UC Irvine Law Review

Volume 10 | Issue 2 Article 8

3-2020

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INTRODUCTION

Natasha Tiger was the licensed practical nurse for a profoundly disabled ten year-old girl who was admitted to the hospital with what appeared to be scald burns.[1] Believing that these "burns" were caused by a scalding bath that Tiger had given the girl, a prosecutor charged Tiger with seven separate crimes.[2] Based in part on her inability to pay for medical experts, Tiger pleaded guilty to a single lesser included offense pursuant to a plea agreement.[3]

When the girl's parents later brought a civil action against Tiger, she retained a physician who diagnosed the girl with toxic epidermal necrolysis (TEN), a dermatological condition characterized by blistering of the skin as an adverse reaction to medications.[4] This diagnosis was corroborated by a biopsy, and it was bolstered by the fact that the girl was taking antibiotic and anti-seizure medications

1. People v. Tiger, 110 N.E.3d 509, 515 (N.Y. 2018).
2. *Id.* at 511.
3. *Id.* at 512.
4. People v. Tiger, 149 A.D.3d 86, 98 (N.Y. App. Div. 2017).

at the time of her skin condition.[5] The civil jury unanimously found that the care rendered by Tiger was not a substantial factor in causing the girl's injuries.[6]

Based on the physician's affirmation and other evidence, Tiger moved to vacate her conviction on grounds of actual innocence.[7] In ultimately denying Tiger relief on June 14, 2018, the Court of Appeals of New York concluded that freestanding claims of actual innocence based on non-DNA evidence (1) *can* be brought by defendants convicted after trials, but (2) *cannot* be brought by defendants who pleaded guilty.[8] Therefore, even if the justices were completely convinced of Tiger's innocence, they were powerless to vacate her conviction.[9]

Courts in other states have found that a similar dichotomy exists for defendants seeking post-conviction DNA testing. For example, in 1996, Elwyn Graham pleaded guilty to capital murder in Arkansas.[10] He later filed a petition for writ of habeas corpus, (1) claiming that he was mentally ill and that his plea was coerced; and (2) seeking to have a hair recovered at the crime scene tested to obtain a profile of the mitochondrial DNA contained in it.[11] The Supreme Court of Arkansas ultimately denied Graham relief, concluding that Arkansas's post-conviction DNA testing statute only covers defendants convicted after trials and does not protect pleading defendants.[12]

The first DNA exoneree in this country was a man with a sub-70 IQ who pleaded guilty to avoid the death penalty,[13] and 74 out of 166 (44.6%) DNA and non-DNA exonerees in 2016 were individuals who had been convicted after guilty pleas.[14] Nonetheless, a number of states have interpreted their post-conviction statutes to prohibit pleading defendants from (1) seeking DNA testing and/or (2) presenting freestanding claims of actual innocence based upon non-DNA evidence. Moreover, many other states could soon read the same pleading defendant prohibitions into their post-conviction laws based upon similar statutory language.[15]

A handful of courts and commentators have argued that pleading defendants should have a right to prove their innocence based on substantive due process.[16]

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5. *Id.* at 98–99.
6. *Tiger*, 110 N.E.3d at 511–12.
7. *Id.* at 512.
8. *Id.* at 514.
9. *See id.* at 522 (Wilson, J., dissenting) ("Natascha Tiger pleaded guilty but is innocent.").
10. Graham v. State, 188 S.W.3d 893, 894 (Ark. 2004).
11. *Id.* at 895.
12. *Id.* at 895–96.
13. *See infra* notes 18–24 and accompanying text.
14. NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2016, at 2 (2017), https://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2016.pdf [https://perma.cc/4NKJ-MSQG] [hereinafter EXONERATIONS IN 2016].
15. *See infra* Section I.B.3.C.
16. *See, e.g.*, Daina Borteck, Note, *Pleas for DNA Testing: Why Lawmakers Should Amend State Post-Conviction DNA Testing Statutes to Apply to Prisoners Who Pled Guilty*, 25 CARDOZO L. REV. 1429 (2004); Justin Brooks & Alexander Simpson, *Blood Sugar Sex Magik: A Review of Postconviction DNA Testing Statutes and Legislative Recommendations*, 59 DRAKE L. REV. 799 (2011); Eunyung Theresa Oh, Note, *Innocence After Guilt: Postconviction DNA Relief for Innocents Who Pled*

But these arguments have largely been foreclosed by the Supreme Court's conclusion in *District Attorney's Office for the Third Judicial District v. Osborne* that there is no substantive due process right to post-conviction DNA testing.[17]

This Article advances a new theory for a right to prove innocence after pleading guilty. Through a series of cases, the Supreme Court has created a right known as the "right to access the courts" that is based on a combination of procedural due process and equal protection concerns.[18] A state violates this right to access the courts by creating a right to appellate review but precluding certain classes of defendants from having the actual or constructive ability to exercise that right.[19] Most notably, in *Halbert v. Michigan*, the Supreme Court found that Michigan violated the right to access the courts by providing the right to appellate counsel to defendants found guilty after trials but withholding that right from pleading defendants.[20] This Article contends that similar reasoning requires the recognition of a right to access the courts for defendants who plead guilty and later seek to use DNA or non-DNA evidence to prove their actual innocence.

Section I reviews the history and structure of post-conviction DNA and non-DNA actual innocence statutes, paying particular attention to statutes with pleading defendant prohibitions. Section II discusses the Due Process and Equal Protection Clause challenges brought by defendants unable to satisfy the statutory requirements of these statutes and why neither Constitutional protection, by itself, is likely to help most pleading defendants. Section III analyzes the history and application of the right to access the courts, including the Supreme Court's *Halbert* opinion. Section IV argues that the right to access the courts can and should be used to recognize a right to prove innocence after pleading guilty and details the mechanics of how this right would work in practice.

I. THE HISTORY AND STRUCTURE OF POST-CONVICTION DNA AND NON-DNA ACTUAL INNOCENCE STATUTES

A. Introduction

In recent years, every state has enacted a post-conviction DNA testing statute, and many states have passed laws allowing defendants to bring freestanding claims of actual innocence based upon non-DNA evidence. This Section focuses upon the history and structure of these statutes, with particular focus on laws that distinguish between pleading and non-pleading defendants.

Guilty, 55 SYRACUSE L. REV. 161 (2004); Rebecca Stephens, Comment, *Disparities in Postconviction Remedies for Those Who Plead Guilty and Those Convicted at Trial: A Survey of State Statutes and Recommendations for Reform*, 103 J. CRIM. L. & CRIMINOLOGY 309 (2013); *cf.* JH Dingfelder Stone, *Facing the Uncomfortable Truth: The Illogic of Post-Conviction DNA Testing for Individuals Who Pleaded Guilty*, 45 U.S.F. L. REV. 47 (2010).

17. District Attorney's Office for the Third Judicial District v. Osborne, 557 U.S. 52, 54 (2009).
18. Lewis v. Casey, 518 U.S. 343, 367 (1996).
19. *Id.* at 371.
20. Halbert v. Michigan, 545 U.S. 605, 622–23 (2005).

B. Post-conviction DNA Testing Statutes

1. History

In 1989, David Vasquez was the first person who proved his innocence through post-conviction DNA testing.[21] In 1984, Carolyn Jean Hamm had been found raped and hanged in her Arlington, Virginia, home, with her hands bound behind her with a Venetian blind cord.[22] Detectives subsequently interrogated Vasquez about the crime for hours.[23] Vasquez, who had a sub-70 IQ, eventually admitted to the crime, but he (1) initially said that he tied Hamm's hands behind her back with ropes, his belt, and a coat hanger before being told that they were bound with a Venetian blind; and (2) initially said that he stabbed Hamm before being told that she was hanged.[24] After unsuccessfully claiming that his confession was involuntary, Vasquez pleaded guilty to second-degree murder and burglary to avoid the death penalty.[25] Subsequent DNA testing established that Timothy Wilson Spencer was guilty of a series of similar crimes that led to him being dubbed the "Southside Strangler."[26] Based on the similar modus operandi of these crimes and the likelihood that Spencer had killed Hamm, Virginia Governor Gerald L. Baliles pardoned Vasquez on January 4, 1989.[27]

The Vasquez case signaled a sea change in wrongful conviction jurisprudence.[28] Previously, post-conviction law had been plagued by inertia, with appellate courts gun-shy about granting relief based upon the unreliability of witness recantations and a reluctance to disturb jury verdicts and guilty pleas.[29] DNA testing created the promise of objective, irrefutable evidence of innocence that could disturb even convictions that had calcified over decades.[30] Three years after the founding of the Innocence Project,[31] New York created the country's first

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21. Michael L. Radelet, *The Role of the Innocence Argument in Contemporary Death Penalty Debates*, 41 TEX. TECH. L. REV. 199, 199 n.3 (2008).

22. *See* Jonah Horwitz & Rob Warden, *David Vasquez*, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3705 [https://perma.cc/76R8-P35J] (last updated Mar. 11, 2014) [hereinafter *Vasquez*].

23. *Id.*

24. *Id.* "A sub-70 IQ score triggers a rebuttable presumption of intellectual disability." Roberts v. Colvin, No. CV616-098, 2017 WL 475698, at *3 (S.D. Ga. Jan. 19, 2017).

25. *Vasquez*, *supra* note 22.

26. Peter Baker, *In Grim Distinction, Va. Killer Is First to Die Based on DNA Testing*, WASH. POST (Apr. 28, 1994), http://www.washingtonpost.com/wp-dyn/content/article/2010/03/16/AR2010031602456.html [https://perma.cc/6CSM-YBTU].

27. *Vasquez*, *supra* note 22.

28. Brandon L. Garrett, *DNA and Due Process*, 78 FORDHAM L. REV. 2919, 2921 (2010).

29. *Id.*

30. Barry C. Scheck, *Preventing the Execution of the Innocent: Testimony Before the Senate Judiciary Committee*, 29 HOFSTRA L. REV. 1165, 1165 (2001).

31. *About Us*, INNOCENCE PROJECT, http://www.innocenceproject.org/about/ [https://perma.cc/C3LF-SCP3] (last visited July 30, 2018).

post-conviction DNA testing statute in 1994.[32] By 2004, thirty-one other states and the federal government had passed similar statutes.[33] Currently, every state has a post-conviction DNA testing statute.[34]

2. Statutory Requirements

Generally speaking, these post-conviction DNA testing statutes allow defendants to seek post-conviction DNA testing of evidence that could establish their actual innocence. A representative example is Hawai'i's post-conviction DNA testing statute, which provides that:

> [n]otwithstanding any other law or rule of court governing post-conviction relief to the contrary, a person who was convicted of and sentenced for a crime, or acquitted of a crime on the ground of physical or mental disease, disorder, or defect excluding responsibility, may file a motion, at any time, for DNA analysis of any evidence that:
>
> (1) Is in the custody or control of a police department, prosecuting attorney, laboratory, or court;
>
> (2) Is related to the investigation or prosecution that resulted in the judgment of conviction or of acquittal of a crime on the ground of physical or mental disease, disorder, or defect excluding responsibility; and
>
> (3) May contain biological evidence.[35]

Hawai'i's statute is possibly the most liberal post-conviction DNA testing statute in the country. It contains (1) no statute of limitations; (2) no limitation on the types of convictions that allow for testing; and (3) the lenient requirement that the defendant must merely establish that the evidence to be tested is related to the investigation or prosecution of the case. While many states similarly have no statute of limitations for defendants seeking post-conviction DNA testing,[36] other states require defendants to seek testing within a certain number of years after their convictions or the final judgments in their cases.[37] For example, Minnesota's statute

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32. Nicholas Phillips, Note, *Innocence and Incarceration: A Comprehensive Review of Maryland's Postconviction DNA Relief Statute and Suggestions for Improvement*, 42 U. BALT. L.F. 65, 66 (2011).

33. *Id.*

34. *See* Theodore Tibbitts, Note, *Post-Conviction Access to DNA Testing: Why Massachusetts's 278A Statute Should Be the Model for the Future*, 36 B.C. J.L. & SOC. JUST. 355, 374 n.185 (2016); *Access to Post-Conviction DNA Testing*, INNOCENCE PROJECT, https://www.innocenceproject.org/access-post-conviction-dna-testing/ [https://perma.cc/8NZ2-TFFN] (last visited July 30, 2018); NAT'L CONFERENCE OF STATE LEGISLATORS, POST CONVICTION DNA TESTING (2013), http://www.ncsl.org/Documents/cj/PostConvictionDNATesting.pdf [https://perma.cc/3DED-Q3E9].

35. HAW. REV. STAT. ANN. § 844D-121 (West 2019).

36. *See, e.g.*, ALASKA STAT. ANN. § 12.73.010 (West 2019); CAL. PENAL CODE § 1405 (West 2018).

37. *See, e.g.*, ALA. CODE § 15-18-200 (2019) (within one year of conviction); DEL. CODE ANN. tit. 11, § 4504 (West 2019) (within three years of final judgment); LA. CODE CRIM. PROC. ANN. art. 930.4, 930.8 (2014) (within two years); ME. REV. STAT. ANN. tit. 15, §§ 2136–2138 (2019) (within two years of conviction).

only allows for a defendant to seek DNA testing within two years of his conviction or the final judgment on his direct appeal.[38]

Like Hawai'i, many states allow defendants convicted of any crime to seek post-conviction DNA testing.[39] Other states only allow defendants convicted of felony offenses to seek such testing.[40] Some states are more restrictive still, permitting DNA testing only for defendants convicted of certain types of felonies.[41] Alabama is the most restrictive in this regard, possibly only allowing testing in capital cases.[42]

Furthermore, while Hawai'i maintains a more lenient standard for post-conviction DNA testing, most states apply one of three more stringent standards of proof. Some states merely require a prima facie showing that the evidence to be tested is material to the conviction or the issue of guilt.[43] Other states require the defendant to demonstrate a reasonable probability that the DNA testing will establish his innocence,[44] and some states even require clear and convincing evidence.[45]

When post-conviction DNA testing produces a favorable result for a defendant, states differ over the burden of proof required to order a new trial. Texas's statute asks the court to decide whether to grant a new trial based upon post-conviction DNA testing by making "a finding as to whether, had the results been available during the trial of the offense, it is reasonably probable that the person would not have been convicted."[46] Meanwhile, Maryland's statute states that a new trial should be granted "on a finding that a substantial possibility exists that

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38. MINN. STAT. ANN. §§ 590.01–.06 (West 2019).

39. *See, e.g.*, IDAHO CODE ANN. § 19-4901 (West 2019); MISS. CODE ANN. § 99-39-5 (West 2019).

40. LA. CODE CRIM. PROC. ANN. art. 930.4, 930.8 (2019); MICH. COMP. LAWS ANN. § 770.16 (West 2019); MONT. CODE ANN. §§ 46-21-110, 53-1-214 (West 2019); NEV. REV. STAT. ANN. § 176.0918 (West 2019); N.M. STAT. ANN. § 31-1A-2 (West 2019); OHIO REV. CODE ANN. §§ 2953.71–.83 (West 2019); S.D. CODIFIED LAWS § 23-5B-1 (2019); UTAH CODE ANN. §§ 78B-9-301 to 304 (West 2019); VA. CODE ANN. § 19.2-327.1 (West 2019); WASH. REV. CODE ANN. § 10.73.170 (West 2019); W. VA. CODE ANN. § 15-2B-14(a) (West 2019); WYO. STAT. ANN. §§ 7-12-302 to -315 (West 2019).

41. ALASKA STAT. § 12.73.010 (West 2019) (felony offenses against the person); IND. CODE ANN. §§ 35-38-7-1 to -19 (West 2019) (certain felonies); KY. REV. STAT. ANN. § 422.285 (West 2019) (certain felonies); MD. CODE ANN., CRIM. PROC. § 8-201 (2018) (certain felonies); OKLA. STAT. ANN. tit. 22, § 1373 (West 2019); OR. REV. STAT. ANN. § 138.690 (West 2019); S.C. CODE ANN. §§ 17-28-10 to -120 (2019); TENN. CODE ANN. §§ 40-30-301 to -313 (West 2019); VT. STAT. ANN. tit. 13 §§ 5561–5577 (West 2019).

42. ALA. CODE § 15-18-200 (2019). *But see infra* notes 376–84 and accompanying text.

43. DEL. CODE ANN. tit. 11, § 4504 (West 2019); ME. REV. STAT. ANN. tit. 15, §§ 2136–2138 (2019); MICH. COMP. LAWS ANN. §770.16 (West 2019); MINN. STAT. ANN. §§ 590.01 to .06 (West 2019); N.J. STAT. ANN. § 2A:84A-32a (West 2019); N.D. CENT. CODE ANN. § 29-32.1-15(1) (West 2019).

44. ALASKA STAT. ANN. § 12.73.010 (West 2019); ARIZ. REV. STAT. ANN. § 13-4240 (2019); CAL. PENAL CODE § 1405 (West 2019); CONN. GEN. STAT. ANN. § 54-102kk (West 2019); D.C. CODE ANN. § 22-4133 (West 2019); FLA. STAT. ANN. §§ 925.11, .12 (West 2019).

45. N.H. REV. STAT. ANN. §§ 651-D:1 to D:4 (2019); VA. CODE ANN. § 19.2-327.1 (West 2019).

46. TEX. CODE CRIM. PROC. ANN. art. 64.04 (West 2019).

the petitioner would not have been convicted if the DNA testing results had been known or introduced at trial."[47]

3. Guilty Pleas and Post-conviction DNA Testing

a. Statutes Explicitly Addressing Pleading Defendants

Several states have post-conviction DNA statutes that explicitly allow for pleading defendants to seek testing. California's statute indicates that a DNA petition will ordinarily be handled by "[t]he judge who conducted the trial, or accepted the convicted person's plea of guilty or *nolo contendere*."[48] Under Idaho's statute, "[a] petitioner who pleaded guilty in the underlying case may file a petition" for DNA testing.[49] Meanwhile, Mississippi's law allows for post-conviction DNA testing "even if the petitioner pled guilty or nolo contendere, or confessed or admitted to a crime."[50]

Using this statute, Bobby Ray Dixon and Phillip Bivens were able to seek DNA testing despite pleading guilty to a murder and rape committed in Forrest County, Mississippi, in 1979.[51] DNA testing of semen left in the victim's body was a match for another man and excluded Dixon and Bivens. In December of 2010, both men were officially exonerated.[52]

Ohio is the only state with a post-conviction DNA statute that explicitly precludes all pleading defendants from seeking testing.[53] Its statute provides that a defendant is not eligible for post-conviction DNA testing "regarding any offense to which the offender pleaded guilty or no contest."[54] In *State v. Harris*, Dwayne Harris was charged with a kidnapping and rape in Cleveland, Ohio; he eventually accepted a plea deal pursuant to which he pleaded guilty to rape in exchange for the kidnapping charge being nolled.[55] The plea was essentially an *Alford* plea,[56] in which a defendant legally pleads guilty but claims he is factually innocent:

47. MD. CODE ANN., CRIM. PROC. § 8-201(i)(2)(iii) (West 2019).

48. CAL. PENAL CODE § 1405(f) (West 2019); *see also* W. VA. CODE ANN. § 15-2B-14(e) (West 2019) ("The motion shall be heard by the judge who conducted the trial or accepted the convicted person's plea, unless the presiding judge determines that judge is unavailable.").

49. IDAHO CODE ANN. § 19-4902(d) (West 2019).

50. MISS. CODE ANN. § 99-39-5(2)(ii) (West 2019).

51. *See* Innocence Project, *Bobby Ray Dixon*, NAT'L REGISTRY EXOERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3179 [https://perma.cc/RA4A-7F72] (last updated Nov. 23, 2016).

52. *See id.*

53. Parisa Dehghani-Taftia & Paul Bieberaa, *Folklore and Forensics: The Challenges of Arson Investigation and Innocence Claims*, 119 W. VA. L. REV. 549, 596 (2016).

54. OHIO REV. CODE ANN. § 2953.72(C)(2) (West 2019).

55. State v. Harris, No. 103924, 2016 WL 3570577 (Ohio App. June 30, 2016).

56. North Carolina v. Alford, 400 U.S. 25, 38 (1960).

The Court: Did you do that?

Harris: I don't admit it, but I'm guilty.

The Court: Did you have sexual conduct with [the victim]?

Harris: No, I did not.[57]

When Harris subsequently filed an application for post-conviction DNA testing, the trial court denied the motion.[58] On appeal, the Court of Appeals of Ohio quickly affirmed this ruling, citing Ohio's post-conviction statute and concluding that "because Harris's application for DNA testing involved a rape offense to which he pled guilty, he was not an eligible offender as defined by the statute."[59]

Meanwhile, Kentucky's post-conviction DNA testing statute generally prohibits pleading defendants from seeking DNA testing. Under Kentucky's statute, the only pleading defendants who can seek such testing are (1) defendants who entered *Alford* pleas; and (2) defendants who were given the death penalty.[60] The Court of Appeals of Kentucky applied this prohibition to prevent Russell Milburn from seeking DNA testing.[61] Pursuant to a plea agreement, Milburn pleaded guilty to rape in the third degree and illegal possession of drug paraphernalia.[62] Milburn later sought DNA testing, claiming that he was coerced into entering a plea "because the Commonwealth offered to dismiss a bail jumping charge that would have led to a property bond foreclosure on a family home."[63] The Court of Appeals of Kentucky denied Milburn relief, finding that his valid guilty plea to a non-capital offense precluded him from seeking DNA testing.[64]

b. Statutes Requiring that Identity was in Issue

Some states have statutes that require a defendant to establish that "identity was in issue" to apply for post-conviction DNA testing.[65] Courts in six of these states construed these statutes as precluding pleading defendants from seeking testing.

One of these states is Arkansas. Its statute allows for post-conviction DNA testing only if "[t]he identity of the perpetrator was at issue during the investigation or prosecution of the offense."[66] In the Elwyn Graham case from the Introduction, the Supreme Court of Arkansas found that Graham's guilty plea foreclosed him

57. *Harris*, 2016 WL 3570577, at *3.

58. *Id.* at *2.

59. *Id.* at *3.

60. *See* KY. REV. STAT. ANN. § 422.285(5)(d), (6)(d) (West 2019); *see also* Owens v. Commonwealth, 512 S.W.3d 1, 8 (Ky. App. 2017) ("[T]he right to DNA testing is not available to someone who pleaded guilty to the offense, unless the death penalty was imposed.").

61. Milburn v. Commonwealth, No. 2013-CA-000417-MR, 2016 WL 1069124 (Ky. App. Mar. 18, 2016).

62. *Id.* at *1.

63. *Id.* at *4.

64. *Id.*

65. *See, e.g.*, ARK. CODE ANN. § 16-112-202(7) (West 2019).

66. *Id.*

from seeking DNA testing based on this statutory language. According to the court, by pleading guilty to capital murder, Graham "admitted that he committed the offense. His identity was thus not in question."[67]

Similarly, Michigan's post-conviction statute only allows DNA testing if "[t]he identity of the defendant as the perpetrator of the crime was at issue during his or her trial."[68] A federal district court found this requirement precluded a defendant who pleaded guilty to sexual assault from seeking DNA testing of a foreign hair collected from the victim's body.[69] The court concluded that the defendant's "DNA claim was 'not on all fours with the statute as far as a post-conviction relief,' because there had not been a trial."[70]

Montana's post-conviction statute allows DNA testing if "the identity of the perpetrator of the felony was or should have been a significant issue in the case."[71] In *State v. DeAvila*, Steve DeAvila unsuccessfully sought to withdraw his plea to kidnapping and related charges due to mental health issues and later sought post-conviction DNA testing.[72] In finding that DeAvila was not entitled to DNA testing, the Supreme Court of Montana concluded that "[i]dentity is not an issue when the defendant admits to committing the act, as DeAvila did in this case."[73]

Pennsylvania courts have reached a similar conclusion. In *Williams v. Erie County Dist. Attorney's Office*, Charles Stephon Williams pleaded guilty to endangering the welfare of a child and related crimes.[74] Subsequently, Williams filed a petition to inspect and test evidence in the State's possession.[75] The trial court denied the petition, and the Superior Court of Pennsylvania affirmed that holding on appeal.[76] It cited to Pennsylvania's post-conviction DNA testing statute, which provides that a defendant seeking testing must present a prima facie case that the "identity of or participation in the crime by the perpetrator was at issue in the proceedings that resulted in the applicant's conviction and sentencing."[77] The court interpreted this section to mean that defendants who plead guilty cannot seek DNA testing.[78] Specifically, the court held that "[w]e fail to see how this mandatory element of an applicant's prima facie case can be demonstrated where he pleaded guilty, thus nullifying any subsequent claim that the 'identity of or the participation in the crime by the perpetrator was at issue.'"[79]

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67. Graham v. State, 188 S.W.3d 893, 896 (Ark. 2004).
68. MICH. COMP. LAWS ANN. § 770.16(4)(b)(iii) (West 2019).
69. *See* Cassarrubias v. Prelesnik, No. 1:09-CV-1172, 2014 WL 1338172 (W.D. Mich. Mar. 31, 2014).
70. *Id.* at *5.
71. MONT. CODE ANN. § 46-21-110(5)(c) (West 2019).
72. State v. DeAvila, No. DA 12-0380, 2013 WL 512695 (Mont. Feb. 12, 2013).
73. *Id.* at *1.
74. Williams v. Erie Cty. Dist. Attorney's Office, 848 A.2d 967, 968 (Pa. Super. Ct. 2004).
75. *Id.*
76. *Id.*
77. *Id.* at 972 (quoting 42 PA. CONS. STAT. ANN. § 9543.1(c)(3) (West 2002)).
78. *Id.*
79. *Id.* Pennsylvania recently changed its law so that defendants who pleaded guilty can seek post-conviction DNA testing. *See Pennsylvania DNA Testing Bills Signed Into Law!*,

In *People v. Urioste*, the Appellate Court of Illinois gave the most full-throated defense of such an interpretation. In *Urioste*, Mark Urioste actually pleaded not guilty by reason of insanity to charges of murder, home invasion, armed violence, and attempted aggravated criminal sexual assault.[80] After he was found guilty, Urioste sought testing under Illinois's post-conviction DNA statute, which required him to make a prima facie case that "identity was the issue in the trial which resulted in his or her conviction."[81]

The court concluded that, by including this requirement,

> our legislature wanted postconviction forensic testing to occur only in those cases where such testing could discover new evidence at sharp odds with a previously rendered guilty verdict *based upon criminal acts that the defendant denied having engaged in*. Our legislature did not want convicted defendants who admitted at their trial to the commission of the acts charged, and did not contest the question of who committed those acts, to make a mockery of the criminal justice system and the statute's grace. It did not want defendants who tendered unsuccessful affirmative defenses at their trial to later disavow the commission of the acts charged, just so they could obtain postconviction testing of evidence meaningless to how they contested their guilt.[82]

Because Urioste admitted committing the acts charged through his insanity plea, the court found that he was not entitled to DNA testing.[83] In subsequent cases, Illinois extended this logic to defendants who pleaded guilty, concluding that they were not entitled to post-conviction DNA testing.[84] In 2014, however, Illinois amended its statute to allow pleading defendants to seek post-conviction DNA testing largely based upon a case in which a man claimed that he pleaded guilty due to being beaten by courtroom deputies.[85]

Delaware is the final state whose courts have read an "identity in issue" clause to preclude pleading defendants from seeking post-conviction DNA testing.[86] Pursuant to a plea agreement, William Wooten pleaded guilty but mentally ill to second-degree kidnapping and murder.[87] After being given a life sentence, Wooten moved for post-conviction DNA testing.[88] The superior court denied his motion under Delaware's post-conviction statute, which only allows for DNA testing if the

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INNOCENCE PROJECT (Nov. 15, 2018), https://www.innocenceproject.org/pennsylvania-dna-law/ [https://perma.cc/H2XU-FWFU].

80. People v. Urioste, 736 N.E.2d 706, 709–10 (Ill. App. Ct. 2000).

81. *Id.* at 710.

82. *Id.* at 714.

83. *Id.* at 714–16.

84. *See, e.g.*, People v. Lamming, 833 N.E.2d 925 (Ill. App. Ct. 2005).

85. Steve Mills, *New Law to Help Inmates Prove Innocence with DNA Tests*, CHI. TRIB. (June 23, 2014), http://www.chicagotribune.com/news/ct-dna-guilty-pleas-met-20140623-story.html [https://perma.cc/WPW8-UZEP].

86. Wooten v. State, No. 134, 1991, 1991 WL 134433 (Del. June 12, 1991).

87. *Id.*

88. Wooten v. State, No. 104, 2003, 2003 WL 22866416 (Del. Nov. 24, 2003).

defendant "presents a prima facie case that identity was an issue in the trial."[89] While Wooten was appealing this decision to the Supreme Court of Delaware, he died.[90] That court then found that Wooten's appeal was moot, concluding that "[g]iven the frequency of guilty pleas in the Superior Court, the issue on appeal clearly is capable of repetition and, therefore, opportunities will exist to review that issue at some future time."[91] The appellate courts in Delaware, however, have not subsequently addressed this issue.

Two states have "identity in issue" language in their statutes but explicitly allow pleading defendants to seek post-conviction DNA testing. New Mexico's statute allows for a defendant to seek post-conviction DNA testing if (1) "identity was an issue in the petitioner's case;" or (2) "there is a reasonable probability that the petitioner would not have pled guilty or been found guilty" if the requested testing "had been performed prior to the petitioner's conviction and the results had been exculpatory."[92]

Texas's post-conviction DNA statute also requires a finding that "identity was or is an issue in the case" before allowing a court to order testing.[93] But the statute goes on to state that,

> [a] convicted person who pleaded guilty or nolo contendere or, whether before or after conviction, made a confession or similar admission in the case may submit a motion under this chapter, and the convicting court is prohibited from finding that identity was not an issue in the case solely on the basis of that plea, confession, or admission, as applicable.[94]

Because of this clause, Christopher Ochoa was able to apply for DNA testing despite pleading guilty to a 1988 rape and murder that occurred at an Austin Pizza Hut.[95] Ochoa claimed that he pleaded guilty to avoid the death penalty, and, in 1998, a man named Achim Josef Marino confessed to the rape and murder.[96] Based upon a finding that identity was an issue in Ochoa's case, Ochoa was able to move for DNA testing of semen recovered from the victim, which matched Marino and excluded Ochoa. As a result, Ochoa was eventually exonerated in 2002.[97]

Finally, a number of other states have post-conviction DNA testing statutes that contain "identity in issue" requirements but do not yet have court opinions resolving whether these clauses preclude pleading defendants from seeking relief. For example, (1) Maine's statute requires that "[t]he identity of the person as the

89. DEL. CODE ANN. tit. 11, § 4504(a)(3) (2007).
90. *Wooten*, 2003 WL 22866416.
91. *Id.* at *1.
92. N.M. STAT. ANN. § 31-1A-2 (West 2019).
93. TEX. CODE CRIM. PROC. ANN. art. 64.03 (West 2019).
94. *Id.*
95. *See* Maurice Possley, *Christopher Ochoa*, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3511 [https://perma.cc/7ZL9-ATWS] (last visited July 30, 2018).
96. *Id.*
97. *Id.*

perpetrator of the crime that resulted in the conviction was at issue during the person's trial;"[98] and (2) New Jersey's statute mandates that a DNA motion "explain why the identity of the defendant was a significant issue in the case."[99] Meanwhile, (1) Minnesota's statute only applies if "identity was an issue in the trial;"[100] and (2) Georgia's statute states that DNA testing is only authorized if "[t]he identity of the perpetrator was, or should have been, a significant issue in the case."[101] Given that these statutes do not contain explicit carve-outs for pleading defendants, it seems reasonably probable that courts in these states will eventually read them to allow only defendants convicted after trials to seek DNA testing.[102]

c. Statutes Referencing a Trial

Some state post-conviction DNA statutes don't require identity to be in issue but do have language making reference to a trial or being tried. Courts in two of these states interpreted these types of statutes as precluding pleading defendants from seeking post-conviction DNA testing.

One of those states was New York. In *People v. Byrdsong*, Clarence Byrdsong was allegedly one of three men involved in a rape and robbery in Queens; he eventually pleaded guilty to first-degree robbery.[103] The other two men were never apprehended, and a fingerprint recovered from the crime scene was not a match for Byrdsong.[104] After he was convicted, Byrdsong moved for DNA testing of crime scene evidence. The trial court denied Byrdsong's motion, finding that his guilty plea precluded him from seeking relief under New York's post-conviction DNA statute.[105] On appeal, the Appellate Division affirmed, noting that New York's post-conviction DNA statute provided that,

> [w]here the defendant's motion requests the performance of a forensic DNA test on specified evidence, and upon the court's determination that any evidence containing [DNA] was secured in connection with the trial resulting in the judgment, the court shall grant the application for forensic DNA testing of such evidence upon its determination that if a DNA test had been conducted on such evidence, and if the results had been admitted in the trial resulting in the judgment, there exists a reasonable probability that the verdict would have been more favorable to the defendant.[106]

98. ME. REV. STAT. ANN. tit. 15, § 2138 (2019).
99. N.J. STAT. ANN. § 2A:84A-32a (West 2019).
100. MINN. STAT. ANN. § 590.01 (West 2019).
101. GA. CODE ANN. § 5-5-41(c)(3)(C) (West 2019).
102. In *State v. Morales*, No. 05-04-1576, 2017 WL 3648541 (N.J. App. Aug. 25, 2017), the Superior Court of New Jersey, Appellate Division found that a defendant who had pleaded guilty had failed to establish that his identity was a significant issue in the case. The court, however, did not explain whether this conclusion was categorical or based upon the facts of the case.
103. People v. Byrdsong, 33 A.D.3d 175, 176 (N.Y. App. Div. 2006).
104. *Id.*
105. *Id.* at 177.
106. *Id.* at 176–77.

Because this statute twice made reference to a "trial resulting in judgment," the Appellate Division construed it as only covering defendants convicted after trials.[107] Therefore, a pleading defendant like Byrdsong was not entitled to DNA testing.[108]

Courts in Florida reached a similar conclusion. In *Stewart v. State*, Willie Stewart pleaded *nolo contendere* to sexual battery and later claimed that DNA testing of evidence in the State's possession would exonerate him.[109] At the time, however, Florida's post-conviction DNA testing statute provided that a defendant "who has been tried and found guilty of committing a crime" may petition the court for DNA testing.[110] The District Court of Appeal therefore denied Stewart relief, concluding that "[a] defendant who enters a plea of guilty or *nolo contendere* may not seek postconviction DNA testing based on language of the statute."[111] Notably, likely in response to cases like the *Byrdsong* and *Stewart* cases, the legislatures in both New York and Florida later amended their post-conviction statutes to allow pleading defendants to seek DNA testing.[112]

Legislatures in other states did not need to amend similar statutes because courts in those states found that they covered pleading defendants. One of those states was Nebraska. In the 1980s, three men and three women (the "Beatrice Six") were charged in connection with the rape and murder of 68-year-old Helen Wilson in Beatrice, Nebraska.[113] Joseph White was convicted after a trial, and the other five defendants, including Thomas Winslow, entered guilty or "no contest" pleas.[114]

Decades later, Winslow moved for DNA testing on semen from the crime scene, and the district court denied his motion, concluding "that Winslow had waived his right to DNA testing because of his plea of no contest."[115] On appeal, the Supreme Court of Nebraska noted that its post-conviction DNA testing statute allows for a court to authorize DNA testing after making "a determination that such testing was effectively not available at the time of trial."[116] The court noted the similarity between this language and the language in the New York statute but ultimately did "not read this reference to limit the scope of the relief granted under

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107. *Id.* at 180.

108. *Id.*

109. Stewart v. State, 840 So.2d 438, 438 (Fla. Dist. Ct. App. 2003).

110. *Id.*

111. *Id.*

112. *See* Brim v. State, 969 So.2d 552, 553 (Fla. Dist. Ct. App. 2007); *New York DNA Database: Governor Cuomo Signs 'All Crimes' DNA Testing Into Law*, HUFFINGTON POST (Mar. 20, 2012), https://www.huffingtonpost.com/2012/03/20/new-york-dna-database-governor-cuomo-all-crimes-dna-testing_n_1366624.html [https://perma.cc/DX7D-U7Q7].

113. *See* Innocence Project, *Thomas Winslow*, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3760 [https://perma.cc/G6B8-LCR4] (last updated July 6, 2016) [hereinafter *Thomas Winslow*].

114. *Id.*

115. State v. Winslow, 740 N.W.2d 794, 797 (Neb. 2007).

116. *Id.* at 799.

the DNA Testing Act to persons convicted after a trial."[117] As a result, in late 2007, Winslow got DNA testing on the semen.[118] It came back as a match for Bruce Allen Smith, "a leading suspect in the days after the murder" who was not a member of the "Beatrice Six."[119] White's conviction was subsequently vacated, and the governor pardoned Winslow and the other members of the "Beatrice Six."[120]

Courts in other states with similar statutes have not yet decided whether they cover pleading defendants. In Alabama, the statute requires the defendant to establish that the evidence to be tested "was not subjected to DNA testing because the existence of the evidence was unknown to the petitioner or to the petitioner's trial attorney prior to trial or because the technology for the testing was not available at the time of trial."[121] Arizona's statute authorizes DNA testing only upon a showing that "[t]he petitioner's verdict or sentence would have been more favorable if the results of deoxyribonucleic acid testing had been available at the trial leading to the judgment of conviction."[122] Louisiana law demands "[a] factual explanation of why there is an articulable doubt, based on competent evidence whether or not introduced at trial, as to the guilt of the petitioner in that DNA testing will resolve the doubt and establish the innocence of the petitioner."[123] Nevada's statute requires "[a] statement that the type of genetic marker analysis the petitioner is requesting was not available at the time of trial."[124] North Dakota's statute only allows DNA testing if "[t]he testing is to be performed on evidence secured in relation to the trial which resulted in the conviction."[125] In Utah the statute requires "a reasonable probability that the defendant would not have been convicted or would have received a lesser sentence if the evidence had been presented at the original trial."[126] Based on the disparate results reached by courts in New York, Florida, and Nebraska in interpreting similar statutes, it is unclear whether courts in these other states will read their statutes to preclude pleading defendants from seeking testing.

Two other states have statutes that do not mention a trial but do mention a "verdict," which is generally defined as a "formal decision or finding made by a jury, impaneled and sworn for the trial of a cause, and reported to the court (and accepted by it) upon the matters duly submitted to them upon trial."[127] Specifically, the statutes in Connecticut and Rhode Island both require a defendant to establish "[a] reasonable probability exists that the requested testing will produce DNA

117. *Id.*
118. *See Thomas Winslow*, *supra* note 113.
119. *Id.*
120. *Id.*
121. ALA. CODE § 15-18-200(e)(2)(B) (2019).
122. ARIZ. REV. STAT. ANN. § 13-4240(C)(1)(a) (2019).
123. LA. CODE CRIM. PROC. ANN. art. 926.1(B)(1) (2019).
124. NEV. REV. STAT. § 176.0918(3)(e) (2013).
125. N.D. CENT. CODE ANN. § 29-32.1-15(1)(a) (West 2019).
126. UTAH CODE ANN. § 78B-9-301(2)(f)(ii) (West 2019).
127. *Verdict*, BLACK'S LAW DICTIONARY (6th ed. 1990).

results which would have altered the verdict or reduced the petitioner's sentence if the results had been available at the prior proceedings leading to the judgment of conviction."[128]

d. Statutes with No Reference to Trial or Identity

Some post-conviction DNA statutes do not contain language referencing a trial or the requirement that identity was in issue. Courts in different states have interpreted these statutes disparately. In 2016, Maryland's highest court found in *Jamison v. State* that the state's post-conviction DNA testing statute did not apply to pleading defendants.[129] In 1990, William Jamison had been charged with various sex offenses in Maryland and entered an *Alford* plea.[130] Eighteen years later, Jamison filed a petition for DNA testing of newly discovered slides containing cellular material taken from the victim.[131] The circuit court granted the motion, and DNA testing produced debatable results.[132] Jamison's experts claimed that the testing pointed to someone else as the perpetrator while the State's experts alleged that the results were too ambiguous to be meaningful.[133]

The circuit court concluded that Jamison had failed to prove his innocence, prompting his appeal.[134] The Court of Appeals of Maryland, however, resolved that appeal on an entirely different basis: that Jamison was not even entitled to seek DNA testing.[135] At the time, Maryland's post-conviction DNA testing statute stated that "a court shall order DNA testing if the court finds that . . . a reasonable probability exists that the DNA testing has the scientific potential to produce exculpatory or mitigating evidence relevant to a claim of wrongful conviction or sentencing."[136] Despite the absence of a reference to a trial or identity being in issue,[137] the court held that "[o]nly subsequent to a conviction after trial can the 'substantial possibility' standard be applied."[138] Therefore, the court concluded "that a person who has pled guilty cannot avail himself of post-conviction DNA testing."[139]

The court ended its opinion by noting the issue facing pleading defendants under its law, but it found that "legislative action may be more appropriate" to resolve that issue.[140] On April 18, 2018, the Maryland legislature did just that,

128. CONN. GEN. STAT. ANN. § 54-102kk(c)(1) (West 2019); 10 R.I. GEN. LAWS ANN. § 10-9.1-12(a)(1) (West 2019).
129. Jamison v. State, 148 A.3d 1267, 1284 (Md. 2016).
130. *Id.* at 1268.
131. *Id.* at 1268–69.
132. Jamison v. State, No. 03-K-90-003657, 2015 WL 11108662 (Md. Cir. Ct. Dec. 9, 2015).
133. *Id.* at *13–16.
134. *Jamison*, 148 A.3d at 1270.
135. *Id.* at 1284.
136. *Id.* at 1278 (quoting MD. CODE ANN., CRIM. PROC. § 8-201(c)(1) (West 2003)).
137. The statute contained an "identity in issue" clause that was removed in 2003. *Id.* at 1279.
138. *Id.* at 1283.
139. *Id.* at 1284.
140. *Id.*

passing a bill allowing pleading defendants to (1) seek post-conviction DNA testing; and (2) bring freestanding claims of actual innocence based on non-DNA evidence.[141]

Legislatures in other states with similar statutes have not needed to amend their laws because courts in those states have interpreted them as covering pleading defendants. Kansas's post-conviction DNA testing statute allows for a defendant to seek DNA testing if he can establish that the evidence to be tested (1) is related to the investigation or prosecution; (2) is in the actual or constructive possession of the State; and (3) was not previously tested or was previously tested but now can be retested through "new DNA techniques that provide a reasonable likelihood of more accurate and probative results."[142]

In finding that pleading defendants are entitled to seek testing under this law in *State v. Smith*, the Court of Appeals of Kansas held that "[t]he legislature is perfectly capable of limiting such post-conviction relief to those who pled not guilty or no contest to the material charges, and no such limitation appears in the text of the statute."[143] The court then noted that Kansas laws allow for pleas to be set aside under some circumstances; therefore, "[b]ecause such a plea is not necessarily irrevocable, it would be inconsistent with the broad legislative goal if DNA testing was unavailable solely because a guilty plea was entered."[144]

Washington's post-conviction DNA testing statute also doesn't reference guilty pleas, trials, or identity being in issue during the investigation or prosecution of the case. It merely requires the defendant to "[e]xplain why DNA evidence is material to the identity of the perpetrator of, or accomplice to, the crime, or to sentence enhancement."[145] In other words, a defendant need not establish that identity *was* in issue at the time when he was convicted, just that the evidence he wants tested would be material to the identity of the perpetrator or accomplice.

Courts in Washington have interpreted this statute as permitting pleading defendants to seek post-conviction DNA testing. In 2005, 16-year-old Michael Washington was a suspect in a home invasion that resulted in a physical altercation.[146] The police recovered duct tape from a windowsill that appeared to be connected to the crime.[147] When the prosecution "threatened to charge [Washington] as an adult with multiple counts of first-degree burglary, [he] pleaded

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141. Alex Mann, *Legislature Passes Bill to Expand Post-Conviction Relief*, U.S. NEWS & WORLD REP. (Apr. 18, 2018), https://www.usnews.com/news/best-states/maryland/articles/2018-04-18/legislature-passes-bill-to-expand-post-conviction-relief [https://perma.cc/EWB2-UTL6].

142. KAN. STAT. ANN. § 21-2512(a) (West 2019).

143. State v. Smith, 119 P.3d 679, 683 (Kan. Ct. App. 2005).

144. *Id.*

145. WASH. REV. CODE ANN. § 10.73.170 (West 2019).

146. *See* Maurice Possley, *Michael Washington*, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5185 [https://perma.cc/VBK9-AYTY] (last visited July 30, 2018).

147. *Id.*

no contest in juvenile court to the charge of burglary with sexual motivation."[148] Washington later successfully moved for DNA testing on the duct tape; "[b]oth male and female DNA were found on the tape, and the analysis revealed that Washington's DNA was not present."[149] Upon a motion by the Snohomish County Deputy Prosecuting Attorney, the court subsequently dismissed Washington's conviction.[150]

Other states have open-ended post-conviction DNA statutes that have not yet been applied by courts in cases of pleading defendants: (1) Colorado's statute requires the defendant to establish that "[c]onclusive DNA results were not available prior to the petitioner's conviction;"[151] and (2) Indiana's statute requires a reasonable probability that exculpatory DNA results would have led to the defendant either (a) not being prosecuted or convicted; or (b) receiving a lesser sentence.[152] Given the open ended nature of such statutes, it is unclear whether courts in those states will construe them to cover pleading defendants.

C. Non-DNA Actual Innocence Statutes

1. History

Historically, defendants could not bring freestanding claims of actual innocence.[153] Instead, a defendant typically had two options after being convicted. First, he could seek relief by presenting newly discovered evidence of innocence "within a year or two, or even as little as twenty-one days, after conviction."[154] Second, a defendant could combine evidence of actual innocence with evidence of a constitutional violation. For example, a defendant could not bring a freestanding claim of actual innocence based upon a new alibi witness; instead, he would have to package it with another claim, such as a claim that his attorney was ineffective in failing to contact that alibi witness before trial.[155] And, a defendant could not bring a freestanding claim of actual innocence based upon an alternate suspect's confession; instead, he would have to package it with another claim, such as a claim that the confession was *Brady* material that the State failed to disclose before trial.[156]

148. *Id.*
149. *Id.*
150. *Id.*
151. COLO. REV. STAT. ANN. § 18-1-413(1)(a) (West 2019).
152. IND. CODE ANN. § 35-38-7-8(4) (West 2019).
153. *See* John M. Leventhal, *A Survey of Federal and State Courts' Approaches to a Constitutional Right of Actual Innocence: Is There a Need for a State Constitutional Right in New York in the Aftermath of CPL (Section) 440.10(G-1)?*, 76 ALB. L. REV. 1453, 1472–73 (2013).
154. Keith A. Findley, *Learning from Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions*, 38 CAL. W. L. REV. 333, 346 (2002).
155. *See, e.g.*, Eli Paul Mazur, *"I'm Innocent": Addressing Freestanding Claims of Actual Innocence in State and Federal Courts*, 25 N.C. CENT. L.J. 197, 221–22 (2003).
156. *See id.*

Based upon the successes of post-conviction DNA statutes, some states modified existing mechanisms or created new mechanisms so that defendants could bring freestanding claims of actual innocence based on non-DNA evidence months or years after their convictions.[157] Some of these mechanisms include petitions for writs of habeas corpus, petitions for post-conviction relief, and petitions for writs of actual innocence.[158] States mainly apply similar standards of proof for determining whether to grant new trials based on non-DNA evidence of actual innocence. Under Maryland's statute, a court determines whether the defendant's proffered evidence of actual innocence "creates a substantial or significant possibility that the result may have been different, as that standard has been judicially determined."[159] Meanwhile, D.C.'s statute asks the court to assess "[h]ow the new evidence demonstrates actual innocence."[160]

2. Statutory Requirements and Pleading Defendants

Some states have statutes that discriminate between pleading and non-pleading defendants seeking to present freestanding claims of actual innocence based on non-DNA evidence. Virginia's actual innocence statute states in relevant part that

> [n]otwithstanding any other provision of law or rule of court, upon a petition of a person who was convicted of a felony upon a plea of not guilty, or the petition of a person who was adjudicated delinquent, upon a plea of not guilty, by a circuit court of an offense that would be a felony if committed by an adult, the Court of Appeals shall have the authority to issue writs of actual innocence under this chapter.[161]

Under this statute, Brandon James Clark was not able to present testimony by "eyewitnesses, including one of the two victims, . . . that Clark was not a perpetrator of [a] shooting" because he had entered an *Alford* plea in connection with the shooting.[162]

Maryland courts also found that pleading defendants cannot bring freestanding claims of actual innocence based on non-DNA evidence. In *Yonga v. State*, Sam Yonga pleaded guilty to a third-degree sexual offense before bringing a petition for writ of actual innocence based upon recantations by the victim and her mother.[163] The Court of Special Appeals of Maryland later noted that such writs based upon newly discovered evidence of innocence are decided by looking "at the original trial in front of the original jury and then hypothesiz[ing] submitting the

157. *See id.* at 222–23.
158. *See id.* at 220–23.
159. MD. CODE ANN., CRIM. PROC. § 8-301(a)(1) (West 2018).
160. D.C. CODE ANN. § 22-4135(g)(1) (West 2019).
161. VA. CODE ANN. § 19.2-327.10 (West 2019).
162. Clark v. Clarke, 648 F. App'x 333, 334 (4th Cir. 2016).
163. Yonga v. State, 108 A.3d 448, 451–53 (Md. Ct. Spec. App. 2015).

newly discovered evidence to that original jury."[164] According to the court, such an assessment is impossible in cases with pleading defendants:

> There is . . . no way to compare the trial that was with the trial that might have been when there was no trial that was. Where there was no trial, it would be utter speculation to attempt to construct what the imaginary trial might have consisted of. We may not hypothesize a mythical trial. The statement of facts offered in support of the guilty plea is only minimalist. A State's Attorney's Office going before a jury would almost certainly opt for a more maximal case of guilt. We do not know, therefore, what witnesses would have been called or what, under direct and cross-examination, they might have said. We do not know whether the appellant would or would not have testified and, if he did testify, how his testimony would have held up. We do not know what medical reports might have been submitted. There would be self-evidently no way to make the prescribed comparison. Newly discovered evidence simply cannot be measured in the case of a conviction based on a guilty plea. With what cast of characters, moreover, would we people our hypothetical testing? Do we ask whether the hypothetical jury that might have rendered a guilty verdict after a hypothetical trial would probably have rendered a different verdict? Or do we ask, as in this case, whether Judge Levitz would still have accepted the guilty plea? These are very different questions. The criteria for rendering a trial verdict and the criteria for accepting a guilty plea are not remotely the same.[165]

The Court of Appeals of Maryland affirmed this reasoning on appeal[166] and later applied it in other cases.[167] But, as noted previously, on April 18, 2018, the Maryland legislature changed the law, passing a bill allowing pleading defendants to (1) seek post-conviction DNA testing; and (2) bring freestanding claims of actual innocence based on non-DNA evidence.[168]

New York law, however, still discriminates between pleading and non-pleading defendants in the non-DNA context. In *People v. Hamilton*, Derrick Hamilton was convicted of second-degree murder after a jury trial based largely on the testimony of the victim's girlfriend, Jewel Smith.[169] Subsequently, Hamilton moved to vacate his conviction based

> upon Smith's recantation of her trial testimony, the discovery of exculpatory evidence that Smith told police shortly after the crime that she did not witness the crime, and the discovery of a new defense witness who claimed that she was with Smith inside a supermarket at the time of the crime.[170]

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164. *Id.* at 461.
165. *Id.* at 462.
166. Yonga v. State, 130 A.3d 486 (Md. 2016).
167. *See, e.g.*, Jamison v. State, 148 A.3d 1267, 1281–82 (Md. 2016).
168. *See* Mann, *supra* note 141 and accompanying text.
169. People v. Hamilton, 979 N.Y.S.2d 97, 100 (N.Y. App. Div. 2014).
170. *Id.*

In addressing Hamilton's motion, an appellate court noted that New York's post-conviction statute did not specifically authorize a freestanding claim of actual innocence.[171] Nonetheless, the court found that Hamilton was entitled to make such a claim under two provisions of New York's Constitution. First, because "a person who has not committed any crime has a liberty interest in remaining free from punishment, the conviction or incarceration of a guiltless person, which deprives that person of freedom of movement and freedom from punishment and violates elementary fairness, runs afoul of the Due Process Clause."[172] Second, "because punishing an actually innocent person is inherently disproportionate to the acts committed by that person, such punishment also violates the provision of the New York Constitution which prohibits cruel and unusual punishments."[173]

In the *Tiger* case from the Introduction, however, the Court of Appeals of New York refused to extend this logic to pleading defendants. According to the court, "[t]he plea process is integral to the criminal justice system and we have observed that there are significant public policy reasons for upholding plea agreements, including conserving judicial resources and providing finality in criminal proceedings."[174] Indeed, the court even noted that "we have recognized that a defendant can plead guilty to a nonexistent or legally impossible offense in satisfaction of an indictment that charges a higher offense."[175] Therefore,

> [a]llowing a collateral attack on a guilty plea obtained in a judicial proceeding that comported with all of the requisite constitutional protections on the basis of a delayed claim of actual innocence would be inconsistent with our jurisprudence and would effectively defeat the finality that attends a constitutionally obtained guilty plea.[176]

As a result, the court was able to conclude that "a guilty plea entered in proceedings where the record demonstrates the conviction was constitutionally obtained will presumptively foreclose an independent actual innocence claim."[177]

In a concurring opinion, Justice Garcia added an additional concern with allowing a pleading defendant to later bring a claim of actual innocence.

> Allowing a defendant to strategically relitigate culpability—at a time when the prosecution's evidence has grown stale, or may be entirely undeveloped—would undermine critical notions of fairness, finality, and sanctity of the legal process, and would "turn the 'solemn act' of pleading guilty into a mere device for maintaining innocence while avoiding trial"[178]

Conversely, other states and jurisdictions explicitly allow pleading defendants

171. *Id.* at 105–07.
172. *Id.* at 107–08.
173. *Id.* at 108.
174. People v. Tiger, 110 N.E.3d 509, 515–16 (N.Y. 2018).
175. *Id.* at 516.
176. *Id.*
177. *Id.*
178. *Id.* (Garcia, J., concurring).

to bring freestanding claims of actual innocence based upon non-DNA evidence. Arizona's actual innocence law provides that "[a]ny person who pled guilty or no contest, admitted a probation violation, or whose probation was automatically violated based upon a plea of guilty or no contest shall have the right to file a post-conviction relief proceeding."[179] D.C.'s law states that "[i]f the conviction resulted from a guilty plea, [the court may consider] the specific reason the movant pleaded guilty despite being actually innocent of the crime."[180] And Utah's law indicates that "[i]f the conviction for which the petitioner asserts factual innocence was based upon a plea of guilty, the petition shall contain the specific nature and content of the evidence that establishes factual innocence."[181]

Kevin Peterson was able to use this Utah law to prove his actual innocence despite his guilty plea.[182] Peterson had been accused of sexually abusing his son and eventually entered into a plea agreement, which stated in pertinent part, "I did not sexually abuse [my son]. However, after being fully advised as to the consequences of my decision by my attorney, I want to plead guilty to the second-degree felony."[183] After Peterson was convicted, his son recanted.[184] Peterson's attorneys also retained two experts who reviewed the medical examination of Peterson's son and concluded that there was no evidence of sexual abuse.[185] Based on this new evidence, Peterson filed a petition for a writ of actual innocence; the State did not oppose it.[186] Peterson was released fifteen years after being arrested.[187]

Other states have mechanisms by which defendants can bring freestanding claims of actual innocence based on non-DNA evidence and have not yet resolved whether they cover pleading defendants.[188]

II. CONSTITUTIONAL CHALLENGES TO POST-CONVICTION DNA AND NON-DNA ACTUAL INNOCENCE STATUTES

A. Introduction

Because these post-conviction DNA and non-DNA statutes contain requirements that can be difficult to satisfy, pleading and non-pleading defendants have frequently brought constitutional challenges after being unable to seek or present evidence of actual innocence. This Section reviews the constitutional

179. ARIZ. R. CRIM. P. 33.1.

180. D.C. CODE ANN. § 22-4135(g)(1)(E) (West 2019).

181. UTAH CODE ANN. § 78B-9-402(4) (West 2019).

182. Janelle Stecklein, *Utah Man Vindicated After Serving 15 Years for Child Sexual Abuse*, SALT LAKE TRIB. (May 15, 2013), https://archive.sltrib.com/article.php?id=55960859&itype=CMSID [https://perma.cc/J6E6-NBVC].

183. *See id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *See, e.g.*, TENN. CODE ANN. § 40-30-102(b)(2) (West 2019).

challenges raised by defendants and explains why they have left many pleading defendants without a way to prove their actual innocence.

B. Substantive and Procedural Due Process Challenges

1. Introduction

The Due Process Clause of the Fourteenth Amendment prohibits states from depriving "any person of life, liberty, or property, without due process of law."[189] This clause affords two types of protection: substantive due process and procedural due process.[190] Substantive due process "prevents the government from engaging in 'conduct that shocks the conscience[]'. . . or interferes with rights 'implicit in the concept of ordered liberty.'"[191] Meanwhile, procedural due process provides that "[w]hen government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner."[192]

2. Post-conviction DNA Statutes

Prior to 2009, some courts found that there was a substantive due process right to post-conviction DNA testing. In *Wade v. Brady*, Robert Wade was charged with felony murder in Massachusetts based upon the felony of rape.[193] At trial, Wade unsuccessfully raised the defense that the predicate sexual act was consensual.[194] Blood and semen evidence from the crime scene "suggested that another individual may have been involved in the rape (either in addition to, or in lieu of, Wade)."[195] Wade thus sought post-conviction DNA testing, but the superior court denied his petition, finding that Wade's new claim that he did not have sex with the victim was "unconvincing and in direct conflict with Wade's trial theory of consent."[196]

After unsuccessfully appealing in state court, Wade brought a § 1983[197] action in federal court, claiming that he had a constitutional right to DNA testing.[198] The district court agreed, concluding, "[b]ecause the individual interests implicated by DNA testing so profoundly outweigh the adverse impact on the state, I find that the Due Process Clause provides a substantive right to post-conviction DNA

189. U.S. CONST. amend. XIV, § 1.
190. United States v. Green, 654 F.3d 637, 652 (6th Cir. 2011).
191. United States v. Salerno, 481 U.S. 739, 746 (1987).
192. *Id.*
193. Wade v. Brady, 460 F. Supp. 2d 226, 229 (D. Mass. 2006).
194. *Id.* at 232.
195. *Id.* at 229.
196. *Id.* at 232.
197. 42 U.S.C. § 1983 imposes liability on any person "who, under color of any statute, ordinance, regulation, custome, or usage, of any State or Territory or the District of Columbia, subjects, or causes . . . the deprivation of any rights, privileges, or immunities secured by the Constitution and laws."
198. *Wade*, 460 F. Supp. 3d at 229.

testing in cases where testing could raise serious doubts about the original verdict."[199]

The United States Supreme Court, however, pumped the brakes on this line of cases in its 2009 opinion in *District Attorney's Office for the Third Judicial Dist. v. Osborne* (*Osborne IV*).[200] In *Osborne*, William Osborne and Dexter Jackson were convicted of kidnapping, assault, and sexual assault after a jury trial.[201] Prior to trial, the State had done DQ Alpha testing on a blue condom that the victim said was used by one of the assailants.[202] The testing determined that semen found on the condom had a genotype that matched a blood sample taken from Osborne, who is African-American; approximately 16% of African-Americans have such a genotype.[203]

After he was convicted, Osborne brought a post-conviction review petition, which, *inter alia*, sought more discriminating restriction-fragment-length-polymorphism (RFLP) testing on the semen found on the condom.[204] After the superior court denied the petition, Osborne appealed to the Court of Appeals of Alaska. That court held that Osborne did not meet two requirements of Alaska's post-conviction DNA testing statute because (1) the evidence—the semen on the condom—was not newly discovered, and (2) Osborne did not exercise due diligence in presenting his claim.[205] The court also concluded that "Osborne has no due process right under the federal constitution to present new evidence to establish his factual innocence."[206]

That said, the court then noted that "several state courts have held that defendants have a due process right, under their respective state constitutions, to obtain post-conviction DNA testing of physical evidence, and to offer the results of that testing to establish their factual innocence."[207] These state courts held that this right is triggered when the defendant can establish that (1) his conviction rested primarily on eyewitness identification; (2) there was a demonstrable doubt concerning the identification; and (3) scientific testing would likely be conclusive on this issue.[208] The court of appeals found a similar due process right existed under the Alaska Constitution and remanded the case to the superior court to determine whether Osborne could satisfy this three-part test.[209] On remand, the superior court

199. *Id.* at 249.

200. Dist. Attorney's Off. for the Third Judicial Dist. v. Osborne (*Osborne IV*), 557 U.S. 52 (2009).

201. *Id.* at 58.

202. *Id.* at 57.

203. *Id.* at 57–58.

204. *Id.* at 58.

205. *See* Osborne v. State (*Osborne State I*), 110 P.3d 986, 992 (Alaska Ct. App. 2005), *superseded by statute*, ALASKA STAT. ANN. § 12.73.020 (West 2019), *as recognized in* Lambert v. State, 435 P.3d 1011 (Alaska Ct. App. 2018).

206. *Id.* at 995.

207. *Id.*

208. *Id.*

209. *Id.*

found that Osborne had failed to satisfy all three parts of this test, a decision that was upheld on appeal.[210]

Osborne then brought a § 1983 action in the United States District Court for the District of Alaska, claiming that he had a federal constitutional right to post-conviction DNA testing.[211] That court held that Osborne had "a limited due process right of access to the evidence for purposes of post-conviction DNA testing" because (1) the testing sought was not available to Osborne at the time of trial; (2) the testing could be easily performed without cost or prejudice to the Government; and (3) the test results could either confirm Osborne's guilt or provide evidence upon which Osborne might seek a new trial.[212]

The State thereafter appealed to the Ninth Circuit, which started its analysis with *Brady v. Maryland*.[213] In *Brady*, the Supreme Court held that the State has an obligation under the Due Process Clause to turn over material exculpatory evidence to the defense.[214] And, while *Brady* is a pre-trial right, the Ninth Circuit noted that it had applied *Brady* in a post-trial context in *Thomas v. Goldsmith*.[215] In *Thomas*, the Ninth Circuit had held that the Due Process Clause required the State "'to come forward with any exculpatory semen evidence in its possession'" that could support his claim of actual innocence in his federal habeas petition.[216] Finding nothing to distinguish *Thomas* from the case at hand, the Ninth Circuit found that Osborne was "entitled to assert in this § 1983 action the due process right to post-conviction access to potentially exculpatory DNA evidence that we recognized in *Thomas*."[217]

The United States Supreme Court subsequently granted certiorari to decide (1) whether Osborne's claims could be pursued under § 1983 ; and (2) whether he had a due process right to the State's evidence for DNA testing.[218] In a 2009 opinion, the Court found that Osborne lacked such a right, obviating the need to resolve the § 1983 issue.[219] First, the Court quickly dispensed with the Ninth Circuit's holding, finding that *Brady* only applies in the pre-trial context.[220] Second, the Court concluded that there is no substantive due process right of access to DNA evidence.[221] Instead, the Court held that the case was governed by *Medina v. California*, which provides a procedural due process framework for assessing the

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210. *Osborne IV*, 557 U.S. 52, 59 (2009).

211. *Id.* at 60.

212. *See* Osborne v. Dist. Attorney's Off. for Third Judicial Dist. (*Osborne III*), 521 F.3d 1118, 1122 (9th Cir. 2008), *rev'd*, 557 U.S. 52 (2009) ("[W]e affirm the judgment of the district court that . . . Osborne has a limited due process right of access to the evidence for purposes of post-conviction DNA testing.").

213. *Id.* at 1128.

214. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963).

215. *Osborne III*, 521 F.3d at 1128.

216. *Id.* (quoting Thomas v. Goldsmith, 979 F.2d 746, 749–50 (9th Cir. 1992)).

217. *Id.* at 1132.

218. *Osborne IV*, 557 U.S. 52, 61 (2009).

219. *Id.* at 102–03.

220. *See id.* at 68.

221. *Id.*

validity of state procedural rules that are part of the criminal process.[222] Under the *Medina* framework, a state procedural rule only violates procedural due process if it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" or "transgresses any recognized principle of fundamental fairness in operation."[223]

The Court then found that Alaska's post-conviction DNA testing statute passed constitutional muster under this procedural due process framework because the statute (1) provided a right to DNA evidence upon a showing that the evidence could establish innocence; (2) exempted petitions for post-conviction DNA testing from otherwise applicable statutes of limitation; and (3) specified a discovery procedure available to those seeking access to DNA evidence.[224] And, while Alaska's statute did place limits on this right, the Court found that these limits were similar to those contained in federal law and the laws of other states.[225] The Supreme Court also noted that the Court of Appeals of Alaska recognized a separate right of access to DNA testing under its state constitution that could provide a failsafe for defendants who can't comply with the strictures of its DNA statute.[226]

Two years later, in 2011, the Supreme Court revisited the right to post-conviction DNA testing in *Skinner v. Switzer*.[227] In *Skinner*, a Texas jury found Henry Skinner guilty of murdering his live-in girlfriend and her two sons.[228] Skinner thereafter twice sought DNA testing of previously untested items from the crime scene, including knives, an axe handle, vaginal swabs, fingernail clippings, and hair samples.[229] The Texas courts rejected Skinner's first motion, concluding that he failed to demonstrate a "reasonable probability . . . that he would not have been . . . convicted if the DNA test results were exculpatory."[230] Later, the Texas courts rejected Skinner's second motion, finding that defense counsel had made a strategic decision not to test the evidence at trial.[231]

Skinner then brought a § 1983 action, claiming that these applications of Texas's DNA statute violated procedural due process.[232] Both the federal district and appellate courts found, however, that § 1983 was an improper vehicle for Skinner's DNA claim.[233] The Supreme Court granted certiorari to answer this question that had gone unanswered in *Osborne*.[234] Ultimately, the Court concluded that § 1983 was the proper vehicle for such a claim and remanded the case without

222. *Id.* at 69–70.
223. *Id.* at 69 (quoting Medina v. California, 505 U.S. 437, 446, 448 (1992)).
224. *Id.* at 69–71.
225. *Id.* at 70.
226. *Id.*
227. Skinner v. Switzer, 562 U.S. 521 (2011).
228. *Id.* at 525.
229. *Id.* at 527.
230. Skinner v. State, 122 S.W.3d 808, 813 (Tex. Crim. App. 2003).
231. *Skinner*, 562 U.S. at 528–29.
232. *Id.* at 529.
233. *Id.*
234. *Id.*

reaching the merits.[235] In remanding, however, the Court noted that "*Osborne* severely limits the federal action a state prisoner may bring for DNA testing . . . and left slim room for the prisoner to show that the governing state law denies him procedural due process."[236]

Since *Osborne*, no court has found that a state's post-conviction DNA testing statute violates procedural due process. The most notable of these opinions is *McKithen v. Brown* (*McKithen II*).[237] In *McKithen*, Frank McKithen was convicted of attempted murder and related crimes after stabbing his wife with a knife.[238] After he was convicted, McKithen filed a motion seeking court-ordered testing to determine whether his fingerprints and/or his wife's blood were on the knife that was allegedly used in the crime.[239] The post-conviction court denied his motion, finding that McKithen failed to prove under New York's DNA statute that there was a reasonable probability that the results of DNA testing would have resulted in a more favorable verdict.[240]

After unsuccessfully appealing in New York state court, McKithen brought a § 1983 action in federal court.[241] In an opinion issued about a year before the Supreme Court decided *Osborne*, the United States District Court for the Eastern District of New York found that McKithen had a procedural due process right to DNA testing.[242] The court reached this conclusion by applying the three part procedural due process framework from *Mathews v. Eldridge*, which focuses on (1) the petitioner's private interest; (2) the risk of erroneous deprivation of this interest through the current procedure(s) and the probable value of additional safeguards; and (3) the State's countervailing interest.[243]

By the time the Second Circuit issued its opinion on appeal, the Supreme Court had handed down its *Osborne* opinion. As noted, that opinion found that the correct procedural due process framework was the state-friendly "fundamental fairness" framework created by *Medina v. California*, not the defendant-friendly framework from *Mathews v. Eldridge*.[244] Therefore, the Second Circuit was quickly able to dispense with the district court's reasoning and proceed with an analysis done by many other federal courts in the wake of *Osborne*:[245] compare the DNA statute at hand with Alaska's statute.[246]

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235. *Id.* at 534.
236. *Id.* at 525.
237. McKithen v. Brown (*McKithen II*), 626 F.3d 143 (2d Cir. 2010).
238. *Id.* at 145–46.
239. *Id.* at 146.
240. *Id.*
241. *Id.*
242. McKithen v. Brown (*McKithen I*), 565 F. Supp. 2d 440, 485 (E.D.N.Y. 2008), *rev'd*, 626 F.3d 143 (2d Cir. 2010).
243. *Id.* at 452 (construing Mathews v. Eldridge, 424 U.S. 319 (1979)).
244. *McKithen II*, 626 F.3d at 152.
245. *See, e.g.*, Alvarez v. Attorney Gen. for Fla., 679 F.3d 1257, 1266–67 n.2 (11th Cir. 2012); Tevlin v. Spencer, 621 F.3d 59, 71 (1st Cir. 2010).
246. *McKithen II*, 626 F.3d at 153–54.

Under this analysis, it was clear that the standards in Alaska's post-conviction DNA statute were more restrictive and difficult to meet than the standards in New York's statute.[247] The principal difference is that New York allows post-conviction DNA testing upon a showing that there is a reasonable probability that the verdict would have been more favorable if such testing had been done at the time of trial.[248] Conversely, Alaska requires a petitioner to establish that DNA testing can "clearly and convincingly" or "conclusively" prove his innocence.[249] This comparison allowed the Second Circuit to conclude that, "*[a] fortiori*, New York's procedure for post-conviction DNA testing must be constitutional as well."[250]

Courts have applied a similar analysis in cases in which defendants claimed that post-conviction DNA testing statutes with pleading defendant prohibitions violated procedural due process. In the aforementioned case in federal court in Michigan, the defendant claimed that Michigan's DNA statute violated procedural due process by precluding pleading defendants from seeking relief.[251] In response, the court quickly concluded that "[t]he Sixth Circuit has held that Michigan law governing procedures for post-conviction DNA testing in criminal cases is more comprehensive than the state procedures sanctioned in *Osborne*, and, thus, adequately protects the due process rights of prisoners."[252]

3. Non-DNA/Actual Innocence Statutes

Pleading and non-pleading defendants have also made due process challenges to statutes that prevent them from presenting freestanding claims of actual innocence based on non-DNA evidence. Some of these challenges have dealt with pleading defendant prohibitions, and some of them have been successful under state Due Process clauses. In March 2018, the Supreme Court of Iowa issued its opinion in *Schmidt v. State*, in which Jacob Lee Schmidt had pleaded guilty to assault with intent to commit sexual abuse in exchange for the State dismissing two counts of sexual abuse in the third degree.[253] Schmidt later sought to prove his actual innocence based upon a recantation by the victim.[254] Iowa's post-conviction statute, however, did not allow pleading defendants to present freestanding actual innocence claims.[255]

The Supreme Court of Iowa concluded that this prohibition violated the Due Process Clause of the Iowa Constitution, finding that "[a]n innocent person has a

247. *Id.*
248. *Id.*
249. *Id.*
250. *Id.* at 154.
251. Cassarrubias v. Prelesnik, No. 1:09-CV-1172, 2014 WL 1338172 (W.D. Mich. Mar. 31, 2014).
252. *Id.* at *6.
253. Schmidt v. State, 909 N.W.2d 778, 782–83 (Iowa 2018).
254. *Id.* at 781.
255. *Id.* at 784.

constitutional liberty interest in remaining free from undeserved punishment."[256] Therefore, "[h]olding a person who has committed no crime in prison strikes the very essence of the constitutional guarantee of substantive due process."[257] As support for its conclusion, the court cited similar opinions by the Illinois and New Mexico Supreme Courts.[258]

Other courts, however, have found that there is no state due process right to present freestanding claims of actual innocence based on non-DNA evidence. In *In re Lincoln v. Cassady*, Missourian Rodney Lincoln was convicted of assaulting "M.D.," a seven year-old.[259] M.D. later recanted her eyewitness identification of Lincoln, claiming "that she was traumatized and pressured into identifying [Lincoln] as the assailant, and now believes that the assailant was a serial killer whose family owned a Volkswagen repair shop in the area of the crimes."[260] Lincoln moved to use this recantation to prove his actual innocence, but the motion was denied under Missouri's post-conviction statute.[261]

Subsequently, the Missouri Court of Appeals rejected Lincoln's due process challenge, finding that the Supreme Court of Missouri had "expressly declined to determine whether the continued incarceration and eventual execution of a person who clearly and convincingly establishes actual innocence violates the due process clause of the constitution, resulting in a manifest injustice warranting habeas relief."[262] On his last day in office on June 1, 2018, Missouri Governor Eric Greitens commuted Lincoln's sentence to time served based on evidence of his innocence, leading to Lincoln's release after thirty-four years of incarceration.[263]

Similarly, in *Yonga v. State*, the Court of Special Appeals of Maryland held that a pleading defendant had no substantive due process right to prove his actual innocence through evidence of the victim's recantation.[264] And, in the *Tiger* case from the Introduction, the Court of Appeals of New York failed to extend precedent finding a state due process right to present non-DNA evidence of actual innocence to pleading defendants.[265]

In the wake of *Osborne*, no defendant has been successful in claiming that a state's non-DNA actual innocence statute violates the federal Due Process Clause. In *Dawson v. Suthers*, James Dawson claimed that the State of Colorado's statutory

256. *Id.* at 793.

257. *Id.*

258. *Id.* at 792–93 (first citing People v. Washington, 665 N.E.2d 1330 (Ill. 1996); and then citing Montoya v. Ulibarri, 163 P.3d 476 (N.M. 2007)).

259. Lincoln v. Cassady, 517 S.W.3d 11, 15 (Mo. Ct. App. 2016).

260. *Id.* at 16.

261. *Id.*

262. *Id.* at 22.

263. 41 Action News Staff, *Governor Greitens Commutes Rodney Lincoln's Sentence on Last Day in Office*, 41 KSHB KAN. CITY (June 2, 2018, 2:26 PM), https://www.kshb.com/news/local-news/governor-greitens-pardons-rodney-lincoln [https://perma.cc/CD4X-FPPB].

264. Yonga v. State, 108 A.3d 448, 455 (Md. Ct. Spec. App. 2015), *aff'd*, 130 A.3d 486 (Md. 2016).

265. *See* People v. Tiger, 110 N.E.3d 509, 517 (N.Y. 2018).

requirements to get testing of blood or urine to establish a post-conviction claim of actual innocence based on an intoxication defense violated procedural due process.[266] The United States District Court for the District of Colorado noted that Colorado's post-conviction DNA statute satisfied *Osborne* and concluded that "it can hardly be that the due process clause would require states to grant postconviction access to scientific testing for determining drug concentrations in blood or urine where that same postconviction testing scheme would not allow access to DNA testing in the same circumstances."[267]

C. Equal Protection Clause Challenges

1. Introduction

The Equal Protection Clause of the Fourteenth Amendment states that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[268] To establish an equal protection violation, a plaintiff must demonstrate that (1) intentional or purposeful State discrimination led to him being treated different from similarly situated individuals, and (2) the disparate treatment was not justified under the requisite level of scrutiny.[269] If a state statute does not interfere with a fundamental right or discriminate against a suspect class, the level of scrutiny is the rational basis test, which considers whether "the challenged classification is rationally related to a legitimate governmental purpose."[270] Post-conviction DNA and non-DNA actual innocence statutes neither interfere with a fundamental right nor discriminate against a suspect class, meaning that they are subject to the rational basis test.[271]

2. Post-conviction DNA Statutes

Defendants in several states have brought Equal Protection Clause challenges to post-conviction DNA testing statutes. These challenges have led to disparate results in different jurisdictions. One of these challenges was successful in *State v. Denney*.[272] Dale Denney had been convicted of aggravated criminal sodomy after a jury trial in Kansas.[273] Denney later filed a petition for DNA testing of the rape kit and other pieces of evidence from the crime scene.[274] The district court denied Denney's motion because Kansas's post-conviction DNA statute only allows for

266. Dawson v. Suthers, No. 14-cv-01919-MSK-NYW, 2015 WL 5525786, at *1–2 (D. Colo. Sept. 21, 2015).
267. *Id.* at *5.
268. U.S. CONST. amend. XIV, § 1.
269. Morrison v. Garraghty, 239 F.3d 648, 654 (4th Cir. 2001).
270. Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450, 457–58 (1988).
271. *See, e.g.*, State v. Denney, 101 P.3d 1257, 1262 (Kan. 2004).
272. *Id.* at 1258.
273. *Id.* at 1259.
274. *Id.* at 1260.

testing in first-degree murder and rape cases.[275] Denney subsequently appealed, claiming that the statute violated "the Equal Protection Clause because there is no rational basis for authorizing DNA testing for those convicted of rape, and for not authorizing DNA testing for those convicted of aggravated criminal sodomy."[276]

The Supreme Court of Kansas began by noting that the purpose of Kansas's post-conviction DNA statute is to help determine whether someone in state custody was wrongfully convicted or sentenced.[277] The court then made the threshold determination that those convicted of rape and those convicted of aggravated criminal sodomy are similarly situated.[278] Having made this finding, the court rejected the State's proffered reason of cost for distinguishing between those convicted of rape and aggravated criminal sodomy, concluding that "cutting costs . . . is not a rational basis for discrimination."[279] Finally, the court raised a difference in the severity of the crimes as a possible basis for distinction but ultimately concluded that rape and aggravated criminal sodomy are crimes with similar levels of severity.[280] Therefore, the court concluded that Kansas's post-conviction DNA statute violated the Equal Protection Clause and remanded for a determination of whether Denney qualified for testing.[281]

In *State v. Cheeks*, the Supreme Court of Kansas applied similar reasoning to conclude that Kansas's statute violated the Equal Protection Clause by allowing defendants convicted of first-degree murder to seek DNA testing while precluding defendants convicted of second-degree murder from seeking the same.[282] In a dissenting opinion, Justice Biles advanced a different rationale for the distinction: "the well-recognized government interest in promoting finality of judgments."[283] The majority, however, turned this argument aside, finding "no legitimate reason for placing someone convicted of first-degree murder/rape in a different position as to the finality of judgment than someone convicted of second-degree murder."[284]

Conversely, a similar challenge was rejected in Maryland. In *Washington v. State*, Trendon Washington tried to use *Cheeks* to secure a similar ruling by the Court of Appeals of Maryland.[285] Washington had been convicted of conspiracy to commit murder in connection with the death of Ricardo Paige.[286] A broom and dust pan found at the crime scene that could have been used to sweep up spent shell

275. *Id.*
276. *Id.* at 1263.
277. *Id.* at 1265.
278. *Id.*
279. *Id.*
280. *Id.* at 1266.
281. *Id.* at 1268–69.
282. State v. Cheeks, 310 P.3d 346, 354 (Kan. 2013).
283. *Id.* at 359 (Biles, J., dissenting).
284. *Id.* at 354.
285. Washington v. State, 148 A.3d 341 (Md. 2016).
286. *Id.* at 344–45.

casings tested positive for blood but were not tested for DNA.[287] After Washington was convicted, he filed a petition for post-conviction DNA testing.[288] The circuit court denied that motion, finding that Maryland's post-conviction DNA statute covers "crimes of violence" but that conspiracy to commit a violent crime is not a crime of violence.[289]

The Court of Appeals of Maryland later affirmed, finding that a defendant convicted of conspiracy to commit murder is not similarly situated to a person convicted of murder because a "conviction of conspiracy to commit murder does not generally require physical presence at the scene of the underlying crime."[290] Instead, "[t]o commit conspiracy, the law only requires an individual to have entered into an agreement with another to commit a crime, and to have actually intended for the crime to be committed."[291] Finally, the court found, *inter alia*, that "it is rational for the State to conclude that DNA evidence related to a crime that requires some physical presence is more likely to exonerate an individual than DNA evidence related to a crime that can be completed through a mere conversation."[292]

To date, no defendant has claimed that a post-conviction DNA statute that precludes pleading defendants from seeking relief violates the Equal Protection Clause.

3. Non-DNA/Actual Innocence Statutes

Defendants have primarily made Equal Protection Clause challenges in the actual innocence context in cases in which states only allow defendants to seek new trials based on DNA evidence. None of these claims have been successful. For instance, Ohioan Rachel Stull sought to present polygraph evidence which she claimed proved her actual innocence of drug charges.[293] Ohio's post-conviction statute, however, only allows defendants to prove actual innocence through DNA testing results.[294] Stull claimed that this statute violated the Equal Protection Clause due to the disparate treatment of DNA and non-DNA evidence.[295] Using the rational basis test, the Court of Appeals of Ohio quickly concluded that there was no Equal Protection violation because it was "unable to compare the reliability of polygraph testing with that of DNA testing."[296]

No defendant has yet claimed that a non-DNA actual innocence statute that precludes pleading defendants from seeking relief violates the Equal Protection Clause.

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287. *Id.* at 345.
288. *Id.*
289. *Id.*
290. *Id.* at 356.
291. *Id.*
292. *Id.* at 356–57.
293. State v. Stull, No. 27036, 2014 WL 1345303 (Ohio Ct. App. Mar. 31, 2014).
294. *Id.* at *5–6.
295. *Id.* at *6.
296. *Id.*

D. Conclusion

There are currently few constitutional avenues of relief available in states in which pleading defendants are precluded from seeking post-conviction DNA testing or presenting non-DNA evidence of actual innocence. A few states have found limited state substantive due process rights to relief, but the Supreme Court's opinion in *Osborne* rejected the notion of a federal substantive due process right to post-conviction DNA testing. And, while *Osborne* recognized a limited procedural due process right to post-conviction DNA testing, no court has since found that right violated in either the DNA or non-DNA context. Finally, while some defendants have brought successful Equal Protection Clause challenges to post-conviction DNA statutes, a claim by a pleading defendant implicates neither a fundamental right nor a suspect class. Therefore, if a defendant were to challenge a pleading defendant prohibition in a post-conviction DNA or actual innocence statute, the State would only need to point to one rational reason for limiting relief to non-pleading defendants. As a result, if a court is to recognize a right to prove innocence after pleading guilty, it likely has to come from another constitutional guarantee.

III. THE RIGHT TO ACCESS THE COURTS

A. Introduction

As noted, the Supreme Court in *Osborne* recognized a limited procedural due process right to post-conviction DNA testing, and courts have found that the Equal Protection Clause provides a possible basis for relief from restrictive post-conviction DNA and non-DNA statutes. While neither of these constitutional protections is likely sufficient by itself to establish a right to prove innocence after pleading guilty, this Article argues that a combination of the two is sufficient to create such a right. Therefore, this Article explores a right that combines aspects of procedural due process and equal protection: the right to access the courts.[297]

B. History of the Right to Access the Courts

The history of the right to access the courts (also known as the right of meaningful access to the courts[298]) can be traced at least as far back as the Supreme Court's 1956 opinion in *Griffin v. Illinois*.[299] In *Griffin*, indigent defendants Judson Griffin and James Crenshaw were convicted of armed robbery and sought a free

297. *See, e.g.*, United States v. Williams, 264 F.3d 561, 573 (5th Cir. 2001) (noting that the procedural due process and equal protection threads of the right to access the courts are intertwined).

298. *See, e.g.*, Schrier v. Halford, 60 F.3d 1309, 1310 (8th Cir. 1995).

299. Griffin v. Illinois, 351 U.S. 12, 18 (1956); *see* Eric Merriam, *Non-Uniform Justice: An Equal Protection Analysis of Veterans Treatment Courts' Exclusionary Qualification Requirements*, 84 MISS. L.J. 685, 705 (2015) ("*Griffin* has been cited as the first in a series of cases establishing an equal protection-based fundamental right to 'access the courts.'").

copy of the entire trial transcript to perfect their appeal.[300] The trial court denied their motion, making it impossible for the men to comply with Illinois appellate procedure.[301]

Griffin and Crenshaw then appealed to the United States Supreme Court, which, in a plurality opinion, acknowledged that states are under no federal constitutional obligation to provide appellate courts or even any right to appellate review.[302] That said, the Court also recognized that the Due Process and Equal Protection Clauses protect defendants at all stages of criminal proceedings, including appeals.[303] Therefore, according to the Court, once a state does provide for appellate review, it cannot "do so in a way that discriminates against some convicted defendants on account of their poverty."[304] The Court was thus able to conclude that Illinois's appellate procedure violated the men's constitutional rights and was "a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law."[305]

Six years later, the Supreme Court expanded upon this right to access the courts in its 1963 opinion in *Douglas v. California*.[306] In *Douglas*, indigent defendants Bennie Will Meyes and William Douglas were convicted of thirteen felonies after a jury trial and sought appointed counsel on appeal.[307] Pursuant to a California rule, when an appealing defendant made a request for counsel, the court was to conduct an independent investigation of the record to determine whether appointing counsel would benefit the defendant or the court.[308] Finding no benefit in the case at hand, the court declined to appoint counsel.[309]

Later, the United States Supreme Court reversed this decision, concluding that the California rule did "not comport with fair procedure" and "lack[ed] that equality demanded by the Fourteenth Amendment . . . ."[310] The problem with the rule, according to the Court, was that "[t]he indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal."[311]

The Supreme Court later clarified this right to access the courts while refusing to extend it in 1974. In *Ross v. Moffitt*, indigent defendant Fred Ross unsuccessfully sought appointed counsel for his appeal to the Supreme Court of North Carolina

300. *Griffin*, 351 U.S. at 13.
301. *Id.* at 15.
302. *Id.* at 18.
303. *Id.*
304. *Id.*
305. *Id.* at 19.
306. Douglas v. California, 372 U.S. 353 (1963).
307. *Id.* at 353–54.
308. *Id.* at 354–55.
309. *Id.*
310. *Id.* at 357–58.
311. *Id.* at 358.

after losing his appeal to the Court of Appeals of North Carolina.[312] He thereafter appealed to the United State Supreme Court, which observed that "[t]he precise rationale for the *Griffin* and *Douglas* lines of cases has never been explicitly stated, some support being derived from the Equal Protection Clause of the Fourteenth Amendment, and some from the Due Process Clause of that Amendment."[313] Specifically, the Due Process thread "emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated."[314] Meanwhile, the Equal Protection thread "emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable."[315]

Focusing primarily on the Equal Protection portion, the Court determined that the analysis was "not one of absolutes, but one of degrees."[316] While equal protection does not require absolute equality or precisely equal advantages, it does require state appellate systems that are "free of unreasoned distinctions."[317] States can therefore make reasoned distinctions among defendants but cannot create a system that, for some defendants, entirely cuts off the ability to appeal or makes an appeal a "meaningless ritual."[318] Applying these principles, the Court concluded that the right to appointed counsel for trial and first appeal were sufficient to create a record for review for the state supreme court.[319] Therefore, the Court found that Ross was not denied his right to access the Supreme Court of North Carolina.[320]

The United States Supreme Court and lower courts have since applied this right to access the courts in a variety of contexts. As in *Griffin* and *Douglas*, some of these cases involved indigent defendants. In *Burns v. Ohio*, the Court held that indigent defendants must be allowed to file appeals and habeas corpus petitions without payment of docket fees.[321] And, in *M.L.B. v. S.L.J.*, the Court found that a Mississippi law requiring an indigent mother to pay record preparation fees in advance of her parental rights appeal violated the right to access the appellate court.[322]

Courts have also applied the right to access the courts outside the indigency context. The most famous of these cases is the United States Supreme Court case, *Bounds v. Smith*.[323] In *Bounds*, North Carolina inmates claimed that they were denied their right to access the courts based upon "the State's failure to provide legal

312. Ross v. Moffitt, 417 U.S. 600, 604 (1974).
313. *Id.* at 608–09.
314. *Id.* at 609.
315. *Id.*
316. *Id.* at 612.
317. *Id.* (quoting Rinaldi v. Yeager, 384 U.S. 305, 310 (1966)).
318. *Id.* (quoting Douglas v. California, 372 U.S. 353, 358 (1963)).
319. *Id.* at 614–16.
320. *Id.*
321. Burns v. Ohio, 360 U.S. 252, 257–58 (1959).
322. M.L.B. v. S.L.J., 519 U.S. 102, 127–28 (1996).
323. Bounds v. Smith, 430 U.S. 817 (1977).

research facilities."[324] The Supreme Court began its analysis by tracing the history of the right to access the courts and noted that "[m]ore recent decisions have struck down restrictions and required remedial measures to insure that inmate access to the courts is adequate, effective, and meaningful."[325]

The Court then observed that the right also "require[s] States to shoulder affirmative obligations to assure all prisoners meaningful access to the courts."[326] According to the Court, "[t]his is not to say that economic factors may not be considered, for example, in choosing the methods used to provide meaningful access. But the cost of protecting a constitutional right cannot justify its total denial."[327] Ultimately, the Court concluded that "[t]he inquiry is . . . whether law libraries or other forms of legal assistance are needed to give prisoners a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts."[328]

The Court then resolved this inquiry by turning aside the State's citation to *Ross v. Moffitt*. The State argued that if defendants were not entitled to appointed counsel for discretionary appeals to state supreme courts, then they were also not entitled to adequate law libraries or assistance from persons trained in the law.[329] The Supreme Court rejected this argument by noting that an appeal to a state supreme court (1) was previously litigated in lower court(s), (2) likely already has appellate briefs, and (3) "is not primarily concerned with the correctness of the judgment below."[330]

The Court found the facts of the *Bounds* case distinguishable because they were largely "original actions seeking new trials, release from confinement, or vindication of fundamental civil rights. Rather than presenting claims that have been passed on by two courts, they frequently raise heretofore unlitigated issues."[331] Simply put, "[t]he need for new legal research or advice to make a meaningful initial presentation to a trial court in such a case is far greater than is required to file an adequate petition for discretionary review."[332] Therefore, the Court concluded "that the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law."[333]

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324. *Id.* at 818.
325. *Id.* at 822.
326. *Id.* at 824.
327. *Id.* at 825.
328. *Id.*
329. *Id.* at 827.
330. *Id.*
331. *Id.*
332. *Id.* at 828.
333. *Id.*

C. Halbert v. Michigan and Pleading vs. Non-Pleading Defendants

Another United States Supreme Court opinion that was able to distinguish *Ross v. Moffitt* provides the strongest support for the proposition that the right to access the courts applies to pleading defendants seeking to prove their innocence through DNA and non-DNA evidence of actual innocence. In *Halbert v. Michigan*, Antonio Halbert, an indigent man, pleaded *nolo contendere* to two counts of criminal sexual conduct in 2001.[334] In 1994, Michigan had amended its state constitution so that "an appeal by an accused who pleads guilty or *nolo contendere* shall be by leave of the court."[335] Therefore, while the Court of Appeals of Michigan had to hear an appeal by a defendant found guilty after a trial, it now had discretion over whether to hear an appeal by a defendant who had pleaded guilty or *nolo contendere*.[336]

Michigan judges thereafter began denying appellate counsel to indigent defendants who had pleaded guilty or *nolo contendere* and were seeking leave to appeal to the Court of Appeals of Michigan, concluding that *Ross v. Moffitt* applies to all discretionary appeals.[337] After being denied appointed counsel under this logic, Halbert appealed to the United States Supreme Court, claiming that *Douglas v. California* should apply to all first appeals, regardless of whether they are discretionary or mandatory.[338]

The Supreme Court ultimately sided with Halbert. The Court reached this conclusion because (1) the Court of Appeals of Michigan considers the merits of the claims in motions for leave to appeal; and (2) "indigent defendants pursuing first-tier review in the Court of Appeals are generally ill equipped to represent themselves."[339] Therefore, denying indigent pleading defendants the right to counsel would functionally deny them their right to appeal under Michigan's constitution because "a pro se applicant's entitlement to seek leave to appeal to Michigan's intermediate court may be more formal than real."[340]

Accordingly, the Court found that Michigan's disparate treatment of pleading and non-pleading defendants violated the right to access the courts.[341] The Court was able to reach this conclusion despite acknowledging a rational countervailing state interest, noting that "[w]hile the State has a legitimate interest in reducing the workload of its judiciary, providing indigents with appellate counsel will yield applications easier to comprehend."[342] Moreover, Michigan's constitutional amendment still provided for a reasoned distinction by requiring the court to hear

334. Halbert v. Michigan, 545 U.S. 605, 609 (2005).
335. *Id.* (quoting MICH. CONST. art. 1, § 20).
336. *Id.*
337. *Id.*
338. *Id.*
339. *Id.* at 617.
340. *Id.* at 620.
341. *Id.* at 623–24.
342. *Id.* at 623.

appeals by non-pleading defendants but allowing the court to issue summary denials of leave to appeal in cases of pleading defendants.[343]

While *Halbert* involved issues of indigency, the Court concluded its opinion with a final footnote explaining that the right to access the courts applies in any case in which a state treats pleading defendants differently from non-pleading defendants in the appellate context. In that footnote, the Court noted that "[w]e are unpersuaded by the suggestion that, because a defendant may be able to waive his right to appeal entirely, Michigan can consequently exact from him a waiver of the right to government-funded appellate counsel."[344] The Court found that such a waiver would similarly violate the right to access the courts because "if Michigan were to require defendants to waive all forms of appeal as a condition of entering a plea, that condition would operate against moneyed and impoverished defendants alike."[345] The Court of Appeals of Michigan later used this footnote to find that a plea conditioned on waiver of appointed counsel on appeal violated the right to access the courts, concluding that "[t]his language [from *Halbert*] unambiguously indicates that the United States Supreme Court would hold unconstitutional the practice of imposing a waiver of appointed appellate counsel as a plea condition."[346]

The dissenting opinion by Justice Thomas in *Halbert* reinforces the conclusions that (1) the opinion was not solely or principally about indigency; and (2) states cannot grant non-pleading defendants a right to appeal while wholly denying that same right to pleading defendants. According to Justice Thomas, "Michigan has not engaged in the sort of invidious discrimination against indigent defendants that *Douglas* condemns."[347] Instead, Justice Thomas argued that "Michigan has done no more than recognize the undeniable difference between defendants who plead guilty and those who maintain their innocence . . . ."[348]

Justice Thomas claimed that affording appellate counsel to non-pleading defendants while denying appellate counsel to pleading defendants was a reasoned distinction for two related reasons. First, "because a defendant who pleads guilty 'may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea' . . . the potential issues that can be raised on appeal are more limited."[349] Second, Michigan amended its Constitution to deny pleading defendants the right to appointed counsel after nearly one third of its civil and criminal appeals were brought by pleading defendants, with "few of these defendants [being] granted relief on appeal."[350] Justice Thomas therefore asserted that the majority's extension of the

343. *Id.*
344. *Id.* at 624 n.8.
345. *Id.*
346. People v. Billings, 770 N.W.2d 893, 897–98 (Mich. Ct. App. 2009).
347. *Halbert*, 545 U.S. at 627 (Thomas, J., dissenting).
348. *Id.*
349. *Id.* at 629 (quoting Tollett v. Henderson, 411 U.S. 258, 267 (1973)).
350. *Id.* at 630.

right to appellate counsel to pleading defendants would (1) clog court dockets, (2) shift resources from defendants who maintained their innocence to defendants who admitted their guilt, and (3) not remedy many wrongful convictions.[351]

IV. A RIGHT TO PROVE INNOCENCE AFTER PLEADING GUILTY

A. Introduction

This Section argues that *Halbert* and the right to access the courts compel the conclusion that courts cannot continue to allow non-pleading defendants to seek post-conviction DNA testing and present non-DNA evidence of actual innocence while denying similar rights to pleading defendants. It begins by discussing why and how the right to access the courts should apply in the post-conviction context and proceeds to explain why state post-conviction DNA and non-DNA statutes should contain minimal reasoned distinctions between pleading and non-pleading defendants.

B. Establishing a Right to Prove Innocence After Pleading Guilty

As noted in the previous Section, the right to access the courts recognizes that states are under no federal constitutional obligation to provide appellate courts or even any right to appellate review.[352] Once a state does provide for appellate review, however, it can make reasoned distinctions between defendants but cannot create a system that, for some defendants, entirely cuts off the ability to appeal or makes an appeal a "meaningless ritual."[353] In *Halbert*, the Court then applied this right to pleading defendants, concluding that (1) making appeals by non-pleading defendants mandatory but appeals by pleading defendants discretionary was a reasoned distinction; but that (2) the failure to afford pleading defendants the right to appellate counsel made their entitlement to seek leave to appeal "more formal than real" and deprived them of their right to access the courts.[354]

The Court in *Halbert* was not explicit about how Michigan's refusal to appoint appellate counsel to pleading defendants implicated both the Due Process and Equal Protection threads of the right to access the courts,[355] but its reasoning seems easily explicable. The *Halbert* Court noted that the Due Process thread of the right to access the courts focuses on "the essential fairness of the state-ordered proceedings."[356] In the ineffective assistance of counsel context, the Supreme Court has held that "the violation of the right to counsel render[s] [a] proceeding

351. *Id.* at 630–31.

352. Griffin v. Illinois, 351 U.S. 12, 18 (1956).

353. *See supra* note 315 and accompanying text.

354. *See supra* note 337 and accompanying text.

355. *See Halbert*, 545 U.S. at 626 (Thomas, J., dissenting) ("The majority does not say where in the Constitution that right is located—the Due Process Clause, the Equal Protection Clause, or some purported confluence of the two.").

356. *Id.* at 611 (quoting M.L.B. v. S.L. J., 519 U.S. 102, 120 (1996)).

presumptively unreliable or entirely nonexistent."[357] For example, assume that (1) corrupt police officers fail to secure a search warrant before searching a defendant's house and uncovering drugs; and (2) defense counsel neither moves for a suppression hearing nor cross-examines the officers at trial. In such a case, the defendant would have a viable claim of ineffective assistance of counsel because his suppression hearing was nonexistent and his trial was unreliable.[358]

Courts have applied a similar analysis in cases involving proceedings in which the right to counsel comes from the Due Process Clause, such as deportation proceedings.[359] In *Halbert*, this analysis would explain the Due Process portion of why the right to access the courts required appointed counsel for pleading defendants. Under this analysis, the Court's conclusion would be that the denial of appointed counsel to pleading defendants meant that their appellate proceeding was (1) nonexistent if the lack of counsel led to the Court of Appeals of Michigan denying leave to appeal, or (2) unreliable if the defendant were forced to represent himself at his appellate proceeding if leave to appeal were granted.

Meanwhile, the Supreme Court has held that the Equal Protection thread of the right to access the courts "emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable."[360] By holding that Michigan could not withhold the right to appellate counsel to pleading defendants, the *Halbert* Court clearly held that pleading and non-pleading defendants seeking to appeal are in indistinguishable situations.

This same reasoning applies in the actual innocence context with even fuller force. Every state has provided for appellate review through post-conviction DNA testing statutes,[361] and many states have provided for appellate review through freestanding actual innocence statutes that allow for the presentation of non-DNA evidence.[362] Therefore, the right to access the courts compels the conclusion that these states can create reasoned distinctions between pleading and non-pleading defendants but cannot practically or actually cut off any right for pleading defendants to appeal.

In this regard, the right to access the courts claim by pleading defendants in the actual innocence context is actually stronger than the claim by the pleading defendant in *Halbert*. The Michigan statute in *Halbert* practically, but did not actually, cut off the right for pleading defendants to appeal. Pleading defendants could still file for leave to appeal in Michigan; they simply had to do so without the

357. Roe v. Flores-Ortega, 528 U.S. 470, 484 (2000).

358. *Cf.* Kimmelman v. Morrison, 477 U.S. 365 (1986) (finding that trial counsel's failure to move to suppress a bedsheet with physical evidence that was seized without warrant in a rape case was deficient performance).

359. *See, e.g.*, Dearinger *ex rel.* Volkova v. Reno, 232 F.3d 1042, 1045 (9th Cir. 2000) ("We . . . conclude that the holding of *Flores-Ortega* applies with equal force to claims of ineffective assistance of counsel arising out of the Fifth Amendment right to due process.").

360. Ross v. Moffitt, 417 U.S. 600, 609 (1974).

361. *See supra* note 33 and accompanying text.

362. *See supra* notes 154–55 and accompanying text.

assistance of counsel. This might have been seen as a "meaningless ritual," but it was at least a ritual that could have led to relief.

Conversely, in states that preclude pleading defendants from seeking DNA testing or presenting freestanding claims of actual innocence based on non-DNA evidence, there is not even a ritual. Imagine a case in which an African American defendant who pleaded guilty to sexually assaulting and murdering a brunette woman (1) seeks DNA testing of blond hairs with follicles found on the victim's underpants, or (2) seeks to present a surveillance video of a Caucasian man entering the victim's house minutes before the crimes occurred. Even in a case in which this evidence did not surface until after the defendant's guilty plea, the defendant would be per se prohibited from seeking such testing or presenting such evidence in a number of states across the country.[363] Therefore, in these states, pleading defendants are denied both meaningful and actual access to the courts. Pleading defendants in states with pleading defendant prohibitions always have a nonexistent appellate proceeding under the Due Process thread, and, under the Equal Protection thread, they are wholly denied avenues of relief that are readily available to non-pleading defendants.

This conclusion is also supported by the Supreme Court's opinion in *Bounds v. Smith*, which distinguished its prior opinion in *Ross v. Moffitt*. As noted, in *Moffitt*, the Court decided that the refusal to appoint counsel for a defendant's appeal to the Supreme Court of North Carolina did not violate the right to access the courts.[364] Conversely, in *Bounds*, the United States Supreme Court found that the right to access the courts required the availability of adequate law libraries or adequate assistance from persons trained in the law for prisoners pursuing "original actions seeking new trials, release from confinement, or vindication of fundamental civil rights . . . rais[ing] heretofore unlitigated issues."[365] This conclusion allowed the Court to distinguish *Moffitt*, which involved an appeal to a state supreme court that (1) was previously litigated in lower court(s); (2) already had appellate briefs; and (3) "[wa]s not primarily concerned with the correctness of the judgment below."[366]

Post-conviction claims based on DNA and non-DNA evidence of actual innocence are similar to the appeal in *Bounds* and different than the appeal in *Moffitt*. By definition, (1) they are original actions seeking release from confinement and/or a new trial, (2) they raise previously unlitigated issues, (3) they never have prior appellate briefs, and (4) they are centrally concerned with the correctness of the judgment below.[367] Furthermore, the claim by pleading defendants in the actual innocence context is stronger than the claim by the defendants in *Bounds*, who were merely practically but not actually denied their right to access the courts.

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363. *See supra* Section I.B.3.b.
364. *Moffitt*, 417 U.S. at 615–16.
365. Bounds v. Smith, 430 U.S. 817, 827 (1977).
366. *Id.*
367. *See generally* Brooks & Simpson, *supra* note 16.

There is reason to believe that courts could adopt this reasoning in future cases based upon past precedent. As noted, in the pre-*Osborne* case, *Wade v. Brady*, a federal district court found that a defendant has a substantive due process right to post-conviction DNA testing.[368] In the alternative, the court found that precluding the defendant from seeking post-conviction DNA testing violated his right to access the courts.[369] The court began by detailing the history of the right and its application in cases dealing with the right to law libraries and appellate counsel.[370] It then concluded that "[d]enying prisoners access to potentially exculpatory DNA evidence limits meaningful access to the courts in even more profound terms than denying access to a law library or attorney."[371] Specifically, "[w]hile the latter restrictions substantially impinge on a prisoner's ability to gain judicial access, the former operates as an absolute bar."[372]

Indeed, in the *Osborne* case itself, the defendant made both substantive due process and right to access the courts claims in the Ninth Circuit. But, because the court found a substantive due process right to post-conviction DNA testing, it concluded that it did not need to "reach Osborne's alternative argument[] that the State's denial of access to potentially exculpatory DNA evidence is effectively a denial of meaningful access to courts."[373] As a result, when the Supreme Court rejected the Ninth Circuit's substantive due process conclusion, it never addressed whether Alaska's post-conviction DNA testing statute implicated the right to access the courts.

In the wake of *Osborne*, two federal circuit courts have touched upon this right to access the courts in the DNA context without providing resolution. The first court was the Second Circuit in the aforementioned *McKithen* case. As noted, Frank McKithen brought a Federal § 1983 claim, alleging that the application of New York's post-conviction DNA statute to preclude him from testing crime scene evidence violated his right to substantive due process.[374] McKithen also claimed a violation of his right to access the courts.[375]

In an odd move, Judge Gleeson of the United States District Court for the Eastern District Court converted McKithen's claim. According to Judge Gleeson:

> As any evidence entitling McKithen to relief under [New York's post-conviction statute] would necessarily undermine confidence in the outcome of trial and thus be necessary for meaningful access to existing clemency mechanisms, I will consider the contours of the right of

368. Wade v. Brady, 460 F. Supp. 2d 226, 249 (D. Mass. 2006).
369. *Id.* at 250.
370. *Id.*
371. *Id.*
372. *Id.*
373. *Osborne III*, 521 F.3d 1118, 1142 (9th Cir. 2008).
374. *McKithen I*, 565 F. Supp. 2d 440, 446 (E.D.N.Y. 2008), *rev'd*, 626 F.3d 143 (2d Cir. 2010).
375. *Id.*

> meaningful access to clemency mechanisms instead of the right of meaningful access to courts.[376]

Having converted the claim, Judge Gleeson made liberal reference to *Halbert v. Michigan* in finding that the New York courts violated McKithen's "right of meaningful access to clemency mechanisms."[377] Judge Gleeson found that "*Halbert* provides strong support for my conclusion that the right of meaningful access to existing clemency mechanisms entails the right to certain evidence of innocence."[378] While Judge Gleeson noted that the right to seek leave to appeal was mandatory in *Halbert* as opposed to the inherently discretionary nature of clemency proceedings, he concluded that an analogy could be found between the two:

> Though clemency proceedings are not exclusively or even primarily "error-correction" proceedings, and often turn not on a revisitation of the facts underlying a conviction, but on an analysis of a defendant's contrition and personality, they nevertheless have one significant, even if discretionary, error-correcting function: they are the last resort for the wrongfully convicted.[379]

It is unclear why Judge Gleeson didn't simply find that the New York courts violated McKithen's right to access the courts by applying the state's post-conviction DNA statute to prevent him from seeking testing that could have been used to prove his actual innocence at a post-conviction proceeding. Such a proceeding would (1) be held in a literal court of last resort, (2) be an "error-correction" proceeding, and (3) turn on a revisitation of the facts underlying his conviction. In other words, a post-conviction proceeding would have been a much closer analog to the appellate proceeding in *Halbert* than a non-judicial clemency proceeding.

But, for whatever reason, Judge Gleeson converted McKithen's claim and granted him relief. This created two problems for McKithen during the State's appeal to the Second Circuit. First, McKithen did not cross-appeal the district court's conversion of his "right to access the courts" claim, which the Second Circuit deemed a constructive denial of that claim.[380] Therefore, the Second Circuit did not address that claim on appeal.[381]

Second, the right recognized by Judge Gleeson—the "right of meaningful access to clemency mechanisms"—is a nonexistent right.[382] In *Osborne*, part of the defendant's substantive due process claim was that he had a liberty interest in "the Governor's constitutional authority to 'grant pardons, commutations, and

376. *Id.* at 479.
377. *Id.* at 470–72.
378. *Id.* at 471.
379. *Id.* at 471.
380. *See McKithen II*, 626 F.3d 143, 155 (2nd Cir. 2010) ("McKithen's substantive due process, access to the courts, and confrontation clause claims were denied by the District Court and McKithen has not appealed them.").
381. *Id.*
382. *Id.*

reprieves.'"[383] The Supreme Court held that this "claim can be readily disposed of" because "noncapital defendants do not have a liberty interest in traditional state executive clemency, to which no particular claimant is entitled as a matter of state law."[384] Therefore, the defendant in *Osborne* could not "challenge the constitutionality of any procedures available to vindicate an interest in state clemency."[385]

This reasoning from *Osborne* made it easy for the Second Circuit in *McKithen* to reverse Judge Gleeson's ruling. The court quickly concluded that "the District Court's holding that a prisoner has a liberty interest in meaningful access to state clemency mechanisms does not survive *Osborne*."[386] As a result, neither court ended up addressing the question of whether there was a violation of McKithen's right to access the courts.

The second federal circuit court to touch upon the right to access the courts in the post-conviction DNA context was the Eleventh Circuit in *Cunningham v. District Attorney's Office for Escambia County*.[387] In *Cunningham*, Dewayne Cunningham was convicted of first-degree rape in Alabama after a jury trial and later sought "DNA and mitochondrial DNA testing on the condom wrapper found in the park and on pubic hairs and fingernail scrapings that were recovered from Brown during the sexual assault examination."[388] Cunningham, however, went directly to federal court because he thought that proceeding in state court would be futile.[389] As noted, Alabama's post-conviction DNA testing statute arguably only applies in capital cases,[390] and Cunningham received, and was only eligible for, a life sentence.[391] Part of Cunningham's claim was that Alabama's statute denied him his right to access the courts.[392]

The Eleventh Circuit effectively bypassed this claim. It acknowledged that Alabama's post-conviction DNA testing statute—Section 15-18-200 of the Alabama Code—only allows for DNA testing in capital cases.[393] But it then noted that another section of the Alabama Code allows any defendant "to 'institute a proceeding' to secure relief 'on the ground that . . . [n]ewly discovered material facts exist' which require that the conviction be vacated."[394] Based upon finding that this section could potentially provide an unexplored avenue for relief for Cunningham,

383. *Osborne IV*, 557 U.S. 52, 67 (2009).
384. *Id.* at 67–68.
385. *Id.* at 68.
386. *McKithen II*, 626 F.3d 143, 152 (2d Cir. 2010).
387. Cunningham v. Dist. Attorney's Off. for Escambia Cty., 592 F.3d 1237 (11th Cir. 2010).
388. *Id.* at 1253.
389. *See id.* at 1272.
390. *See supra* note 39 and accompanying text.
391. *Cunningham*, 592 F.3d at 1271–72.
392. *Id.*
393. *Id.* at 1266.
394. *Id.* at 1267.

the court held that it did not need to address whether Section 15-18-200 violated his right to access the courts.[395]

Thus, while the right to access the courts was part of *Osborne* and two post-*Osborne* cases, none of those courts ended up answering the question of whether it applies to defendants seeking post-conviction DNA testing. That said, it is likely that none of those cases were good candidates for application of the right to access the courts because the defendants in all three cases likely would have failed under the Equal Protection thread: (1) Osborne was distinguishable from defendants who exercised due diligence under Alaska's DNA statute; (2) McKithen was distinguishable from defendants who established the reasonable probability that the results of DNA testing would have resulted in a more favorable verdict; and (3) Cunningham was arguably distinguishable from defendants who were convicted of more serious crimes with more serious penalties.[396]

Conversely, in a state like Pennsylvania, assume that two defendants are convicted of third-degree murder, given the same sentence, and diligently present post-conviction claims for DNA testing based on crime scene evidence that clearly could establish their innocence. If one of these defendants pleaded guilty, they could not seek testing; if the other one was found guilty after a trial, he could seek testing.[397] Pursuant to *Halbert*, these two individuals are similarly situated, and preventing the pleading defendant from seeking relief violates the right to access the courts.

C. Feasibility and Mechanics of a Right to Prove Innocence After Pleading Guilty

1. Introduction

Judges in New York and Maryland have questioned whether it is feasible to have pleading defendants bring freestanding claims of actual innocence based on DNA and/or non-DNA evidence. As noted, in the *Tiger* case, the Court of Appeals of New York found that allowing pleading defendants to collaterally attack their convictions with evidence of actual innocence would contradict the finality that results from the plea process that is "integral to the criminal justice system."[398] Moreover, in the aforementioned *Jamison* case, the Court of Appeals of Maryland rejected the defendant's claim that the *Strickland v. Washington* test for determining whether new trials should be granted based on ineffective assistance of counsel could be applied in cases of pleading defendants seeking to prove their actual

395. *Id.* at 1268–69.

396. *Cf.* State v. Denney, 101 P.3d 1257, 1266 (Kan. 2004) (finding that rape and aggravated criminal sodomy were not crimes of differing severity for Equal Protection purposes).

397. For example, William M. Kelly, Jr., a mentally ill man, pleaded guilty to third-degree murder in 1990 and was later able to obtain DNA testing that proved his innocence in 1993. *See* Innocence Project, *William M. Kelly, Jr.*, NAT'L REGISTRY EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid= [https://perma.cc/2E6K-2824] (last visited July 30, 2018).

398. People v. Tiger, 110 N.E.3d 509, 515 (N.Y. 2018).

innocence.[399] It turns out, however, that these cases actually support the feasibility and desirability of a right to prove innocence after pleading guilty.

a. Statutes and Case Law

First, as noted, (1) the Maryland legislature passed a bill on April 18, 2018, allowing pleading defendants to bring freestanding actual innocence claims based on DNA and non-DNA evidence;[400] and (2) New York recently amended its post-conviction statute to allow pleading defendants to seek post-conviction DNA testing.[401] These laws indicate that the legislatures in both states thought that it was feasible for courts to adjudicate actual innocence petitions by pleading defendants. The New York legislature's decision was later validated in 2014 when Josue Ortiz, who suffers from schizophrenia and bipolar disorder, sought DNA testing after pleading guilty to manslaughter in connection with the deaths of two brothers in 2004.[402] That testing linked three other men to the killings; those men eventually pleaded guilty to the killings, and Ortiz's convictions were vacated.[403]

Ortiz was not the only pleading defendant exonerated in 2014. Forty-seven exonerees in 2014 were individuals who had been convicted after guilty pleas, a record number[404] that would soon be surpassed in 2015 and again in 2016.[405] These exonerations in and of themselves are evidence of the feasibility of a right to prove innocence after pleading guilty.

b. Mechanics of a Right to Prove Innocence After Pleading Guilty

Second, Supreme Court precedent in both the ineffective assistance and *Brady v. Maryland* contexts as well as post-conviction statutes in states like Texas establish the mechanics of a right to prove innocence after pleading guilty. In *Strickland v. Washington*, the Supreme Court held that a defendant proves a case of ineffective assistance of counsel by establishing (1) deficient performance*, i.e.*, that defense counsel's "representation fell below an objective standard of reasonableness;" and (2) prejudice*, i.e.,* "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[406]

399. Jamison v. State, 148 A.3d 1267, 1283–84 (Md. 2016).

400. *See* Mann, *supra* note 141 and accompanying text.

401. *See* Brim v. State, 969 So.2d 552, 552 (Fla. Dist. Ct. App. 2007); *supra* note 111 and accompanying text.

402. *See* Maurice Possley, *Josue Ortiz*, NAT'L REGISTRY EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4633 [https://perma.cc/T9BB-RXSN] (last updated Apr. 19, 2017).

403. *Id.*

404. NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2014, at 3 (2015), http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2014_report.pdf [https://perma.cc/7U6Z-A59M].

405. *See infra* notes 465–66 and accompanying text.

406. Strickland v. Washington, 466 U.S. 668, 688–94 (1984).

In *Jamison*, the Court of Appeals of Maryland concluded that this test cannot apply to pleading defendants in the actual innocence context because the defendant's plea deprives the prosecution of a trial and leaves the post-conviction court with nothing against which to weigh the defendant's DNA or non-DNA evidence of actual innocence.[407] The court failed to acknowledge, however, that the Supreme Court has applied the ineffective assistance of counsel test and its prejudice prong to pleading defendants for decades.

In its 1985 opinion in *Hill v. Lockhart*, the Court held "that the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel."[408] Adopting an approach already taken by several federal circuit courts, the Supreme Court concluded that a pleading defendant satisfies *Strickland*'s prejudice prong by showing "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."[409]

The Court then noted that "[i]n many guilty plea cases, the 'prejudice' inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial."[410] To illustrate this inquiry, the Court gave an example:

> [W]here the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error "prejudiced" the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial.[411]

This inquiry is easily adaptable to the actual innocence context. Recall the hypothetical in which an African American man pleads guilty to sexually assaulting and murdering a brunette woman only to find out later that blond hairs with follicles were discovered on the victim's underpants. If DNA testing revealed that the hairs likely came from a serial killer in the area who was unknown to the defendant, it is probable that, if this testing had been done earlier, (1) the defendant would neither have pleaded guilty nor been told to plead guilty; and (2) the jury would not have convicted him. Conversely, if DNA testing revealed that the hairs likely came from the defendant's best friend and alleged accomplice in the crime, it is likely that (1) the defendant would have pleaded guilty and been told to plead guilty; and (2) the jury would have convicted him if he instead proceeded to trial.

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407. Jamison v. State, 148 A.3d 1267, 1281–82 (Md. 2016). *But see id.* at 1285 (McDonald, J., dissenting) ("A court that is capable of assessing the effect of evidence on the outcome of a hypothetical trial for one purpose can surely do it for the other.").

408. Hill v. Lockhart, 474 U.S. 52, 58 (1985).

409. *Id.* at 59.

410. *Id.*

411. *Id.*

The argument that the *Strickland* inquiry is easily adaptable to the actual innocence context is not merely theoretical; it is the inquiry already being used by states like Texas that allow pleading defendants to present freestanding claims of actual innocence. For instance, in *Lampkin v. State*, the defendant was able to seek post-conviction DNA testing of the victim's underwear despite pleading guilty to sexually assaulting her; that testing excluded the defendant as the source of DNA recovered from the panties.[412] The defendant then argued that if the DNA test results had been available earlier, "he would not have pleaded guilty and would not have been convicted by a jury."[413] The Court of Appeals of Texas, however, denied the defendant a new trial because (1) the victim said she recognized his voice from prior interactions with him; (2) the victim had intercourse with her boyfriend six to eight hours before the assault; and (3) the victim said her assailant did not have an erection and might not have "had a climax."[414] Based on this evidence, the court rejected the defendant's claim that "he would not have pleaded guilty and would not have been convicted by a jury" if the DNA testing had been done before his guilty plea.[415]

This is not to say that the *Jamison* court's concern about the difficulty of assessing prejudice in the absence of a trial is unfounded. But the *Strickland* test provides a clear roadmap regarding how to determine prejudice for pleading defendants in the actual innocence context. On June 5, 2018, the Court of Appeals of North Carolina held in dicta that pleading defendants should be able to seek post-conviction DNA testing.[416] In doing so, the court "acknowledge[d] the inherent difficulty in establishing the materiality required by [North Carolina's post-conviction statute] for a defendant who pleaded guilty."[417] But the court ultimately found that the test should be the same as the *Strickland* test: the defendant must establish that he "would not have pleaded guilty *and otherwise would not have been found guilty*."[418] According to the court, in such cases, "[t]he trial court is obligated to consider the facts surrounding a defendant's decision to plead guilty in addition to other evidence, in the context of the entire record of the case, in order to determine whether the evidence is 'material.'"[419]

This is the same approach taken by courts considering *Brady* claims by pleading defendants. As noted, in *Brady v. Maryland*, the Supreme Court held that prosecutors have an obligation under the Due Process Clause to turn over material exculpatory evidence*,* i.e., evidence that creates the reasonable probability of a

412. Lampkin v. State, No. 11-14-00038-CR, 2015 WL 4734028, at *1 (Tex. App. Aug. 6, 2015).
413. *Id.* at *2.
414. *Id.* at *1.
415. *Id.* at *2.
416. *See* State v. Randall, 817 S.E.2d 219, 221 (N.C. App. 2018) ("[W]e do not believe that the statute was intended to completely forestall the filing of a such a motion where a defendant did, in fact, enter a plea of guilty.").
417. *Id.*
418. *Id.*
419. *Id.*

different outcome.[420] In *United States v. Ruiz*, the Supreme Court upheld a defendant's waiver of her right to material impeachment evidence largely because the prosecution agreed to disclose "any information establishing the factual innocence of the defendant."[421] Since *Ruiz*, a number of courts have (1) found that pleading defendants have a *Brady* right to evidence of actual innocence; and (2) determined whether that right was violated by doing a quasi-*Strickland* analysis.[422]

In *Buffey v. Ballard*, Joseph Buffey pleaded guilty to two counts of sexual assault and one count of robbery in West Virginia pursuant to a plea agreement.[423] Before Buffey entered his plea, the State failed to disclose that a lieutenant had reached the following conclusion regarding DNA testing: "[A]ssuming there are only two contributors (including [the victim]), Joseph Buffey is excluded as the donor of the seminal fluid identified [from the rape kit] cuttings."[424]

The Supreme Court of Appeals of West Virginia found that the State's failure to disclose this evidence was a *Brady* violation by concluding that, if this evidence had been disclosed, (1) Buffey would neither have pleaded guilty nor been told to plead guilty; and (2) the jury would not have convicted him.[425] With regard to the first part of the analysis, the court credited post-conviction testimony by Buffey and his attorney that Buffey would have proceeded to trial if he knew about the DNA evidence.[426] And, with regard to the second part of the analysis, the court concluded that "[i]f this case had proceeded to trial, the DNA evidence could have been used by the Petitioner to cast a reasonable doubt upon his guilt on the sexual assault charges."[427]

Buffey reveals how courts can assess post-conviction claims of actual innocence by pleading defendants. Assume the same facts as in *Buffey*, except for the fact that the rape kit was lost at the time of Buffey's plea and not discovered for another decade. If testing of that kit excluded Buffey as the source of the DNA, the court could have conducted the same analysis and concluded that, if this testing had been done before Buffey's plea, (1) Buffey would have neither pleaded guilty nor been told to plead guilty; and (2) the jury would not have convicted him.

This was the result that occurred in the case of Larry Bostic, a Florida man who pleaded guilty to a rape in 1989. While Florida initially did not allow pleading defendants to seek post-conviction DNA testing, it changed the law in 2006. Testing in 2007 excluded Bostic as the source of DNA evidence from the victim's underwear and rape kit, leading to his release.[428]

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420. Brady v. Maryland, 373 U.S. 83, 87 (1963).
421. United States v. Ruiz, 536 U.S. 622, 631 (2002).
422. *See, e.g.*, Garcia v. Hudak, 156 F. Supp. 3d 907, 915–16 (N.D. Ill. 2016).
423. Buffey v. Ballard, 782 S.E.2d 204, 206 (W. Va. 2015).
424. *Id.* at 208.
425. *Id.* at 220–21.
426. *Id.*
427. *Id.*
428. *See* Maurice Possley, *Larry Bostic*, NAT'L REGISTRY EXONERATIONS, http://

c. Missouri v. Frye and Expanding Constitutional Challenges to Guilty Pleas

There is a third and final reason that the cases from Maryland and New York support the feasibility and desirability of a right to prove innocence after pleading guilty. As noted, (1) the Court of Appeals of Maryland questioned the feasibility of adapting the *Strickland* test to actual innocence claims by pleading defendants because of the lack of a trial record; and (2) the Court of Appeals of New York found that allowing pleading defendants to bring actual innocence claims would undermine the plea process that is so critical to the criminal justice system.

Both of these claims, however, are belied by the Supreme Court's opinion in *Missouri v. Frye*.[429] In *Frye*, the prosecution made two unanswered plea offers to Galin Frye, who ended up pleading guilty, without a plea agreement, to driving with a revoked license.[430] Frye later appealed, claiming that he received ineffective assistance of counsel because his attorney did not inform him of the plea offers.[431]

The State responded that Frye's case was distinguishable from *Hill v. Lockhart*, which addressed the question of "whether there was ineffective assistance leading to acceptance of a plea offer, a process involving a formal court appearance with the defendant and all counsel present."[432] In such cases, both the State and the trial court have a "substantial opportunity" to prevent subsequent claims of ineffective assistance "by establishing at the plea entry proceeding that the defendant has been given proper advice or, if the advice received appears to have been inadequate, to remedy that deficiency before the plea is accepted and the conviction entered."[433]

Conversely, "[w]hen a plea offer has lapsed or been rejected, . . . no formal court proceedings are involved," and "discussions between client and defense counsel are privileged."[434] As a result, "the prosecution has little or no notice if something may be amiss and perhaps no capacity to intervene in any event."[435] Accordingly, the State argued that "it is unfair to subject it to the consequences of defense counsel's inadequacies, especially when the opportunities for a full and fair trial, or, as here, for a later guilty plea albeit on less favorable terms, are preserved."[436]

While the Supreme Court acknowledged that the State's arguments had some "persuasive force" but found that they did "not suffice to overcome a simple reality": that "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas."[437] The Court thus found that it

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www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3036 [https://perma.cc/VP7J-SBG4] (last updated Aug. 23, 2014).

429. Missouri v. Frye, 566 U.S. 134 (2012).
430. *Id.* at 138–39.
431. *Id.* at 139.
432. *Id.* at 142.
433. *Id.*
434. *Id.* at 143.
435. *Id.*
436. *Id.*
437. *Id.*

had to extend the right to the effective assistance of counsel to rejected plea agreements because "plea bargains have become so central to the administration of the criminal justice system."[438]

Having extended the right, the Court concluded that something like the prejudice test from *Hill v. Lockhart* applied to a rejected plea bargain, with the key questions being (1) whether the defendant would have accepted the plea bargain if properly advised by his attorney; and (2) whether an intervening event would have prevented the plea agreement from taking effect.[439] And, with regard to the second question, the Court found that the absence of a plea proceeding was not a significant roadblock for determining prejudice. According to the Court, "in most instances it should not be difficult to make an objective assessment as to whether or not a particular fact or intervening circumstance would suffice, in the normal course, to cause prosecutorial withdrawal or judicial nonapproval of a plea bargain."[440]

The *Frye* opinion resolves the concerns of the New York and Maryland courts. In *Tiger*, the Court of Appeals of New York used the fact that the plea process has become integral to the American criminal justice system to inoculate guilty pleas from post-conviction claims of actual innocence based on non-DNA evidence.[441] But *Frye* stands for the opposite proposition that the importance of the plea process means that pleading defendants should more readily be allowed to challenge the propriety of their pleas.

Meanwhile, the Court of Appeals of Maryland in *Jamison* concluded that the lack of a trial record made the *Strickland* standard impossible to apply in cases of pleading defendants.[442] In *Frye*, the Court acknowledged the potential difficulty in determining prejudice with regard to a plea offer that was not the subject of a plea proceeding.[443] But the *Frye* Court ultimately concluded that this concern was not enough to overcome the simple fact that pleas have come to dominate the American criminal justice system, meaning that constitutional protections must be adapted to cover pleading defendants.[444] Similar reasoning compels the conclusion that defendants should have the right to prove innocence after pleading guilty based upon the right to access the courts.

438. *Id.*
439. *Id.* at 148.
440. *Id.*
441. People v. Tiger, 110 N.E.3d 509, 516–17 (N.Y. 2018).
442. Jamison v. State, 148 A.3d 1267, 1281–83 (Md. 2016).
443. *Frye*, 566 U.S. at 143.
444. *Id.* at 143–44.

D. Reasoned Distinctions

1. Possible Reasoned Distinctions in the Actual Innocence Context

As the Supreme Court initially noted in *Ross v. Moffitt*, the right to access the courts obligates the states to create appellate systems that are free from "unreasoned distinctions."[445] That said, as the Court later noted in *Halbert*, states can include reasoned distinctions such as Michigan's constitutional amendment that made appeals by pleading defendants discretionary despite the fact that appeals by non-pleading defendants were mandatory.[446] The State cannot, however, create a system that, for some defendants, entirely cuts off the ability to appeal or makes an appeal a "meaningless ritual."[447] If states were to recognize a right to prove innocence after pleading guilty, the question becomes whether they could or should recognize reasoned distinctions between pleading and non-pleading defendants under their actual innocence statutes.

It is easy to imagine a few reasoned distinctions that states could proffer in the actual innocence context that would not wholly cut off the right to appeal for pleading defendants. First, states could change the burden of proof for pleading defendants. As one example, states that require defendants to establish a reasonable probability that DNA testing will prove their innocence could require pleading defendants to make such a showing by clear and convincing evidence.[448] Second, states could adopt a version of Texas's post-conviction law, which (1) requires a defendant to prove that identity was in issue to seek DNA testing, but (2) prohibits a court from relying *solely* on a guilty plea to conclude that identity was not in issue.[449] Under Texas's statute, a court can still use a defendant's plea as some evidence that identity was not in issue, and courts or legislatures in other states could find that guilty pleas create a rebuttable presumption that identity was not in issue. Third, states could adopt a version of Alaska's post-conviction law, which allows for post-conviction DNA testing if "the applicant did not admit or concede guilt under oath in an official proceeding for the offense . . . except that the court, in the interest of justice, may waive this requirement."[450]

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445. Ross v. Moffitt, 417 U.S. 600, 612 (1974).

446. Halbert v. Michigan, 545 U.S. 605, 612 (2005).

447. *Ross*, 417 U.S. at 612.

448. *See* ALASKA STAT. ANN. § 12.73.010 (West 2019); ARIZ. REV. STAT. ANN. § 13-4240 (2019); CAL. PENAL CODE § 1405 (West 2019); CONN. GEN. STAT. ANN. § 54-102kk (West 2019); D.C. CODE ANN. § 22-4133 (West 2019); FLA. STAT. ANN. §§ 925.11–.12 (West 2019); *see also supra* notes 43–44 and accompanying text.

449. *See* N.M. STAT. ANN. § 31-1A-2 (West 2019); *see also* notes 91–92 and accompanying text.

450. ALASKA STAT. § 12.73.020(3) (2010). "Confusingly, the statute also states DNA testing is available only if 'the applicant was convicted after a trial and the identity of the perpetrator was a disputed issue in the trial,' leaving open the question whether an individual who pled guilty may be granted relief under this section—because the guilty plea means there was no trial and no issue to dispute." Brooks & Simpson, *supra* note 16, at 861 n.408.

2. The Justifications for the Reasoned Distinctions in Halbert

This distinction in Alaska's post-conviction DNA law is most similar to the Michigan constitutional amendment making appeals by pleading defendants discretionary in *Halbert*. There are good reasons to believe, however, that the type of appeal in *Halbert* is meaningfully different from an actual innocence appeal in a way that militates against distinctions between pleading and non-pleading defendants in the latter context. While the *Halbert* majority was not explicit about why Michigan's constitutional amendment regarding mandatory versus discretionary appeals was a reasoned distinction between pleading and non-pleading defendants, Justice Thomas's dissent explained what Michigan was thinking. First, as Justice Thomas noted, "because a defendant who pleads guilty 'may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea,' . . . the potential issues that can be raised on appeal are more limited."[451] Justice Thomas was citing to a Supreme Court of Michigan opinion,[452] which in turn was citing the United States Supreme Court's opinion in *Tollett v. Henderson*.[453] In turn, the *Henderson* Court cited a trilogy of Supreme Court opinions for the holding that,

> a guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea . . . .[454]

This limitation on the types of constitutional challenges that can be brought by pleading defendants provides two explanations for why Michigan made appeals by pleading defendants discretionary. The first explanation is that the types of appeals by pleading defendants that Michigan made discretionary are frequently not about the actual innocence of the defendant. This fact is illustrated by two of the most important Supreme Court opinions in this area.

First, in *Boykin v. Alabama*, Edward Boykin, Jr. pleaded guilty to five counts of common law robbery, which was a capital offense at the time.[455] Later, Boykin successfully appealed, claiming that his plea was involuntary, not because he was innocent, but because he was unaware that entering a guilty plea was the equivalent of signing his death warrant.[456] As Boykin's lawyers wrote in his appellate brief, "Why would anyone plead guilty to a capital offense except as a matter of trial

451. *Halbert*, 545 U.S. at 629 (Thomas, J., dissenting).
452. People v. Bulger, 614 N.W.2d 103 (Mich. 2000).
453. Tollett v. Henderson, 411 U.S. 258 (1973).
454. *Id.* at 267.
455. Boykin v. Alabama, 395 U.S. 238, 239 (1969).
456. *Id.* at 243–44.

strategy (for example, pursuant to an agreement with the prosecutor not to seek the death penalty)?"[457]

Second, in *Henderson v. Morgan*, Timothy Morgan was a "retarded" seventh grader who was committed to a school for mental defectives before being released to work on a farm.[458] Morgan later had an argument with his boss, who threatened to return him to state custody.[459] Later that night, Morgan entered his boss's "bedroom with a knife, intending to collect his earned wages before leaving; she awoke, began to scream, and he stabbed her."[460] Morgan was charged with first-degree murder and pleaded guilty to second-degree murder pursuant to a plea agreement.[461] Subsequently, Morgan successfully appealed, claiming that his plea was involuntary because he did not realize that second-degree murder requires proof of intent.[462]

There are clear constitutional reasons why both of these defendants should have been allowed to appeal, which is why the *Halbert* Court held that Michigan could not deny defendants like Boykin and Morgan the right to appointed counsel. But Justice Thomas was also right to find that appeals by these types of defendants less important than appeals by defendants claiming they are actually innocent of any criminal conduct.

As Justice Thomas also noted in *Halbert*, the second explanation for Michigan making appeals by pleading defendants discretionary is because they are so rarely meritorious.[463] The aftermaths of both *Boykin* and *Morgan* illustrate why this was the case. In *Boykin*, the Court held that due process requires that the court record contain affirmative evidence that the defendant knowingly, voluntarily, and intelligently pleaded guilty.[464] In the wake of *Boykin*, the federal government and most states created mandatory rules covering a series of subjects that judges must discuss with the defendant on the record to ensure that pleas are made knowingly, voluntarily, and intelligently.[465] As a result, *Boykin*-esque appeals are rarely successful.[466]

Meanwhile, in *Morgan*, the Court noted that the record normally contains references to the judge or defense counsel explaining the nature of the criminal charge to the defendant.[467] Further, the Court held that it could be appropriate to

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457. Brief for Petitioner, Boykin v. Alabama, 395 U.S. 238 (1969) (No. 642), 1968 WL 94352, at *26–27.

458. Henderson v. Morgan, 426 U.S. 637, 641 (1976).

459. *Id.*

460. *Id.*

461. *Id.* at 642.

462. *Id.* at 646–47.

463. Halbert v. Michigan, 545 U.S. 605, 630 (2005) (Thomas, J., dissenting).

464. Boykin v. Alabama, 395 U.S. 238, 243–44 (1969).

465. *See* RALPH C. CHANDLER ET AL., CONSTITUTIONAL LAW DESKBOOK § 5:18, at 425 (2d ed. 1993).

466. *Id.*

467. Henderson v. Morgan, 426 U.S. at 647.

presume in most cases that defense counsel sufficiently explained the nature of the charge to the defendant.[468] But, because the district court explicitly found that neither the judge nor defense counsel had properly advised Morgan, the Court concluded that his plea was involuntary under the Due Process Clause.[469] In most cases, however, the presumption that the defendant was aware of the nature of the crime leads to the finding that his plea was voluntary.[470]

3. Reasoned Distinctions Do Not Make Sense in the Actual Innocence Context

Unlike the direct appeals by pleading defendants in *Halbert*, post-conviction actual innocence claims are: (1) by definition about actual innocence, and (2) frequently successful. The first part of this analysis is clear. When any defendant, including a pleading defendant, brings a petition for writ of actual innocence or a petition for post-conviction DNA testing, the defendant is claiming that he has or is seeking evidence that could prove his actual innocence.[471] Therefore, post-conviction actual innocence claims by pleading defendants and non-pleading defendants are not substantively different and are always about actual innocence.

The second part of this analysis is established by empirical evidence. Historical data establishes that "[r]oughly 42 percent of the post-conviction DNA tests requested by the Innocence Project confirmed guilt, 43 percent proved the defendant's innocence, and 15 percent were inconclusive."[472] Thus, while the direct appeals challenging guilty pleas in *Halbert* were rarely successful, DNA appeals have been successful more than forty percent of the time. There is not any comparable data for the rate of success for claims of actual innocence based on non-DNA evidence, but empirical data reveals that most exonerations are not based on DNA evidence. As of 2016, there were 1994 exonerations in the DNA era, with only 442 (22.17%) of those exonerations based in whole or in part on DNA evidence.[473] Therefore, 1552 exonerations (77.83%) have been based on non-DNA evidence.[474] In 2016, just 10% of exonerations were based on DNA evidence while 90% of exonerations were based on non-DNA evidence.[475]

Importantly, in recent years, there have been nearly as many DNA and non-DNA exonerations for defendants who pleaded guilty as defendants convicted

468. *Id.*
469. *Id.* at 646–47.
470. *See, e.g.*, Oppel v. Meachum, 851 F.2d 34, 38 (2d Cir. 1988).
471. *See generally* Brooks & Simpson, *supra* note 16.
472. Christie Thompson, *Out of Prison, Out of Luck*, MARSHALL PROJECT (May 27, 2015, 12:25 PM), https://www.themarshallproject.org/2015/05/27/out-of-prison-out-of-luck [https://perma.cc/MSV6-56W9]. The DNA testing in the 42% of cases in which guilt is confirmed also seems valuable because it forecloses future appeals by the defendant, which can conserve judicial resources and bring additional finality. *Cf. Osborne III*, 521 F.3d 1118, 1122 (9th Cir. 2008) (finding a right to post-conviction DNA testing because it could confirm guilt or innocence).
473. EXONERATIONS IN 2016, *supra* note 14, at 5.
474. *Id.*
475. *Id.*

after trials. In 2015, 65 out of 149 (43.6%) exonerees had been convicted after guilty pleas;[476] the following year, 74 out of 166 (44.6%) exonerees had previously pleaded guilty.[477] It is also likely that both of these numbers would have been higher were it not for the pleading defendant prohibitions that exist in several states. Overall, then, neither of the rationales for the "reasonable distinction" between pleading and non-pleading defendants in *Halbert* apply in the actual innocence context.

4. A Limitation and Possible New Dimension of a Right to Prove Innocence After Pleading Guilty

In *Griffin v. Illinois*, the Supreme Court held that states are under no federal constitutional obligation to provide a right to appellate review.[478] It is only after a state creates a right to appellate review that the right to access the courts is triggered.[479] Therefore, because every state has a post-conviction DNA testing statute,[480] defendants across the country can use a *Halbert*-esque analysis to claim a right to seek DNA testing after pleading guilty because they are similarly situated to non-pleading defendants who have such a right.

As noted, however, while some states allow defendants to bring freestanding claims of actual innocence based on non-DNA evidence, other states do not.[481] A pleading defendant like Missourian Rodney Lincoln thus could not use a *Halbert*-esque analysis to establish a right to prove his actual innocence through non-DNA evidence because non-pleading defendants lack such a right in Missouri.[482]

In states like Missouri, the question then becomes whether defendants with non-DNA evidence of actual innocence can rely on post-conviction DNA statutes to argue for a right to prove innocence after pleading guilty. As noted, to invoke the right to access the courts, a defendant must establish that he was denied an avenue of relief that was provided to similarly situated individuals.[483] So, are defendants with non-DNA evidence of actual innocence similarly situated to defendants who have (or are seeking) DNA evidence of actual innocence? It seems evident that in certain cases the answer to this question will be "no." In the aforementioned case of Ohioan Rachel Stull, her alleged polygraph evidence of actual innocence clearly

476. NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2015, at 2 (2016), http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2015.pdf [https://perma.cc/5PRP-3NZA].

477. EXONERATIONS IN 2016, *supra* note 14, at 2.

478. Griffin v. Illinois, 351 U.S. 12, 18 (1956).

479. *Id.*

480. *See supra* note 33 and accompanying text.

481. *See supra* notes 154–55 and accompanying text.

482. *See* Lincoln v. Cassady, 517 S.W.3d 11, 15 (Mo. Ct. App. 2016); *see also supra* notes 256–61.

483. *See* Ross v. Moffitt, 417 U.S 600, 604 (1974); *see also supra* text accompanying notes 309–17.

did not make her similarly situated to a convicted defendant with DNA evidence clearly indicating that an alternate suspect committed the crime.[484]

There are other cases, however, in which a defendant with non-DNA evidence would have a plausible claim that they are similarly situated to a defendant with DNA evidence. Imagine three cases in which an African American defendant is charged with robbing a bank, and (1) non-DNA forensic evidence, like a latent fingerprint lifted from the gun used in the crime, is a "match" for an alternate suspect with several robbery convictions; (2) surveillance footage from the robbery shows that the robber was Caucasian; or (3) an alternate suspect confesses to the crime and marked bills from the robbery are found in his house. In any of these cases, the defendant would seem to have a good argument that they are similarly situated to a convicted burglar with exculpatory DNA evidence recovered from a window that may or may not have been used by the burglar.[485]

It is beyond the scope of this article to argue whether the defendant in any of these three cases would have a viable claim under the right to access the courts. But it is important to note that while this right to access the courts might leave some defendants without a right to prove innocence after pleading guilty, it could also potentially provide an avenue for relief for both pleading and non-pleading defendants in states like Missouri.

CONCLUSION

In 2015 and 2016, a total of 139 out of 315 (44.1%) DNA and non-DNA exonerees had been convicted after guilty pleas.[486] Nonetheless, a number of states have pleading defendant prohibitions in their post-conviction statutes that preclude defendants who pleaded guilty from (1) seeking DNA testing, and/or (2) presenting freestanding claims of actual innocence based on non-DNA evidence. While existing constitutional challenges to these statutes have proved ineffective, the right to access the courts provides the foundation and framework for a right to prove innocence after pleading guilty. Based upon the Supreme Court's opinion in *Michigan v. Halbert*, there is a compelling claim that states cannot allow non-pleading defendants to prove their actual innocence while completely foreclosing this avenue of relief to pleading defendants. Instead, courts should recognize a right to prove innocence after pleading guilty so that defendants across the country have the same right to seek and present evidence of actual innocence.

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484. *See* State v. Stull, No. 27036, 2014 WL 1345303 (Ohio Ct. App. Mar. 31, 2014); *see also supra* text accompanying notes 290–91.

485. *See supra* notes 145–49 and accompanying text.

486. *See supra* notes 468–69 and accompanying text.