



2011

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## Recommended Citation

Phillips, Nicholas (2011) "Comment: Innocence and Incarceration: A Comprehensive Review of Maryland's Postconviction DNA Relief Statute and Suggestions for Improvement," *University of Baltimore Law Forum*: Vol. 42 : No. 1 , Article 4.  
Available at: <http://scholarworks.law.ubalt.edu/lf/vol42/iss1/4>

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## COMMENT

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### INNOCENCE AND INCARCERATION: A COMPREHENSIVE REVIEW OF MARYLAND'S POSTCONVICTION DNA RELIEF STATUTE AND SUGGESTIONS FOR IMPROVEMENT

By: Nicholas Phillips\*

#### I. INTRODUCTION

In 1989 Gary Dotson became the first person in the United States to be exonerated of his crime through the use of DNA technology.<sup>1</sup> After being convicted in 1979 of rape and aggravated kidnapping, Dotson was cleared after DNA testing conclusively proved that spermatozoa found on the alleged victim's underwear could not have come from Dotson, but may have come from the victim's boyfriend at the time.<sup>2</sup> In light of the uncovered evidence, the State's Attorney's Office declined to retry the case.<sup>3</sup> Since then, 272 other names have been cleared after testing of biological evidence either established their innocence or seriously undermined the validity of their conviction.<sup>4</sup> While criminal convictions carry a presumption of validity,<sup>5</sup> DNA technology conclusively identifies

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\* J.D. Candidate, 2012. I would like to thank the staff of the *University of Baltimore Law Forum* for all of their hard work. I would also like to thank my faculty advisor, Professor Byron L. Warnken, for his assistance and wisdom. Finally, a special thanks to my parents, Andrew and Teresa, and the rest of my family and friends for their support, encouragement, and confidence in me throughout law school.

<sup>1</sup> *Gary Dotson*, INNOCENCE PROJECT, [http://www.innocenceproject.org/Content/Gary\\_Dotson.php](http://www.innocenceproject.org/Content/Gary_Dotson.php) (last visited Oct. 19, 2011). While Dotson was released in August 1989, the conviction of David Vasquez for murder was reversed in January 1989. *David Vasquez*, MID-ATLANTIC INNOCENCE PROJECT, <http://www.exonerate.org/other-local-victories/david-vasquez/> (last visited Oct. 19, 2011). However, Vasquez was exonerated after the police and FBI tested evidence in similar crimes because DNA testing of evidence used to convict Vasquez proved inconclusive. *David Vasquez*, INNOCENCE PROJECT, [http://www.innocenceproject.org/Content/David\\_Vasquez.php](http://www.innocenceproject.org/Content/David_Vasquez.php) (last visited Oct. 19, 2011). The distinction between Vasquez and Dotson is that Vasquez was cleared after law enforcement officials conclusively linked to the already committed Timothy Spencer, also known as the South Side Strangler, crimes carried out in the exact same fashion as the crime thought to have been committed by Vasquez. *David Vasquez*, MID-ATLANTIC INNOCENCE PROJECT, <http://www.exonerate.org/other-local-victories/david-vasquez/>; <http://www.exonerate.org/other-local-victories/david-vasquez/> (last visited Oct. 19, 2011).

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

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

<sup>4</sup> *Innocence Project Case Profiles*, INNOCENCE PROJECT, <http://www.innocenceproject.org/know/> (last visited Oct. 19, 2011).

<sup>5</sup> *Loper v. Beto*, 405 U.S. 473, 499 (1972) (Rehnquist, J., dissenting) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 468-69 (1938)).

individuals and makes it possible, in certain circumstances, to exonerate an individual who was wrongfully convicted of a crime.<sup>6</sup>

In 1993 Kirk Bloodsworth became the first death row inmate to be exonerated by postconviction DNA testing.<sup>7</sup> Bloodsworth was convicted eight years earlier in Baltimore County, Maryland of killing and sexually assaulting a nine-year-old girl.<sup>8</sup> DNA evidence collected from the crime scene eventually proved that Bloodsworth did not commit the crime.<sup>9</sup> As a result, Bloodsworth's exoneration generated significant media attention and public interest about the death penalty and wrongful convictions, especially in Maryland.<sup>10</sup>

Because of its proven reliability, DNA evidence is now admissible in all trial courts in the United States.<sup>11</sup> Shortly after DNA testing proved reliable, states began enacting postconviction relief statutes specifically to aid inmates in proving their innocence through DNA analysis. In 1994 New York enacted the nation's first postconviction DNA testing statute.<sup>12</sup> By 2004 the federal government and thirty-two states, including Maryland, enacted statutes providing for postconviction DNA relief.<sup>13</sup> Today almost every jurisdiction in the United States allows criminals to challenge the factual validity of their convictions through DNA testing.<sup>14</sup>

In Maryland, there are numerous limitations on the accessibility and scope of postconviction DNA relief. While Maryland law provides relief under the Uniform Postconviction Procedure Act, and other similar

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<sup>6</sup> NAT'L COMM'N ON THE FUTURE OF DNA EVIDENCE, U.S. DEP'T OF JUSTICE, POSTCONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS 2 (1999), available at <https://www.ncjrs.gov/pdffiles1/nij/177626.pdf> [hereinafter FUTURE OF DNA EVIDENCE]. While DNA can help to free the falsely convicted, prosecutors can also use DNA to establish the guilt of the accused at trial. *Id.*

<sup>7</sup> *Kirk Bloodsworth*, INNOCENCE PROJECT, [http://www.innocenceproject.org/Content/Kirk\\_Bloodsworth.php](http://www.innocenceproject.org/Content/Kirk_Bloodsworth.php) (last visited Oct. 19, 2011).

<sup>8</sup> *Id.* On appeal, Bloodsworth's conviction was reversed and remanded and he was subsequently sentenced to two consecutive life sentences. *Id.*; see also *Bloodsworth v. State*, 307 Md. 164, 512 A.2d 1056 (1986), *remanded to* 76 Md. App. 23, 543 A.2d 382 (1988), *cert. denied*, 313 Md. 688, 548 A.2d 128 (1988).

<sup>9</sup> *Bloodsworth*, *supra* note 7. Genetic material found on the victim's undergarments, presumed to belong to the assailant, revealed spermatozoa that did not match Bloodsworth's DNA profile. *Id.*

<sup>10</sup> See Rob Hiassen, *The Second Life of Kirk Bloodsworth*, THE BALTIMORE SUN, June 30, 2000, <http://www.baltimoresun.com/news/maryland/bal-profile073000,0,2351215.story>.

<sup>11</sup> FUTURE OF DNA EVIDENCE, *supra* note 6, at 1. While there is a common misconception that DNA technology identifies a particular individual, DNA testing works to exclude individuals based on a comparison to the original source. *Id.* at 21.

<sup>12</sup> *Blake v. State (Blake I)*, 395 Md. 213, 219, 909 A.2d 1020, 1023 (2006) (citing N.Y. CRIM. PROC. LAW § 440.30(1-a) (McKinney 2006)).

<sup>13</sup> *Blake I*, 395 Md. at 218, 909 A.2d at 1023 n. 4.

<sup>14</sup> Nancy Ritter, *Postconviction DNA Testing Is at Core of Major NIJ Initiatives*, 262 NIJ J. 18, 19 (2009), <https://www.ncjrs.gov/pdffiles1/nij/225758.pdf>.

statutes,<sup>15</sup> weaknesses in section 8-201 tend to limit its usefulness to inmates who are actually innocent.<sup>16</sup> At the same time, such deficiencies could theoretically lead to the release of an inmate who is factually guilty of the crime for which he was convicted, but is nevertheless able to seek relief by this statute.<sup>17</sup> Part II of this paper will survey Maryland's Postconviction DNA Relief statute and discuss the decisions by the Maryland appellate courts relating to section 8-201. In Part III, similar statutes allowing postconviction relief through DNA testing will be evaluated to provide a broader context of the state of the law as it relates to DNA testing and its relevance to the postconviction process. Part IV will give a more detailed analysis of the Maryland statute, and will identify portions of the statutory scheme that may be improved.

## II. MARYLAND'S POSTCONVICTION DNA RELIEF STATUTE

### A. Filing the Petition

Pursuant to Maryland law, persons convicted of murder, manslaughter, rape, or a sexual offense<sup>18</sup> may file a petition for DNA testing of biological evidence<sup>19</sup> related to their conviction,<sup>20</sup> or for a law enforcement database search to identify the source of tested physical evidence.<sup>21</sup> The petition must indicate where the charging document was filed, the date and location of trial, the offenses for which the petitioner

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<sup>15</sup> MD. CODE ANN., CRIM. PROC. § 8-201(b) (West 2009). An inmate may file a petition for DNA testing “[n]otwithstanding any other law governing postconviction relief” which would include appeals filed under the Uniform Postconviction Procedure Act. *See generally* CRIM. PROC. §§ 7-101 to 109. Inmates may also seek to prove their innocence via a petition for writ of actual innocence based on newly discovered evidence. CRIM. PROC. § 8-301. Unlike a postconviction DNA relief petition, a petition for writ of actual innocence allows the introduction of new evidence unavailable at the time of the trial. *Id.* Additionally, section 8-301 allows the court to set aside a verdict, resentence, grant a new trial, or correct a sentence. *Id.*; *see also* CRIM. PROC. § 8-201 (limiting remedy to a new trial).

<sup>16</sup> *See* discussion *infra* Part IV.

<sup>17</sup> *See* discussion *infra* Part IV.B.

<sup>18</sup> CRIM. PROC., § 8-201(b) (specifically limiting offenses for which DNA testing is permitted); *see generally* MD. CODE ANN., CRIM. LAW §§ 2-201, 2-204, 2-207, 3-303-06 (West 2011).

<sup>19</sup> CRIM. PROC. § 8-201(a)(2) (“[b]iological evidence includes but is not strictly limited to, blood, hair, saliva, semen, epithelial cells, buccal cells, or other bodily substances from which genetic marker groupings may be obtained.”).

<sup>20</sup> CRIM. PROC. § 8-201(b)(1). The petition must be filed in the circuit court where the charging document was filed. MD. R. 4-703(b).

<sup>21</sup> CRIM. PROC. § 8-201(b)(2). For example, a court may order a DNA databank search when an apprehended criminal used a similar modus operandi as allegedly used by the petitioner. Upon an order being granted, a “cold hit” may appear in the system, thus linking the unknown crime scene DNA to a DNA profile of another individual already in a DNA database. *Id.*

was convicted, and the sentence imposed.<sup>22</sup> Further, it must also describe with particularity all previous proceedings, including appeals, motions, postconvictions, and other collateral proceedings.<sup>23</sup> Lastly, the petition must also contain a description of the evidence the petitioner wishes to have tested<sup>24</sup> and how such evidence is factually related to the petitioner's claim of innocence.<sup>25</sup> In sum, the petitioner needs to describe the factual basis for the claim that the State has custody of the evidence or that it could be acquired from a third party by court order, a description of how the evidence relates to the conviction, and that a reasonable probability exists that testing may provide exculpatory or mitigating evidence relevant to the wrongful conviction or sentencing.<sup>26</sup> The court may also grant a motion to withdraw the petition.<sup>27</sup> After the petitioner files the motion, the clerk of court must send copies to the State's Attorney, county administrative judge, and if the petitioner claims they are indigent, the Office of the Public Defender.<sup>28</sup>

Upon receipt of the petition, the State's Attorney must either file an answer to the petition or a motion to transfer due to improper venue.<sup>29</sup> The answer must first address whether the evidence sought by the petitioner exists and is appropriate for DNA testing.<sup>30</sup> If the State contends that the evidence cannot be located, it must indicate what efforts were made to locate the evidence, including locations that were searched, the search procedure, and the names and business addresses of

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<sup>22</sup> MD. R. 4-704(a)(1)(B). Petitions may be amended to the extent that they serve the interest of justice. MD. R. § 4-704(b).

<sup>23</sup> MD. R. 4-704(a)(1)(C). This includes the location and case number of each proceeding as well as the dates of decisions and determinations made during each proceeding. *Id.* A statement must also be made about whether the petitioner is able to pay the cost of testing and hire counsel. MD. R. 4-704(a)(1)(D). If indigent, the petitioner may request that the court appoint counsel. *Id.*

<sup>24</sup> MD. R. 4-704(a)(2)(A); *see also* *Simms v. State*, 409 Md. 722, 972 A.2d 1012 (2009) (petition sufficiently described items to be tested when it alleged that jacket, shoes, pants, belt and socks collected from crime scene may produce exculpatory evidence).

<sup>25</sup> MD. R. 4-704(a)(2)(B).

<sup>26</sup> *Id.* If known, the petitioner must also state the type of DNA testing desired and a statement of how such testing is generally accepted by the scientific community. MD. R. 4-704(a)(2)(C).

<sup>27</sup> MD. R. 4-704(c). The withdrawal shall be without prejudice if filed before DNA testing is ordered, and if an order has been issued, the withdrawal shall be with prejudice unless the court orders otherwise after finding good cause. *Id.*

<sup>28</sup> MD. R. 4-705. If the evidence is not suitable for DNA testing, the State must give the reasons why. MD. R. 4-706(c)(2)(A).

<sup>29</sup> MD. R. 4-706(a). A motion to transfer venue must be filed within 30 days of the receipt of the petition. MD. R. 4-706(b)(1). An answer must be filed within 60 days of receipt of the petition or within 60 days after the denial of a motion to transfer venue. MD. R. 4-706(c)(1).

<sup>30</sup> MD. R. 4-706(c)(2)(A).

individuals involved in search efforts.<sup>31</sup> If the State contends that the evidence has been destroyed, it is required to describe the legal requirements regarding the destruction of such evidence and whether the appropriate protocols were followed.<sup>32</sup> Additionally, the answer must either supply documentation, if it exists, stating that evidence relevant to the claim of innocence was properly destroyed, or state the reasons for noncompliance.<sup>33</sup> Finally, the answer must respond to every allegation contained in the petition.<sup>34</sup> After considering the State's answer, the court can deny the petition if it finds either that the petitioner has no standing to make the claim or the facts alleged do not entitle the petitioner to any relief.<sup>35</sup> A petitioner has the option of filing a response to challenge the sufficiency or accuracy of the answer or to amend the petition itself.<sup>36</sup>

Until 2009, a petitioner in Maryland filing a motion for postconviction DNA testing did not have a right to the assistance of counsel.<sup>37</sup> Looking to the United States Constitution, the Supreme Court has held that there is no right to counsel in collateral attacks on criminal convictions.<sup>38</sup> While the Maryland Constitution does not guarantee any right to counsel for collateral attacks,<sup>39</sup> the Court of Appeals of Maryland indicated that if a provision guaranteeing a right to counsel was enacted by the Maryland

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<sup>31</sup> MD. R. 4-706(c)(2)(B).

<sup>32</sup> MD. R. 4-706(c)(2)(C).

<sup>33</sup> *Id.*

<sup>34</sup> MD. R. 4-706(c)(2)(D).

<sup>35</sup> MD. R. 4-707(a). However, once a petitioner presents a prima facie case of entitlement to relief, the court may not summarily deny the petition without a hearing. *Simms v. State*, 409 Md. 722, 731, 976 A.2d 1012, 1018 (2009). In one case, sufficient facts were alleged when petitioner, after being convicted of murder, claimed bloody clothing at crime scene collected from crime scene, believed to be that of the assailant would not have any of his DNA on them. *Id.* at 733, 976 A.2d at 1019; *see also* *Gregg v. State*, 409 Md. 698, 719-20, 976 A.2d 999, 1011 (2009) (where the petitioner alleged prima facie case when, after being convicted of murder, that epithelial cells found on the gun's trigger would not contain his DNA).

<sup>36</sup> MD. R. 4-708. This provision also states that the petitioner may request, after filing a petition under section 8-201(b)(2) of the Maryland Criminal Procedure Article, a broader search of DNA databases if the purpose is to identify the source of physical evidence which was used for DNA testing. *Id.*

<sup>37</sup> *See* *Arey v. State*, 400 Md. 491, 508, 929 A.2d 501, 511 (2007); *Blake I*, 395 Md. at 234-37, 909 A.2d at 1032-34.

<sup>38</sup> *E.g.*, *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) (“[A defendant] has no such right [to counsel] when attacking, in postconviction proceedings, a conviction that has long since become final upon exhaustion of the appellate process.”).

<sup>39</sup> *See* *Blake I*, 395 Md. at 235, 909 A.2d at 1033. Article 21 of the Maryland Declaration of Rights, which operates as the functional equivalent to the right to counsel found in the 6th Amendment to the United States Constitution, is interpreted *in pari materia* with the 6th Amendment, and is not interpreted any broader for the purpose of providing counsel after a direct appeal. *E.g.*, *Lodowski v. State*, 307 Md. 233, 245-46, 513 A.2d 299, 306 (1986).

Legislature, it would be upheld.<sup>40</sup> As of 2009, a court must appoint counsel to the petitioner if the motion is not denied unless counsel for the petitioner has already entered his or her appearance.<sup>41</sup> As a result, first time petitioners for postconviction relief have a statutory right to counsel.<sup>42</sup>

### B. The Hearing Stage

The court must hold a hearing on the petition if it determines the petitioner has standing and finds any of the following factors: (1) that the evidence related to a judgment of conviction exists and there is, or may be; a reasonable probability that DNA testing may produce exculpatory evidence related to conviction or sentencing; (2) the State contends that the evidence cannot be located and a genuine dispute exists as to whether the search was adequate<sup>43</sup>; (3) the State contends that the evidence was destroyed and a genuine dispute exists as to whether the destruction conformed to protocol or was lawful; or (4) the State is unable to produce evidence it was required to preserve under section 8-201(i)(1).<sup>44</sup> When the State alleges that the evidence requested for testing no longer exists or cannot be found, a petitioner must be given an opportunity to respond to the State's assertion<sup>45</sup> for reasons of fundamental fairness.<sup>46</sup>

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<sup>40</sup> See *Blake I*, 395 Md. at 235, 909 A.2d at 1033 (“Any right to counsel appellant may have under the DNA testing statute must be found in [section] 8-201 [of the Maryland Criminal Procedure article].”).

<sup>41</sup> MD. R. 4-707(b). Counsel must be appointed within 30 days after the State files its answer. *Id.*

<sup>42</sup> CRIM. PROC. § 7-108(a). If a postconviction proceeding is reopened under section 7-104, whether the petitioner is provided with counsel is left to the discretion of the court. *Id.* Thus, the petitioner would be *guaranteed* a lawyer only if a postconviction proceeding is opened for the first time upon favorable DNA results.

<sup>43</sup> See *Blake v. State (Blake II)*, 418 Md. 445, 462, 15 A.3d 787, 797 (2011) (hiring outside company to perform search of police evidence unit and State's Attorney's Office sufficient to satisfy State's search burden); *Horton v. State*, 412 Md. 1, 15, 985 A.2d 540, 548 (2009) (search efforts insufficient when, after some investigation, the petitioner narrowly tailors particular areas where a search should be continued); *Arey*, 400 Md. at 503, 929 A.2d at 508 (search of evidence control unit insufficient to show that evidence doesn't exist); *Blake I*, 395 Md. at 227, 909 A.2d at 1028 (memorandum from evidence clerk stating that property did not exist insufficient to show nonexistence). The burden is on the State to establish that the evidence in question no longer exists. *Id.*

<sup>44</sup> MD. R. 4-709(a); see also *Gregg*, 409 Md. at 721, 976 A.2d at 1012 (once a prima facie showing of entitlement to relief is shown, the trial court lacks discretion to deny a hearing, appellant made prima facie case after alleging that epithelial cells found on trigger of firearm used in homicide would not match his DNA, showing that he did not fire it). The hearing must be held within 90 days after service of response to the State's answer or within 120 days after service of the State's answer if no response is filed. MD. R. 4-709(d). For discussion about evidence requiring preservation, see *infra* notes 66, 67 and accompanying text.

<sup>45</sup> *Arey*, 400 Md. at 505, 929 A.2d at 509; *Blake I*, 395 Md. at 222, 909 A.2d at 1025.

<sup>46</sup> *Blake I*, 395 Md. at 228, 909 A.2d at 1028.

Additionally, the Court mandates the guarantee of a hearing, as the guarantee exists for other dispositive motion hearings in criminal and civil cases.<sup>47</sup> Further, due process considerations tend to support the argument that a hearing is necessary and allowing a hearing is the practice of other jurisdictions.<sup>48</sup> During the hearing, the burden is on the state to prove that the evidence in question is missing or no longer exists.<sup>49</sup> In *Blake I*, an unsworn memorandum from the officer in charge of evidence control, stating that the evidence from the case could not be located, was insufficient to show that evidence in question does not exist.<sup>50</sup>

No hearing is required if the petitioner either lacks standing or if the facts alleged do not entitle the petitioner to relief as a matter of law.<sup>51</sup> A court may also elect to hold a hearing in its discretion even if one is not required.<sup>52</sup> Further, a court may also grant the petition and order DNA testing without a hearing if there is a written agreement between the petitioner and the State's Attorney.<sup>53</sup> The court must deny the petition, after conducting a hearing, if it finds that an adequate search was conducted, the evidence in question does not exist, and that the State did not willfully destroy evidence it was not required to preserve.<sup>54</sup> Alternatively, the petition must be denied if the method of testing requested by the petitioner is not generally accepted or if there is no reasonable probability that DNA testing would produce exculpatory or

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<sup>47</sup> *Id.* at 228-32, 909 A.2d at 1028-29. In civil cases, court cannot grant motion for judgment notwithstanding a verdict, motion for a new trial, motion to amend a judgment, or other dispositive motion without a hearing if a party so requests. MD. R. 2-311(e) and (f). A hearing is also required for petitions filed under the Uniform Postconviction Procedure Act. MD. R. 4-406.

<sup>48</sup> *Blake I*, 395 Md. at 228-32, 909 A.2d at 1028-31.

<sup>49</sup> *Id.* at 227, 232, 909 A.2d at 1028, 1031. No mention is made, however, of exactly what the State's burden is. *See id.* at 227, 909 A.2d at 1028. Because scientific evidence must be preserved under section 8-201(j) of the Maryland Criminal Procedure Article, there is a presumption that the evidence exists and is in the states control. *See Blake I*, 395 Md. at 223, 909 A.2d at 1026. Prosecutors should be hesitant to hastily conclude that evidence does not exist because evidence may be found in many different places like the prosecutors office, state and local crime laboratories, hospitals and clinics, defense investigators, courthouse evidence rooms, offices of defense counsel, independent crime laboratories, clerks of court, and court reporters. *Id.* at 221-23, 909 A.2d at 1024-25 (citing FUTURE OF DNA EVIDENCE, *supra* note 6, at 36, 46).

<sup>50</sup> *Blake I*, 395 Md. at 227, 909 A.2d at 1028.

<sup>51</sup> MD. R. 4-709(b)(1). If the court does not hold a hearing, the judge must issue a written order citing the reasons why a hearing is not required. MD. R. 4-709(e).

<sup>52</sup> MD. R. 4-709(c).

<sup>53</sup> MD. R. 4-709(b)(2). The court must approve the stipulation, and testing must still be conducted under the provisions of Maryland Rule 4-710(a)(2)(B). MD. R. 4-709(b)(2).

<sup>54</sup> MD. R. 4-710(a)(1)(A).



mitigating evidence relevant to a claim of wrongful conviction or sentencing.<sup>55</sup>

### C. Testing of Forensic Evidence

DNA testing must be ordered if the court finds that identification evidence related to a judgment of conviction exists and there is a reasonable probability<sup>56</sup> that the requested testing may produce exculpatory or mitigating evidence related to conviction or sentencing.<sup>57</sup> The order must contain a description of the evidence to be tested, the laboratory where testing will be performed<sup>58</sup>, and the method of testing to be utilized.<sup>59</sup> The location of testing is especially likely to be litigated, as the cost of testing varies considerably among crime labs.<sup>60</sup> The order must also address the payment for the cost of testing.<sup>61</sup>

The method of testing selected by the court must be generally accepted within the scientific community.<sup>62</sup> The two most prevalent types of DNA analyses used in the scientific setting, RFLP testing<sup>63</sup>

<sup>55</sup> MD. R. 4-710(a)(1)(B).

<sup>56</sup> *Thompson v. State*, 411 Md. 664, 683, 985 A.2d 32, 43 (2009). Reasonable probability is defined as “a probability sufficient to undermine confidence in the outcome [of a trial].” *Wilson v. State*, 363 Md. 333, 347, 768 A.2d 675, 682 (2001) (citing *U.S. v. Bagley*, 473 U.S. 667, 682 (1985)).

<sup>57</sup> CRIM. PROC. § 8-201(d)(1); MD. R. 4-710(a)(2)(A).

<sup>58</sup> CRIM. PROC. § 8-201(f); MD. R. 4-710(a)(2)(B)(i). If the parties cannot agree where the DNA testing will be done, the court may designate testing at any laboratory accredited by the American Society of Crime Laboratory Directors, the Laboratory Accreditation Board, or the National Forensic Science Technology Center. CRIM. PROC. § 8-201(f)(4); MD. R. 4-710(a)(2)(B)(i)(c).

<sup>59</sup> Compare CRIM. PROC. § 8-201(f), with MD. R. 4-710(a)(2)(B)(i)(a)-(c). There is an apparent discrepancy between the Maryland Criminal Procedure article and the Maryland Rules as to whether these provisions in the court’s order for testing are mandatory or discretionary. A court in all practicality should be required to order these provisions as they are the sort of nuances the State and the petitioner may quibble over.

<sup>60</sup> OFFICE OF STATE BUDGET AND MANAGEMENT, COST STUDY OF DNA TESTING AND ANALYSIS, 8 (2006), available at [http://www.osbm.state.nc.us/files/pdf\\_files/3-1-2006FinalDNAREport.pdf](http://www.osbm.state.nc.us/files/pdf_files/3-1-2006FinalDNAREport.pdf). At a public crime lab, the test can cost anywhere from \$350 to \$1,800. *Id.* at 8. The North Carolina study found that DNA analysis at private crime labs cost anywhere from \$445 to \$1,200, but that costs only includes laboratory work. *Id.* at 7. Costs for expert testimony can be up to \$2,000 per day plus travel expenses. *Id.*

<sup>61</sup> Compare CRIM. PROC. § 8-201(h) (stating that the petitioner must initially pay for the testing and if the results are favorable to the petitioner, the court must order the State to pay for the cost of testing), with MD. R. 4-710(a)(2)(B)(i)(e) (only requiring that the order for testing contain a provision concerning payment for testing and could be interpreted to mean that a judge may order the state to pay the initial cost of testing).

<sup>62</sup> CRIM. PROC. § 8-201(d)(2); Md. R. 4-710(a)(1)(b).

<sup>63</sup> Restriction Fragment Length Polymorphism Testing works by isolating DNA from biological samples and cutting them into smaller fragments using a restriction enzyme. FUTURE OF DNA EVIDENCE, *supra* note 6, at 26-27. The smaller fragments are then organized by length where discrete locations of the human genome are then visualized as bands on film. *Id.* at 27. This test was developed in 1994 and has been used in many exonerations but

and PCR testing<sup>64</sup>, have been accepted by the courts. The court, in its discretion, may order the preservation of a sample of material for further testing and analysis at a later date.<sup>65</sup> The Court of Appeals of Maryland has also held that a hearing court lacks the power to order exclusion of the same samples from further testing.<sup>66</sup> The court may also order the release of biological evidence held by a third party.<sup>67</sup> Finally, the court may make any other order it deems appropriate.<sup>68</sup>

#### *D. Review After Testing*

After testing is completed, if the result of the DNA test or database search is unfavorable to the petitioner, namely, “if the test results fail to produce exculpatory or mitigating evidence [regarding] wrongful conviction or sentencing,” the petition is dismissed.<sup>69</sup> However, if the test results are favorable to the petitioner<sup>70</sup>, the court may order the opening or reopening of a postconviction proceeding.<sup>71</sup> It is important to note that the Court of Appeals has held that a petitioner cannot lose the

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requires a minimum of 100,000 cells that are not degraded and thus many small samples will not be suitable for RFLP testing. *Id.* at 26-27.

<sup>64</sup> Nuclear Polymerase Chain Reaction Testing works by utilizing an enzyme to amplify, or copy, specific regions of a DNA sample from within a cell’s nucleus. *Id.* at 27. While this test has been used in criminal matters, it is not as discriminating as other forms of testing. See DNA Fingerprinting Methods, <http://www.fingerprinting.com/dna-fingerprinting-methods.php> (last visited Oct. 24, 2011). PCR testing can also be used to draw a DNA profile from a cell’s mitochondria. FUTURE OF DNA EVIDENCE, *supra* note 6, at 28. Mitochondrial testing is most often used when there is a very small sample to be analyzed, such as dried bones or teeth, or when the sample is too degraded for Nuclear PCR testing. *Id.*

<sup>65</sup> CRIM. PROC. § 8-201(f)(3); MD. R. 4-710(a)(2)(B)(ii)(b); *Thompson v. State* 395 Md. 240, 909 A.2d 1035 (2006). The court does need to first find that there is sufficient DNA material to preserve due to the possibility that there will only be enough genetic material for a single test. *Id.* at 250-51, 909 A.2d at 1042. Provisions guaranteeing that enough samples are preserved for possible future testing are important as the advancement of science may make testing possible in the future using a new testing technique or mechanism which was not available at the time the petition was filed.

<sup>66</sup> *Thompson*, 395 Md. at 259, 909 A.2d at 1047.

<sup>67</sup> CRIM. PROC. § 8-201(f)(5); MD. R. 4-710(a)(2)(B)(ii)(a). Scientific evidence may not always be in the custody of the state. It is certainly possible that evidence may be located, for example, in a hospital or medical facility or even with the victim or victim’s family. Compelling the release of such potential evidence may be difficult without obtaining a court order. See *Horton v. State*, 412 Md. 1, 10, 985 A.2d 540, 545 (hospital refused, citing patient confidentiality, to release slide of pap smear taken from rape victim).

<sup>68</sup> CRIM. PROC. § 8-201(f); MD. R. 4-710(a)(2)(B)(ii)(c); *Horton*, 412 Md. at 4, 985 A.2d at 542.

<sup>69</sup> MD. R. 4-711(a); accord CRIM. PROC. § 8-201(i)(1).

<sup>70</sup> The standard of “favorable to petitioner” logically includes any test result in which the DNA subject to testing does not conclusively match the DNA profile of the petitioner.

<sup>71</sup> CRIM. PROC. § 8-201(i)(2)(i)-(ii); MD. R. 4-711(b)(1)(A)-(C). The petitioner being granted a postconviction hearing would most likely then challenge that the conviction is subject to collateral attack on grounds traditionally available under a writ of habeas corpus. CRIM. PROC. §§ 7-102(a)(4), 7-102(b).

right to argue DNA testing by failing to raise it as an issue in another postconviction proceeding.<sup>72</sup> In the event that the results of the DNA testing show a substantial possibility that the petitioner would not have been convicted if the DNA results were revealed to the trier of fact, the court may order a new trial in lieu of a postconviction proceeding.<sup>73</sup> The hearing court may also order a new trial when a substantial possibility of innocence based on the testing does not result, but, instead, a new trial is warranted in the interests of justice.<sup>74</sup> If the court elects to grant the petitioner a new trial, the court in its discretion may order release of the petitioner from incarceration prior to trial.<sup>75</sup> The release may be conditioned on bond or other conditions that reasonably assure the appearance of the petitioner at trial.<sup>76</sup>

### *E. Preserving Scientific Evidence*

Apart from the provisions regarding the process for testing scientific evidence, Maryland's statute also requires the preservation of scientific evidence that the State has reason to know contains genetic material and is kept in connection with an offense for which a petitioner can seek relief under this statute.<sup>77</sup> Such evidence must be kept during the time for which an inmate is sentenced.<sup>78</sup> The length of sentence also includes consecutive sentences imposed for other offenses for which the defendant was found guilty.<sup>79</sup> If the State is unable to produce items for testing upon request, the court must hold a hearing to determine whether the destruction of the evidence was willful or intentional.<sup>80</sup> If the court determines that the failure to produce the evidence for testing was the

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<sup>72</sup> *Arrington v. State*, 411 Md. 524, 545, 983 A.2d 1071, 1082 (2009).

<sup>73</sup> CRIM. PROC. § 8-201(i)(2)(iii); MD. R. 4-711(b)(1)(D); *Arrington*, 411 Md. at 552, 555 983 A.2d at 1087, 1089 (petitioner awarded a new trial where state argued victim's blood was on petitioner's pants after a stabbing—a fact later proved to be false).

<sup>74</sup> CRIM. PROC. § 8-201(i)(3); MD. R. 4-711(b)(2).

<sup>75</sup> CRIM. PROC. § 8-201(i)(4); MD. R. 4-711(b)(3).

<sup>76</sup> CRIM. PROC. § 8-201(i)(4); MD. R. 4-711(b)(3).

<sup>77</sup> CRIM. PROC. § 8-201(j)(1); *Horton v. State*, 412 Md. 1, 5, 985 A.2d 540, 542 (2009). The offenses for which petitioner may seek relief are limited to murder, manslaughter, and various sex offenses. See *supra* notes 18, 19 and accompanying text. Many other states have similar provisions that require states to retain evidence that has scientific value. *E.g.*, ARIZ. REV. STAT. ANN. § 13-4221 (West Supp. 2008); FLA. STAT. ANN. § 925.11(4) (West Supp. 2009); MICH. COMP. LAWS ANN § 770.16(C)(12) (West 2006); OHIO REV. CODE ANN. § 2953.81(A) (West 2010); OKLA. STAT. ANN. tit. 22, § 1372 (West 2003). These sorts of provisions will not be discussed in depth here because this paper focuses on substance and procedures of postconviction DNA testing provisions. Statutes regarding the retention of biological evidence will be discussed to the extent they are relevant to this topic.

<sup>78</sup> MD. CODE ANN., CRIM. PROC. § 8-201(j)(2) (West 2010).

<sup>79</sup> *Id.*

<sup>80</sup> CRIM. PROC. § 8-201(j)(3)(i). The court is only required to hold a hearing as to the existence of such evidence when there is a genuine factual dispute as to whether or not the evidence still exists. *Arey v. State*, 400 Md. 491, 507, 929 A.2d 501, 510 (2007).

result of intentional and willful destruction, the court must order a postconviction hearing and the postconviction court must infer that the results of the test would have been favorable to petitioner.<sup>81</sup>

If the State wishes to dispose of evidence holding potential scientific value prior to the expiration of the time period it is required to be kept, they must notify the individual incarcerated, his or her attorney of record, and the Office of the Public Defender.<sup>82</sup> The notice must include a description of the evidence, the intentions of the State to dispose of the evidence, unless an objection is filed in writing, and the name and location of the circuit court where an objection may be filed.<sup>83</sup> The individual has 120 days from the date of service to file an objection to destruction of the evidence in the appropriate circuit court.<sup>84</sup> The State may subsequently dispose of the evidence if no objection is filed.<sup>85</sup> If an objection is timely filed, the court must hold a hearing on whether or not the evidence may be destroyed.<sup>86</sup> The court may order the destruction of the evidence if it determines, by a preponderance of the evidence, that the evidence lacks any significant forensic value<sup>87</sup> or that the evidence cannot be practically retained by a law enforcement agency due to a physical characteristic.<sup>88</sup> If destruction is requested due to a physical characteristic of the evidence, the court must order that the party opposing destruction be given an opportunity to obtain samples of the evidence prior to its destruction.<sup>89</sup> The samples of evidence must be collected by a qualified crime scene technician.<sup>90</sup> Further, an aggrieved party may appeal an order made pursuant to section 8-201 to the Court of Appeals of Maryland.<sup>91</sup>

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<sup>81</sup> CRIM. PROC. § 8-201(j)(3)(ii). When a postconviction hearing is granted in this instance, the petitioner would likely need to establish that the judgment violated either the Federal or Maryland Constitution or that the sentence is subject to collateral attack. *See* CRIM. PROC. § 7-102(a)(1), (a)(4).

<sup>82</sup> § 8-201(k)(1); *Horton*, 412 Md. at 5, 985 A.2d at 542.

<sup>83</sup> CRIM. PROC. § 8-201(k)(2).

<sup>84</sup> *Id.*

<sup>85</sup> CRIM. PROC. § 8-201(k)(3).

<sup>86</sup> CRIM. PROC. § 8-201(k)(4).

<sup>87</sup> CRIM. PROC. § 8-201(k)(4)(i).

<sup>88</sup> CRIM. PROC. § 8-201(k)(4)(ii). Characteristics of size and bulk are enumerated in the statute, but these would not presumably be the only properties of evidence that could fit this portion of the statute. The probability of evidence needed to be discarded under this portion of the statute is not likely to apply as DNA evidence will most likely be found on relatively small tangible items.

<sup>89</sup> *Id.*

<sup>90</sup> CRIM. PROC. § 8-201(k)(5).

<sup>91</sup> CRIM. PROC. § 8-201(k)(6).

### *F. Retroactive Application*

The Court of Appeals of Maryland has stated that amendments to section 8-201 are to be applied retroactively.<sup>92</sup> Maryland courts are not bound by language contained in previous versions of section 8-201 once new language becomes effective, despite the fact that the appeal may have been filed at the time when previous language was in effect.<sup>93</sup> Such retrospective application of a statute is an exception to the general rule that most new statutes are strictly applied prospectively and the Court of Appeals of Maryland listed several reasons for applying the Postconviction DNA Relief statute in such a way.<sup>94</sup> First, the statute is merely a procedural change rather than the alteration of a substantive right.<sup>95</sup> Second, the legislature intended the statute to have a remedial effect for persons who are wrongfully convicted.<sup>96</sup> New laws applying to procedural changes do not carry a presumption of operating prospectively, and the statute is designed to remedy past cases of injustice where a person was convicted of a crime they did not commit.<sup>97</sup>

Consider a situation where Jeffrey was convicted for the murder of Kimberly and wishes to utilize section 8-201 twenty-five years later in an attempt to prove his actual innocence. Without an allowance in cases like Jeffrey's, an entire class of convicts<sup>98</sup> would not be able to benefit from the new law, despite the fact that they are the group that has the most to gain.<sup>99</sup> Because these petitioners were convicted before the postconviction DNA statute became effective, and before DNA testing and other forensic technologies became widely used, such convictions, from the outset, are the ones that are the most suspect.

### III. POSTCONVICTION DNA RELIEF IN OTHER JURISDICTIONS

Forty-eight states, the District of Columbia, and the federal government have statutes allowing a petitioner to make a motion for DNA testing of biological evidence.<sup>100</sup> Both substantive and procedural

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<sup>92</sup> *Thompson v. State*, 411 Md. 664, 667, 985 A.2d 32, 33-34 (2009); *Gregg v. State*, 409 Md. 698, 714-15, 976 A.2d 999, 1008-09 (2009).

<sup>93</sup> *Gregg*, 409 Md. at 714-18, 967 A.2d at 1008-10.

<sup>94</sup> *Id.* at 714-15, 976 A.2d at 1008-09.

<sup>95</sup> *Id.* at 715, 976 A.2d at 1008.

<sup>96</sup> *Id.* at 715, 976 A.2d at 1008-09.

<sup>97</sup> *Id.*

<sup>98</sup> The class of convicts refers to those incarcerated prior to the enactment of the postconviction DNA testing statute.

<sup>99</sup> Consider this class of inmates referenced in the text to those who were convicted prior to the widespread use of DNA evidence in the courtroom.

<sup>100</sup> The only two states which do not have post-conviction DNA relief statutes are Massachusetts and Oklahoma. *Access to Post-Conviction DNA Testing*, INNOCENCE PROJECT,

rules for obtaining relief through postconviction DNA testing vary significantly by jurisdiction. State rules have increased in their importance to those seeking relief, as the Supreme Court has made it clear that it does not intend to create any constitutional right to postconviction DNA testing.<sup>101</sup> Therefore, the various procedural and substantive rules enumerated in postconviction DNA relief statutes have become imperative, as federal courts will not intervene by overruling decisions made by state courts of last resort.<sup>102</sup> It is the policy of the federal courts, except in the case of a “truly persuasive demonstration of actual innocence,” to not grant any form of federal habeas corpus relief and respect the state court judgment.<sup>103</sup>

### *A. Standard to Obtain Court Ordered DNA Testing*

There exist a number of slightly varying standards specifically outlining what a petitioner must allege the results of testing will show. These standards can generally be categorized into two groups. The first group requires that a test result favorable to the petitioner show a reasonable probability of a different trial verdict.<sup>104</sup> The second group requires that the petitioner allege that a favorable test result would be materially relevant to a claim of actual innocence or, worded alternatively, a prima facie showing of entitlement to relief.<sup>105</sup> Still others require that the petitioner allege DNA testing will prove their innocence beyond all doubt.<sup>106</sup>

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[http://www.innocenceproject.org/Content/Access\\_To\\_PostConviction\\_DNA\\_Testing.php](http://www.innocenceproject.org/Content/Access_To_PostConviction_DNA_Testing.php)  
(last visited Oct. 12, 2011).

<sup>101</sup> See *Dist. Attorney’s Office v. Osborne*, 129 S. Ct. 2308, 2322, 2316 (2009) (resting on the conclusion that there is no substantive due process right to obtain access to State’s evidence for testing). However, the Court made it clear that creating a due process right in the area of postconviction DNA testing would be unwise because it would essentially preclude state legislatures from creating their own rules in this developing area of criminal procedure. *Id.* at 2322.

<sup>102</sup> See *id.*

<sup>103</sup> *House v. Bell*, 547 U.S. 518, 554 (2006) (quoting *Herrera v. Collins*, 506 U.S. 390, 417 (1993) (internal quotations omitted)).

<sup>104</sup> *E.g.*, CONN. GEN. STAT. ANN. § 54-102kk(c)(1) (West 2009); IOWA CODE ANN. § 81.10(7)(e) (West 2009); N.C. GEN. STAT. § 15A-269(b) (2007). Maryland has also adopted this standard. See MD. CODE ANN., CRIM. PROC. § 8-201(c) (West 2009); see also *supra* note 26 and accompanying text.

<sup>105</sup> *E.g.*, 18 U.S.C.A. § 3600(a)(6)(B) (West Supp. 2010); see also ARK. CODE ANN. § 16-112-202(6)(B) (2006); COL. REV. STAT. ANN. § 18-1-413(a) (West 2004); DEL. CODE ANN. tit. 11, § 4504(a)(5) (West 2007); 725 ILL. COMP. STAT. ANN. 5/116-3(c)(1) (West 2008) (stating that there is no requirement to allege that testing would completely exonerate petitioner); MINN. STAT. ANN. § 590.01(1a)(c)(2) (West Supp. 2008).

<sup>106</sup> ARK. CODE ANN. § 16-112-202(8)(B) (2006); COL. REV. STAT. ANN. § 18-1-413(1)(a) (West 2004) (stating that a court shall not order relief DNA testing unless petitioner shows by a preponderance of the evidence that *favorable test results will demonstrate actual innocence*)(emphasis added).

*B. Standards of What DNA Testing Results Must Yield to For Petitioners to be Entitled to Relief*

Jurisdictions vary widely on what DNA test results must show so that a petitioner can be granted relief. At the very minimum, the results must show enough doubt as to the validity of a conviction to warrant further inquiry. Many jurisdictions require that, in light of the testing, it is “reasonably probable” that the petitioner would not have been convicted if such DNA test results were available at trial.<sup>107</sup> One rule mandates that when the results are favorable to the petitioner the court may take any action it deems to be appropriate under the circumstances, including sending the case to postconviction, granting a new trial, or even vacating the judgment of conviction and releasing the petitioner.<sup>108</sup> Another rule states that, in a hearing after testing is completed, a court may order any appropriate relief if the petitioner appears to be innocent in light of all of evidence available.<sup>109</sup> In some jurisdictions, the petitioner must show compelling evidence that a new trial would result in an acquittal.<sup>110</sup>

*C. Application of Statute to Different Crimes*

Jurisdictions vary considerably as to the crime or crimes a petitioner must have been convicted of in order to be eligible for postconviction DNA relief. At one end of the spectrum, two states allow for DNA testing only in death penalty cases.<sup>111</sup> On the other end, many jurisdictions allow a petitioner to request DNA testing after being convicted of any felony.<sup>112</sup> Generally, most jurisdictions place no

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<sup>107</sup> *E.g.*, TX. CODE CRIM. PROC. ANN. art. § 64.04 (West 2006).

<sup>108</sup> *E.g.*, IND. CODE ANN. § 35-38-7-1 (LexisNexis supp. 2008); *see also* KAN. STAT. ANN. § 21-2512(f)(2)(B) (2007); N.C. GEN. STAT. § 15A-270(c) (2007).

<sup>109</sup> DEL. CODE ANN. tit., 11 § 4504(b) (West 2007). Due to the difficulty of proving a negative, namely, that a petitioner did *not* commit the crime for which he was convicted, a clear and convincing showing of innocence is likely lowest possible standard of proof acceptable to serve justice to those wrongly convicted and serve the interest of the state in keeping those who are guilty in prison. However, the Delaware standard defeats its own purpose because it first requires that a petitioner demonstrate that no trier of fact could find them guilty, and then sends the case to be decided by a new trier of fact.

<sup>110</sup> 18 U.S.C.A. § 3600(g)(2) (West Supp. 2010); *People v. Starks*, 850 N.E.2d 206, 212 (Ill. App. 2006) (evidence must be so conclusive that it would probably change the result of the trial).

<sup>111</sup> The two states allowing for postconviction DNA testing only in death penalty cases are Kentucky and Nevada. KY. REV. STAT. ANN. § 422.285 (West Supp. 2008); NEV. REV. STAT. ANN. §§ 176.0918-.0919 (LexisNexis 2009).

<sup>112</sup> *E.g.*, CAL. PENAL CODE § 1405 (West Supp. 2009); *see also* FLA. STAT. ANN. § 925.11 (West Supp. 2009); GA. CODE ANN. § 5-5-41(c) (West 2011) (stating that relief is limited to serious violent felonies as defined in § 17-10-6.1); IOWA CODE ANN. § 81.10(1) (West 2009); OHIO REV. CODE ANN. § 2953.72(C)(1)(a) (West 2010); UTAH CODE ANN. § 78B-9-301 (West 2008).

significant limitation on the type of crime for which the petitioner must have been found guilty.<sup>113</sup>

#### *D. Right to Counsel*

A minority of jurisdictions provide a compulsory right to counsel.<sup>114</sup> In most jurisdictions the right to counsel provision is triggered upon some preliminary showing by the petitioner of entitlement to relief.<sup>115</sup> At this time, the Maryland Rules require an appointment of counsel to the petitioner if the petitioner is indigent and if the motion is not denied as a matter of law.<sup>116</sup> It appears that the appointment of counsel provision may have been written in reaction to the cases where a petitioner stood a chance of success, but genuinely required the assistance of counsel to further aid the petitioning and hearing process.<sup>117</sup>

#### *E. Testing Must Not Have Been Available To the Petitioner Prior to Conviction*

Many jurisdictions require that the ability to test DNA evidence be contingent upon the availability to test during the time prior to conviction, and the failure on the part of the petitioner to utilize such testing, without compelling justification, constitutes a waiver of the right to make a postconviction challenge for potentially exculpatory DNA testing.<sup>118</sup>

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<sup>113</sup> See, e.g., 18 U.S.C.A. § 3600(a) (West Supp. 2010) (crimes of imprisonment or death); ARK. CODE ANN. § 16-112-202 (2006); COL. REV. STAT. ANN. § 18-1-413 (West 2004); CONN. GEN. STAT. ANN. § 54-102kk(a) (West 2009) (addressing crimes of incarceration); DEL. CODE ANN. tit. 11, § 4504 (2007); 725 ILL. COMP. STAT. ANN. 5/116-3 (West 2008); MINN. STAT. ANN. § 590.01 (West Supp. 2008); N.C. GEN. STAT. § 15A-269 (West 2007); TEX. CODE CRIM. PROC. ANN. art. 64.01 (West 2006). While these jurisdictions may theoretically allow for testing after conviction for any crime, convictions for less serious crimes are far less likely to get to the point where postconviction DNA testing becomes an issue because: (1) DNA evidence simply will not be collected given the circumstances of the crime; (2) the existence or nonexistence of forensic evidence is not relevant to the investigation; and (3) the petitioner would be released from custody before any potential DNA testing would be completed making any petition for DNA testing a moot point, assuming the statute requires incarceration as a requirement to file a petition.

<sup>114</sup> See, e.g., IOWA CODE ANN. § 81.10(11) (West 2009) (stating that counsel be appointed upon filing the motion for relief when petitioner claims he or she is indigent).

<sup>115</sup> E.g., COL. REV. STAT. ANN. § 18-1-412(2)-(4) (West 2004) (stating that counsel be appointed by court upon a prima facie showing of entitlement to relief if defendant is indigent); see also CONN. GEN. STAT. ANN. § 54-102kk(e) (West 2009) (counsel appointed by court if indigent); N.C. GEN. STAT. § 15A-269 (West 2007) (stating that there be a counsel appointment by court upon a showing that DNA testing may be material to relief and indigence); TEX. CODE CRIM. PROC. ANN. art. 64.01(c) (West 2006) (stating that counsel be appointed upon finding of reasonable grounds for motion to be filed and indigence).

<sup>116</sup> See *supra* notes 37-42 and accompanying text.

<sup>117</sup> See *supra* notes 37-42 and accompanying text.

<sup>118</sup> E.g., 18 U.S.C.A. § 3600(a)(3)(A) (West Supp. 2010); see also COL. REV. STAT. ANN. § 18-1-413(1)(C)(II) (West 2004); DEL. CODE ANN. tit. 11, § 4504(a)(2) (West 2007); 725 ILL.



Other jurisdictions only require that the DNA itself, while possibly available for testing, was, for whatever reason, not tested.<sup>119</sup> Provisions such as these prevent the petitioner from strategically not having relevant biological evidence tested, and subsequently claiming they have the right to test such evidence in an attempt to develop facts that could have been available at trial. Additionally, statutes in several jurisdictions allow for further DNA testing to be performed *only* upon a showing that the availability of newer technology has a substantial likelihood of being more probative than the methods used in previous tests.<sup>120</sup> Allowing petitioners to file subsequent motions for DNA testing satisfies the purpose underlying Maryland Code section 8-201 by not restricting a petitioner to a single petition in the hope that science has advanced far enough to potentially provide relief. Supplementary testing might be done if a new method of DNA testing is accepted by the courts, or if the petitioner can demonstrate that, for whatever reason, the results of prior tests can be shown to have been unreliable.

#### *F. Identity Issue Must Have Been Raised In Prior Proceedings*

Several jurisdictions require that the identity of the perpetrator be disputed at some point in the prior proceedings.<sup>121</sup> While the rule may initially appear idiosyncratic, its purpose is to keep petitioners from generating new factual issues as a bridge to possible avenues of relief that were not previously argued. Such a requirement prevents a situation where a petitioner argued an affirmative defense such as consent or self-defense. Admitting involvement in the act, but merely denying that a crime was committed, makes DNA testing a moot point.

#### *G. Time Limitations for Filing Petition*

A minority of jurisdictions also impose a time limitation, typically two to three years, for a petitioner to file a motion for postconviction DNA testing.<sup>122</sup> The majority rule, however, is to impose no time restraint in

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COMP. STAT. ANN. 5/116-3(a)(1) (West 2008); MINN. STAT. ANN. § 590.01(1a)(2) (West Supp. 2008); TEX. CODE CRIM. PROC. ANN. art. 64.01(b)(1)(a)(i) (West 2006).

<sup>119</sup> E.g., ALA. CODE § 15-18-200(c)(2) (West 2011).

<sup>120</sup> E.g., 18 U.S.C.A. § 3600(a)(3)(B) (West Supp. 2010); *see also* ARK. CODE ANN. § 16-112-202(10)(B)(iii) (2006); 725 ILL. COMP. STAT. ANN. 5/116-3(a)(2) (West 2008); MINN. STAT. ANN. § 590.01(1a)(2) (West Supp. 2008); N.C. GEN. STAT. § 15A-269(a)(3)(B) (West 2007).

<sup>121</sup> 18 U.S.C.A. § 3600(a)(7) (West Supp. 2010); ARK. CODE ANN. § 16-112-202(10)(B)(iii) (2006); DEL. CODE ANN. tit. 11, § 4504(a)(3) (West 2007); 725 ILL. COMP. STAT. ANN. 5/116-3(b)(1) (West 2008); IOWA CODE ANN. § 81.10(7)(c) (West 2009); MINN. STAT. ANN. § 590.01(1a)(b)(1) (West Supp. 2008); TEX. CODE CRIM. PROC. ANN. art. 64.03(a)(1)(B) (West 2006).

<sup>122</sup> 18 U.S.C.A. § 3600(a)(10)(A) (West Supp. 2010) (stating that a motion may be brought at any time within five years of enactment of the Justice for All Act or within three

any form on a petition for testing of DNA evidence.<sup>123</sup> There is currently no requirement in Maryland that the petition be filed within any particular amount of time.<sup>124</sup>

#### *H. Requirement of a Chain of Custody*

Nearly all jurisdictions require that any biological evidence to be tested have a proper chain of custody sufficient to ensure that it was not tampered with or materially altered.<sup>125</sup> The purpose is to ensure the reliability of evidence.<sup>126</sup> The reason for requiring a sufficient chain of custody in a postconviction DNA petition is essentially the same. Without a minimal showing that the evidence now being subjected to DNA testing is reliable, petitioners may skirt the system when they demand testing after evidence was somehow tampered with<sup>127</sup>, a potential problem that a proper chain of custody is designed to combat.<sup>128</sup>

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years of conviction); ARK. CODE ANN. § 16-112-202(10)(A) (2006) (stating that there is rebuttable presumption of timeliness within 36 months); DEL. CODE ANN. tit. 11, § 4504(a) (West 2007) (motion must be filed within three years “after the judgment of conviction is final”); ME. REV. STAT. ANN. tit. 15, § 2137 (West 2008) (stating that a motion must be filed within two years of conviction or within two years of the discovery of new technology); MINN. STAT. ANN. § 590.01(4)(a) (West Supp. 2008) (stating that a motion must be filed within two years unless evidence could not have reasonably been discovered within the required timeframe).

<sup>123</sup> *E.g.*, COLO. REV. STAT. ANN. §§ 18-1-412 to 413 (West 2004); *see also* 725 ILL. COMP. STAT. ANN. 5/116-3 (West 2008); IOWA CODE ANN. § 81.10 (West 2009); MD. CODE ANN., CRIM. PROC. § 8-201 (West 2009) (no limitation listed); TEX. CODE CRIM. PROC. ANN. art. 64.01-64.05 (West 2006).

<sup>124</sup> *See generally* MD. CODE ANN., CRIM. PROC. § 8-201 (West 2009). Because DNA evidence has the capability of proving innocence decades after a crime occurred, there is no compelling reason to deny testing merely because a long time has passed. However, given the current climate in the criminal justice system where forensic evidence can be a crucial part of a case, the number of cases where the possibility that new DNA evidence will be uncovered that may establish innocence will certainly diminish in the years to come as both prosecutors and defense attorneys will try to seek out this evidence that could prove dispositive of guilt or innocence in several instances. The Court of Appeals has also rejected a laches argument presented by the state. *Gregg v. State*, 409 Md. 698, 716-17, 976 A.2d 999, 1009 (2009).

<sup>125</sup> *E.g.*, 18 U.S.C.A. § 3600 (West Supp. 2010); *see also* ARK. CODE ANN. § 16-112-202(4) (West 2006) (requiring that the evidence remain in the possession of the State with proper chain of custody); DEL. CODE ANN. tit. 11, § 4504(a)(4) (West 2007); IDAHO CODE ANN. § 19-4902(c)(1) (West 2004); 725 ILL. COMP. STAT. ANN. 5/116-3(b)(2) (West 2008) (requiring a prima facie proof of no tampering); IOWA CODE ANN. § 81.10(7)(b) (West 2009); ME. REV. STAT. tit. 15, § 2138(4)(B) (West 2008) (requiring prima facie evidence of sufficient chain of custody); MINN. STAT. ANN. § 590.01(1b)(2) (West Supp. 2008); TEX. CODE CRIM. PROC. ANN. art. 64.03(a)(1)(A)(ii) (West 2006). Maryland’s statute does not have any chain of custody requirement. *See* MD. CODE ANN., CRIM. PROC. § 8-201 (West 2009).

<sup>126</sup> *Thompson v. State*, 80 Md. App. 676, 683, 566 A.2d 126, 130 (2010).

<sup>127</sup> 7A MD LAW ENCYCLOPEDIA, CRIMINAL LAW, § 138 (Robert F. Koets et al. eds., 2000).

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

### I. Challenging a Conviction Based on a Plea Agreement

Jurisdictions are sharply divided over whether petitioners who pled guilty still retain the privilege to make postconviction motions for DNA testing.<sup>129</sup> Several jurisdictions explicitly allow, via statute or case law, a petitioner who pled guilty to make a motion for relief.<sup>130</sup> A minority of jurisdictions do not permit a court to grant a motion for DNA testing if the conviction stemmed from a guilty plea.<sup>131</sup> Courts in most jurisdictions still have not had an opportunity to decide whether a guilty plea bars a petitioner from seeking relief.<sup>132</sup>

### J. Miscellaneous Provisions

Two other rules utilized in a few jurisdictions are worth discussion. At least one state and the federal government require that the theory or theories of innocence enumerated in a petitioner's motion cannot be inconsistent with a defense presented at trial.<sup>133</sup> Three jurisdictions, including the federal government, also require that the petitioner sign an affidavit of actual innocence.<sup>134</sup> A few jurisdictions require that the petitioner still be incarcerated to apply for relief.<sup>135</sup>

## IV. WEAKNESSES IN MARYLAND'S STATUTE AND SUGGESTIONS FOR CHANGE

The extraordinary feature of DNA is that it can exonerate individuals who were wrongfully convicted.<sup>136</sup> With that in mind, the end result of

<sup>129</sup> See 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, 50-51 n. 18-20 (2010) (discussing the merits of allowing offenders to challenge, through postconviction DNA testing, convictions to which they pled guilty).

<sup>130</sup> E.g., CAL. PENAL CODE § 1405(e) (West 2009); see also D.C. CODE § 22-4133(b)(4) (2009); HAW. REV. STAT. ANN. § 844D-123(a)(1) (West 2009); IDAHO CODE ANN. § 19-4202(d) (West 2004); MO. REV. STAT. § 547.035 (West 2002) (as interpreted in *Weeks v. State*, 140 S.W.3d 39, 46 (Mo. 2004)); TEX. CODE CRIM. PROC. ANN. art. 64.03(b) (West 2006) (stating that identity must be an issue).

<sup>131</sup> E.g., 725 ILL. COMP. STAT. ANN. § 5/116-3 (West 2008) (as interpreted in *People v. O'Connell*, 879 N.E.2d 315, 319 (Ill. 2007)); see also OHIO REV. CODE ANN. § 2953.72(C)(2) (West 2010).

<sup>132</sup> See 18 U.S.C.A. § 3600 (West Supp. 2010); see also ARK. CODE ANN. § 16-112-202 (West 2006); COLO. REV. STAT. § 18-1-413 (West 2004); DEL. CODE ANN. tit. 11, § 4504 (West 2007); IOWA CODE ANN. § 81.10 (West 2009).

<sup>133</sup> 18 U.S.C.A. § 3600(a)(6)(A) (West Supp. 2010); see also ARK. CODE ANN. § 16 112-202(6)(A) (West 2006) (excluding instances where the petitioner put forth an affirmative defense at trial).

<sup>134</sup> 18 U.S.C.A. § 3600(a)(1) (West Supp. 2010); see also N.C. GEN. STAT. § 15A-269(b)(3) (2007); TEX. CODE CRIM. PROC. ANN. art. 64.01(a) (West 2006).

<sup>135</sup> E.g., COLO. REV. STAT. ANN. § 18-1-412(a) (West 2004); see also CONN. GEN. STAT. § 54-102kk(a) (West 2009).

<sup>136</sup> FUTURE OF DNA EVIDENCE, *supra* note 6, at 2.

Maryland's statute should be limited to freeing individuals who are in prison for crimes they can prove to a virtual certainty they did not commit.<sup>137</sup> The key goals the legislature should strive to reach are: (1) freeing inmates who were wrongfully convicted after a trial as quickly and efficiently as possible; (2) eliminating instances where a factually guilty inmate could be released from incarceration; and (3) providing greater access to DNA evidence and greater scrutiny of cases that appear to be meritorious. Petitions should not be granted in instances where innocence is possible, but ultimately incapable of being proven to any sort of substantial certainty.

*A. The Standard Should be Changed Regarding what the Petitioner Must Allege DNA Testing Will Show*

Maryland's statute currently states that a court shall order testing if a petitioner can establish a reasonable probability that such testing will produce exculpatory or mitigating evidence relevant to wrongful conviction or sentencing.<sup>138</sup> The statute currently allows for review upon an allegation that testing has the potential to reveal "exculpatory or mitigating evidence relevant to a claim of wrongful conviction or sentencing."<sup>139</sup> Such a standard should be changed to reflect what DNA testing is capable of, namely, establishing identity, and only permit a court to order review upon an allegation that testing will reveal exculpatory evidence relating only to a wrongful conviction.

The value of DNA evidence lies in its power to identify individuals in ways that other forms of evidence cannot. The possibility of DNA evidence uncovering and eventually proving facts sufficient to mitigate an improper sentence is simply too unlikely to be allowed. Essentially, what a petitioner would be trying to accomplish is speculation of facts that are almost impossible to prove through DNA testing, and are only properly raised and argued at trial. Furthermore, prior to any motion for review of DNA evidence, petitioners have multiple opportunities to argue that any sentence they received was excessive or unconstitutional. A petitioner may take advantage of making the proper sentencing arguments

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<sup>137</sup> Notwithstanding the difficulty of proving a negative, after a trial in which the petitioner was convicted, the burden of proof must necessarily shift from the State to the petitioner to prove a miscarriage of justice occurred. The high burden of proving one's innocence shifts as the State has already fulfilled their burden of proving the petitioner guilty beyond all reasonable doubt. Having them prove the petitioner's guilt again, simply because some doubt has arisen, is patently inequitable.

<sup>138</sup> MD. CODE ANN., CRIM. PROC. § 8-201(d)(1)(i) (West 2009).

<sup>139</sup> *Id.* There also appears to be an internal discrepancy within section 8-201. Compare CRIM. PROC. § 8-201(b)(1) (where a petition may only be filed to challenge a judgment of conviction), with § 8-201(d) (where DNA testing may be ordered if a court finds the scientific potential exists to correct an error in conviction *or* sentencing).

during the sentencing phase of the trial,<sup>140</sup> sentence review by a panel of circuit court judges,<sup>141</sup> by filing a motion for modification or reduction of sentence,<sup>142</sup> through the direct appeal process,<sup>143</sup> and during other postconviction proceedings.<sup>144</sup>

Accordingly, the statute should be reworded to eliminate any possibility that DNA testing could be ordered for the sole reason of mitigating a sentence. A petitioner's recourse for an incorrect sentence, in the postconviction DNA testing context, should be limited to the event of a grant of a motion for DNA testing and the establishment of actual innocence by a test, thus rendering moot any possibility that a sentence was improper.

*B. The Standard Should be Changed for What the Result of DNA Testing Must Show for a Petitioner to be Awarded Relief*

As the statute is written, a petitioner is entitled to relief if the results of the DNA test ordered by a court are "favorable to the petitioner."<sup>145</sup> The end result of any DNA relief statute should be only to release petitioners who are able to meet the high burden of substantially establishing actual innocence. Section 8-201 petitions should not be available to inmates who are only able to establish a mere possibility that they are not guilty of the crime for which a jury convicted them. If the testing ordered by the court is inconclusive, while "favorable" to the petitioner, there should be no remedy available. There should also be no remedy available in situations where DNA testing shows that the petitioner is "probably" innocent. Once the veil of the presumption of innocence dissipates, petitioners attempting to prove they were wrongfully convicted should be compelled to show that a reasonable person would not only see that they are not guilty, but that a reasonable person would be substantially convinced of factual innocence.

In light of this proposed standard, new trials should not be granted. It is also difficult to see what real purpose a postconviction hearing serves when DNA evidence shows that a man in prison did not commit the

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<sup>140</sup> See *Jennings v. State*, 339 Md. 675, 683, 664 A.2d 903, 907 (1995) (stating that trial courts have nearly unfettered discretion in the information they may consider in reaching the proper sentence); *Smith v. State*, 308 Md. 162, 167, 517 A.2d 1081, 1084 (1986) (stating that a defendant's sentence should fit the offender and not merely the crime).

<sup>141</sup> MD. CODE ANN., CRIM. PROC. § 8-102 (West 2009) (stating that the defendant must be sentenced by a circuit court to two or more years in prison).

<sup>142</sup> MD. R. 4-345(e).

<sup>143</sup> MD. R. 8-201; MD. R. 8-202.

<sup>144</sup> MD. CODE ANN., CRIM. PROC. § 7-102(a)(1) (West 2011). The defendant would most likely make an allegation that their sentence violates the Constitution of the United States or the Constitution or laws of the State of Maryland.

<sup>145</sup> See CRIM. PROC. § 8-201(i)(2).

crime for which he was convicted. All that should be necessary is a single streamlined process where a judge first determines if DNA testing is warranted, and then another hearing by the same judge to determine if testing shows that the petitioner is factually innocent, a determination from which either party involved may appeal. Of course, a petitioner should be left free to file another motion under section 8-201 if future technological advancements may yield more conclusive results.

Any standard for entitlement to relief will have its shortcomings when viewed in terms of who it does and does not benefit. However, at the postconviction stage, the presumption of innocence does not exist.<sup>146</sup> The postconviction DNA petition should not be permitted for anything other than substantially proving one's actual innocence. While it is an unfortunate fact that innocent people are in prison for crimes they did not commit, if those petitioners are not able to prove their innocence, and are only able to show their probable innocence, they should be forced to find another avenue for relief.

### *C. The Statute Should Be Expanded to Include Relief for More Crimes*

While the number of successful section 8-201 petitions for crimes other than homicide and rape will likely only amount to a minimal percentage of exonerations, the option should be available to those petitioners who are serving lengthy prison sentences for crimes they may not be guilty of committing. In many cases, this may be the last option for a factually innocent petitioner looking for relief if their case has slipped through the cracks at the trial and appellate levels. Where there exists the possibility that a petitioner could prove their innocence, postconviction DNA testing should be allowed so long as testing would be probative to proving one's innocence.

Maryland currently only affords the possibility of relief to petitioners who are convicted of various degrees of murder, manslaughter, or sex offenses.<sup>147</sup> Conversely, while petitioners are only entitled to relief for those few enumerated crimes, Maryland prosecutors are not bound in any way from using DNA evidence at trial no matter what crime or crimes for which the defendant has been charged.<sup>148</sup> In theory, a Maryland prosecutor could obtain a conviction for burglary where DNA evidence was used to establish that the defendant was inside the home, but the

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<sup>146</sup> See *Herrera*, 506 U.S. at 399 (holding that the presumption of innocence disappears if the defendant has been convicted after a fair trial); see also *Harvey v. Horan*, 285 F.3d 298, 317 (2002) (holding that after a defendant is found guilty by a jury he no longer enjoys a presumption of innocence).

<sup>147</sup> See *supra* Part II.A, notes 18-20 and accompanying text.

<sup>148</sup> MD. CODE ANN., CTS. & JUD. PROC. § 10-915(c) (West 2009) (stating that DNA evidence is admissible in any criminal proceeding).

defendant could not later come back and file a petition for postconviction DNA testing to argue that a newer form of DNA testing will show that the first test was mistaken. This is an inherent and fundamental flaw in Maryland's postconviction DNA statute that is wholly inequitable to the end goal of serving justice.

Maryland should strongly consider entertaining petitions for DNA testing upon conviction for more felonies and crimes punishable by at least one year in prison. While some states offer the possibility of relief for any felony<sup>149</sup>, Maryland should expand the statute by specifically enumerating more offenses for which review may prove someone's innocence, the rationale being that there are several types of crimes for which DNA evidence will not be analyzed. For example, there is simply no reason to entertain petitions for convictions of various types of fraud<sup>150</sup>, crimes against public administration<sup>151</sup>, and gaming violations.<sup>152</sup> For such crimes, the probability of DNA evidence even being collected and/or being material justifies them not being included in the statute.<sup>153</sup> It may be wise, however, for the Maryland Legislature to include a provision, in section 8-201(b), where a judge may entertain a postconviction DNA petition for a crime not included in the list upon a special finding that DNA testing may prove to be exculpatory.

The Maryland Legislature should strongly consider expanding the Postconviction DNA Relief statute to include possible relief for crimes not originally included. Most crimes against persons including attempted

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<sup>149</sup> See *supra* Part III.B, note 112 and accompanying text.

<sup>150</sup> See MD. CODE ANN., CRIM. LAW §§ 8-103 to 108 (West 2009) (referencing bad check crimes); see also CRIM. LAW §§ 8-203 to 210 (referencing credit card crimes); CRIM. LAW §§ 8-301 to 305 (referencing identity theft crimes); CRIM. LAW §§ 8-401 to 408 (referencing other forms of commercial fraud); CRIM. LAW §§ 8-503 to 505 (referencing public assistance frauds); CRIM. LAW §§ 8-509 to 515 (referencing Medicaid frauds); CRIM. LAW §§ 8-520 to 523 (referencing other public frauds); CRIM. LAW §§ 8-601 to 613 (referencing counterfeiting and related crimes); CRIM. LAW §§ 8-701 to 702 (referencing crimes against estates); CRIM. LAW § 8-801 (referencing financial crimes against vulnerable adults); CRIM. LAW §§ 8-901 to 905 (referencing miscellaneous frauds).

<sup>151</sup> See CRIM. LAW §§ 9-101 to 102 (regarding perjury); see also CRIM. LAW §§ 9-201 to 205 (regarding bribery); CRIM. LAW §§ 9-302 to 306 (regarding obstruction of justice); CRIM. LAW §§ 9-402 to 408 (regarding harboring and escape); CRIM. LAW §§ 9-412 to 417 (regarding contraband in places of confinement); CRIM. LAW §§ 9-504 to 506 (regarding false statements); CRIM. LAW § 9-604 (regarding false alarm); CRIM. LAW §§ 9-702, 9-703 (regarding sabotage); CRIM. LAW §§ 9-802 to 805 (regarding criminal gang offenses).

<sup>152</sup> See CRIM. LAW §§ 12-103, 12-105, 12-109 (regarding various gaming violations).

<sup>153</sup> The elements required to prove these crimes make DNA evidence simply not relevant. In the event that such DNA evidence was collected, any exculpatory value it might have would, in a best-case scenario, be so tenuous as to not justify relief.

murder<sup>154</sup>, assault<sup>155</sup>, various sex offenses<sup>156</sup>, robbery<sup>157</sup>, kidnapping<sup>158</sup>, and abuse,<sup>159</sup> should be included because: (1) these crimes are more likely than others to be investigated promptly and thoroughly; and (2) forensic evidence could be easily used to tie the offender to the particular victim or to the scene of the crime.

One potential argument against inclusion of these crimes is the interest of judicial economy, as many petitions filed for these “lesser” crimes will simply not have relevant forensic evidence to examine, due either to the facts of the case or because DNA and other forms of forensic evidence were not gathered for testing. Allowing such petitions could clog the court system to the detriment of other more meritorious petitions. The end result is patently unfair to petitioners who are wrongfully imprisoned, as they should have at their disposal all reasonable means to challenge the validity of their conviction.

A situation may also arise where DNA evidence related to a crime of violence, for whatever reason, was not collected, potentially because: (1) police and prosecutors were certain they had enough evidence to convict their suspect; or (2) investigators knew of the chance that any possible DNA analysis may be exculpatory.<sup>160</sup> Unfortunately, a petitioner filing a postconviction DNA motion will not have any success under these circumstances. One way to prevent this kind of potential abuse would be to permit a defendant, at trial, to argue that the police had the opportunity to collect and analyze biological evidence at a crime scene that may have indicated that the defendant did not commit the crime. The jury should then be permitted to infer that such evidence would have been exculpatory. Such an argument could be permitted whether agents of the State deliberately chose not to collect scientific evidence for analysis or if such an error was merely an oversight. Even in the latter scenario, the defendant on trial is still potentially deprived of an opportunity to present an alternate theory of the crime.

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<sup>154</sup> See CRIM. LAW §§ 2-205, 2-206.

<sup>155</sup> See CRIM. LAW §§ 3-202 to 204 (regarding assault in the first and second degree, and reckless endangerment) and § 3-210 (regarding assault by inmate).

<sup>156</sup> See CRIM. LAW § 3-307 (regarding sexual offense in the third degree); *see also* CRIM. LAW §§ 3-309 to 312 (regarding attempted rape and attempted sexual offense); CRIM. LAW § 3-314 (regarding sexual conduct between correctional officer and inmate); CRIM. LAW § 3-315 (regarding continuing course of conduct with child); CRIM. LAW § 3-321 (regarding sodomy).

<sup>157</sup> CRIM. LAW §§ 3-402, 3-403, 3-405 (regarding carjacking).

<sup>158</sup> CRIM. LAW §§ 3-502, 3-503 (regarding kidnapping and child kidnapping).

<sup>159</sup> CRIM. LAW § 3-601 (regarding child abuse); *see also* CRIM. LAW § 3-602 (regarding the sexual abuse of a minor); CRIM. LAW §§ 3-604, 3-605 (regarding the abuse of vulnerable adults).

<sup>160</sup> Consider convictions based solely on, or through a combination of, eyewitness testimony, other forms of physical evidence, and video or audio recordings that do not conclusively identify the defendant.



*D. A Right to Counsel Upon an Initial Showing of Entitlement to Relief Should be Guaranteed*

One compelling reason to allow for a petitioner to have a right to counsel during postconviction proceedings and, if necessary, have counsel paid for by the State, is the complexity of the science behind DNA testing. This is especially true considering that petitioners must state which test they want to use and how it is generally accepted in the scientific community.<sup>161</sup> Also, assuming the petition contains a sufficient allegation warranting an answer by the State, the petitioner should be entitled to help in responding to the State's arguments and opposition.

Although it would be ideal for a state to provide and pay for counsel as a matter of course when any petitioner wishes to seek assistance, the sheer number of potential petitions and the budgetary and manpower constraints on the Office of the Public Defender make providing counsel for all petitioners practically impossible.<sup>162</sup> The issue then becomes when, exactly, should counsel be appointed for a petitioner to strike the proper balance between the legitimate interests of an inmate and the interests of the court systems and the State. As the law is written, the petitioner must survive dismissal as a matter of law.<sup>163</sup> Counsel is also appointed prior to the critical stages when the petitioner has the option of responding to the State's answer and filing an amended petition.<sup>164</sup>

Even without legal expertise, *pro se* petitioners do not have an especially difficult time successfully alleging the requirements for testing if their case is truly meritorious, as evidenced by the many reported opinions by the Court of Appeals of Maryland.<sup>165</sup> However, petitions may be dismissed for other technical reasons and possibly because the petitioner has not thought of every last location where exculpatory evidence may be located. Focusing attention on petitions that state a particularized *prima facie* case for relief, as well as meeting all other requirements, should adequately minimize the number of petitions filed, making it more manageable for the Office of the Public Defender. Requiring that a petitioner make his or her initial showing will strike a balance between an already overworked public defender system, and a petitioner's right to have the assistance of counsel for when scientifically complex or other difficult nuances of law become relevant.

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<sup>161</sup> See MD. R. 4-704(a)(2)(C).

<sup>162</sup> See STATE OF MARYLAND OFFICE OF THE PUBLIC DEFENDER, FISCAL YEAR 2010 ANNUAL REPORT (2010), available at <http://www.opd.state.md.us/Index%20Assets/Annual%20Report%20FY2010%20fnldr5.pdf>.

<sup>163</sup> See MD. R. 4-707(a).

<sup>164</sup> See MD. R. 4-707(b).

<sup>165</sup> See *Arey v. State*, 400 Md. 491, 929 A.2d 501 (2007); see also *Blake v. State*, 395 Md. 213, 909 A.2d 1020 (2006) (regarding Maryland cases filed *pro se*).

Even considering the above, minor changes are necessary that will further protect a petitioner's interests. My solution would be to have a right to counsel upon an allegation that, first, evidence exists and, second, that evidence, with the result being favorable to the petitioner would, third, tend to establish factual innocence. Upon satisfying those requirements, counsel should be appointed to aid the petitioner in their attempt to establish their actual innocence. Mere technical violations that cause a petition to be dismissed should not serve as grounds to prevent the filing of an additional petition. Furthermore, the appointment of counsel provision should be enacted in section 8-201 instead of the Maryland Rules. Finally, counsel should be appointed as soon as practicable after the State has filed an answer. There is no logic in a court waiting thirty days to assign counsel and the additional time that counsel has to review the State's answer will strengthen the quality of the petition and, hopefully, result in fewer postponements resulting from lack of time to prepare a response.

*E. There Should be a Requirement that Eligibility for Relief be Contingent Upon Identity Being Raised as an Issue at Trial*

Maryland's Postconviction DNA Statute does not impose any restrictions on who may be entitled to DNA testing based on previous proceedings at trial.<sup>166</sup> The goal of these suggested rules are threefold. First, they are designed to prevent a petitioner from raising new issues and alternate theories of the crime, which were not disputed or made an issue at trial. Second, the statutory scheme must be designed to keep inmates in prison unless the claim is truly meritorious and they may possibly prove themselves innocent by making their allegations of entitlement to relief consistent with arguments raised at trial. At some point, there must be reasonable limitations on what a petitioner can argue during postconviction proceedings. Third, such a rule saves the court's time by allowing a judge to summarily deny those petitions that will ultimately fail.

Consider a situation in which Timothy was charged, in Maryland, with the first-degree rape of Mary. At trial, Timothy defended against the charges by claiming Mary consented. The jury, not believing Mary consented, convicted Timothy of the crime. Timothy then filed a motion under section 8-201 for DNA testing of biological evidence that, for the sake of argument, is material to the case. By electing to defend against the charge via his argument that the victim consented, Timothy admitted

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<sup>166</sup> See generally MD. CODE ANN., CRIM. PROC. § 8-201(b) (West 2009).

sexual contact with the victim at or around the time of the alleged rape.<sup>167</sup> Despite that fact, there is no provision in the statute barring Timothy from filing a motion for DNA testing.<sup>168</sup> To help eliminate such a quandary, Maryland should require, like many other states, that identity have been made an issue at some point during prior proceedings.<sup>169</sup> While no petitioner should be forced to allege mistaken identity as their only defense at trial, a petitioner should in all practicality argue that they were not the perpetrator.

The benefit to be derived from DNA evidence arises from its ability to link biological evidence to an actual person. Petitions to review DNA evidence should not be used as a vehicle to reexamine factual issues surrounding the circumstances of crimes that are alleged to have been committed. Without a requirement that identity must have been made an issue during prior proceedings, a petitioner filing under section 8-201 could attempt to re-litigate factual issues other than identity, for which the science behind DNA is simply not useful.<sup>170</sup>

*F. A Provision Should be Created to Account for the Speed of Scientific Advancement*

The science behind DNA technology is still in its infancy.<sup>171</sup> Since the mid-1980s, a multitude of different tests<sup>172</sup> have been utilized by law enforcement agencies around the country, both to conclusively link suspects to criminal activity and also to clear suspects who may have otherwise been tried and convicted.<sup>173</sup>

Many states have enacted a provision that recognizes that the technology related to the DNA analysis of biological specimens is still evolving, and therefore allow for the filing of a new petition for a newer

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<sup>167</sup> While only a legal admission for purposes of arguing the proffered defense, Timothy arguing on postconviction that he was not Mary's rapist is not very convincing in light of his arguments made at trial.

<sup>168</sup> Even if DNA testing revealed that the sample used against Timothy at trial was conclusively established as not being his, this fact should not warrant the reversal of conviction. Timothy admitted to the sexual contact and just because the DNA was not his does not erase the fact that the jury chose to disbelieve his version of events.

<sup>169</sup> See *supra* Part III.F, note 1202 and accompanying text.

<sup>170</sup> While a petition raising issues other than identity has at best a minimal chance of being successful, there is currently no limitation barring such a claim as long as the petition relates to DNA evidence. While a *prima facie* showing of entitlement to relief could be established in theory, such a petition would most likely be unsuccessful.

<sup>171</sup> See *Unreliable or Improper Forensic Science*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/Unreliable-Limited-Science.php> (last visited November 3, 2011).

<sup>172</sup> The most widely used DNA testing methods are RFLP testing and PCR testing. FUTURE OF DNA EVIDENCE, *supra* note 6, at 26-28.

<sup>173</sup> FUTURE OF DNA EVIDENCE, *supra* note 6, at 2.

testing method that may be more probative than prior tests.<sup>174</sup> Provisions in these statutes that allow for further testing, to parallel the advancement of science, permit a petitioner to file potentially meritorious motions where prior testing was insufficient to develop a DNA profile capable of establishing exculpatory evidence.<sup>175</sup> Such a provision allows for a petitioner to make the same allegations, but have the evidence carrying potential forensic value retested using a different method of DNA testing which may yield more probative results.

Imagine a situation where Christopher is serving a life sentence for a homicide committed during a home invasion. Evidence introduced at trial included a drop of blood at the crime scene that matched Christopher's blood type, was conclusively determined to not be the victim's, and was believed by the police to have belonged to the attacker. After the enactment of Maryland's Postconviction DNA Relief Statute in 2003, Christopher petitioned to have the drop of blood tested for a DNA profile and agreed to provide a sample of his own DNA for comparison. Unfortunately, the crime lab that performed the test did not have a sufficient sample of cells to create a DNA profile of the blood drop from the crime scene. Accordingly, Christopher's motion for relief was denied. Now, Christopher wishes to have the same blood drop tested for DNA analysis for the same purpose using a more advanced form of DNA testing that requires less biological material than the previous testing method. A court may be tempted to deny Christopher's motion for testing given that prior testing did not warrant relief. The judge presiding over the hearing may erroneously conclude that the testing would not be any more probative than any other test that was previously conducted.<sup>176</sup>

A statutory provision allowing for a new type of test to be performed on genetic material, which could not be tested previously, protects against miscarriages of justice based solely on the fact that the motion, while meritorious, was simply filed before a test delivering meaningful results could be performed. Maryland, like other jurisdictions, should add a provision allowing a petitioner to have DNA evidence tested again. That provision should be conditioned on: (1) a sufficient showing that a newly developed method of testing would yield more probative results, or that prior testing utilizing the same method was for some reason unreliable; and (2) there is sufficient genetic material left for testing. The rapid

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<sup>174</sup> See *supra* Part III.E, note 11920 and accompanying text.

<sup>175</sup> See *id.*

<sup>176</sup> While this is an extreme example, this and other analogous factual scenarios could occur. As of now there is nothing barring the filing of more than one motion under section 8-201, but a difficult judge may still find as fact that no reasonable probability of the discovery of mitigating evidence exists. By finding as fact that the new test does not stand a better chance of producing results probative of innocence, a judge in his or her discretion could possibly block a meritorious petition that has a reasonable probability of being successful.

advancement of technology, and the fact that DNA can sometimes be tested decades after a sample was collected, also justifies states imposing no time restriction on how long after a conviction a motion for postconviction DNA testing may be filed.<sup>177</sup>

*G. There Should be a Requirement that a Petitioner May Only File a Motion if They are Presently Incarcerated*

Interestingly enough, it is conceivable for an innocent person to be released from prison and still be eligible for exculpatory postconviction DNA testing under section 8-201.<sup>178</sup> Even after release, persons convicted of certain crimes in Maryland will have certain limitations on civil rights and liberties.<sup>179</sup> While some of the restrictions on those who have served time in prison are, in some cases, substantial, the statute should be designed to provide relief only to those who are having their most precious right taken away from them—freedom. Again, such a rule should be implemented to protect the courts from having to deal with a potentially limitless amount of motions that have, at best, only a minimal chance of being successful and will only provide a marginal amount of relief when compared to the relief of those petitions coming from those who are presently incarcerated. When weighing the value of freedom against the restoration of rights taken as a result of a criminal conviction, petitioners who are already free from incarceration should not be permitted to file a petition in the interest of judicial economy. Furthermore, the volume of petitions coming from persons who are not incarcerated could end up eclipsing otherwise meritorious petitions from inmates whose convictions might seriously be questioned.

The financial burden on all parties, when weighed against the potential relief by someone who is not even incarcerated, should also be considered. Substantial costs will be incurred by the Office of the Public

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<sup>177</sup> See *Innocence Project Asks Virginia Appeals Court to Clear a Richmond Man Who Has Served Nearly 27 Years for Rapes He Didn't Commit*, INNOCENCE PROJECT, [http://www.innocenceproject.org/Content/Innocence\\_Project\\_Ask\\_Virginia\\_Appeals\\_Court\\_to\\_Clear\\_a\\_Richmond\\_Man\\_Who\\_Has\\_Served\\_Nearly\\_27\\_Years\\_for\\_Rapes\\_He\\_Didnt\\_Commit.php](http://www.innocenceproject.org/Content/Innocence_Project_Ask_Virginia_Appeals_Court_to_Clear_a_Richmond_Man_Who_Has_Served_Nearly_27_Years_for_Rapes_He_Didnt_Commit.php) (last visited Sept. 29, 2011).

<sup>178</sup> See MD. CODE ANN., CRIM. PROC. § 8-201(b) (West 2009) (containing no restriction as to who may apply for DNA testing of biological evidence. In theory a petitioner previously released from prison could conceivably file a motion for relief under this subsection up until the time of their death).

<sup>179</sup> See CRIM. PROC. §§ 11-701 to 727 (regarding sex offender registration); see also MD. CODE ANN., PUB. SAFETY § 5-306(a)(2) (West 2011) (regarding persons convicted of felonies or misdemeanors for which they were sentenced to incarceration for one year or longer cannot own firearms); MD. CODE ANN., CTS. & JUD. PROC. § 8-103(b)(4) (West 2011) (regarding persons who received a sentence for a crime punishable by greater than six months incarceration are not qualified to serve on a jury). Apart from the legal consequences of having served time behind bars, the stigma of having a felony conviction may affect one's ability to find employment and strain other social relationships.

Defender in representing the petitioner<sup>180</sup>, the State's Attorney's Office in defending the conviction, and, finally, the court in both pecuniary terms and in the time it takes to hear the petition.<sup>181</sup> Furthermore, an individual who is not incarcerated and seeks postconviction relief because of significant collateral consequences stemming from the conviction may file a writ of *coram nobis*—a civil action challenging a judgment based on an error of fact.<sup>182</sup>

#### *H. Relief Should Not be Allowed When the Petitioner Pled Guilty*

Maryland courts have yet to decide whether petitioners who pled guilty to crimes retain the right to make a motion for postconviction DNA testing, and the Maryland Legislature has either consciously left such a decision for the courts or has overlooked the possibility that such a situation might arise.<sup>183</sup> The argument against barring a motion is that the petitioner may have pled guilty on the advice of defense counsel who believed, with the State's evidence, that the petitioner would be convicted and sentenced to life in prison. Instead, defense counsel negotiated a plea arrangement with the State's Attorney handling the case in which the potential petitioner would serve a shorter sentence in prison. Acting on advice of counsel, the petitioner accepted the deal.

On the other hand, plea bargains limit the effectiveness of postconviction DNA petitions in several ways.<sup>184</sup> To have DNA testing ordered in Maryland, a petitioner must show a reasonable probability that testing will produce exculpatory evidence.<sup>185</sup> Under most circumstances, the facts alleged in a petition for postconviction relief will necessarily, in part, be drawn from the trial record.<sup>186</sup> However, when there was a guilty plea, there is no detailed trial record, no witness testimony, and often there is only a minimal factual investigation on the part of the State and defense counsel.<sup>187</sup> Thus, both the defense's factual quest to establish

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<sup>180</sup> This does assume that the petitioner is indigent and either unable or unwilling to hire private counsel.

<sup>181</sup> The substantial costs can be thought of in terms of manpower, time, etc. This also includes depriving the Office of the Public Defender of valuable time that could be spent on other petitions that have a greater chance of being successful, as well as other functions of the office.

<sup>182</sup> *Skok v. State*, 361 Md. 52, 78, 760 A.2d 647, 661 (2000); *see also* MD. R. 15-1201 to 1207.

<sup>183</sup> Courts in other jurisdictions have answered the question of whether a petitioner who pled guilty may later bring a motion to test DNA evidence from a crime scene. Unless the legislature makes a decision sometime in the near future, this issue stands a strong chance of being addressed by the Court of Appeals of Maryland. *See Stone, supra* note 129, at 50-51 n. 18-19.

<sup>184</sup> *Stone, supra* note 129, at 56.

<sup>185</sup> MD. CODE ANN., CRIM. PROC. § 8-201(d) (West 2009).

<sup>186</sup> *Stone, supra* note 129, at 57.

<sup>187</sup> *Stone, supra* note 129, at 56-57.

innocence as well as the State's attempt to refute innocence are hindered by the inherent gaps available in evidence in cases in which the petitioner pled guilty.<sup>188</sup> Petitions stemming from a conviction following a guilty plea should thus be denied.

*I. Petitioner Should be Required to Allege a Sufficient Chain of Custody*

The Maryland legislature should enact a requirement that the petitioner show a chain of custody sufficient to demonstrate that the evidence to be tested has not been tampered with or otherwise compromised. While it would not be prudent to require an inmate to show a perfect chain of custody, requiring the petitioner to show a reasonable probability that no tampering occurred is manageable. Practically speaking, it will be very difficult for a defendant to prove beyond any doubt that evidence was not tampered with, principally because he is making an allegation about the present state of evidence not within his direct control. Also, establishing a reasonable probability is equivalent to the burden held by the State in proving its case.<sup>189</sup>

V. CONCLUSION

Maryland's Postconviction DNA Relief Statute, as currently written, provides an avenue for those charged with the most violent crimes to prove their factual innocence.<sup>190</sup> The Maryland General Assembly should limit what petitioners seek to prove<sup>191</sup>, expedite claims that show merit<sup>192</sup>, and create rules that would be helpful in quickly denying frivolous petitions and those which have no chance of success.<sup>193</sup>

By mandating that a petitioner must seek to prove actual innocence, the possibility that an inmate may seek only to establish that their sentence was improper, an end that analysis of DNA evidence is simply not able to accomplish, would be eliminated.<sup>194</sup> An argument that a petitioner wishes to show mitigating evidence relating to the crime they committed would also be preempted by such a change in the letter of the law. While arguments that relevant evidence other than DNA was not considered, or that a sentence is excessive in light of what a petitioner was convicted for, do have their place during the appellate and postconviction processes, those arguments have no place in a motion for

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<sup>188</sup> Stone, *supra* note 129, at 57-58.

<sup>189</sup> Jones v. State, 172 Md. App. 444, 462, 915 A.2d 1010, 1020-21 (2007).

<sup>190</sup> MD. CODE ANN., CRIM. PROC. § 8-201(b) (West 2009); *see also supra* text accompanying note 15.

<sup>191</sup> *See supra* Part IV.A.

<sup>192</sup> *See supra* Part IV.B.

<sup>193</sup> *See supra* Part IV.

<sup>194</sup> *See supra* Part IV.A.

DNA analysis simply because any result would not be sufficiently probative towards arguing those points.<sup>195</sup>

By extension, Maryland should reword the relief portion of the statute so that it mandates the denial of relief absent a showing of actual innocence. The statutory scheme should not be designed to provide relief after DNA testing reveals only a possibility that a petitioner is innocent.<sup>196</sup> The term “favorable” in the relief portion of the statute is a loosely defined term that could be stretched to the extreme end of awarding a new trial if DNA testing proves to be inconclusive.<sup>197</sup>

While an increased burden on the court system may result by expanding the list of offenses for which a petitioner is eligible for relief under section 8-201, the end result of providing greater access to justice is more thoroughly preserved.<sup>198</sup> Additionally, Assistant State’s Attorneys are not restricted to using DNA evidence only for the prosecution of rapes and murders.<sup>199</sup> Logically speaking, and although the case will certainly be rare where a burglar is able to prove their innocence through the use of DNA evidence, inmates should have a means to test this evidence because it is equally probative in proving innocence as it is in proving guilt beyond a reasonable doubt.<sup>200</sup>

Requiring an inmate to have argued identity at some point during their trial for a section 8-201 petition to be considered for review guarantees that they will only be seeking review about an issue that DNA testing has the capability to prove.<sup>201</sup> Such a rule also helps to guarantee that a petitioner is not simply filing the motion in a long shot attempt to raise an issue that likely was not previously mentioned, but also places a burden on the petitioner to, at minimum, make an argument that is not entirely different from a defense they were committed to establishing at trial.<sup>202</sup>

The technology of DNA testing is constantly evolving<sup>203</sup> and DNA evidence can be preserved for decades after a crime occurs.<sup>204</sup> In light of this, Maryland should amend to include a provision that allows for the

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<sup>195</sup> MD. CODE ANN., CRIM. PROC. § 8-201 (West 2009); *see also supra* text accompanying notes 137-142, 171 and accompanying text.

<sup>196</sup> *See supra* Part IV.B.

<sup>197</sup> *See supra* note 70 and accompanying text.

<sup>198</sup> *See supra* Part IV.C.

<sup>199</sup> MD. CODE ANN., CTS. & JUD. PROC. § 10-915(c) (West 2011); *see also supra* text accompanying note 148.

<sup>200</sup> MD. CODE ANN., CTS. & JUD. PROC. § 10-915(c) (West 2011); *see also supra* text accompanying note 147 and accompanying text.

<sup>201</sup> *See supra* Part IV.E.

<sup>202</sup> *See supra* Part IV.E.

<sup>203</sup> *See supra* notes 171-73 and accompanying text.

<sup>204</sup> *See supra* note 177 and accompanying text.



retesting of DNA evidence under section 8-201 when a new form of testing may be more probative than the previous method of testing.<sup>205</sup>

While requiring that a petitioner be incarcerated will, in nearly all circumstances, be more of a formality than a bar to relief, such a rule is necessary for the expediency of the courts as well as limiting the litigation of issues when the time for review has simply come to pass.<sup>206</sup> Furthermore, people who are not in prison and wish to establish their factual innocence may file a writ of *coram nobis*, which would be more proper for someone who is not incarcerated.<sup>207</sup>

Neither the legislature nor the Maryland courts have made any determination about whether a petitioner may apply for relief under section 8-201 after pleading guilty.<sup>208</sup> There are some compelling reasons to justify allowing petitioners who pled guilty to seek relief, however, there is also no way to definitively establish that DNA testing will be probative of a claim of innocence. Because it is most likely that neither side, after the plea agreement, attempted to develop any factual account of the crime, it is impossible in plea bargaining to determine exactly what the presence or absence of DNA material from a crime scene actually means.<sup>209</sup>

There is a chain of custody requirement for postconviction DNA relief in most jurisdictions, but Maryland has not yet enacted this requirement.<sup>210</sup> Accordingly, section 8-201 should be amended so that a defendant must establish, at the bare minimum, that the evidence was not tampered with or altered.<sup>211</sup>

Maryland's statutory scheme governing postconviction DNA relief petitions is imperfect. Maryland should take certain cues from other jurisdictions and create rules designed to prevent miscarriages of justice. The Maryland Legislature, in the interest of expeditiously freeing those wrongfully convicted and keeping those who do not deserve their freedom behind bars, should amend section 8-201 as necessary to further the suggested goals of the statutory scheme.<sup>212</sup>

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<sup>205</sup> See *supra* Part IV.F.

<sup>206</sup> See *supra* Part IV.G.

<sup>207</sup> See *supra* note 182 and accompanying text.

<sup>208</sup> See *supra* note 183 and accompanying text.

<sup>209</sup> See *supra* notes 186-88 and accompanying text.

<sup>210</sup> See *supra* Part III.H.

<sup>211</sup> See *supra* Part IV.I.

<sup>212</sup> See *supra* Part IV.