Facing the Uncomfortable Truth: The Illogic of Post-Conviction DNA Testing for Individuals Who Pled Guilty

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Introduction

FOR ANYONE FAMILIAR WITH scholarly discussions involving the post-conviction uses of DNA evidence, Gary Dotson¹ and Bruce Godschalk² are familiar names: each was wrongly incarcerated for a crime he did not commit and later proven innocent using DNA technology. The case of Charles Anthony Williams, on the other hand, is less well known. He was convicted of aggravated sexual assault in Dallas, Texas in 1991 and sentenced to twenty years in prison.³ Shortly thereafter, he pleaded guilty to two other sexual assaults and began serving his sentences concurrently.⁴ Nevertheless, he continued to proclaim his innocence and ultimately filed a motion for post-conviction DNA testing which was granted in 2008.⁵ In March 2009, the DNA testing in Charles Williams’s case was completed.⁶ Rather than support his claim

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⁴ Id.; Laura Bauer, Post-conviction DNA Testing Works Both Ways, Richmond Times-Dispatch, May 2, 2009, at P-01.
⁵ Williams Press Release, supra note 3.
of innocence, it instead confirmed his guilt in all three sexual assault cases.\(^7\) Confirmations of guilt through post-conviction DNA testing receive minimal attention from the mass media, and even less from those scholars specifically engaged in the ongoing debate over the proper uses of post-conviction DNA testing. This is a shame, given that, historically, post-conviction DNA testing inculpates petitioning individuals as often as it exonerates them: in other words, for every Gary Dotson there is a Charles Williams.\(^8\) Considering that testing is only granted to the very limited number of cases that might possibly prove meritorious, there are unknown numbers of petitioners whose cases never even reach testing because their motions were patently without merit.

Yet, despite the existence of individuals such as Charles Williams, scholarly articles concerning the availability and desirability of post-conviction DNA testing tend to gravitate to the statistically rare instances of false imprisonment (such as Gary Dotson and Bruce Godschalk), advancing them as proof that the search for innocence must trump all other considerations of logic and pragmatism. In doing so, they generally dismiss the predominance of correctly decided cases within the system and the negative impact that expansive post-conviction DNA motions have upon that system. More importantly, these articles fail to distinguish between trial and plea bargain convictions when analyzing the costs and benefits associated with the post-conviction DNA process. As a result, scholars have focused primarily on the efficacy and suitability of post-conviction DNA testing in general, and assumed that the results hold true as well for guilty plea cases in particular. This is, unfortunately, not the case.

This Article advances the unpopular and uncomfortable proposition that, due to the special nature of guilty pleas and the undervalued costs in both money and manpower that post-conviction DNA testing places upon the criminal justice system, such testing should not be made available to convicted persons who pleaded guilty. Although denying this class of incarcerated individuals access to such testing would undoubtedly result in the continued imprisonment of innocent persons, the purpose of this Article is to show that such a

\(^7\) Id.
result, while far from ideal, is both a necessary concession to reality and a logically defensible outcome.

Part I of this Article provides a brief overview of post-conviction DNA statutes in general. In Part II, the concept of finality as it pertains to guilty plea cases is discussed. Part III details the often overlooked and generally undervalued costs associated with post-conviction DNA testing, specifically as they relate to plea bargain cases. The final section, Part IV, provides a cost/benefit analysis of allowing plea bargain defendants access to the post-conviction DNA process.

I. Post-Conviction DNA Statutes

As of 2009, forty-eight states (as well as the federal government and the District of Columbia) have enacted some form of legislation allowing post-conviction DNA testing. Although these statutes employ a variety of different standards and procedures, they have some basic elements in common. Generally, each of these statutes grants certain classes of convicted individuals the ability to petition the judicial system to order DNA testing on items of biological evidence associated with their original case. Most statutes require that the evidentiary chain of custody be unbroken and that at the time of the original conviction, the petitioner did not have access to the particular form of DNA testing being sought. The main areas of variance among the statutes arise as to: (1) the particular classes of convicted individuals who are allowed access to such testing; (2) the existence or not of an “identity at issue” requirement; and (3) the materiality threshold that must be met in order for DNA testing to be granted.

Concerning materiality, each state statute requires that the petitioner must be able to show that a favorable test result would enhance his claim of innocence in order for DNA testing to be ordered by the court. In some states, a petitioner must only show that a favorable test result would be materially relevant to his case, which has been interpreted to mean that a reasonable probability exists of a different outcome to the case. Other states require that a favorable test result would affirmatively prove that the defendant would not have been

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11. Id. at 367.
12. Id. at 368.
convicted of the offense.\textsuperscript{13} Aside from the variance in thresholds, nearly every statute requires that there be a “reasonable probability” that the test would have the named effect.\textsuperscript{14} Another important area of divergence among the statutes is the so-called “identity at issue” condition: many states require that the identity of the perpetrator must be an issue in order for testing to be granted.\textsuperscript{15} In other words, where the actual issue of a case revolved around whether a crime was committed at all (such as where a self-defense claim was raised) as opposed to who actually committed it, DNA testing is not appropriate.\textsuperscript{16}

Finally, a significant area of difference between the state statutes involves the particular classes of convicted individuals who are allowed access to post-conviction DNA processes. There are a variety of different limitations that are imposed in this area. For example, some states limit post-conviction DNA motions to felony convictions or even to specific types of crime.\textsuperscript{17} However, for the purposes of this Article, the most important limitation revolves around whether or not an individual pleaded guilty (or \textit{nolo contendere}). On this particular issue, the state statutes are less than clear, and the relative paucity of judicial decisions interpreting those statutes provides little clarification. Fifteen jurisdictions (either through the statutory language itself or through a court decision interpreting the statute) appear to allow individuals who pleaded guilty to file post-conviction DNA motions.\textsuperscript{18}

\textsuperscript{13} Id. at 368–69.
\textsuperscript{14} Id. at 369.
\textsuperscript{15} Id. at 375. See also Brandon L. Garrett, \textit{Claiming Innocence}, 92 Minn. L. Rev. 1629, 1680 (2008) [hereinafter Garrett, \textit{Claiming Innocence}].
\textsuperscript{16} Swedlow, DNA Review, supra note 10, at 375–76.
\textsuperscript{17} Id. at 356-57; see also Garrett, \textit{Claiming Innocence}, supra note 15, at 1680–81.
while only a handful of states expressly deny access to plea bargain defendants. However, the majority of statutes neither explicitly include nor exclude plea bargain defendants. The ambiguous language of the statutes makes it difficult to determine the actual

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Code Ann. § 17-28-30(B) (2009) (“A person who pled guilty or nolo contendere . . . may apply for forensic DNA testing . . . no later than seven years from the date of sentencing.”); Va. Code Ann. § 19.2-327.3(A)(i) (2009) (specifically allowing individuals who pleaded guilty to particular types of felonies to file post-conviction DNA motions); W.Va. Code § 15-2B-14(c) (2009) (“The motion shall be heard by the judge who conducted the trial or accepted the convicted person’s plea . . . .”); Wyo. Stat. Ann. § 7-12-303(d) (2009) (specifically forbidding courts from granting testing where “the trial or a plea of guilty or nolo contendere occurred after January 1, 2000 . . . .” Thus, it must be assumed that a court could grant a plea bargain defendant’s motion if the plea occurred before January 1, 2000); Tex. Code Crim. Proc. Ann. art 64.03(b) (West 2009) (“A convicted person who pleaded guilty or nolo contendere . . . may submit a motion under this chapter . . . .”).


prevalence of guilty plea individuals within the post-conviction DNA system. Moreover, the tendency of post-conviction DNA statutes to not specifically distinguish between trial convictions and guilty plea convictions might explain why commentators and scholars tend to group trial cases and guilty plea cases together for analytical purposes.

II. Finality in the Criminal Justice System

A. The Specific Finality of Guilty Plea Convictions

The finality of criminal convictions is considered a key issue in the debate over the expansion of post-conviction DNA testing to guilty plea offenders.21 As expressed by Justice Harlan in his Sanders v. United States dissenting opinion, the general concept of finality is that “[b]oth the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation.”22 The U.S. Supreme Court has repeatedly emphasized the importance of finality in criminal convictions and the harm that post-conviction challenges can have on the criminal justice system.23 As such, there must be a point at which a convicted defendant ceases challenging his conviction and begins rehabilitating himself for re-entry into society.24 This end point allows not only the defendant and society to move forward, but also provides the government the opportunity to discontinue its defense of a previously achieved conviction and instead refocus its limited resources on the acquisition and defense of other convictions. Post-conviction DNA testing necessarily offends concepts of finality, since it re-opens otherwise closed cases, allowing for the testing of old biological evidence in a concerted effort to not only undermine, but indeed overturn, final convictions.

21. Seth F. Kreimer & David Rudovsky, Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing, 151 U. Pa. L. Rev. 547, 561 (2002) [hereinafter Kreimer & Rudovsky] (noting that prosecutors have sought to limit the availability of post-conviction DNA testing due to concerns over the finality of convictions, as well as financial considerations, the need to protect the plea bargain system, and the fear of an overwhelming number of frivolous requests).


Proponents of post-conviction DNA testing counter finality arguments by asserting that one of the primary grounds for respecting the finality of a conviction (namely, that attempting to ascertain the objective truth in a case years after its closure is unlikely to produce better results than the initial judgment) is not implicated where DNA evidence can conclusively prove the innocence or guilt of an offender.\footnote{Kreimer & Rudovsky, supra note 21, at 596.} Furthermore, it is often claimed that any governmental interest in closure is outweighed by society’s interest in ensuring that a procedural mechanism exists to make such objective post-conviction determinations.\footnote{Borteck, supra note 2, at 1467.} In this light, DNA’s ability to conclusively prove the innocence or guilt of an offender is frequently cited as evidence that post-conviction DNA testing actually enhances, rather than undermines, considerations of finality, since it serves as a final safeguard, ensuring the legitimacy and accuracy of criminal convictions.\footnote{Eunyung Theresa Oh, Note, Innocence After “Guilt”: Postconviction DNA Relief for Innocents Who Pled Guilty, 55 Syracuse L. Rev. 161, 184–85 (2004).}

Such arguments have proven to be not only logically powerful but also practically effective, as all but two U.S. states now have statutes specifically allowing defendants post-conviction access to DNA testing.\footnote{Fact Sheet, INNOCENCE PROJECT, supra note 9.}

Yet, for all of their merit in situations where the offender was given a trial, these arguments fail to take into consideration the specific problems presented by guilty pleas. In order to fully appreciate these problems, it is necessary to understand the nature of the plea-bargaining process and guilty pleas in particular. Plea bargaining is generally defined as an exchange of concessions by the defendant and the state.\footnote{Joseph A. Colquitt, Ad Hoc Plea Bargaining, 75 Tul. L. Rev. 695, 701 (2001).} Within the plea bargain negotiations, the defendant is attempting to obtain some form of leniency from the state in return for his agreement to plead guilty (or \textit{nolo contendere} to criminal charges).\footnote{Michael H. Graham, Plea Bargaining Pursuant to Fed.R.Evid. 410: “Criminal Defendant Beware!!!”, 44 CRIM. L. BULL. 960, 963 (2008).} The form of leniency sought by the defendant is normally a reduction in either the punishment or the type of criminal charge sought by the state, though in some instances the state may agree to dismiss the charges in return for an alternate punishment (such as a deferral).\footnote{Colquitt, supra note 29, at 701–02. Colquitt divides plea bargaining into two separate types: charge bargaining, wherein a criminal charge is reduced to a lesser-included offense or where multiple charges are reduced in number; and sentence bargaining, wherein the severity of the punishment is reduced or set.} Inherent in these discussions is the understanding of a quid pro quo:
that each side will give something up it values in favor of gaining something else from the other bargaining party.\textsuperscript{32} In this respect, the agreement reached through the plea bargaining process is essentially a contract.\textsuperscript{33} As such, plea bargain agreements are routinely reviewed using basic contract law analysis.\textsuperscript{34}

It is no exaggeration to say that plea bargaining is one of the bedrock foundations of the criminal justice system. Indeed, Professors Scott and Stuntz have gone so far as to assert that plea bargaining is “not some adjunct to the criminal justice system; it is the criminal justice system.”\textsuperscript{35} Statistics bear this out: most, though not all, filed cases end in a plea-bargained agreement.\textsuperscript{36} Concerning actual criminal convictions, ninety percent are the direct result of plea bargaining.\textsuperscript{37} In some jurisdictions the disposal rate reaches as high as ninety-five percent.\textsuperscript{38} This dominance holds true as well for rape convictions (the felony most likely to be challenged later through post-conviction DNA proceedings):\textsuperscript{39} eighty-four percent are obtained through a plea bargain.\textsuperscript{40} While the prevalence of plea bargains within the system is irrelevant to this discussion, the outcome of this prevalence is not: the overwhelming majority of offenders within the American criminal justice system obtained their sentences through some form of negotiated plea bargain agreement. This simple fact must be acknowledged when discussing the desirability of allowing plea bargain offenders access to post-conviction DNA procedures, since such offenders represent the lion’s share of potential requests.

However, it is not just the frequency of plea bargains that creates a special consideration for post-conviction DNA testing; it is the nature of the plea bargain itself. As stated above, a plea bargain is essentially a contract between the defendant and the state, wherein each side gives up something it values in exchange for a concession from
the other party. Where plea bargaining creates a problem in regards to post-conviction DNA testing, is in the nature of the concessions sought and given by each side. At the outset of negotiations, the defendant bears the risk that he will be convicted and sentenced to the maximum punishment, while the prosecutor bears the risk that the defendant will be acquitted and go free.41 Both parties seek to minimize these risks through an exchange of concessions: the defendant agrees to relinquish any possibility that he will go free while the prosecutor agrees to seek a lower sentence or charge.42 This is the classic version of a plea bargain agreement and inherent in this exchange is the assumption that the agreement will be final and enforceable.43

This presumption of finality is one of the key components of the agreement.44 For the state, besides avoiding the potential of an acquittal, a negotiated plea bargain removes the necessity to continue investing resources in a case and it allows the state to invest those resources elsewhere.45 This is an essential part of the prosecutor’s bargain. For the defendant, the finality of a plea-bargained conviction is a concession given to the state in order to obtain what is essential to his side of the bargain: a reduced sentence. The importance of finality to the agreement is underlined by the general practice of requiring the defendant to specifically waive (in writing) any right to later challenge the conviction.46 It must be noted that the conception of finality inherent in plea bargain agreements is vastly different from the general concept as discussed earlier. The general notion of finality is, at its essence, simply a rule governing the extent of the appellate review process, whereas the finality of a plea-bargained case is the indispensable element of the plea bargain itself. Both parties negotiate specifically to end the case. Changing the terms of what constitutes “finality” within this context would not merely tinker around the edges of the system but rather would rewrite the main purpose of the agreement after the fact. Such an act would have major, largely unforeseeable, ramifications upon the system itself, both in regard to agreements previously reached, as well as in regard to future plea bargain negotia-

42. Id.
43. Id. at 1913–14.
44. Swedlow Pleading Guilty, supra note 33, at 588–89.
45. See Easterbrook, supra note 32, at 1975 (“In purchasing procedural entitlements with lower sentences, prosecutors buy that most valuable commodity, time. With time they can prosecute more criminals.”).
46. Colquitt, supra note 29, at 739.
Thus, extending post-conviction DNA testing to cover plea bargain defendants implicates notions of finality (and their attendant consequences) specific to the plea bargain system that the normally advanced counterarguments raised in favor of general post-conviction DNA testing do not answer.

B. Systematic Incompatibility

The concept of a plea-bargain-specific finality, however, is not the only difficulty raised by the prospect of extending post-conviction DNA testing to plea-bargain defendants. Rather, applying the highly complicated, fact-driven post-conviction procedures to the often equally as complicated, but fact-scarce, plea bargain records can lead to a multitude of unforeseen problems. These two systems (plea bargains and post-conviction DNA testing), each of which functions reasonably well independently, are simply not designed to function in tandem.

1. Limitations of Evidence in Plea Bargain Cases

A plea bargain agreement ends a criminal case without the necessity of a complete trial. This early closure of the case severely limits the effectiveness of any later post-conviction DNA proceedings. Depending on the timing of the agreement within the context of the procedural history of the case, the plea bargain almost certainly cuts short any further investigation into the facts of the case by either party. Thus, the evidentiary record in plea bargain cases is generally limited to the information gathered by the police that led to the original charge. Since the outcome of the case is already determined, neither side has any incentive to supplement or challenge this evidence. Nor does the plea of guilty itself add to the record, since the factual basis offered in support of a plea is generally very limited in nature.

47. It is possible, for instance, that prosecutors will begin to require defendants to also specifically waive any right to request post-conviction DNA testing. In fact, at least one jurisdiction has already foreseen this possibility and enacted legislation to forbid the practice. See Cal. Penal Code § 1405(m) (West 2005).

48. A plea bargain can generally be reached at nearly any point in the case: as early as the arraignment or as late as during the trial itself. Naturally, the timing of the plea bargain plays an important role in the amount of investigation either or both sides may conduct. Robert L. Segar, Pleas Bargaining Techniques, in 25 Am. Jur. Trials 73, 111-114 (Charles S. Parnell ed., 1978).

49. Swedlow, Pleading Guilty, supra note 33, at 577.

50. Id. at 577–78; see also Colquitt, supra note 29, at 746 (noting that records of guilty pleas are primarily concerned with documenting the intelligent waiver of any constitutional rights by the defendant).
limitations of such an evidentiary record are legion. What evidence exists is untested by trial and generally incomplete. Witness testimony is limited to witness statements, which have not undergone cross-examination (the so-called “greatest legal engine ever invented for the discovery of the truth”)\textsuperscript{51} and indeed may be contradicted by other witnesses (or the original witnesses themselves if given the chance). If biological evidence exists, there is no expert testimony or explanation as to its possible interpretations or importance to the case. As such, there is neither a complete interpretive picture of the case, nor is the available partial picture inherently trustworthy. In short, the benefits of a trial to the determination of what actually happened are seriously lacking.

Such evidentiary limitations are unremarkable and unimportant in plea bargain cases, since the guilty plea ends the case. However, in post-conviction DNA proceedings, these limitations are a severe handicap to both parties. The parties (as well as the judge) normally rely upon the evidence and facts generated by the original trial when assessing the merits of a post-conviction DNA motion.\textsuperscript{52} Where no such trial record exists (as is the case with a plea bargain), the parties inevitably must attempt to recreate the facts of the case using whatever evidence is available. This evidence generally consists of old witness statements and police reports. Nor do attempts by either party to supplement the record through investigation normally bear fruit: as seen in speedy trial cases, evidence generally grows stale with time as memories fade and witnesses disappear.\textsuperscript{53} The incomplete, and occasionally unreliable, information provided by the available sources complicates the post-conviction proceedings: often, neither party (nor the judge) is in a position to conclusively determine from the evidentiary record whether biological evidence existed at the time, or if it did, whether it still exists and is available for testing.\textsuperscript{54}

\textsuperscript{51} 5 Wigmore, Evidence § 1367 (Chadbourn rev. 1974).
\textsuperscript{53} Doggett v. U.S., 505 U.S. 647, 655–56 (1991) (holding that excessive delay in bringing a case to trial is presumed to compromise the reliability of the evidence involved in that trial); Margaret Berger, Lessons from DNA: Restriking the Balance Between Finality and Justice, in DNA and the Criminal Justice System: The Technology of Justice 109, 110 (David Lazer ed., 2004) (arguing that evidence becomes less reliable over time).
sensitivity of DNA technology over the past decade has compounded this problem, since testable quantities of biological material may now exist on items of evidence that were long ago dismissed as containing insufficient (or no) biological material. Establishing even the hypothetical existence of biological material in a case using incomplete and outdated police reports is exceedingly difficult. Furthermore, the importance or relation of any existing biological evidence to the facts of the case can be nearly impossible to determine given the lack of a comprehensive evidentiary and factual record. Thus, reaching a conclusion on the ultimate issue, whether DNA testing could decisively prove the innocence of the defendant, is significantly impeded by the nature of the incomplete evidence in a plea bargain case.

The difficulty of reaching such a conclusion is further amplified by the complexity of DNA results. Proponents of post-conviction DNA testing often view DNA test results as a black and white world: the tests either exculpate the defendant or they do not. However, DNA test results are not always so straightforward. A test sample may provide an inconclusive result, contain multiple DNA profiles (unexplained by the evidence), or be so degraded as to only allow a partial or limited match. Moreover, DNA test results themselves neither incriminate nor exculpate a defendant, they only speak in terms of “inclusion” or “exclusion” of the defendant from the tested biological evidence. Thus, they only connect (or exclude) the defendant to (or from) the evidence, they cannot explain what such a biological connection means in the context of the case. The test results are only clear when the facts surrounding the biological evidence, and its relation to the facts of the offense, are clear. For example, an “inclusive” DNA test result can be very difficult}
result linking a defendant to a cigarette found at the victim’s apartment may be either incriminating (where the victim stated that the offender was smoking the cigarette), potentially exculpating (where the victim stated that the offender definitely did not smoke the cigarette), or neither (where the victim had no recollection of the cigarette). In each scenario, the DNA test result is only as probative as the facts in the record allow it to be, and the facts in a plea bargain case are inherently limited.

Furthermore, the entirety of the discussion above hinges on the assumption that the particular offense to which the offender pleaded guilty bears a logical relation to the discoverable facts in the case. This assumption is nearly always true when a conviction results from a trial, because otherwise the verdict likely would be vulnerable to appellate challenges concerning the sufficiency of the evidence. In such situations, post-conviction DNA procedures function well, because it is this necessary correlation between the state’s evidence and the offender’s conviction that DNA testing seeks to disprove. Such a connection is not always present in plea bargain cases. Since plea bargains are the logical result of protracted negotiations in which both sides have significant risk, it is not uncommon for a compromise to be struck whereby the defendant pleads guilty to an “offense that bears little resemblance to the one with which he was originally charged.” These “ad hoc” plea bargains are simply a strategic decision made by the defendant in order to avoid the negative repercussions of pleading to the original crime.

However, the presence of “ad hoc” plea bargains within the system makes post-conviction DNA procedures involving plea-bargained convictions problematic. Where a defendant pleaded guilty “ad hoc,” any post-conviction DNA proceedings would likely support a claim of innocence, because the defendant would be technically innocent of the convicted offense (and any DNA result would further support that claim). Given that the defendant’s actual innocence of the convicted offense was an understood part of the original plea bargain, this result would be unfortunate, and another example of the danger of under-

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60. Jackson v. Virginia, 443 U.S. 307, 318 (1979) (holding that when reviewing the sufficiency of the evidence, the record must “reasonably support a finding of guilt beyond a reasonable doubt”).

61. Swedlow, Pleading Guilty, supra note 33, at 579.

62. See Colquitt, supra note 29, at 740.

63. For example, an individual who has committed a sexual offense might seek to avoid having to register as a sex offender by negotiating the option of pleading to a non-sexual offense.
mining finality in plea-bargain cases. In instances where the reviewing
court was able to distinguish between “ad hoc” and “normal” plea con-
ventions, this would be less of a problem, since the court could make
an informed decision as to whether to formally acknowledge the “in-
ocence” of the offender or delve into the impact of the DNA result
on the actual underlying (originally charged) offense. The problem,
however, stems from a reviewing court’s inability to make such a dis-
tinction, either because the post-conviction DNA procedures do not
allow sufficient discretion or because not enough facts exist for the
reviewing judge to determine that the conviction in question was the
result of an “ad hoc” plea bargain. Indeed, given that the reviewing
court (and the parties) are generally working with limited facts
gleaned from an older police or prosecutor’s file on the case (where
the existence of such an “ad hoc” arrangement might or might not be
mentioned), the lack of evidence in favor of the convicted offense
could just as easily be interpreted as signifying a weak case as evidence
of an “ad hoc” agreement. Naturally, the reverse is also possible: a
genuinely weak case being mistaken as an “ad hoc” plea. In any event,
the mere existence of such agreements within the system complicates
the application of post-conviction DNA procedures to that system.

2. Gaming the System

A final concern arising from the post-conviction DNA review of
plea-bargained cases is the possible gaming of the system by creative
attorneys and defendants. While highly unlikely, such a possibility is
nevertheless real. There is no mechanism within the post-conviction
DNA statutes to deter a guilty offender from seeking to gain an advan-
tage in the future using DNA testing. Consider, for example, where
a defendant (who knows he is guilty) pleads guilty at arraignment to
an offense in exchange for a highly reduced sentence. Since the plea
was made early in the process, very little evidence will have been un-
covered and all subsequent attempts to gain further evidence will have
ceased. By subsequently challenging the conviction through post-con-

64. There are, however, mechanisms within some post-conviction DNA statutes that
seek to deter guilty defendants from filing frivolous motions. For instance, the U.S. federal
statute requires that the defendant assert “under penalty of perjury” that they are actually
innocent, which could conceivably subject a defendant to a further criminal charge if sub-
sequent post-conviction DNA testing proved actual guilt. See 18 U.S.C.A. § 3600(a)(1)
(West 2000). In addition, some states, such as Texas, only allow defendants to request DNA
testing for biological evidence if that particular form of DNA testing was either not techni-
cally possible at the time of their trial or not available at that time to the defendant for
viction DNA procedures, the defendant will be in a position to selectively test the evidence most advantageous to his cause, and interpret that result in the light of the very undeveloped evidence that exists in the case. In doing so, the defendant would be able to advance theories of innocence that, with a full evidentiary record, would be untenable. In short, the defendant would be using the confusion spawned by a hand-picked exculpatory DNA result in the context of limited evidence (a result of his early plea) to sustain an attack on his conviction, all the while profiting from having locked in an advantageous and inflexible sentence through a plea bargain. As such, the offender would have everything to gain from DNA testing, and nothing to lose (as is often the case in collateral attacks on guilty pleas). Such legal maneuverings have, in some instances, been barred by the wording of post-conviction DNA statutes. However, legislatures cannot be expected to foresee (and foreclose) every possible procedural manipulation stemming from the intersection of plea bargains and post-conviction DNA testing. Good lawyers will find opportunities in even the most well-planned statutes, which is especially dangerous given the complexity and historically unchallenged nature of the plea bargain system.

The usefulness of post-conviction DNA testing at correcting mistaken trial verdicts is undeniable. Interpreting the probative value of post-conviction DNA results is easiest and most reliable where a rich evidentiary record exists to aid in that interpretation. Trials routinely produce these very types of records. Plea bargains, however, are a completely separate legal procedure and produce an entirely different type of evidentiary record, one that is not as amenable to post-conviction oversight and not as helpful in the interpretation of DNA test results. The facts of a plea-bargained case are frequently limited (if available at all) and untested by cross-examination or further investigation, leading to the complete absence of information on some essential issues and the possible misinterpretation of the evidence that is available. Along with the complicating existence of “ad hoc” plea bargains and the possible gaming of the system by resourceful attorneys, these evidentiary issues counsel against the extension of existing post-conviction DNA statutes into the realm of plea bargains. The two systems are simply incompatible.

65. Blackledge v. Allison, 431 U.S. 63, 71 (1977) (“More often than not a prisoner has everything to gain and nothing to lose from filing a collateral attack upon his guilty plea.”).
66. See supra note 60 and accompanying text.
III. The Unconsidered Costs of DNA Testing

Proponents of post-conviction DNA testing underestimate the true costs generated by post-conviction DNA testing. Proponents generally point to the inexpensive cost of current DNA testing, the fact that the defendant often pays for such testing anyway, and the fact that the state already has the evidence and need not go out of its way to obtain it. Likewise, it is often argued that any testing costs borne by the state pale in comparison to the cost of continuing to needlessly incarcerate an innocent individual and the associated costs of allowing a guilty offender to remain free. Leaving aside the question of whether these arguments are generally correct or convincing, the major difficulty they present, and the reason that they are especially unconvincing in this context, is that they ignore the special problems posed by plea bargain cases. As with the evidentiary and finality issues previously discussed, plea bargain cases create different problems than trial cases, and their costs must be calculated accordingly. To gain a better understanding of the weakness of the proponents' cost arguments and to further explore the unique costs inherent in plea bargain cases, three necessarily artificial categories of costs will be analyzed: those associated with the evidence, with manpower, and with the impact on victims and witnesses.

A. Costs Associated with the Evidence

Advocates of post-conviction DNA testing argue that the state's administrative costs arising from biological evidence and any testing of that evidence are minimal. Specifically, they argue that the state already possesses the evidence (and must do nothing special in regards to that evidence) and that the cost of DNA testing is inexpensive (and often paid by the defendant). These arguments completely underestimate the enhanced difficulties presented by plea bargain cases. Furthermore, they invariably ignore the future costs that will likely be born by the state concerning the preservation of evidence.

The cost of DNA testing in a particular case, depending on its complexity and the type of testing required, may range from $2,500 to $5,000. Proponents seize upon this information to advance the posi-

68. Medwed, Innocentrism, supra note 67, at 1565.
tion that testing is inexpensive.\textsuperscript{70} Where such testing leads to the exculpation of an innocent individual, the quoted price does indeed appear a bargain. However, in every other instance, the price is simply an extra sunken cost with no beneficial result. Given that, by some estimates, at least sixty percent of all testing cases fail to exculpate a defendant,\textsuperscript{71} this is not an insubstantial amount of “wasted” money. While it can be legitimately argued that the benefits incurred through the exculpatory tests more than make up for the wasted costs associated with the non-exculpatory tests, at a minimum, one must take into consideration the significant amount of sunken costs that plea bargain cases (which make up ninety percent of the criminal justice system) likely produce.

In addition, there are non-financial costs related to the actual testing of biological evidence that are rarely considered by testing proponents. In particular, it is often forgotten (or ignored) that DNA testing actually destroys the biological evidence that is being tested. This destruction is irrelevant where the testing produces a usable result. Unfortunately, that is not always the case. In some instances, DNA testing sacrifices the biological evidence in return for an indeterminate, non-helpful result. Such an elimination of evidence can have real consequences, both to the defendant (who may have sacrificed the possibility of future testing with more advanced technology) and for the state (which may be paying handsomely for the destruction of evidence with no clear benefit). Where a testing case involves only one defendant, the fear of wasted evidence is minimal: only an exculpatory result will free the defendant and such a result is necessarily useful in any further investigation for the real perpetrator. However, in cases involving multiple defendants (especially where not all of the perpetrators have been identified), the prospect of destroying useful evidence involves more difficult questions.

Finally, the future costs for the state of preserving and storing biological evidence are invariably overlooked by testing proponents. This is an important, though understandable, oversight. Since most state statutes fail to require the government to preserve biological evidence in closed criminal cases, it is not surprising that DNA testing proponents fail to factor such preservation costs into their calculations.\textsuperscript{72} The apparent assumption is that governmental officials do not

\textsuperscript{70} Oh, supra note 27, at 172–73.

\textsuperscript{71} Scheck, supra note 8, at 601.

incur any additional evidence storage costs due to post-conviction DNA testing because the only evidence that is organized and stored is done so for other reasons. While this may have been true in the past, the rules (and attitudes) concerning the destruction of biological evidence are rapidly changing. As of 2005, twenty-one jurisdictions had legislated a duty upon governmental officials to preserve and retain any biological evidence associated with a closed criminal case until the release of the convicted individual. These legislatively imposed duties were created primarily to aid post-conviction DNA testing cases. Indeed, they are the logical end result of a statutory right to such testing (and therefore the jurisdictions involved would appear to be the vanguard of a much larger movement). Thus, while the state may not have incurred any additional costs preserving the evidence in an older case, it is very likely incurring system-wide costs for the preservation of evidence in all potential future DNA cases. Since plea bargain cases represent the lion’s share of the criminal justice system, the overwhelming majority of evidence storage costs will be incurred in plea bargain cases. As such, any discussion of costs associated with post-conviction DNA testing, specifically relating to plea bargain cases, must take this system-wide commitment of future costs into consideration.

B. Costs Associated with Manpower

The most heavily debated and misunderstood subject concerning the costs of post-conviction DNA testing relates to the time burden such testing arguably places on state employees. Generally, opponents of DNA testing assert that the sheer volume of frivolous motions, as well as the amount of time needed to competently research and answer these motions, is an unacceptable strain on both the prosecutor and the judicial system. Proponents, on the other hand, argue that such concerns are overstated. Regardless of which side is correct, the most important aspect of this discussion is the fact that the manpower costs incurred by the state in handling plea bargain cases are substantially different from those incurred in trial cases.

73. Id. at 1255–56 (identifying preservation requirements in nineteen states, the federal government, and the District of Columbia).
74. Id. at 1256.
75. Kreimer & Rudovsky, supra note 21, at 610–11.
76. Id.
Despite what post-conviction DNA testing proponents assert, frivolous DNA motions do exist and are a problem.77 The main difficulty from a cost perspective is that prosecutors must treat all motions as if they are meritorious until their research proves otherwise.78 Thus, prosecutors must diligently investigate each and every claim, expending valuable time and resources, since it is only through such investigation that the frivolous nature of a motion can be discovered.79 Moreover, it is not only the prosecutor that is burdened with extra work: the officials in charge of preserving evidence (frequently either courthouse employees or the police evidence unit) must ascertain whether biological evidence even exists, public defenders often must interview the defendant and prepare the actual DNA motion, and judges and clerks are required to process and rule on any motions and answers that are filed. In plea-bargain cases where the records are especially fact-scarce, sometimes even investigators (either police investigators or those associated with the prosecuting attorney’s office) must be brought in to flesh out the evidentiary record. Each of these individuals incurs real and substantial costs in the pursuit of due diligence for every DNA motion filed, frivolous or meritorious. In addition, innocent defendants themselves pay a price: the “tidal wave of frivolous motions can drown out the viable” motions, thus making an otherwise meritorious motion appear frivolous by association.80

Testing proponents frequently argue that frivolous motions are an illusion because guilty defendants do not seek DNA testing.81 The argument is that guilty defendants refrain from filing DNA motions for fear of submitting their DNA to the state and possibly being linked to other unsolved crimes.82 While there is an admitted attractiveness to the logical simplicity of this argument, the reality is quite different. Statistics show that guilty defendants do not think quite as logically about their potential criminal exposure as scholars do: the Innocence Project itself (the most well-known of the many post-conviction DNA innocence projects) reports that in fifty to sixty percent of its cases that advance to testing, the DNA results actually inculpate the defen-

77. Medwed, The Zeal Deal, supra note 54, at 148.
79. See Medwed, The Zeal Deal, supra note 54, at 149.
80. Medwed, The Zeal Deal, supra note 54, at 148–49. See also Brown v. Allen, 344 U.S. 443, 537 (1953) (Jackson, J., concurring) (“It must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search.”).
81. Oh, supra note 27, at 179; Kreimer & Rudovsky, supra note 21, at 610–11.
82. Supra note 8 and accompanying text.
This is an astonishing statistic, given that only the most meritorious-seeming DNA motions generally make it as far as actual testing; most patently frivolous motions are eliminated during the investigatory phase. Thus, it must be assumed that the overwhelming majority of filed DNA motions are without merit. Since plea bargain cases generate ninety percent of criminal convictions, allowing post-conviction DNA testing in those cases likely leads to a very substantial increase in not only overall DNA motions but frivolous motions too. Such an increase would result in a noticeable enlargement in the associated financial and manpower costs as well.

In addition, the prosecution costs associated with plea bargain cases are considerably higher than those related to trial cases. When reviewing a trial case, prosecutors very often need only obtain and read over the trial transcript to determine whether any biological evidence might exist and whether the claim has any substantive merit. However, when initially reviewing a plea bargain case, the prosecutor likely must find (an often arduous process on its own) and read through the entire prosecutor’s file, if it still exists. Such files are, as previously discussed, neither complete nor inherently trustworthy. They also occasionally fail to detail the physical evidence that was gathered in the investigation. Thus, when dealing with a plea bargain case, the prosecutor frequently must first research and investigate the case thoroughly in order to assure that all of the available information is gathered, before reviewing the actual merits of the motion. This is a time-consuming process that offers very few shortcuts and no guarantees of success.

Likewise, the individuals involved in ascertaining the existence of biological evidence in plea bargain cases are also more heavily burdened than in trial cases. As previously noted, current technology al-

83. See supra note 8 and accompanying text.
84. The New England Innocence Project, for instance, generally accepts only 10% of the applications that it receives. Carroll, supra note 56, at 678.
85. Jacobi & Carroll, supra note 8, at 270 (“[T]he majority of petitions involve guilty prisoners applying for post-conviction DNA testing.”). See also Steve McGonigle, Overturned Convictions: Righting Wrongs, DALLAS MORNING NEWS, Jan. 22, 2007 at A1 (reporting that in Dallas County, Texas, 93% of the 464 post-conviction DNA motions filed between 2001 and 2007 were considered without merit).
86. See Tammy Ardolf & John Stone, Handling Post-Conviction DNA Motions, TEX. PROSECUTOR, Sept.–Oct. 2004, at 25 (identifying the trial transcripts and the original prosecutor’s file as the best initial sources of information about a case); Arcabascio, supra note 52, at 68 (noting that a trial transcript can be used to provide a court with the underlying facts in a post-conviction DNA case).
87. See Ardolf & Stone, supra note 86, at 23.
allows the testing of material previously considered insufficient (or even unidentified originally), a result that has led to the conclusion that “the net in the search for evidence should be cast as widely as possible.” As such, considering the general difficulty of identifying relevant evidence in plea bargain cases due to the incomplete evidentiary and factual records available, it is not uncommon that evidence clerks are required to locate nearly all of the evidence in plea bargain cases, and not just those pieces that were previously marked as “biological material.” In addition, since any request to locate evidence originates from a fact-starved prosecutor, the request itself is often short of helpful information. For example, whereas a trial transcript might contain a detailed description of a piece of physical evidence that must be located, a plea bargain case may only result in a simple request to locate a “dress” or a “sheet” associated with the case. Needless to say, locating such evidence is exponentially harder under these limitations, especially when one considers the often-haphazard evidence storage procedures that some jurisdictions maintain. Further hindering the pursuit of evidence is the often-lamentable fact that most evidence is, in fact, not preserved. Barry Scheck, one of the co-founders of the Innocence Project, has estimated that “useful biological evidence” exists in only about fifteen percent of cases. Thus, evidence storage administrators are normally charged with an impossible task, but without a reliable appellate or evidentiary record, they are unaware of its impossibility. Unsurprisingly, it takes less time to determine the existence of evidence than it does to conclusively determine its non-existence. Unfortunately, such exhaustive searches are often required by both meritorious and frivolous motions alike. The attendant increase in time and resources spent in such fact-scarce plea bargain cases, whether meritorious or not, imposes a sizeable, though frequently overlooked, burden on the state.

C. Costs Associated with Victims and Witnesses

If the manpower costs associated with post-conviction DNA testing are subject to the heaviest scholarly debate, then the emotional costs imposed upon victims and witnesses by the process are the least debated. Indeed, in many instances, scholars dismiss such costs out of

88. Arcabascio, supra note 52, at 72–73. See also Kreimer, Truth, supra note 52, at 659.
89. Jones, supra note 72, at 1245.
hand, arguing that victims are only impacted in those rare instances where the defendant is actually exonerated.\(^{92}\) Unfortunately, this is not always true and is even less likely to be true in plea bargain cases than in trial cases.

In the past few decades, there has been an increasing awareness of the rights of victims to both participate in and be informed of criminal proceedings concerning their assailant. This movement has led to numerous victims’ rights statutes (or even constitutional amendments) at both the state and federal levels.\(^{93}\) A significant element of such statutes concerns the victim’s right to be notified of any relevant proceedings in their assailant’s criminal case, both pre-trial and post-trial.\(^{94}\)

While the language of these laws may not explicitly include post-conviction DNA motions, the intent of the statutes unmistakably dictates that victims are entitled to notification at some point in the process. The difficult question for prosecutors is to determine at what stage in the process victims become entitled to that notification. This uncertainty places prosecutors in an unenviable position: they must choose between protecting victims (by withholding notification until later in the process) and protecting themselves (by fulfilling a liberal interpretation of the statutes and providing notification of all filings).

For its part, the U.S. Department of Justice recommends that victims be informed of any post-conviction DNA motion as early in the process as possible, while simultaneously cautioning prosecutors to use their discretion to shield victims.\(^{95}\) However, regardless of the merits of the DNA motion or the explicitness of any applicable state statute, prosecutorial discretion in this area is often limited by the need to ensure that victims find out about any motion from the state and its victim assistance specialist (both to protect the victim’s confidentiality and for emotional reasons), rather than from the defense or the me-

\(^{92}\) Kreimer & Rudovsky, supra note 21, at 607 (arguing that “[t]esting itself has no impact whatsoever on victims, witnesses, or complainants, unless it actually exonerates an innocent individual”).


Thus, in spite of the arguments set forth by proponents of post-conviction DNA testing that victims are rarely affected by DNA motions, prosecutors are repeatedly required (either by circumstances or statute) to notify victims early in the process.

Notification is also not simply a meaningless formality, with little or no impact on victims. Though this may be true regarding some victims, in many instances such notification is a difficult and painful experience. Unlike “normal” post-trial notifications concerning appeals or parole, a notice informing the victim of a pending post-conviction DNA motion is generally unexpected and confusing. Post-conviction DNA motions normally arrive well after the case has been “closed,” thus upsetting any finality or closure that the victim has achieved. Moreover, since the post-conviction DNA process is likely unknown or unfamiliar to the victim, it is therefore potentially even more alarming and must be explained. Likewise, the types of cases that typically result in a post-conviction DNA motion, such as sexual assault, produce victims and witnesses that are likely to react strongly to any subsequent developments in the case. In addition, unlike appeals (which may focus on legal error or technicalities) or parole hearings (which focus on rehabilitation and release), the post-conviction DNA process is concerned with the actual innocence of the defendant, and thus is seen by victims and witnesses as a direct attack on their honesty and integrity. Given these circumstances, notification of even the simple filing of a post-conviction DNA motion can impose a severe emotional cost on the victim.

Plea bargain cases are more likely than trial cases to require victims to pay that price, and often more. As previously asserted, plea bargain cases generally suffer from limited evidentiary records and often oblige both parties to recreate the facts of the case from old

96. Id.
98. Carroll, supra note 56, at 667. See also Travis & Asplin, supra note 95, at 55 (noting that post-trial events are emotionally painful); Ardolf & Stone, supra note 86, at 26 (stating that victims are often confused or defensive when initially contacted); Stephanie Simon, DNA Tests for Inmates Debated, L.A. Times, Feb. 10, 2003, at A10 (describing the experience of prosecutors when notifying victims of post-conviction DNA testing).
100. Travis & Asplin, supra note 95, at 55.
101. Carroll, supra note 56, at 668 n.17. See also Edward J. Imwinkelried, The Relative Priority that Should Be Assigned to Trial Stage DNA Issues, in DNA AND THE CRIMINAL JUSTICE SYSTEM: THE TECHNOLOGY OF JUSTICE, supra note 55, at 91, 96 (noting that the subsequent development of mental illness by the victim must be taken into account when notification is considered).
witness statements and police reports that are neither inherently reliable nor complete. Therefore, victims may need to be contacted not only for notification purposes, but also for investigative purposes, since they are frequently the key piece of evidence in the case. Needless to say, such investigative contacts are likely to be more upsetting to victims than mere notification, and are thus normally discouraged. Additionally, motions that result in actual DNA testing necessitate not only victim notification but normally also victim cooperation and participation in the form of DNA sample collection, though the impact on the victim is obviously mitigated by the meritorious nature of the instigating motion. Regardless, the costs imposed upon victims by the post-conviction DNA process (whether for notification or investigative purposes) are both formidable and generally underappreciated by scholars.

IV. Final Assessment

A. Cost/Benefit Analysis of Post-Conviction DNA Motions Arising from Plea Bargained Cases

In order to comprehend the undesirability of allowing plea bargain defendants access to the post-conviction DNA process, it is necessary to discuss not only the costs that such motions place upon the system and victims but also the extremely limited nature of the benefits that are derived from allowing such access. The most obvious and significant benefit of post-conviction DNA testing is the exoneration of innocent defendants. Proponents also frequently argue that testing helps repair the harm to society and victims (as well as defendants) caused by the incarceration of innocent individuals. They likewise assert that post-conviction DNA testing helps reveal the flaws inherent in the system. While each of these outcomes is an obvious benefit of the process, that does not mean that the benefits are equally likely to result from both trial cases and plea bargained cases. In practice, the very opposite appears to be true: plea-bargained cases that are subjected to the post-conviction DNA process produce far fewer benefits than trial cases do.

To understand why plea bargain cases in a post-conviction DNA context are less likely to benefit society than trial cases, it is necessary

102. Travis & Asplin, supra note 95, at 55–56.
103. Id. at 56.
104. Borteck, supra note 2, at 1467–68; Oh, supra note 27, at 182.
105. Oh, supra note 27, at 184.
to analyze the statistics for exonerated defendants. In 2008, Professor Garrett reviewed the 208 cases at that time where an individual had been exonerated using post-conviction DNA analysis.\textsuperscript{106} Of those 208 cases, only nine of the original convictions were the result of a plea bargain agreement.\textsuperscript{107} Thus, even though plea bargains comprise approximately ninety percent of all criminal convictions (including eighty-four percent of rape convictions), they produced only four percent of all post-conviction DNA innocence cases.\textsuperscript{108} While this number must be taken with a grain of salt (given that it is still unclear how many states actually allow plea bargain defendants access to the post-conviction DNA process), the exoneration rate in Texas bolsters Professor Garrett’s conclusions. Texas provides an especially good comparison since it is both the state with the most DNA exonerations (forty to date)\textsuperscript{109} and one of the few states that explicitly allows guilty plea defendants access to post-conviction DNA testing.\textsuperscript{110} However, reviewing Texas’s exonerations shows that only two were not trial cases.\textsuperscript{111} As such, even in the ideal setting of a state with explicit access for plea bargain defendants and numerous exonerations, plea bargain cases produced only five percent of Texas’s exonerations, a percentage firmly in line with Professor Garrett’s findings.\textsuperscript{112} This seeming irrelevance of plea bargain cases within the post-conviction DNA process is rather notable given the prevalence of such cases within the criminal justice system generally, and leads to the inevitable conclusion that plea bargain cases provide a target-poor environment in

\textsuperscript{106} Garrett, \textit{Judging Innocence}, supra note 1, at 57.

\textsuperscript{107} Id. at 74. See also Fact Sheet, Innocence Project, \textit{supra} note 9 (Although the Innocence Project identifies eleven such cases where guilty plea individuals were later exonerated through post-conviction DNA testing, this minor increase fails to substantially change the argument.).

\textsuperscript{108} Garrett, \textit{Judging Innocence}, supra note 1, at 74.


\textsuperscript{110} Tex. Code Crim. Proc. Ann. art 64.03(b) (West 2009).


\textsuperscript{112} Garrett, \textit{Judging Innocence}, supra note 1, at 74.
terms of post-conviction DNA testing. In short, in the context of plea bargain cases, any benefit derived by the exoneration of innocent defendants is minimal, since there are so very few exonerations from this class of cases.

Furthermore, because there are so very few exonerations arising from plea-bargained cases, any flaws that might be revealed about the system through these exonerations (such as the limitations of eye-witness testimony or police misconduct) are likely to appear random rather than systematic. As such, even though it may be true that exonerations provide a lucid window into the failings of the system, where plea-bargained cases are concerned, the failings will likely fail to exhibit any systematic pattern due to their restricted number, and therefore, be of limited benefit to any reform process. The minor number of plea bargain exonerations also minimizes the benefits that society might accrue from repairing the harm done from false imprisonment: since there are very few falsely imprisoned defendants discovered in this class of cases, there are equally limited benefits to be obtained by repairing those isolated incidents.

Just as plea-bargained cases that are subject to the post-conviction DNA process produce fewer benefits for society (in comparison to trial cases), they conversely impose far higher costs (relative to trial cases). First, the damage to the specific, bargained-for finality of plea bargains is substantial. Unlike trial cases, where finality is a general concept that can be redefined without fatal consequences, the finality inherent in plea bargains is an indispensible element of the bargain itself. Undermining the finality of plea bargains has an unknown and incalculable impact upon the system itself, and not just upon the individual cases involved. Second, the demonstrated incompatibility of the fact-scarce plea bargain system with the fact-intensive post-conviction DNA process leads to increased workloads and creates the potential for unreliable results. The two systems are largely unsuited for each other, and this incompatibility raises costs and increases the difficulty of even the simplest DNA case. Third, since plea bargain cases comprise ninety percent of the criminal justice system, their inclusion within the post-conviction DNA process has the potential to exponentially increase the manpower and monetary costs associated with processing motions and storing evidence in future cases. Fourth, the limited evidentiary record of most plea bargain cases requires supplementary investigation, leading to even further monetary and manpower costs, as well as the possible necessity of contacting (and questioning) the victim. Given the increased costs associated with plea
bargain cases within the post-conviction DNA process, it is necessary
to treat them differently than trial cases. For while the cost/benefit
analysis may produce a positive result in the context of trial cases
(where there exists substantial benefits at a moderate cost), it fails to
do so in the context of plea-bargained cases (where minimal benefits
are produced at a very high cost). The substantial difficulties inherent
in exposing plea-bargained cases to the post-conviction DNA system,
combined with the increased costs generated by the process as well as
the exceedingly low exoneration rate that is produced, lead to the
inevitable, if uncomfortable, conclusion that plea bargained cases
should not be subject to the post-conviction DNA process.

B. The Myth of an “Innocence” Trump Card

Any adjudicatory system relying upon the judgment and expertise
of humans will inevitably make mistakes.113 The advent of post-convic-
tion DNA statutes has created a nearly unprecedented opportunity to
both discover and correct such human errors within the criminal jus-
tice system. The difficulty, however, is to determine the extent to
which society should support the correction of these mistakes. For
proponents of post-conviction DNA motions, the answer is relatively
straightforward: since society empowered the system that is making
these mistakes, it has a duty to discover and correct every possible er-
ror.114 In other words, the possibility of innocence should trump all
other considerations of cost and inconvenience. This argument, how-
ever, misjudges the true nature of both the criminal justice and plea
bargain systems while simultaneously overstating society’s role in the
imprisonment of individuals who pleaded guilty.

Contrary to common perception, the criminal justice system is
not directly concerned with the actual innocence or guilt of defend-
ants: rather it is “designed to ensure a fair procedure and not necessa-
rily a fair outcome.”115 In other words, while the system is set up to
objectively determine the guilt or innocence of an individual, it does
so not by concentrating on that objective determination, but rather,
by making certain that the individual is given a fair and objective pro-
cess. It is assumed or understood that if the procedures are impartial
and fair, then the result will take care of itself. Thus, the criminal jus-
tice system is more open to arguments based upon the procedural

113. Medwed, Innocentrism, supra note 67, at 1553.
114. Borteck, supra note 2, at 1467.
115. George C. Thomas III et al., Is It Ever Too Late for Innocence? Finality, Efficiency, and
rights of a defendant (the procedures accorded to an individual) than it is to arguments based upon the specific facts of a defendant’s case (whether an individual is factually guilty).\textsuperscript{116} By advancing the argument that objective innocence trumps all other considerations, proponents of post-conviction DNA testing fail to realize that, for the most part, individuals who have been adjudged guilty through due process are guilty in the only sense of the word that matters to the criminal justice system.\textsuperscript{117} In \textit{Herrera v. Collins}, the United States Supreme Court made it clear that claims of actual innocence were secondary to the procedural rights of defendants.\textsuperscript{118} As such, the argument that fact-based innocence claims should take precedence over other aspects of the system assumes a reality that does not exist.

Likewise, the innocence or guilt of a defendant within the plea bargain system also appears as a secondary consideration, subordinate to the certainty of the outcome. Defendants plead guilty in order to minimize their exposure to stiff penalties and achieve a final, lesser sentence. It is the certainty and finality of a palatable result that drives their actions. Whether they are guilty or innocent is a consideration of obvious importance to their ultimate decision, but, given that they eventually pleaded guilty, it is clearly not of paramount importance (in relation to certainty). Under these circumstances, it is difficult to see why society should treat the innocence of a plea bargain defendant as more important than the finality of the result when the defendant himself has already failed to do so. This is especially true given the unpredictable consequences that undermining that finality may have on the plea bargain system itself.

Furthermore, proponents of post-conviction DNA testing who argue the preeminence of objective innocence and that society has a duty to correct its own mistakes overlook an important conceptual distinction that exists between trial cases and plea bargain cases. In the context of a trial case, the defendant has necessarily maintained his innocence and forced society to imprison him against his will. Moreover, society has been integrally involved in this process not only through its elected officials but also through the jury process that achieved an incorrect result. However, in the context of a plea bargain case, the defendant is imprisoned with his express consent, and it is not a jury’s mistaken judgment that has brought about this imprisonment, but rather a strategic decision by the defendant himself. Thus,

\textsuperscript{116} Medwed, \textit{Innocentrism}, supra note 67, at 1551.
\textsuperscript{117} Thomas, supra note 115, at 264.
\textsuperscript{118} 506 U.S. 390, 404 (1993).
the debt that society owes to an individual falsely imprisoned after a jury trial is vastly different than that which it owes to a defendant who voluntarily pleaded guilty and accepted punishment. To argue that actual innocence should be the dominant consideration in each of these two conceptually different situations is to not only ignore the distinction between these two types of cases, but also to willfully ignore the different roles that actual innocence has already played in each process. On one hand, where the defendant has consistently maintained his innocence throughout a trial, then actual innocence is an obvious consideration of great importance and should continue to be so throughout the post-conviction DNA process. On the other hand, where the defendant voluntarily subordinated his innocence in favor of more practical considerations, then there is very little reason for society not to do so in post-conviction procedures.

As such, it is not only logical, but entirely appropriate, to subject the availability of post-conviction DNA procedures to a cost/benefit analysis. Neither the overall criminal justice system, nor the plea bargain system in particular, places preeminent importance upon the objective determination of guilt or innocence. The actual innocence of a plea bargain defendant may be a powerful ideological and emotional symbol, but that should not necessarily trump all other considerations of cost and benefit.

Conclusion

By weighing the negative costs associated with subjecting the plea bargain system to the post-conviction DNA process against the minimal benefits that doing so would produce, there is a very strong case to be made that plea bargain defendants should be denied access to DNA procedures. That innocent individuals will thereby remain trapped in the criminal justice system is an unfortunate given. However, the reality of an underfunded criminal justice system leaves little room for choice.

The continued imprisonment of innocent individuals who pleaded guilty is an uncomfortable, but defensible, side effect of society’s legitimate attempts to punish the guilty. In this respect, the criminal justice system can be viewed in the same light as other regulatory schemes that seek to maximize the overall benefits to society while knowingly accepting the negative consequences of those regula-

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119. Thomas, supra note 115, at 274.
Thus, governments recognize that raising the speed limit on highways will result in increased traffic fatalities, yet they accept these fatalities as a palatable side effect of ensuring a more efficient flow of traffic. Concerning post-conviction DNA procedures, the negative consequence of denying plea bargain defendants access to the system is the certainty that some innocent individuals will remain incarcerated. However, by restricting the post-conviction DNA system only to trial cases, society reduces the emotional costs paid by victims and minimizes the substantial manpower and monetary costs associated with both court procedures and evidence investigation and storage, while simultaneously ensuring the finality and certainty that is essential to the plea bargain system. If plea-bargain cases were a target-rich environment producing numerous innocent defendants (as trial cases indeed do), these considerations would likely be outweighed by the sheer necessity of ensuring the objective fairness and accuracy of the criminal justice system. However, as previously demonstrated, plea bargain cases produce minimal benefits in this regard since they have historically offered few provable claims of innocence.

The idea that, in spite of this historical absence of colorable claims, the substantial increases in manpower and evidentiary costs detailed above should be disregarded in favor of an expanded search for the very rare cases of plea bargain actual innocence, is to confuse aspiration with reality. Society may aspire to create a perfectly functioning criminal justice system, but in reality, it appears unwilling to pay the costs associated with such a system. The uncomfortable truth is that the state departments associated with DNA motions (such as forensic science labs) are already severely underfunded, leading to numerous problems, not the least of which are massive backlogs for DNA tests. Allowing plea bargain defendants access to the post-conviction DNA process places an unjustifiable strain on the exact areas of the criminal justice system that need their load lightened, not increased. Furthermore, any time spent reviewing an old plea bargain

120. Medwed, Innocentrism, supra note 67, at 1554.
121. Id.
DNA case is time taken away from working an ongoing investigation or a post-conviction DNA trial case.

In the final analysis, regardless of the assertions of proponents for expansive post-conviction DNA testing, the question of who should be allowed access to post-conviction DNA testing is one of priorities. In the context of trial cases, the impressive exoneration rate (at moderate costs) requires that funding for this process be given priority. In contrast, the exceedingly low number of exonerations produced by plea bargain cases, with the potential for very significant cost increases, dictates nearly the opposite result. Ultimately, it is not simply a question of whether society should allow plea bargain defendants to challenge their convictions through post-conviction DNA testing, but rather whether this would be a more efficient use of taxpayer resources than other, more beneficial, uses. The uncomfortable truth is evident: allowing plea bargain defendants access to the post-conviction DNA process is illogical.