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Unnecessary Burdens to Post-Conviction DNA Testing: New Mexico's Post-Conviction DNA Relief Statute and Suggestions for Improvement

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Unnecessary Burdens to Post-Conviction DNA Testing: New Mexico's Post-Conviction DNA Relief Statute and Suggestions for Improvement

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Abstract: Post-conviction DNA testing is often the last option a convicted person may have to establish that they are not guilty of a crime. New Mexico's post-conviction DNA statute requires convicted persons who seek DNA testing to claim innocence and establish that the identity of the perpetrator was an issue at trial. These requirements are currently included in many state post-conviction DNA statutes; however, some states have amended their statutes to remove these unnecessary requirements. Convicted persons who claimed self-defense, or another affirmative defense may be denied post-conviction DNA testing because of inability to claim "innocence" and because the identity of the perpetrator may not have been an issue at trial. This Article argues that New Mexico's post-conviction DNA statute should be amended to remove these requirements, as they are unnecessarily burdensome and can prevent exonerations of "no crime" wrongfully convicted persons. This Article first discusses how post-conviction DNA testing may be used to exonerate wrongfully convicted persons. Second, it provides an analysis of post-conviction DNA testing statutes and their application in jurisdictions outside of New Mexico. Third, it discusses New Mexico's current post-conviction DNA statute and proposes amendments. Finally, it addresses potential concerns to lessening the burden on access to post-conviction DNA testing.

Keywords: Wrongful Convictions; Conviction DNA; Post-conviction Statute; No-crime Wrongful Conviction; New Mexico's Post-Conviction DNA Testing Statute.

1. Introduction

On June 15, 2012, Gregory Marvin Hobbs got into a physical altercation with Ruben Archuleta, Jr. and Ruben Archuleta, Sr.[1] During this close physical altercation, Gregory Hobbs shot and killed both his opponents[2]. The state, on the one hand, determined that the shooting of Ruben Archuleta, Jr. was legally justifiable; on the other, it charged Gregory Hobbs with voluntary manslaughter for the shooting of Ruben Archuleta, Sr.[3]

Gregory Hobbs maintains that he shot Ruben Archuleta, Sr., in self-defense[4]. He described that after the shooting of Archuleta, Jr., Archuleta, Sr. grabbed for the gun in Hobbs' hand, attempting to shoot Hobbs[5]. Hobbs tried to back up and get away, but Archuleta, Sr. grabbed him once again The two men struggled over the gun, and Hobbs stated that he was in fear for his life when he fired the gun and shot Archuleta, Sr.[6]

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1. See *State v. Hobbs*, 2020 NMCA 44, para. 2, *cert. granted* (Sept. 8, 2020).
2. *Id.*
3. *Id.*
4. *Id.* at para. 3.
5. *Id.*
6. *Id.*

Two separate eyewitnesses to the shooting, including Archuleta, Jr.'s wife Teresa, testified that Hobbs and Archuleta, Sr. had been wrestling before the gun went off[7]. One of the witnesses corroborated Hobbs' version of events by testifying that it appeared Archuleta, Sr. was trying to get the gun from Hobbs before being shot[8]. At trial, the state argued that the evidence did not support Hobbs' description of events[9]. Despite being given an instruction on Hobbs' theory of self-defense[10], the jury rejected Hobbs' theory, and convicted him of voluntary manslaughter[11]. Hobbs was consequently sentenced to seven years in prison for the death of Ruben Archuleta, Sr.[12]

At trial, no forensic testing (including DNA testing) was ordered by the state or by Roswell's Police Department[13]. It is unclear why DNA testing of the evidence obtained pre-trial was not tested at the time of trial. In 2015, Hobbs petitioned the 5th Judicial District Court for post-conviction DNA testing of the gun used in the shooting and of the t-shirt Hobbs wore at that time[14]. Although the statutory requirements within New Mexico's post-conviction DNA relief statute would have seemed to prevent Hobbs from obtaining DNA testing[15], the state did not oppose Hobbs' motion, and the petition was granted[16].

In Hobbs' case, the testing resulted in finding of Ruben Archuleta, Sr.'s DNA on the ejection port of the handgun[17]. Hobbs' defense team argued that the finding of Archuleta, Sr.'s DNA on the handgun supported Hobbs' assertion of self-defense at trial. Specifically, a finding that Archuleta, Sr. came into contact with the gun supported Hobbs' description of a struggle over the gun, and his claim that at the time

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7. *Id.* at para. 4.
8. *Id.*
9. *Id.* at para. 5.
10. *Id.*
11. *Id.* at para. 6.
12. *Id.*
13. *Id.* at para. 11.
14. *Id.* at para. 8.
15. N M Stat. Ann. § 31-1A-2 (West 2019); see discussion *infra* (regarding petitioners who claim self-defense being unable to assert innocence and prove that identity was an issue at trial).
16. *Hobbs*, 2020 NMCA 44, at para. 9.
17. *Id.* at para. 16.

of the shooting, he was in fear of death or great bodily harm from Archuleta, Sr.[18]

Inasmuch as post-conviction DNA statutes were initially drafted in order to offer relief to individuals who can prove "actual innocence" (that someone else was the perpetrator), they tend to exclude individuals who may be able to prove they are not guilty (by reason of affirmative defense), or "legally innocent"[19]. Black's Law Dictionary defines innocence as "[t]he absence of guilt; esp., freedom from guilt for a particular offense"[20]. It further differentiates between "actual" and "legal" innocence by defining "actual innocence" as "[t]he absence of facts that are prerequisites for the sentence given to a defendant" and "legal innocence" as "[t]he absence of one or more procedural or legal bases to support the sentence given to a defendant"[21]. In fact, individuals may be wrongfully convicted if they acted in self-defense; out of necessity; when involuntarily intoxicated; or, under conditions of duress or insanity, because in these cases no crime actually occurred[22]. For this reason, these kinds of convictions are termed "no crime" wrongful convictions, as one of the fundamental elements for criminal liability is lacking[23]. "No crime" wrongful convictions may also occur when an alleged victim's reputation for violence is excluded at trial; when flawed jury instructions are given; and when the prosecutor misrepresents the self-defense justification[24].

New Mexico's post-conviction DNA statute, in conformity with several other states' statutes[25], requires a person who seeks

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18. See *Hobbs*, 2020 NMCA 44 (the state has appealed the 5th Judicial District Court's grant of a new trial for Gregory Hobbs, and the case has been granted certiorari by the New Mexico Supreme Court).

19. For the purposes of this Article, actual innocence and innocence will not be differentiated, and the terms legal innocence and not guilty will likewise be treated equally, to avoid confusion based on semantics.

20. See *Innocence,* Black's Law Dictionary (Thomson Reuters 2019).

21. *Id.*

22. James R. Acker and Sishi Wu*, "I did it, but. I didn't": When Rejected Affirmative Defenses Produce Wrongful Convictions*, 98 Neb. L. Rev 578, 579 (2020).

23. *Id.*; see also Jessica S. Henry, *Smoke but No Fire: When Innocent People Are Wrongly Convicted of Crimes That Never Happened*, 55 Am. Crim. L. Rev 665, 666 (2018) (defining "no crime" wrongful convictions as convictions that occur when no crime ever occurred, "for events that were never criminal or that never even happened.").

24. Acker and Wu*, "I Did It, but … I Didn't"* at 621-622 (cited in note 22).

25. See *Analysis* in Part 3.

post-conviction DNA testing to claim innocence and establish that the identity of the perpetrator was an issue at trial[26]. An individual who has killed another person in self-defense, like Gregory Hobbs, may be unable to claim innocence, but at the same time may be not guilty because no crime was committed[27]. Jurisdictions are divided on whether to grant post-conviction DNA testing motions for individuals who asserted self-defense at trial, specifically due to the issue of identity[28]. Since jurisdictions are divided on this issue, and there is no case precedent in New Mexico, district courts should be provided with a clear direction. New Mexico's legislature should provide the courts with clarity: either courts will allow convicted persons who asserted affirmative defenses to petition for post-conviction DNA testing, or prohibit this category from seeking testing.

This article argues that New Mexico's post-conviction DNA statute should be amended to remove both requirements that petitioners claim innocence, and that petitioners establish that the identity of the perpetrator was an issue at trial. This amendment would conform with the otherwise liberal statutory requirements of New Mexico's post-conviction DNA statute and prevent the exclusion of a category of wrongfully convicted persons. Other states, such as Maryland[29], have already rectified the exclusion of individuals who claimed self-defense by removing these statutory requirements. Removing these limitations would allow wrongfully convicted inmates who claimed self-defense at trial to attempt to exonerate themselves through DNA evidence.

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26. See N M Stat Ann § 31-1A-2 (West 2019).

27. Acker and Wu, *"I Did It, but … I Didn't"* at 624 (cited in note 22); see also *No Crime* in *Glossary* (The National Registry of Exoneration), available at https://www.law.umich.edu/special/exoneration/Pages/glossary.aspx (last visited April 20, 2021) (defining "no crime" wrongful convictions); see also *Guilty*, Black's Law Dictionary (Thomson Reuters 2019) (defined as "having committed a crime; responsible for a crime").

28. Compare *Davis v. State*, 11 So. 3d 977, 978 (Fla. Dist. Ct. App. 2009) (holding that persons who claimed self-defense cannot claim that identity was an issue at trial), with *State v. Braa*, 410 P.3d 1176 (Wash. Ct. App. 2018), *review denied*, 424 P.3d 1225 (Wash. 2018) (holding that persons who claimed self-defense can claim that identity was an issue at trial).

29. See *Gregg v. State*, 976 A.2d 999, 1005 (Md. 2009).

Part 2 of this article's analysis section explains how post-conviction DNA testing can be used to exonerate "no crime" wrongfully convicted persons[30]. Part 3 further explores how different states' DNA testing statutes have been interpreted and applied in criminal cases. Part 4 examines New Mexico's legislation on the matter and proposes amendments to the statute. Part 5 finally discusses potential concerns to the proposed amendments and explains why lessening the statutory burden on access to post-conviction DNA testing will not result in a flood of overturned convictions.

1.1. Background

Wrongful convictions have recently become a topic of increased concern and public outcry, partly due to media attention following the publication of *Just Mercy* by Bryan Stevenson[31]. The term "wrongful conviction", as commonly understood, describes when the wrong person is charged and convicted of a crime.[32] The wrong person may be convicted of a crime for many reasons, including false identification by witnesses and false confessions[33]. The Innocence Project's mission is to exonerate these individuals, and to date it has succeeded in exonerating 375 "wrong person" wrongfully convicted individuals[34].

This kind of wrongful convictions account for some, but not for all wrongful convictions[35]. Cases where no crime has actually occurred may result in "no crime" wrongful convictions[36]. This type of

30. Jessica S. Henry, *Smoke but No Fire* at 666 (cited in note 23) (defining "no crime" wrongful convictions as convictions that occur when no crime ever occurred, "for events that were never criminal or that never even happened.").

31. Bryan Stevenson, *Just Mercy,* (Spiegel and Grau, 2014).

32. Acker and Wu, *"I Did It, but ... I Didn't"* at 579 (cited in note 22).

33. *DNA Exoneration in the United States* (The Innocence Project), available at https://www.innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited April 20, 2020) (for further data on wrongful convictions, see Appendix 1).

34. *Id.* The Innocence Project was founded in 1992 by Peter Neufeld and Barry Scheck at the Cardozo School of Law. It aims to exonerate wrongfully convicted persons through DNA testing and acts to reform the current criminal justice system to prevent further wrongful convictions (further information available at https://innocenceproject.org/about/) (last visited 20 April, 2020).

35. Acker and Wu, *"I Did It, but ... I Didn't* at 578-581 (cited in note 22).

36. *Id.* at 581-582 (2020); see also S. Henry, *Smoke but No Fire* at 666 (cited in note 23).

conviction may occur when a person kills in self-defense, and the trier of fact convicts the individual of a homicide charge[37]. These wrongful convictions are linked to failed self-defense claims[38]. "No crime" and "wrong person" wrongful convictions result in the same unjust outcome: a person who has not committed a crime is sent to prison, or even executed, erroneously[39].

DNA testing, which first became viable in 1985[40]. has enabled wrongfully convicted persons to exonerate themselves in quite a few cases[41]. Deoxyribonucleic acid, known as DNA, contains the genetic makeup, often described as a blueprint, of a person, animal, plant, or microbe. DNA testing is thus an incredibly powerful tool, which can be used to both identify criminal suspects and exonerate wrongfully accused or convicted persons[42]. Identification of suspects in criminal cases is done by comparing DNA evidence taken from a crime scene with either an identified suspect's DNA, or by running it through DNA databases, such as the Combined DNA Index System (CODIS)[43]. The same methodology can exonerate suspects and wrongfully convicted individuals[44], either by proving that someone

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37. Acker and Wu, *"I Did It, but ... I Didn't"* at 581-582 (cited in note 22). See also *Hobbs,* 2020 NMCA 44 (citedi in note 1).

38. Acker and Wu, "I Did It, but ... I Didn't" at 621-622 (cited in note 22).

39. DNA Exoneration in the United States (*The Innocence Project*), available at https://www.innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited April 20, 2020).

40. Randy James, *A Brief History of DNA Testing*, (Time, Jun. 19, 2009), available at http://content.time.com/time/nation/article/0,8599,1905706,00.html (last visited April 18, 2021).

41. *DNA Exoneration in the United States* (The Innocence Project), available at https://www.innocenceproject.org/dna-exonerations-in-the-united-states/, (last visited April 20, 2020).

42. *Advancing Justice Through DNA Technology: Using DNA To Solve Crime* (March 7, 2017) (The U.S. Department of Justice Archives), available at https://www.justice.gov/archives/ag/advancing-justice-through-dna-technology-using-dna-solve-crimes (last visited April 20, 2020).

43. *Id.* (CODIS is an FBI tool, allowing federal, state, and local forensic laboratories to link forensic evidence to stored DNA profiles of known offenders). See *Combined DNA Index System (CODIS)* (FBI, Laboratory Services), available at https://www.fbi.gov/services/laboratory/biometric-analysis/codis (last visited April 20, 2020).

44. *Advancing Justice Through DNA Technology: Using DNA To Solve Crime* (March 7, 2017) (The U.S. Department of Justice Archives), available at https://www.justice.

else committed the crime, or, as seen in the *Hobbs* case, supporting a theory of defense[45].

A retrospective study funded by the U.S. Department of Justice investigated the percentage of wrongful convictions which could have been overturned by post-conviction DNA testing[46]. Researchers conducted a survey of an unbiased sample of 715 homicides and sexual assaults, which resulted in convictions, between the years 1973 and 1987[47]. This survey determined that among its sample of convicted offenders, 8% were eliminated as contributors of probative evidence (evidence related to the conviction), and 5% were eliminated as contributors of any evidence, supporting exoneration[48]. Given the advent of DNA testing technology in 1985, it is likely that these percentages may be lower today, due to its application[49]. However, these statistics have already demonstrated that DNA testing is an effective tool that can be used to overturn wrongful convictions.

In response to the realization that wrongfully convicted individuals may be exonerated through post-conviction DNA testing, all fifty states as well as the federal government have enacted statutes regarding the subject[50]. These statutes allow convicted individuals to petition a court for DNA testing of evidence that was not previously subject to

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gov/archives/ag/advancing-justice-through-dna-technology-using-dna-solve-crimes (last visited April 20, 2020).

45. *Hobbs*, 2020 NMCA 44 (cited in note 1).

46. John Roman, et al., *Post-Conviction DNA Testing and Wrongful Conviction*, Urban Institute Justice Policy Center, at 5 (Research Report, funded by the U.S. DOJ, Jun. 2012).

47. *Id.*

48. *Id.*

49. See *Exonerations By Year And Type Of Crime* (The National Registry of Exonerations), available at https://www.law.umich.edu/special/exoneration/Pages/Exoneration-by-Year-Crime-Type.aspx (last visited April 20, 2021). As of April 5, 2021 there have been 2,760 exonerations in the U.S., with an increase in exonerations of "all types of crime" since 1991 (41 exonerations) to a height in 2016 (181 exonerations). The rate of exonerations decreased in 2020 to 129 exonerations for "all crimes," which may indicate that fewer wrongful convictions have occurred since application of DNA forensics in criminal cases.

50. *Access To Post-Conviction DNA Testing* (The Innocence Project), available at https://www.innocenceproject.org/causes/access-post-conviction-dna-testing/ (last visited April 20, 2021) (stating that all 50 states now have post-conviction DNA statutes).

DNA testing, that was not previously subject to the current forensic method of DNA testing, or that was either tested or interpreted incorrectly at trial.[51] If an individual is granted post-conviction DNA testing, a district court will consider what relief, if any, may be sought.[52]

State legislatures are not alone in their attempts to proactively address the nationwide problem of wrongful convictions. Some state prosecutors have created their own protocols to seek DNA testing for inmates convicted prior to the early 1990s[53], to determine whether exonerating evidence could be provided using current technology[54]. However, other prosecutors believe exonerations based on this technology may expose police and prosecutorial misconduct as well as systemic flaws and thus threaten the credibility of the criminal justice system[55].

Notably, the Attorney General's office in Virginia prevented testing of DNA which might have exonerated two men who had already been executed, for fear of the public discovering that the state had sentenced to death innocent men[56]. In 1997, then Texas Governor George W. Bush pardoned Kevin Byrd, a man convicted of sexually assaulting a pregnant woman[57]. The pardon was a result of exculpatory DNA testing, which could not have been performed prior to Byrd's trial in 1985[58]. Because the Harris County Clerk's Office had stored the biological evidence taken during the rape kit, Mr. Byrd was successfully exonerated[59]. Bush predicted that the re-examination of biological evidence in Harris County would lead to more exonerations[60]. However, the Harris County Clerk's Office began "systematically destroying" rape kits in its possession, thus ruling out the possibility

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51. See, e.g., N M Stat Ann § 31-1A-2(D) (West 2019).

52. N M Stat Ann § 31-1A-2(I) (West 2019).

53. DNA testing was unavailable prior to 1985, so inmates convicted prior to 1990 may have DNA evidence that was not previously tested.

54. Seth F. Kreimer and David Rudovsky, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, 151 Univ. Pa. L. Rev. 547, 557-58 (2002).

55. *Id.* at 562.

56. *Id.*

57. Cynthia E. Jones, *Evidence Destroyed, Innocence Lost: The Preservation of Biological Evidence Under Innocence Protection Statutes*, 42 Am. Crim. L. Rev. 1239 (2005).

58. *Id.*

59. *Id.*

60. *Id.*

of further exonerations based on old evidence[61]. State post-conviction DNA statutes effectively mitigate undue prosecutorial intervention by enabling convicted individuals who meet specific criteria to seek DNA testing[62].

For inmates who have newly discovered evidence, or whose DNA evidence was previously unable to be tested[63], post-conviction DNA testing statutes are often the only gateway to seeking justice. However, post-conviction DNA testing statutes vary widely among the states in terms of their requirements for petitions[64]. At the outset, the majority of states limit post-conviction DNA testing categorically by case type[65]. For example, both Kentucky and Nevada bar access to post-conviction DNA testing to all convicted prisoners except those convicted of a capital offense ("a crime for which the death penalty may be imposed"[66]).

The majority of states, including New Mexico, require that the convicted individual claim innocence[67]. In addition, many states, again including New Mexico, require individuals to establish that the identity of the perpetrator was at issue at trial[68]. As we will discuss further below, these overly burdensome statutory limitations on access to post-conviction DNA testing should be removed in order to prevent the exclusion of a specific category of convicted persons. A person convicted after a failed self-defense claim (such as Mr. Hobbs) may be wrongfully convicted, as no crime has been committed. The fundamental question is whether a person who has been wrongfully

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61. *Id.* at *1240.*

62. See, e.g., N M Stat Ann § 31-1A-2 (West 2019).

63. Post-conviction DNA testing may also be conducted when new technology is available. See, e.g., N M Stat Ann § 31-1A-2 (West 2019).

64. See generally, Brandon L. Garrett, *Claiming Innocence*, 92 Minn. L. Rev.1629 (2008) (for further discussion, see *Analysis* in Part 2 and Appendix 2).

65. *Id.* at 1679–80.

66. See, e.g., Ky. Rev. Stat. Ann § 422.285 (West 2017); Nev. Rev. Stat. Ann. § 34.724 (West 2020). See also *Offense*, Black's Law Dictionary (Thomson Reuters 2019).

67. See *infra*, Analysis in Part 2 and note 124. See also, Brandon L. Garrett, *Claiming Innocence*, 92 Minn. L. Rev. 1629, 1680–81 (2008) (some states require an affidavit claiming innocence in the petition for post-conviction DNA testing). See, e.g., Cal Pen Code § 1405 (West 2015).

68. See *infra* note 124. See also N M Stat Ann § 31-1A-2 (West 2019).

convicted should be prevented from seeking justice only because they cannot claim innocence or prove that another perpetrator was at fault.

2. Analysis. Post-Conviction DNA evidence

2.1. Exoneration through Post-Conviction DNA Testing

An individual can be wrongfully convicted when they are actually innocent of the alleged criminal act[69]. This type of conviction generally occurs when the wrong person was accused and convicted of a crime[70]. An individual may also be wrongfully convicted when they asserted a self-defense claim at trial which failed[71]. Erroneous convictions based on a failed self-defense claim (where a convicted person actually acted in self-defense) are "no crime" wrongful convictions[72] as an individual who acts in self-defense has committed no criminal act and is therefore not guilty[73].

"No crime" wrongful convictions occur for many reasons, including: erroneous exclusion of an alleged victim's reputation for violence at trial; flawed jury instructions; and prosecutorial misrepresentation

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69. See Colo. Rev. Stat. Ann. § 18-1-411 (West 2003) (defining actual innocence as "clear and convincing evidence such that no reasonable juror would have convicted the defendant"); see also *Innocent*, Black's Law Dictionary (Thomson Reuters 2019) (cited in note 20) (defined as "Someone who has not, in a given situation, committed any harmful act; a person who is blameless in a particular setting") (for the purposes of this Article, requiring a petitioner to assert or establish actual innocence is not differentiated from requiring a petitioner to establish innocence in petitions for post-conviction DNA testing).

70. *DNA Exoneration in the United States* (The Innocence Project), available at https://www.innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited April 20, 2020).

71. Acker and Wu, *"I Did It, but ... I Didn't"* at 624 (cited in note 22).

72. *Id.*; see also *Glossary* (The National Registry of Exonerations), available at https://www.law.umich.edu/special/exoneration/Pages/glossary.aspx (last visited April 20, 2021) (defining "no crime" wrongful convictions). See also S. Henry, Smoke but No Fire at 666 (cited in note 23).

73. See *Guilty*, Black's Law Dictionary (Thomson Reuters 2019) (defined as "having committed a crime; responsible for a crime"). See also S. Henry, *Smoke but No Fire* at 666 (cited in note 23).

of the self-defense justification[74]. Scholarly literature on the subject of self-defense claims and wrongful convictions is limited; however, James Acker and Sishi Wu discussed nineteen cases of exoneration of persons that had been wrongfully convicted due to failed self-defense claim[75].

The advent of DNA testing in 1985 resulted in both convictions based on biological evidence and exonerations[76]. The combined sentence served by individuals who were later exonerated through post-conviction DNA testing result in 5,284 years of imprisonment[77].

The first wrongfully convicted person exonerated through post-conviction DNA evidence was Gary Dotson, who in 1989 was exonerated after serving ten years for rape and aggravated kidnapping.[78] The DNA testing conclusively assessed that the semen found in the victim's underwear could not have come from Gary Dotson[79].

Because of its unequivocal accuracy and reliability in producing valid identification of perpetrators, DNA evidence is admissible in all United States courts[80]. New York became the first state to pass a post-conviction DNA statute in 1994, with 32 additional states and the federal government enacting statutes by 2004[81]. Currently, all states apply statutes that allow inmates to prove innocence[82] through post-conviction DNA testing[83]. although the limitations and barriers to testing vary substantially from state to state[84].

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74. Acker and Wu, *"I Did It, but ... I Didn't"* at 621-622 (cited in note 22).
75. *Id.*
76. James, *A Brief History of DNA Testing* (cited in note 40).
77. *DNA Exoneration in the United States* (The Innocence Project), available at https://www.innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited April 20, 2020) (see Appendix 1 for further discussion of exonerated individuals).
78. Nicholas Phillips, *Innocence and Incarceration: A Comprehensive Review of Maryland's Postconviction DNA Relief Statute and Suggestions for Improvement*, 42 Univ. Balt. L.F. 65, 65 (2011).
79. *Id.*
80. *Id.* at 66.
81. *Id.*
82. Or lack of guilt in cases of "no crime" wrongful convictions.
83. (stating that all 50 states now have post-conviction DNA statutes).
84. For further analysis, see Appendix 2.

2.2 Post-Conviction DNA Testing Petitions

Post-conviction DNA testing may be utilized in cases where DNA testing of evidence obtained from the scene has never been conducted, and in cases where previously inconclusive DNA evidence can be re-analyzed to potentially obtain a more probative result due to the advent of newer technology.[85] Newer technology enables DNA testing to produce more conclusive proof of identity than DNA testing in the early 1990s, when many tests may have yielded inconclusive results[86]. Courts are no longer divided on the issue of admissibility of DNA testing in criminal cases[87]. However, determining the correct standard for granting petitions for post-conviction DNA testing is still an issue[88].

A petition to a court for post-conviction DNA testing or other post-conviction relief is filed as a separate motion with the court, not as part of the original case[89]. Procedurally, post-conviction relief petitions act as "expansion[s] of habeas corpus"[90], expanding a convicted individual's ability to seek relief in a limited number of cases.

The specific procedures and policies for petitioning a court for post-conviction DNA testing vary between the federal government and the states. Under the federal standard, an individual sentenced to imprisonment or death for a federal offense may petition the court for DNA testing of "specific evidence" if many requirements are met[91]. These include an assertion of "actual innocence;" that any and all state remedies have been first exhausted; that the DNA evidence was either not previously tested; or that it was tested using outdated testing methods; and that at trial the identity of the perpetrator was at issue.[92]

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85. Anna Franceschelli, *Motions for Postconviction DNA Testing: Determining the Standard of Proof Necessary in Granting Requests*, 31 Cap. Univ. L. Rev 243, 244 (2003).
86. *Id.*
87. *Id.*
88. *Id.*
89. *State v. Allen*, 283 P.3d 114, 117 (Idaho Ct. App. 2012).
90. *Id.*
91. 18 U.S. Code § 3600 (West) (federal post-conviction DNA testing code).
92. *Id.*

Because post-conviction DNA testing can result in overturned convictions[93], states are wary of granting post-conviction DNA testing when that testing has the potential to exonerate a convicted felon[94]. States have different requirements for granting post-conviction DNA testing petitions[95]. By requiring petitioners to assert claims of innocence and/or establish that identity was an issue at trial, many states, including New Mexico[96], exclude petitioners who claimed to have acted in self-defense. Defendants who assert self-defense claims at trial have the right to DNA testing of biological evidence as part of the trial process[97]. Although convicted individuals do not have equal due process rights after conviction, asserting a self-defense claim at trial should not preclude a person from requesting post-conviction DNA testing.

Because there is presently no case law interpreting New Mexico's current statute (which includes the requirements of asserting innocence and establishing that the identity of the perpetrator was an issue) it is likely that courts will refer to other jurisdictions for guidance. However, New Mexico courts will not find a clear answer by looking at other jurisdictions, due to a lack of concurrence[98]. New Mexico should consider amending the statute in order to provide the courts with clarity on whether individuals who asserted affirmative defenses may seek post-conviction DNA testing.

2.3. When Relief May be Granted

When a petitioner has been allowed to obtain post-conviction DNA testing, the results of the test must meet additional standards for any relief to be granted[99]. Post-conviction DNA test results may

93. See, e.g., N M Stat Ann § 31-1A-2(I) (West 2019) (stating that if the DNA results are exculpatory, a district court may set aside the charges and sentencing, order a new trial, or grant other relief).

94. Franceschelli, *Motions for Postconviction DNA Testing* at 247 (cited in note 85).

95. See *Analysis* in Part 3.

96. See Part 2, Section 2.

97. See, e.g., *Adams v. State*, 387 P.3d 153, 164 (Idaho Ct. App. 2016) (where defendant who claimed to have stabbed victim in self-defense was entitled to seek DNA testing of evidence before trial).

98. See Part 3.

99. See, e.g., N M Stat Ann § 31-1A-2(I) (West 2019).

exclude a convicted person as a source, create reasonable doubt as to guilt, or may be inconclusive[100]. State and federal courts in the United States generally require that the results "prove innocence"[101]. Additionally, many states impose time restrictions for introduction of newly discovered evidence after conviction and sentencing, thereby limiting access to relief in order to "ensure the integrity of the trial process"[102]. Certain states, including Oregon, avoid potential injustices by allowing judicial discretion, so that a judge may waive the time restriction in the interest of justice[103].

In addition to statutory limitations that restrict a person's ability to seek relief, cost also may prohibit some indigent convicted persons from petitioning the court[104]. Convicted individuals often rely on innocence or justice projects, such as The Innocence Project, or The New Mexico Innocence and Justice Project, or other state equivalents for legal and financial support in post-conviction proceedings[105]. The state funded projects, such as The New Mexico Innocence and Justice Project, are often limited by financial restrictions which may reduce the number of cases the projects can take on[106].

The Innocence Protection Act, codified in part under Chapter 18 of the United States Code, provides differing procedures for relief, dependent on the results of post-conviction DNA tests[107]. If the testing produces inconclusive results, a court may order additional testing, or

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100. Franceschelli, *Motions for Postconviction DNA Testing* at 247 (cited in note 85).

101. *Id.* Citing National Institute of Justice, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, 10 (1996).

102. *Id.* at 28.

103. *Id.* at 29.

104. *Id.*

105. *Exonerate the Innocence* (The Innocence Project), available at https://www.innocenceproject.org/exonerate/ (last visited 20 April, 2020).

106. *New Mexico Innocence and Justice Project* (The University of New Mexico School of Law), https://lawschool.unm.edu/ijp/index.html. Explaining that funding comes from state grants and requesting private funding by donors to continue its services.

107. 18 U.S. Code § 3600 (West 2016). The Innocence Protection Act has been cited in state court cases involving post-conviction DNA testing; see, e.g., *In re Towne*, 195 Vt. 42, 86 A.3d 429, 432 (2013).

deny any relief[108]. In the event testing produces inculpatory results, the government may: (1) deny relief; (2) hold the applicant in contempt if the application included a false claim of "actual innocence;" (3) assess charges for the DNA testing; (4) deny good conduct credit through the Director of the Bureau of Prisons; and (5) deny parole if the prisoner is under jurisdiction of the United States Parole Commission[109]. If the results produce exculpatory results, "exclud[ing] the applicant as the source of the DNA evidence," the applicant may file a motion for a new trial or resentencing[110]. Courts shall grant motions for new trial or resentencing if the DNA test results (considered in addition to all other evidence in the case) "establish by compelling evidence" that a new trial would result in acquittal of the federal offense[111], or they shall grant a motion for resentencing if the DNA evidence was first admitted during a federal sentencing hearing, and exoneration of the offense entitles the applicant "to a reduced sentence or a new sentencing proceeding"[112].

The federal courts have analyzed the due process rights of convicted persons in relation to post-conviction relief. The United States Supreme Court in *Brady v. Maryland* set a standard for post-conviction relief when it held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment[113][...]". In *Brady*, Justice Douglas stated, "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly"[114]. The Court agreed that suppression of evidence by the prosecution at trial deprived the defendant of their due process rights under the

108. 18 U.S. Code § 3600(f) (West 2016).
109. 18 U.S. Code § 3600(f) (West 2016).
110. 18 U.S. Code § 3600(g) (West 2016).
111. 18 U.S. Code § 3600(g)(2)(A) (West 2016).
112. 18 U.S. Code § 3600(g)(2)(B) (West 2016).
113. *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (the Supreme Court in *Osborne* (Dist. Attorney's Office for Third Judicial Dist. v. Osborne, 557 U.S. 52, 68 (2009)), held that the *Brady* framework should not be applied to post-conviction cases).
114. *Id.* at 87.

Fourteenth Amendment[115]; however, it declined to declare Maryland court's denial of a new trial a Due Process Clause violation[116].

The Court in *U.S. v. Laureano-Salgado* recently considered the *Brady* standard as more "defendant-friendly." The Court noted that, although a motion for a new trial requires that (1) the evidence was unknown or unavailable at trial; and (2) the evidence could not have been discovered at trial through due diligence, the *Brady* standard amended the third and fourth requirements of *Peake*[117] to require that petitioners demonstrate "a reasonable probability that [...] the result of the proceeding would have been different"[118]. The Supreme Court held in *Osborne* that the *Brady* standard should not be applied to post-conviction proceedings, because convicted individuals do not enjoy the same liberty interests as free men[119]. The Court held that once a person is convicted, there is no longer a presumption of innocence[120]. It also held that a convicted person must no longer be afforded due process by the state, and deemed state post-conviction relief procedures as a "choice" not dictated by due process[121].

The federal courts have held that claims of "actual innocence" are not themselves constitutional claims afforded due process, but that in some cases act as "gateways" for petitioners to pass through to have "otherwise barred" claims considered[122].

States differ in their requirements for relief based on post-conviction DNA testing, due to varying statutory rules. For example, in Maryland, favorable post-conviction DNA test results may allow a petitioner to have a post-conviction hearing; or, if the results show a "substantial possibility" that the original jury would not have convicted the petitioner at trial, a court may order a new trial instead of

115. *Id.* at 86.

116. *Id.* at 90.

117. *U.S. v. Peake*, 874 F.3d 65 (1st Cir. 2017) (holding that "(3) is material, not just cumulative or impeaching; and (4) is sufficiently compelling that it would probably produce an acquittal at a retrial").

118. *U.S. v. Laureano-Salgado*, 933 F.3d 20, 28-29 (1st Cir. 2019).

119. Dist. Attorney's Office for Third Judicial Dist. v. Osborne, 557 U.S. 52, 68 (2009).

120. *Id.*

121. *Id.*

122. *Herrera v. Collins*, 506 U.S. 390, 404 (1993).

the hearing[123]. Delaware permits motions for post-conviction DNA testing only within three years of the date of conviction, and requires the DNA test results establish "actual innocence"[124]. A petitioner may be granted a new trial in Delaware only if the petitioner establishes by clear and convincing evidence that no reasonable jury, when considering the DNA test results with the other evidence at trial, would have convicted the petitioner[125].

New Mexico requires the results of the DNA testing be "exculpatory" in order for a district court to either: (1) set aside the judgement and sentence; (2) dismiss charges with prejudice; (3) order a new trial; or (4) order other appropriate relief[126].

3. Analysis of state post-conviction dna testing statutory requirements

3.1. States Requiring Petitioners Assert Innocence

At least twenty-six states and the District of Columbia require petitioners, under state statute, to assert a claim of "actual innocence"[127] or establish innocence, on a petition to the court for post-conviction DNA testing[128]. Among these state statutes requiring claims of

123. Nicholas Phillips, *Innocence and Incarceration: A Comprehensive Review of Maryland's Postconviction DNA Relief Statute and Suggestions for Improvement*, 42 Univ. Balt. L. Forum 65, 73-74 (2011).

124. Del. Code Ann. tit. 11, § 4504(b) (West 2000).

125. *Id.*

126. N M Stat Ann § 31-1A-2(I) (West 2019).

127. *Innocence*, Black's Law Dictionary (Thomson Reuters 2019) (actual innocence is defined as: "The absence of facts that are prerequisites for the sentence given to a defendant") (for the purposes of this Article, requiring a petitioner to assert or establish actual innocence is not differentiated from requiring a petitioner to establish innocence in petitions for post-conviction DNA testing).

128. See, e.g., Ala. Code § 15-18-200 (2020); Ark. Code Ann. § 16-112-202(6)-(7) (West 2005); Cal. Penal Code § 1405(b) (West 2015); Colo. Rev. Stat. Ann. § 18-1-411 (West 2003); Del. Code Ann. tit. 11, § 4504(a) (West 2000); D.C. Code Ann. § 22-4133 (West 2001); Fla. R. Crim. P. 3.853(B)(2)-(3) (2010); Idaho Code Ann. § 19-4902 (West 2012); 725 Ill. Comp. Stat. Ann. 5/116-3 (West 2014); Iowa Code Ann. § 81.10(d) (West 2019); Me. Rev. Stat. tit. 15, § 2137 (2019); Mass. Gen. Laws Ann. ch. 278A, § 3(d) (West 2012); Minn. Stat. Ann. § 590.01 (West 2005) (held unconstitutional by Reynolds v. State (Reynolds v. State, 888 N.W.2d 125 (Minn. 2016), on time

innocence, much variation is found both in the specific wording of the statutes[129] and in the judiciary application of those statutes.

At least fourteen state statutes which require claims of innocence also require the identity of the perpetrator of the crime to have been an issue at trial[130]. Arkansas' post-conviction DNA testing statute has some of the strictest requirements, requiring a petitioner to: (1) include a theory of defense establishing petitioner's "actual innocence" and (2) requiring that the identity of the perpetrator must have been an issue at trial[131]. Arkansas additionally requires that petitioners did not plead guilty at trial, this because the state has determined that if a petitioner pled guilty, identity could not have been an issue at trial[132].

Requiring petitioners to assert innocence excludes petitioners who claimed self-defense and other justification defenses from successfully petitioning a court for post-conviction DNA testing, which may absolve them of guilt[133]. Petitioners whose failed self-defense claims resulted in "no crime" wrongful convictions are at risk of having their petitions denied because of semantics. A petitioner who asserted a self-defense claim at trial claims to be not guilty by reason of affirmative defense. Not guilty in this context is not equivalent to an assertion of innocence as required by statute[134].

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limit of 2 years, has not been revised as of Oct. 19, 2020); Mo. Ann. Stat. § 547.035 (West 2018); N M Stat Ann § 31-1A-2(I) (West 2019); N.Y. Crim. Proc. Law § 440.30 (McKinney 2020); N.D. Cent. Code Ann. § 29-32.1-15 (West 2019); Ohio Rev. Code Ann. § 2953.74 (West 2010); Okla. Stat. Ann. tit. 22, § 1373.2 (West 2020); Or. Rev. Stat. Ann. § 138.692 (West 2020); 42 Pa. Stat. and Consol. Stat. Ann. § 9543.1(6) (West 2018); Tex. Code Crim. Proc. Ann. art. 64.03 (West 2017); Utah Code Ann. § 78B-9-301 (West 2018); Vt. Stat. Ann. tit. 13, § 5566(a)(1) (West 2020); Va. Code Ann. § 19.2-327.3 (West 2020); Wis. Stat. Ann. § 974.07 (West 2011).

129. See *supra* note 124.

130. See, e.g., Iowa Code Ann. § 81.10(d) (West 2019) (the 14 states statutes are found in footnote 124 and include: Arkansas; California; Delaware; Florida; Idaho; Illinois; Iowa; Maine; Minnesota; Missouri; North Dakota; Ohio: Oregon; and Texas).

131. Ark. Code Ann. § 16-112-202(6)-(7) (West 2005).

132. See *Leach v. State*, 580 S.W.3d 871, 872 (Ark. 2019) (for further analysis of post-conviction DNA testing statutes by state, see Appendix 2).

133. See *Hobbs*, 2020 NMCA 44 (cited in note 1).

134. See N M Stat Ann § 31-1A-2 (West 2019).

3.2. Identity at Issue and Lesser Requirements

Several states, which do not require petitioners to assert claims of innocence in petitions for post-conviction DNA testing, still require the identity of the perpetrator to have been an issue at trial[135]. Of these states, New Jersey additionally requires petitioners to show that if the DNA testing results are favorable, a new trial would likely be granted[136]. New Jersey also established the Truth Project in 2001, which allows inmates to attempt to prove innocence through post-conviction DNA testing at the expense of the state[137]. Michigan also requires petitioners to show that the DNA evidence itself is material to the issue of identity[138]. Hawaii has perhaps the most inclusive statute[139]. In fact, although it requires identity to have been an issue, the standard is significantly less restrictive than many of the previously described state statutes, requiring petitioners to show only that there exists a reasonable probability of a different verdict[140]. Washington imposes a higher standard than Hawaii, requiring petitioners to show there is a likelihood that the post-conviction DNA testing will demonstrate innocence, based on a standard of more probable than not[141]. States requiring identity to have been an issue at trial tend to exclude petitioners who claimed self-defense or other affirmative defenses at trial[142].

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135. See, e.g., N.J. Stat. Ann. § 2A:84A-32a (West 2016); Ga. Code Ann. § 5-5-41(E) (West 2015); Haw. Rev. Stat. Ann. § 844D-[123](A)(1), (B)(1) (West 2020); Mich. Comp. Laws Ann. § 770.16 (West 2015).

136. *State v. Armour*, 141 A.3d 381, 391 (N.J. Super. App. Div. 2016).

137. Franceschelli, *Motions for Postconviction DNA Testing* at 266 (cited in note 85).

138. Mich. Comp. Laws Ann. § 770.16 (West 2015).

139. Based on close evaluation of thirty-three state statutes and the District of Columbia. See Haw. Rev. Stat. Ann. § 844D-123(A)(1), (B)(1) (West 2020).

140. Haw. Rev. Stat. Ann. § 844D-123(A)(1), (B)(1) (West 2020).

141. Wash. Rev. Code Ann. § 10.73.170 (West 2005).

142. See e.g., *State v. Donovan*, 853 A.2d 772, 776 (Me. 2004) (holding that identity cannot be an issue when a defendant raises a consent or justification defense); see also *People v. Urioste*, 736 N.E.2d 706, 714 (Ill. App. Ct. 2000) (holding that when a defendant raises an affirmative defense, identity ceases to be an issue); but see *Davis*, 11 So. 3d 977, 978 (Fla. Dist. Ct. App. 2009) (holding that self-defense claims do not preclude identity to have been an issue for post-conviction DNA testing) (cited in note 28).

Some statutes do not include clauses requiring identity to be an issue, but rather concentrate on issues such as reasonable probability of different outcomes[143] or producing exculpatory results[144]. Maryland has a similar statutory requirement to Delaware[145], requiring a court to determine, before granting motions for post-conviction DNA testing, whether there is a reasonable probability that the DNA testing can scientifically produce exculpatory or mitigating evidence[146]. Maryland further defines "exculpatory" as "tends to establish innocence"[147]. Likewise, Arizona's statute requires petitioners to show that a reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory DNA results had been available at trial[148].

3.3. Further State Imposed Restrictions Based on Timely Filing

Several states and the federal government additionally burden petitioners with time limitations on filing petitions for post-conviction DNA testing. The federal courts impose on petitioners a one year statute of limitations for post-conviction DNA testing, unless a court is persuaded by petitioner's claim of "actual innocence" that no reasonable juror could find petitioner guilty with the newly discovered evidence[149]. The majority of states, including New Mexico, allow petitions for post-conviction DNA testing at any time after sentencing, provided that the evidence is still available for testing[150]. Some states, including Pennsylvania, require that petitions shall be filed in a

143. See, e.g., Ariz. Rev. Stat. Ann. § 13-4240 (2000).

144. See, e.g., *Givens v. State*, 188 A.3d 903, 912 (Md. 2018).

145. Del. Code Ann. tit. 11, § 4504(a) (West 2000).

146. *Givens*, 188 A.3d 903, 912 (cited in note 144).

147. *Id.* at 914.

148. Ariz. Rev. Stat. Ann. § 13-4240 (2000).

149. *Carter v. Klee*, 286 F. Supp. 3d 846, 853 (E.D. Mich. 2018), *certificate of appealability denied*, 14-14792, 2018 WL 10440862 (E.D. Mich. Feb. 5, 2018).

150. See, e.g., 725 Ill. Comp. Stat. Ann. 5/116-3 (West 2014); Ariz. Rev. Stat. Ann. § 13-4240 (2000); Haw. Rev. Stat. Ann. § 844D-123 (West 2020); Okla. Stat. Ann. tit. 22, § 1373.2 (West 2020); Idaho Code Ann. § 19-4902 (West 2020); Utah Code Ann. § 78B-9-301(West 2018); 42 Pa. Stat. and Consol. Stat. Ann. § 9543.1(4) (West 2018); Tenn. Code Ann. § 40-30-303 (West 2012); Fla. Stat. Ann. § 925.11(1)(b) (West 2007); N M Stat Ann § 31-1A-2 (West 2019).

"timely manner" but ultimately allow for post-conviction DNA testing motions to be filed at any time[151].

Other states impose additional restrictions on petitioners' ability to request post-conviction DNA testing by limiting the time available for petitioners to submit motions[152]. Georgia has one of the most exclusionary policies, requiring all post-conviction motions to be filed within 30 days from sentencing or conviction[153]. Michigan's procedural requirement is similar to that of Georgia; a petitioner convicted after January 8, 2001, must file a motion for post-conviction DNA testing within 60 days of the conviction; however, a petitioner convicted before January 8, 2001 may file a motion at any time[154]. Maine, Delaware and New York also impose time limits for petition filing[155].

The Innocence Project lists many proposed amendments to the fifty state statutes which contain excessive burdens on access to post-conviction DNA testing[156]. The list includes the removal of "sunset provisions," which the project describes as "absolute deadlines" such as those provided in the statutes of Georgia, Michigan, Maine, Delaware, and New York[157].

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151. See, e.g., 42 Pa. Stat. and Consol. Stat. Ann. § 9543.1(4) (West 2018).

152. See, e.g., N.Y. Crim. Proc. Law § 440.30 (McKinney 2020); Me. Rev. Stat. tit. 15, § 2137 (2019); Del. Code Ann. tit. 11, § 4504 (West 2000); Mich. Comp. Laws Ann. § 770.2 (West 2015); Ga. Code Ann. § 5-5-41(E) (West 2015).

153. Ga. Code Ann. § 5-5-41 (E) (West 2015).

154. Mich. Comp. Laws Ann. §§ 770.16(1), 770.2 (West 2015).

155. Me. Rev. Stat. tit. 15, § 2137 (2019) (requiring petitions be filed two years after date of conviction, or if testing is requested due to newly available DNA testing technology, within two years of the time the new technology is available); Del. Code Ann. tit. 11, § 4504 (West 2000) (imposing a statute of limitations for post-conviction remedies of three years); N.Y. Crim. Proc. Law § 440.30 (McKinney 2020) (imposing a five-year statutory limitation unless "extraordinary circumstance[s]" made it impossible to test the DNA evidence within the five years after conviction).

156. *Access to Post-Conviction DNA testing* (The Innocence Project), available at https://www.innocenceproject.org/causes/access-post-conviction-dna-testing/ (last visited 20, April 2020).

157. N.Y. Crim. Proc. Law § 440.30 (McKinney 2020); Me. Rev. Stat. tit. 15, § 2137 (2019); Del. Code Ann. tit. 11, § 4504 (West 2000); Mich. Comp. Laws Ann. § 770.2 (West 2015); Ga. Code Ann. § 5-5-41 (E) (West 2015) (for further discussion of state statutes, see Appendix 2).

4. Analysis of New Mexico's Post-Conviction DNA Testing Statute

4.1. New Mexico's Statutory Requirements for Post-Conviction DNA Testing

The state of New Mexico allows any person convicted of a felony, who claims that DNA evidence will establish their innocence, to petition the district court of the convicting jurisdiction for DNA testing[158]. The statute requires that a petitioner show by a preponderance of the evidence that the evidence was not previously subject to DNA testing (or to the current DNA testing available)[159]; that the DNA testing will likely produce admissible evidence[160]; and that the identity of the perpetrator was at issue[161]. The New Mexico statute includes allowances for petitioners who meet the above-mentioned requirements to be appointed counsel[162] and provides that no petitioners shall be denied access to post-conviction DNA evidence due to inability to pay[163]. In addition, the statute grants petitioners the right to appeal a court's denial of the requested DNA testing[164]. Importantly, New Mexico's statute requires the state to preserve all evidence from investigations and prosecutions which could potentially be subject to DNA testing for the entire period of incarceration, including probation or parole[165]. New Mexico's statute does not include a time limit nor does it impede petitioners who pled guilty from petitioning the court[166].

New Mexico's statutory requirements match those of the many states requiring claims of innocence and that the identity of the perpetrator had been an issue at trial[167]. This presents a problem for petitioners who claim to be not guilty, by reason of affirmative defense,

158. N M Stat Ann § 31-1A-2(A) (West 2019).
159. N M Stat Ann § 31-1A-2(D) (West 2019).
160. *Id.*
161. *Id.*
162. N M Stat Ann § 31-1A-2(E) (West 2019).
163. N M Stat Ann § 31-1A-2(J) (West 2019).
164. N M Stat Ann § 31-1A-2(L) (West 2019).
165. N M Stat Ann § 31-1A-2(M) (West 2019).
166. N M Stat Ann § 31-1A-2 (West 2019).
167. See *supra* note 124 (the states include: Arkansas; California; Delaware; Florida; Idaho; Illinois; Iowa; Maine; Minnesota; Missouri; North Dakota: Ohio; Oregon, and Texas).

and who cannot claim that identity was an issue. These statutory requirements undermine the possibility of exonerating wrongfully convicted persons, convicted of crimes that they were not responsible for.

4.2. New Mexico Courts' Interpretation and Application of the Post-Conviction DNA Relief Statute

New Mexico courts have only recently been presented with cases where interpretation and application of the post-conviction DNA statute is at stake[168]. The *Hobbs* case presented an opportunity for the New Mexico Court of Appeals to analyze the post-conviction DNA statute when the prosecutor appealed the defendant's grant of a new trial based on post-conviction DNA testing[169]. In *Hobbs,* the defendant was convicted of voluntary manslaughter and sentenced to seven years[170]. The incident resulting in the victim's death from gunshot wounds involved a physical altercation, where the defendant alleged that the victim grabbed the gun in his hand, and attempted to use it against the defendant[171]. The defendant raised a claim of self-defense at trial[172].

The Court of Appeals rejected the state's argument that Section A[173] of the post-conviction DNA relief statute requires petitioners to prove that the results of DNA testing "will establish their innocence"[174]. Instead, the court determined that the innocence standard listed in Section A of the statute only requires petitioners to *claim* that the DNA evidence will establish their innocence[175]. The court ruled that criminal defendants have a "fundamental interest" in avoiding wrongful conviction[176] and that New Mexico courts when deciding whether relief should be granted under the statute, should balance the interest

168. See, e.g., *Hobbs*, 2020 NMCA 44 (cited in note 1); *State v. Duran*, 2020 WL 3440537 (N.M. Ct. App. June 22, 2020) (Both cases have been granted certiorari by the New Mexico Supreme Court and are thus pending review).

169. *Hobbs*, 2020 NMCA 44 at para. 20 (cited in note 1).

170. *Id.* at para. 7.

171. *Id.* at para. 2-3.

172. Id. at para. 3.

173. N M Stat Ann § 31-1A-2(A) (West 2019).

174. *Hobbs*, 2020 NMCA 44 at para. 32; N M Stat Ann § 31-1A-2(A) (West 2019).

175. *Hobbs*, 2020 NMCA 44 at para. 32 (*emphasis added*).

176. *Id.* at para. 37.

of the defendant in avoiding wrongful conviction with the "public's interest in the finality of a conviction" and the interests of the victim[177].

The Court of Appeals reviewed *de novo* the issue of when relief should be granted based on post-conviction DNA evidence[178]. The court held that the DNA evidence must be material to the issue of innocence of the petitioner and that it must raise a reasonable probability that had the evidence been available at trial, the petitioner would not have pled guilty or been convicted[179]. The court explained that the New Mexico legislature when drafting the statute, "expected" that DNA evidence, which is exculpatory, would have led to a different outcome at trial[180]. The court defined the term "exculpatory" in *Hobbs* as "evidence reasonably tending to negate guilt"[181]. The court announced a novel standard that New Mexico courts shall apply when deciding whether to grant post-conviction relief based on exculpatory DNA evidence[182].

The Court of Appeals had an additional opportunity to review the post-conviction DNA relief statute in *State v. Duran*[183], the companion case to *Hobbs*. The *Duran* case also involved a district court's denial of the defendant's motion for relief based on the results of post-conviction DNA testing[184]. The defendant in *Duran* filed a petition for post-conviction DNA testing under the statute twenty-eight years after his conviction in 1987 for murder and armed robbery[185]. The defendant in *Duran* requested post-conviction DNA testing of evidence found on the victim; specifically, DNA recovered underneath the victim's fingernails, and multiple hairs found on the victim[186]. The results of the post-conviction DNA testing eliminated the defendant as a contributor to the DNA evidence[187]. The Court of Appeals reversed the district

177. *Id.* (quoting *Montoya v. Ulibarri*, 2007 NMSC 35, 29, 142 N.M. 89).
178. *Id.* at para. 24.
179. *Id.* at para. 38.
180. *Id.* at para. 41.
181. *Id.* at para. 1 (quoting Buzbee v. Donnelly, 1981-NMSC-097, para. 45, 96 N.M. 692).
182. *Id.* at para. 42.
183. *Duran*, 2020 WL 3440537 at para. 1 (cited in note 168).
184. *Id.* at para. 1, 12.
185. *Id.* at para. 1, 7.
186. *Id.* at para. 11.
187. *Id.*

court's denial of the defendant's motion for post-conviction relief based on the DNA testing, and remanded the case for reconsideration according to the new standard announced in *Hobbs*[188].

Because both *Hobbs* and *Duran* have been granted certiorari by the New Mexico Supreme Court[189], it is currently unknown how the Supreme Court will decide the outcome of these cases. However, because these cases are the first to examine the post-conviction DNA statute, the Court may set a clear standard for the lower courts to apply. The *Hobbs* case may help bring to light problems with the statute, importantly the exclusion of petitioners who claimed self-defense at trial and may be wrongfully convicted.

4.3. The Problem with the Requirement of Identity as an Issue and Claims of Innocence

New Mexico is not an outlier of states requiring identity to be an issue at trial, or in requiring petitioners to state a claim of innocence within their petitions for post-conviction DNA testing[190]. However, several states' post-conviction DNA statutes do not include a requirement for petitioners to assert innocence[191]. Only a few states' statutes do not include the requirement of identity as an issue at trial[192].

The problem with states requiring claims of innocence[193] from petitioners who seek to exonerate themselves from potentially erroneous convictions or sentences is that some petitioners may be unable to meet the heavy burden of proving that no reasonable juror could have convicted them given the evidence. For example, in cases like *Hobbs*[194],

188. *Id.* at para. 23; see also *Hobbs*, 2020 NMCA 44 at para. 42 (cited in note 1).

189. *Hobbs*, 2020 NMCA 44 (cited in note 1); *Duran*, 2020 WL 3440537 (cited in note 168).

190. See, e.g., Ark. Code Ann. § 16-112-202 (West 2005); Cal. Penal Code Ann. § 1405 (West 2015).

191. See, e.g., Ariz. Rev. Stat. Ann. § 13-4240 (2000); Ga. Code Ann. § 5-5-41 (E) (West 2015); Haw. Rev. Stat. Ann. § 844D-123 (West 2020); Mich. Comp. Laws Ann. § 770.16 (West 2015); N.J. Stat. Ann. § 2A:84A-32a (West 2016); Wash. Rev. Code Ann. § 10.73.170 (West 2005).

192. See, e.g., Md. Code Ann., Crim. Proc. § 8-201 (West 2018); Ariz. Rev. Stat. Ann. § 13-4240 (2000).

193. Or actual innocence.

194. *Hobbs*, 2020 NMCA 44 (cited in note 1).

because the defendant raised a claim of self-defense, it is possible that a "reasonable juror" could convict because no other perpetrator was implicated.

Convicted individuals who claim self-defense or other affirmative defenses may be preempted from petitioning the court for post-conviction DNA testing based on the stringent requirement for claiming innocence. The requirement for claiming innocence seems to be interpreted by the courts to mean that petitioners must claim that someone else was responsible, like in the *Duran* case, where DNA testing conclusively eliminated the defendant as the source of DNA evidence found on the victim[195]. Requiring all petitioners to, under oath, claim innocence under penalty of law seems unnecessarily burdensome, and may exclude petitioners who claim to be not guilty based on self-defense.

States are widely divided on whether petitioners who claim to be not guilty of a crime based on an affirmative defense, such as self-defense, are entitled to post-conviction DNA testing. Some states are of the opinion that identity is no longer an issue after petitioners state affirmative defense claims, while other states hold that these petitioners may not be summarily denied post-conviction DNA testing[196]. For example, Maine courts have held that identity is always at issue in criminal trials unless a defendant admits to an act by asserting an affirmative defense[197]. Illinois has a similar rule, holding that when a defendant claims any affirmative defense, identity is no longer at issue.[198] In *People v. Urioste*, an Illinois court held, "[i]t would make no sense to allow DNA testing in cases where identity was not the issue at the trial"[199]. By holding that convicted individuals who asserted an affirmative defense are unable to claim that identity was an issue at trial,

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195. *Duran*, 2020 WL 3440537 at para. 11 (cited in note 168).

196. See, e.g., *State v. Donovan*, 853 A.2d 772, 776 (Me. 2004) (holding that identity cannot be an issue when a defendant raises a consent or justification defense); see also *People v. Urioste*, 736 N.E.2d 706, 714 (Ill. App. Ct. 2000) (holding that when a defendant raises an affirmative defense, identity ceases to be an issue); but see *Davis*, 11 So. 3d 977, 978 (Fla. Dist. Ct. App. 2009) (holding that self-defense claims do not preclude identity to have been an issue for post-conviction DNA testing) (cited in note 28).

197. *State v. Donovan*, 853 A.2d 772, 776 (Me. 2004).

198. *People v. Urioste*, 736 N.E.2d 706, 714 (cited in note 196).

199. *Id.*

these states prevent these individuals from seeking post-conviction DNA testing.

By contrast, some states, including Florida and Washington, have held that it is inappropriate to summarily deny post-conviction DNA testing to petitioners who claim to have acted in self-defense based on the issue of identity[200]. In *Davis,* the Florida District Court of Appeals reversed the trial court's denial of petitioner's motion for post-conviction DNA testing, where the denial was based on petitioner's assertion of self-defense.[201] The trial court had denied the petition because it felt the petitioner's self-defense claim negated the possibility that the identity of the perpetrator had been an issue at trial[202]. The court of appeals, however, held that petitions for testing should not be summarily denied because the defendant did not deny the act which was alleged to be criminal[203]. The court ruled that the correct standard to apply when determining whether to grant a petition, is considering whether the DNA testing would have had a reasonable probability, if available at trial, of resulting in an acquittal or lesser sentence[204].

Similarly, Washington courts have held that individuals who claimed self-defense can state that identity was an issue at trial, because it is the identity of the perpetrator, which the court differentiates from the commissioner of an act[205]. In *Braa*, the court rejected the state's proposition that because the defendant's identity as the shooter was not at issue at trial, the DNA evidence would be immaterial to the issue of identity. The court explained that the evidence must be relevant to the identity of the perpetrator[206]. The court held that a person who kills another in lawful self-defense is "not a perpetrator" and that if convicted, the person is "misidentified as the perpetrator" making the identity of the perpetrator an issue within the meaning of the statute[207]. The court further established that petitioners who claim self-defense should not be denied post-conviction DNA testing,

200. See, e.g., *Davis*, 11 So. 3d 977, 978; *Braa*, 410 P.3d 1176 (cited in note 28).
201. *Davis*, 11 So. 3d 977, 978 (cited in note 28).
202. *Id.*
203. *Id.*
204. *Id.*
205. *Braa*, 410 P.3d 1176 (cited in note 28).
206. *Id.*
207. *Id.*

when that testing may establish innocence of the alleged crime[208]. In addition, the court held that if the legislature intended to restrict post-conviction DNA testing for individuals claiming self-defense, this would be evidence of "perverse legislative intent" where a statute is enacted "to free some-but not all-innocent persons"[209].

4.4. Proposed Resolution to the Exclusion of Petitioners

New Mexico's post-conviction DNA testing statute, when considered in relation to other states' statutes, could be described as somewhat liberal[210]. However, New Mexico's statute still requires the petitioner to assert innocence and that the identity of the perpetrator be an issue at trial[211]. As described above, requiring identity to have been an issue at trial has been interpreted both to include and to exclude individuals who claim self-defense[212]. This ambiguity in jurisdictional authority, seems to exclude such individuals without good cause. As the discussion above shows, there is no clear precedent for New Mexico to follow. Without direction from the legislature, petitioners who are wrongfully convicted (for "no crime" wrongful convictions), may be unable to access post-conviction DNA testing.

Many states have recognized that certain requirements of post-conviction DNA testing statutes are unfair when applied to some categories of individuals. For example, several states including New Mexico and Texas have allowed individuals who pled guilty at trial to petition the court for DNA testing, in order to allow those individuals who may have been coerced into confessing or conceded guilt, to avoid more lengthy sentences, and establish their innocence[213]. This

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208. *Braa*, 410 P.3d 1176 (cited in note 28).

209. *Id.*

210. See, e.g., Mo. Ann. Stat. § 547.035 (West 2018) (requiring a claim that DNA testing will yield evidence of actual innocence); Ala. Code § 15-18-200 (2020) (only allowing petitioners convicted of Capital offenses who are awaiting execution to petition for post-conviction DNA testing).

211. N M Stat Ann § 31-1A-2 (West 2019).

212. *Braa*, 410 P.3d 1176 (cited in note 28).

213. See, e.g., D.C. Code Ann. § 22-4133 (West 2001); Fla. Stat. Ann. § 925.11(1)(a) (West 2007); Haw. Rev. Stat. Ann. § 844D-123(b)(1) (West 2020); Mass. Gen. Laws Ann. ch. 278A, § 3(d) (West 2012); N M Stat Ann § 31-1A-2 (West 2019); Or. Rev. Stat.

type of statutory allowance aims to prevent individuals seeking post-conviction DNA testing from being summarily denied such possibility based on a technicality. The need for revision of the New Mexico post-conviction DNA statute is apparent when considering cases such as *Hobbs*[214]*.* In *Hobbs*, the defendant argued that his post-conviction DNA testing was exculpatory because it weakened the state's argument that the defendant was not under threat of death or bodily harm at the time of the shooting, thereby supporting his self-defense claim[215]. If individuals like Mr. Hobbs are summarily denied DNA testing which could establish their claims of self-defense, thereby proving that they are not guilty of the alleged crime, a grave injustice is done[216].

This Article does not aim to resolve the issues discussed in the New Mexico post-conviction DNA statute but does propose a potential resolution for purposes of promoting discussion. A revision of the New Mexico statute could potentially assist petitioners overturn "no crime" wrongful convictions. An example of a state finding issue with its post-conviction DNA testing statute and amending said statute is found in Maryland.

In 2003, Maryland amended its post-conviction DNA testing statute towards a more liberal approach[217]. The Maryland post-conviction DNA statute formerly contained both the requirement that petitioners claim "actual innocence" and show that identity had been an issue at trial[218]. The statute was amended in 2003 to provide for a new standard as to r whether a petitioner should be granted post-conviction DNA testing. Such a standard requires considering whether there is a reasonable probability for the DNA testing to produce exculpatory

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Ann. § 138.692(3) (West 2020); 42 Pa. Stat. and Consol. Stat. Ann. § 9543.1(5) (West 2018); Tex. Code Crim. Proc. Ann. art. 64.03(b) (West 2017).

214. *Hobbs*, 2020 NMCA 44 (cited in note 1).

215. *Id*. at para. 10.

216. *Id.* (Mr. Hobbs was granted post-conviction DNA testing, however it seems likely the current statutory requirements will allow for ambiguous determination by the district courts when reviewing petitions by individuals convicted after a failed self-defense claim).

217. See *Gregg*, 976 A.2d 999 at 1005 (cited in note 29).

218. *Id*. at 1006.

or mitigating evidence related to a wrongful conviction or sentence[219]. This change in statutory language results in a more lenient approach to allow for post-conviction DNA testing when appropriate[220].

Maryland's statute could be improved upon by removing a requirement that limits indigent petitioners, as it demands all petitioners to pay the cost of post-conviction DNA testing[221]. The state reimburses petitioners if the results are favorable[222]. This type of cost-based limitation may function to exclude petitioners who cannot afford DNA testing, providing an unjust barrier to potential relief from wrongful conviction.

5. Addressing Concerns to Amendment

There is a profound moral imperative in our society to not condemn the innocent. Our criminal justice system has determined that by requiring a standard of proof beyond any reasonable doubt, innocent people should not be incarcerated for crimes they did not commit[223]. However, innocent people who had previously been convicted, were later on exonerated through the advent of DNA testing[224]. The moral imperative of not convicting, sentencing, or executing innocent people[225] is, in the United States , balanced against the societal interest in "the finality of convictions"[226]. The numerous limitations on access to testing discussed in this Article support a theory that as a general rule states are more invested in maintaining the finality of

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219. *Givens*, 188 A.3d 903, 912 (cite in note 144); Md. Code Ann., Crim. Proc. § 8-201(c) (West 2018).

220. *Exonerate the Innocence* (The Innocence Project), available at https://www.innocenceproject.org/exonerate/ (last visited April 15, 2021) (to date, 375 people have been exonerated through post-conviction DNA testing).

221. Md. Code Ann., Crim. Proc. § 8-201(h)(1) (West 2018).

222. Md. Code Ann., Crim. Proc. § 8-201(h)(2) (West 2018).

223. See *In re Winship*, 397 U.S. 358, 364 (1970) (stating that "it is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.").

224. *Exonerate the Innocence* (The Innocence Project), available at https://www.innocenceproject.org/exonerate/ (last visited April 15, 2021).

225. In addition to people who are not guilty by reason of affirmative defense.

226. *Ex parte Smith*, 444 S.W.3d 661, 666 (Tex. Crim. App. 2014).

convictions than exculpating wrongfully convicted individuals. New Mexico courts have stated the importance of "ensuring accuracy in criminal convictions in order to maintain credibility"[227]. Maintaining credibility of the New Mexico court system, although of obvious importance, does not seem to require excessive limitation on access to post-conviction DNA testing.

Some individuals may balk at the concept of reducing procedural limitations on access to post-conviction DNA testing, fearing that either a multitude of inmates will rush to file petitions; or that numerous convictions will be overturned. A quick look at the statistics of exonerations, and more specifically at, exonerations due to post-conviction DNA testing, should assuage any fears that additional access to testing will open such a floodgate. In the United States, only 2,679 people have been exonerated since 1989[228]. This indicates that since the advent of DNA testing in 1985, it is likely that fewer people are being wrongfully convicted based on the availability of DNA testing at trial.

For an inmate to request post-conviction DNA testing, there must be a viable piece of evidence, containing non-degraded biological material which has been kept by the state[229]. This requirement itself limits inmates' ability to seek testing, because the evidence may no longer be viable, or because it was lost or destroyed by the state. The Innocence Project notes that 29% of its cases were closed due to lost or destroyed biological evidence[230].

Post-conviction DNA testing in New Mexico is not the last procedural barrier between an inmate and freedom[231]. It would be more

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227. *Hobbs*, 2020 NMCA 44 at para. 37 (quoting *Montoya v. Ulibarri*, 2007-NMSC-035, 142 N.M. 89) (cited in note 1).

228. See about *DNA* (The National Registry Of Exonerations), available at https://www.law.umich.edu/special/exoneration/Pages/DNA.aspx (last visited April 15, 2021).

229. See, e.g., N M Stat Ann § 31-1A-2(D) (West 2019); Keith A. Findley, *New Laws Reflect the Power and Potential of DNA*, 75 Wis. Law 20.20 (2002) (explaining that Wisconsin's new law requires the state to preserve biological evidence for postconviction DNA testing).

230. *DNA Exonerations in the United States* (The Innocence Project), available at https://www.innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited April 15, 2021).

231. N M Stat Ann § 31-1A-2 (West 2019).

appropriate to describe it as the first barrier after all appeals have been denied. The New Mexico post-conviction DNA testing statute also serves as the relief statute and includes instructions to the district courts on how to address petitions for DNA testing[232]. Section F states that when a district court reviews a petition for post-conviction DNA testing, "the district court may dismiss the petition, order a response by the district attorney, or issue an order for DNA testing"[233]. Through this language, a district court may dismiss a petition outright for post-conviction DNA testing if it deems the petition lacks merit. Any concern that a flood of petitions for post-conviction DNA testing would overwhelm the judicial system , or present a substantial judicial cost, should be reduced by the fact that the statute does not require a preliminary hearing, and in fact allows for outright dismissal of petitions at the discretion of the district courts[234].

Whenever a New Mexico district court orders post-conviction DNA testing as a result of a petition being granted, the court is still precluded from granting any relief to petitioners unless the results are deemed "exculpatory"[235]. If the district court finds that the results are exculpatory, it may either (1) set aside the petitioner's conviction and sentence; (2) dismiss the charges with prejudice; (3) grant a new trial; or (4) order other relief[236]. In order for a district court to determine whether DNA results are considered exculpatory under the statute, a multistep analysis must be conducted[237]. In *Hobbs*, the Court of Appeals recently reviewed the interpretation as to whether a post-conviction DNA test should be considered exculpatory[238]. It held that DNA evidence is exculpatory when the evidence: "(1) is material; (2) is not merely cumulative; (3) is not merely impeaching or contradictory; and (4) raises a reasonable probability that the petitioner would not have pled guilty or been found guilty[239]. [...]". This standard of proof

232. N M Stat Ann § 31-1A-2(F) (West 2019).

233. *Id.*

234. *Id.*

235. N M Stat Ann § 31-1A-2(I) (West 2019).

236. *Id.*

237. *Hobbs*, 2020 NMCA 44 (cited in note 1) (the standard announced by the court to determine the exculpatory nature of evidence could be overruled in the pending review by NMSC).

238. Id. at para. 42.

239. *Id.*

for determining whether DNA results are exculpatory, such that a district court could grant a new trial or other relief is a high standard.

The risk of any person serving a prison sentence or being executed due to a wrongful conviction is too high to restrict access to post-conviction DNA testing to situations where someone else may be at fault. Because New Mexico has a high standard for granting a petitioner's relief based on the results of post-conviction DNA testing, it is unnecessary for the state to require such a high burden for inmates to request testing. Specifically, other states have successfully implemented changes to their post-conviction DNA testing statutes, removing the claim of innocence and identity requirements[240]. As it currently stands, the New Mexico post-conviction DNA statute may entirely prohibit wrongfully convicted individuals who asserted self-defense claims at trial from petitioning for testing, based upon the state's identity requirement. By removing the unnecessary restrictions on access to post-conviction DNA testing, the state could more equitably grant petitions for post-conviction DNA testing[241]. without fear of overturning many convictions. The New Mexico post-conviction DNA relief statute contains enough procedural burdens to ensure that only those inmates whose test results are exculpatory may be granted relief[242].

6. Conclusion

Individuals wrongfully convicted after asserting self-defense claims are prohibited from seeking relief based on unnecessary statutory restrictions. States such as New Mexico, which require petitioners to claim innocence and prove that identity was an issue at trial, prohibit individuals who may have valid claims of self-defense from seeking justice. These statutory limitations upon petitioners who seek post-conviction DNA testing are unnecessarily burdensome because after a petitioner is granted DNA testing, there are further statutory limitations before any relief is granted. The New Mexico legislature

240. See, e.g., Md. Code Ann., Crim. Proc. § 8-201 (West 2018).
241. Innocent or not guilty due to justification.
242. N M Stat Ann § 31-1A-2(I) (West 2019).

should follow the example set by Maryland and remove these statutory restrictions on DNA testing. This would ensure that individuals who may be wrongfully convicted are not excluded based on an assertion of self-defense.

Appendix 1(Wrongful conviction statistics)

The demographic makeup of the exonerated includes 60% African American, 31% Caucasian, 8% Latinx, 1% Asian American, and less than 1% Native American or self-identified "Other."[243] Misidentification by eyewitnesses resulted in 69% of the wrongful convictions, and 29% involved false confessions[244]. While the 375 wrongfully convicted persons were sitting in jail, 154 additional violent crimes were committed by the 165 actual assailants later identified[245]. While free, these assailants committed 83 sexual assaults; 36 homicides, and 35 "other violent crimes"[246]. Out of the 104 people who were convicted based on false confessions, 22% had exculpatory DNA evidence available at trial[247]. In a study of 10,060 cases where DNA testing was performed during criminal investigations by FBI labs, more than 25% of the cases resulted in exclusion of suspects (pre-trial) based on the DNA testing[248].

Appendix 2 (States requiring assertions of innocence)

California has a similarly strict statutory requirement (to Arkansas) for post-conviction DNA testing petitions[249]. It requires that petitioners include motions for testing a statement that (1) petitioner is

243. See *DNA Exonerations in the United States* (The Innocent Project), available at: https://www.innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited April 17, 2021)

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

249. Cal Penal Code §1405(b), (West 2015).

not the perpetrator of the crime, and (2) an explanation detailing how the DNA testing is relevant to the petitioner's claim of innocence[250]. In a California death penalty case, the court upheld a trial court's decision to deny post-conviction DNA testing, even though the petitioner satisfied the requirement that the DNA testing would be relevant to the issue of identity, due to there being other categories of evidence making it less probable that petitioner was innocent[251].

The state of Delaware requires petitioners to sign affidavits, under threat of perjury, asserting that the petitioner is actually innocent and explain how the DNA testing requested *will establish* innocence[252]. Interestingly, the Delaware courts have interpreted the statute to require that the DNA testing to be conducted has the scientific potential to yield a favorable result, but that the statute does not require petitioner to show that the test will likely produce favorable results[253].

The post-conviction DNA testing statute in Florida contains strict requirements regarding the assertions to be made by petitioners seeking DNA testing[254]. For example, the statute requires petitioners to make "a statement that the movant is innocent" along with the assertion of identity being an issue at trial[255]. Florida courts have also applied the statute strictly, finding that denial of post-conviction DNA testing to petitioners who alleged self-defense at trial is proper, because identity is not determined to be a disputed issue when the petitioner has testified to being physically present at the scene[256].

Under the Idaho post-conviction DNA testing statute, petitioners must present a prima facie case that identity was an issue at trial, and the trial court shall only grant testing where the results of that testing has the scientific potential of producing evidence demonstrating that it is more probable than not that the petitioner is innocent[257]. The Idaho courts have interpreted the post-conviction DNA testing

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250. *Id.*

251. See *Richardson v. Super.* Ct., 183 P3d 1199, 1206 (Cal 2008), as modified (July 16, 2008)

252. Title 11 Del Code Ann § 4504(a) (West 2000) (emphasis added).

253. See *Anderson v. State*, 831 A2d 858, 867 (Del 2003).

254. Fla Rule Crim Proc 3.853(B)(2)-(3) (2010).

255. *Id.*

256. See *Scott v. State*, 75 S3d 392, 392-93 (Fla App 2011).

257. Idaho Code Ann. § 19-4902(c), (e)(1) (West 2012).

standard as requiring that the DNA testing has the scientific potential of demonstrating a greater than 51% chance that the petitioner is in fact innocent[258].

The Illinois post-conviction DNA testing statute also requires petitioners to state a prima facie case that identity was an issue at trial and assert "actual innocence"[259]. However, the standard for when a court should allow post-conviction DNA testing differs from the previously mentioned statutes because it limits the courts to approve testing to when the testing is capable of producing relevant evidence supporting the petitioner's claim for "actual innocence," or when the testing will raise a reasonable probability that the petitioner would have been acquitted if the evidence had been available at trial[260]. The Illinois courts, similar to the Florida courts, have upheld a strict interpretation of the identity requirement for post-conviction DNA testing[261]. Specifically, the Illinois Court has held that convicted individuals who pled guilty at trial are unable to seek post-conviction DNA testing because they are unable to claim that identity was a disputed issue at trial.

The state of Iowa has seemingly lenient statutory requirements for petitioners to obtain post-conviction DNA testing[262], but the courts, by contrast, have held petitioners to extremely high standards when determining whether petitioners should have access to testing[263], The Iowa court defined its "demanding actual innocence standard," as requiring petitioners who request DNA testing to demonstrate by clear and convincing evidence that, despite their conviction, no reasonable fact-finder could convict the petitioner in light of the DNA test results[264], The court explained that this demanding standard is required in order to balance the liberty interests of a factually innocent petitioner to be free against the state's interest in finality, and conservation of resources[265].

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258. See *Johnson v. State*, 395 P3d 1246, 1253 (Idaho 2017).

259. 725 ILCS 5/116-3 (West 2014).

260. *Id.*

261. See *People v. O'Connell*, 879 NE2d 315, 319 (Ill 2007).

262. Iowa Code Ann § 81.10(d) (West 2019).

263. See, e.g., *Dewberry v. State*, 941 NW2d 1, 5 (Iowa 2019), rehearing denied (Jan. 16, 2020).

264. *Id.*

265. *Id.*

Maine's post-conviction DNA testing statute requires petitioners to: (1) state claims of "actual innocence," (2) demonstrate that the identity of the perpetrator of the crime was an issue at trial, and (3) requires that the DNA evidence petitioner seeks to be tested be material to the issue of identity[266]. Maine courts have held that a court shall allow post-conviction DNA testing when the testing could either exonerate the petitioner, or significantly advance the petitioner's claim of actual innocence[267].

Both Minnesota and Missouri have similar statutory requirements for post-conviction DNA testing to Illinois and Maine[268]. However, Missouri's statute requires petitioners to state a claim that the DNA testing will yield results of the petitioner's "actual innocence"[269]. North Dakota's post-conviction DNA statute likewise requires petitioners to establish a claim of "actual innocence," and present a prima facie case that identity was an issue at trial[270].

The state of Ohio requires a more enhanced requirement than the above described statutes, requiring petitioners to show that no reasonable juror could have convicted the petitioner if the results of the post-conviction DNA testing had been available at trial[271]. The statute defines this standard as "outcome determinative"[272] and additionally requires that identity had been an issue at trial, and that petitioner must demonstrate that the DNA testing will exclude the petitioner as a source[273].

Oregon and Texas have similar statutory requirements for post-conviction DNA testing, as both states impose a requirement that in light of the DNA results, the petitioner would not have been prosecuted or convicted[274]. The Oregon statute, besides the requirements

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266. Title 15 Me Rev Stat Ann § 2137 (2019).

267. See *State v. Donovan*, 853 A2d 772, 776 (Me 2004).

268. Minn Stat Ann § 590.01 (West 2005) (held unconstitutional by *Reynolds v. State*, 888 NW2d 125 (Minn 2016), on time limit of 2 years, has not been revised as of Oct. 19, 2020); Mo. Ann. Stat. § 547.035 (West 2018).

269. Mo Ann Stat § 547.035 (West 2018)

270. ND Cent Code Ann § 29-32.1-15 (West 2019).

271. See *State v. Prade*, 930 NE2d 287, 291 (Ohio 2010).

272. *Id.*

273. Ohio Rev Code Ann § 2953.74 (West 2010).

274. Ohio Rev Code Ann § 138.692 (West 2020); Tex Crim Proc Code Ann § 64.03 (West 2017).

that petitioner claim "actual innocence" and show that identity was at issue, also requires petitioners to demonstrate that if the DNA results had been available at trial, (1) no prosecution would have occurred, or (2) there would have been a more favorable outcome to the petitioner[275]. The Texas statutory requirements are similar to that of the Oregon statute; however, the standard specifically requires petitioners to establish by a preponderance of the evidence, that he or she would not have been convicted if the DNA results had been obtained during trial.[276] Texas courts have interpreted this preponderance of the evidence standard to mean that there must have been a greater than 50% chance of petitioner being acquitted if the DNA results were admitted at the time of trial.[277]

Several of the states which require claims of innocence by petitioners seeking post-conviction DNA testing also include additional rules or burdens of proof. For example, the Alabama statute, which seems to be the most exclusionary statute[278], only permits individuals convicted of Capital offenses who are awaiting execution to file petitions[279]. Additionally, Alabama requires petitioners to show that the DNA test result "on its face" would demonstrate factual innocence of the crime[280].

Two states, Florida and Colorado, require petitioners to demonstrate, in petitions for post-conviction DNA testing, that the DNA test will produce definitive results of "actual innocence"[281]. The Colorado statute defines "actual innocence" as "clear and convincing evidence such that no reasonable juror would have convicted the defendant"[282]. At least six state statutes require petitioners demonstrate that if the DNA results had been available at trial, there is a reasonable probability that no juror could have found the petitioner guilty, or that trial

275. Ohio Rev Code Ann § 138.692 (West 2020).

276. Tex Crim Proc Code Ann § 64.03 (West 2017).

277. See, e.g., *Leal v. State*, 303 SW3d 292, 302 (Tex Crim App 2009).

278. Based upon analysis of the 26 state statutes and the District of Columbia which require innocence claims.

279. Ala Code § 15-18-200 (2020).

280. *Id.*

281. Fla Rule Crim Proc 3.853(B)(2)-(3) (2010); Colo Rev Stat Ann § 18-1-413(1) (West 2003).

282. Colo Rev Stat Ann § 18-1-411 (West 2003).

would not have resulted in conviction.[283] In addition, Illinois includes a requirement that petitioners demonstrate a reasonable probability that they would have been acquitted at trial had the evidence been available[284]; Ohio includes the Outcome Determinative standard previously examined[285]; and Delaware requires the DNA to have the scientific potential to yield a favorable result to the petitioner[286].

283. See, e.g., Or Rev Stat Ann § 138.692 (West 2020); Tex Crim Proc Code Ann § 64.03 (West 2017); Ohio Rev Code Ann § 2953.74 (West 2010); Iowa Code Ann § 81.10(d) (West 2019); 725 ILCS 5/116-3 (West 2014); Wis Stat § 974.07 (West 2011).

284. 725 ILCS 5/116-3 (West 2014).

285. Ohio Rev Code Ann § 2953.74 (West 2010).

286. Title 11, Del Code Ann § 4504(a) (West 2000).