S. 2073, the original version of the Innocence Protection Act, “[t]he proposed legislation would apparently represent a significant federal intervention into state judicial procedures, and runs counter to a legislative trend . . . curtailing the rights of Death Row inmates to reopen their cases”). As S. 486 does not significantly differ from the version introduced in the 106th Congress, this criticism may still apply to the current version of the Act. *See* Alpert, *supra* note 171, at A1. Other critics of the Leahy proposal have also pointed to federalism concerns. *Id.* Todd Gaziano, a fellow at the Heritage Foundation, a conservative think tank in Washington, D.C., said that “[i]t is the height of Congress [sic] presumptuousness to tell the ‘backward’ states how they must run an enlightened criminal justice system.” *Id.* For this reason, Gaziano proposes that the bill apply only to federally charged defendants. *Id.* He also believes DNA testing will be used as a delay tactic. *Id.*

[174] S. 486 § 2291(d)(2).

[175] S. 486 § 2291(d)(1)(A)–(D).

[176] S. 486 § 2291(d)(1)(D).

[177] *Ex parte Criner*, No. 36,856-01, slip op., opinion at 5 (Tex. Crim. App. July 8, 1998) (stating that the burden Criner must meet to receive a new trial is that the new DNA evidence “‘unquestionably establishes’ innocence,” meaning that a jury would be persuaded of the defendant’s innocence).

[178] *Id.* at 2–3.

[179] The Innocence Protection Act states that it applies to persons convicted of a federal crime and that these defendants may apply to federal courts for postconviction DNA testing. S. 486 § 2291(a). States that accept federal funding from grants listed in the Innocence Protection Act must make postconviction DNA testing available to persons convicted of state crimes. S. 486 § 103(a)-(b).

[180] Again, the post-testing procedures provided for federal courts are found in § 2291(g), and the section states that if the test results are favorable to the defendant, the court must order a hearing, even if a law exists that would prohibit such a hearing.

[181] *Ex parte Criner*, opinion at 1.

[182] S. 486 § 2291(g)(3).

[183] *See supra* notes 152–56 and accompanying text.

[184] *See* Cohen, *supra* note 43, at 28 (explaining that the vast majority of the docket that needs postconviction DNA testing consists of “old” cases, prosecuted when DNA testing was not available or not widely used in criminal procedures, but now that law enforcement is using DNA in its investigations to convict, there should be fewer people convicted where DNA evidence was available but not presented at trial); Amanda Ripley, *Going Back and Getting It Right*, TIME, Mar. 19, 2001, at 62. San Diego County district attorney Paul Pfingst is the first district attorney in the United States to initiate a program to review old murder and rape cases to determine whether new DNA tests would have affected the trial’s result. *Id.* Pfingst’s program demonstrates why postconviction DNA testing is not unfeasible in terms of court resources. Specifically, since the advent of Pfingst’s program, no prosecutors have been ousted due to faulty convictions, nor have budgets escalated. *Id.* In addition, in the program “[o]nly the rarest case merits review.” *Id.* This is probably due to the relevance of DNA test results in comparison with the facts of the crime (i.e., whether there is a single perpetrator), and whether the evidence has been preserved for testing. In addition, as DNA testing becomes more widespread, the likelihood that DNA tests were not performed at trial diminishes.

[185] Peter Neufeld, a co-founder of the Innocence Project, argues for the broadest possible access to DNA testing and insists that defendants who have pleaded guilty or confessed should have an equal right to DNA testing. Neufeld states: “‘If the issue is innocence, why quibble? Why not just do the test?’” Craig Timberg, *DNA Spurs Change in Va.; Crime Panel Debates Evidence, New Trials*, WASH. POST, Dec. 2, 2000, at B1.

[186] *See* Anne Krueger, *DNA Offers Biological Body of Evidence; Genetic Testing a Powerful Tool to Convict or Exonerate*, SAN DIEGO UNION-TRIB., Jan. 31, 1999, at B1 (estimating the cost of a DNA “PCR” test to be \$50, as private labs are charging this amount to form a national DNA database).

[187] *See* Alpert, *supra* note 171, at A1 (stating that the cost of housing a prisoner in a state institution for a year ranges from \$20,000 to \$25,000).

[188] S. 486 § 2291(c) (2000). The Act also requires that states that receive grant monies from the federal government must “preserve all

evidence that was secured in relation to the investigation or prosecution of a State crime” in order to receive the funding. S. 486 § 103(a)(2) (2000).

[189] S. 486 § 2291(c) (2000).

[190] See Masters, *supra* note 42, at A1 (explaining that court personnel and police believe that preserving DNA evidence on the “off chance that still more advanced DNA testing” will become available will be a logistical nightmare and suggest, perhaps, that it is not worth it because fifty to sixty percent of defendants who request testing are implicated, rather than exonerated by postconviction testing).

[191] Of the states that have passed postconviction testing statutes, only Arizona specifically requires the preservation of DNA evidence in the context of the postconviction DNA testing statute. ARIZ. REV. STAT. ANN. § 13-4240(H) (West 2000) (requiring the state to “preserve during the pendency of the proceeding all evidence in the state’s possession or control that could be subjected to” DNA testing).

[192] WASH. REV. CODE ANN. § 10.73.170(1)–(2) (West 2000).

[193] See, e.g., Cohen and Shepard, *supra* note 21, at 17E. Bennett Gershman, a former prosecutor and law professor at Pace University Law School, explains that prosecutors are reluctant to allow postconviction DNA testing because “[t]hey worked hard to get a guilty verdict . . . They’ve got a victim who has been traumatized by the defendant’s crime. I don’t think a prosecutor is going to say, ‘Hey, this guy might be innocent, and I am going to go out of my way to prove it.’” *Id.*; see also Masters, *supra* note 42, at A1 (indicating that, in the absence of a statute providing for postconviction testing, the availability of DNA testing varies according to the practices of prosecutors and judges, and that prosecutors in Maryland and the District of Columbia are more amenable to defendants’ requests for testing than those in Virginia).

[194] *Ex parte Criner*, No. 36,856-01, slip op., opinion at 4–6 (Tex. Crim. App. July 8, 1998).

[195] *Id.* at 6, 7.

[196] See LaFollette, *supra* note 76, at 1305 (explaining that while some defendants are exonerated, “almost all” states that confront new DNA evidence in rape cases grant new trials).

[197] See *Sireci v. State*, 773 So.2d 34 (Fla. 2000) (barring defendant’s request for DNA testing because defendant did not request such testing within two years of discovering new evidence); *Ziegler v. State*, 654 So.2d 1162 (Fla. 1995) (barring defendant’s request for postconviction DNA evidence using modern DNA techniques for procedural reasons because the defendant failed to request testing within two years of discovering new evidence). In both *Ziegler* and *Sireci*, the Florida Supreme Court noted that absent a procedural bar, the defendants’ requests for DNA testing would still be denied because the court believed that the new DNA evidence would not produce an acquittal at retrial.

[198] 470 U.S. 68 (1985). In *Ake*, defendant Ake was arrested and charged with murder. *Id.* at 70. His behavior during stages of pre-trial was abnormal and bizarre, and the examining psychiatrist concluded that the defendant was a possible paranoid-schizophrenic. Ultimately, the defendant was diagnosed as competent to stand trial. *Id.* at 71. The issue for the Supreme Court was whether the Constitution required that an indigent defendant have access to a psychiatric examination in order to prepare an effective defense based on insanity or a mental condition, when the defendant’s sanity was an issue at trial. Because the “potential accuracy of the jury’s determination is so dramatically enhanced” and “the interests of the individual and the State in an accurate proceeding are substantial, the State’s interest in its fisc must yield.” *Id.* at 83.

[199] *Id.* at 83.

[200] *Id.* at 79. The Court determined that psychiatry has played an important role in criminal proceedings as, at the time of defendant’s trial, forty states had decided that an indigent defendant was entitled to the assistance of a psychiatrist in certain situations. *Id.*

[201] *Id.* at 80.

[202] POSTCONVICTION DNA TESTING REPORT, *supra* note 46, at 1. The report notes that in “little more than a decade DNA . . . has become the foremost forensic technique for identifying perpetrators and eliminating suspects.” The report also indicates that DNA technology has experienced rapid and significant changes so that crime laboratories can now extract reliable DNA data from relatively small samples.