WILL THE TRUTH SET THEM FREE? NO, BUT THE LAB MIGHT: STATUTORY RESPONSES TO ADVANCEMENTS IN DNA TECHNOLOGY

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I. INTRODUCTION

Ronald Cotton was pardoned in 1995 after twice being convicted of the rape of a North Carolina student.[1] The strongest evidence against him was the eyewitness testimony of the victim.[2] In 1999, Anthony Porter was exonerated after spending seventeen years in an Illinois prison for a double shooting homicide that he did not commit.[3] He had been scheduled to be executed more than six months earlier.[4] January 2000 marked the release of Clyde Charles of Louisiana, a man who spent nineteen years in prison after being convicted of rape. [5] The charge had been made up by the alleged victim.[6] Christopher Ochoa was released from a Texas prison in 2001, twelve years after being wrongly convicted for the murder of a Pizza Hut employee.[7] He had received a life sentence.[8]

What these men have in common, in addition to having been wrongly convicted, is that each was freed through DNA testing. Each was convicted before the use of DNA evidence in trials was available. Each was found guilty beyond a

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1. *See* John Hinton & Michelle Johnson, *Without Doubt: Evidence Piles Up, But the Jury is Still Out on the Value of DNA Testing*, WINSTON-SALEM J. (N.C.), Feb. 18, 2001, at 1, *available at* 2001 WL 3041086.

2. *See id.*

3. *See* Daniel J. Lehmann, *Porter Cleared of '82 Murders*, CHI. SUN-TIMES, Mar. 12, 1999, at 8, *available at* 2000 WL 6529475.

4. *See id.*

5. *See* Mark Riley, *DNA Testing Gives Freedom to 64th Inmate*, SYDNEY MORNING HERALD, Apr. 1, 2000, at 25, *available at* 2000 WL 18229220.

6. *See id.*

7. *See* Kathryn Wolfe, *DNA Proves the Wrong Man Convicted*, HOUS. CHRON., Jan. 17, 2001, at 13, *available at* 2001 WL 2993107.

8. *See id.*

reasonable doubt. What accounts for such horrendous mistakes in justice? According to a study conducted by the Innocence Project[9] of sixty-two wrongful convictions, a disturbing factor present in eighty-four percent of the convictions was mistaken eyewitness identification.[10] Other factors present in the wrongful convictions included testimony of snitches or informants (21%), false confessions (24%), shoddy defense attorneys (27%), prosecutorial misconduct (42%) and police misconduct (50%).[11] The scientific nature of DNA testing, however, makes the testing, in most situations, immune to the human fallibilities that have led to such miscarriages of justice.[12]

DNA, or deoxyribonucleic acid, is present in every cell containing a nucleus, and contains the genetic code for all living things.[13] Genetic traits are determined by the precise sequence of four different base pairs found on DNA segments known as alleles.[14] Because all individuals other than identical twins have unique genetic codes, DNA can be used in identity testing.[15] Technology today does not allow for testing of the entire DNA sequence, but only of a few discrete DNA segments.[16] DNA identity testing looks for a match of alleles in only 0.1% of the DNA sequence; in any two people, 99.9% of the sequence is

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9. The Innocence Project is a clinic run by Professor Barry Scheck at Cardozo School of Law, Yeshiva University. The project is dedicated to freeing those who have been wrongly convicted.

10. *See* JIM DWYER ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES OF THE WRONGLY CONVICTED 246 (2000). Witness misidentification has generated a field of study unto itself and has been the subject of many psychological experiments. *See* BRIAN L. CUTLER & STEVEN D. PENROD, MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY AND THE LAW (1995); *see also* Robert Buckhout, *Nearly 2000 Witnesses Can Be Wrong*, SOC. ACTION & L., May 1975, at 2.

11. *See* DWYER ET AL., *supra* note 10, at 246.

12. Remember, however, that scientific tests are conducted by people and that people are not perfect. Consider the case of Fred Zain, a serologist once employed by the West Virginia State Police Crime Laboratory and then by the County Medical Examiner's Laboratory in San Antonio. *See* Paul Gianelli, *The Abuse of Scientific Evidence in Criminal Cases: The Need for Independent Crime Laboratories*, 4 VA. J. SOC. POL'Y & L. 439, 442–47 (1997). While working for both labs, Zain falsified lab results and testified against defendants using his false data. *See id.* at 442, 447–48. Known as being "very pro-prosecution," Zain even testified that a defendant's DNA found on a rape victim "could only have originated from [the defendant]." *Id.* at 448. Such blanket statements are untrue as DNA profiling cannot positively identify *one* person. However, DNA profiling can exclude a person; the defendant was later excluded through subsequent DNA tests. *See id.* Both West Virginia and Texas have brought perjury charges against Zain. *See id.* at 448–49.

13. *See* State v. Bible, 858 P.2d 1152, 1179 (Ariz. 1993).

14. *See id.*

15. *See id.* (citing William C. Thompson & Simon Ford, *DNA Testing: Debate Update*, 28 TRIAL 52 (1992)).

16. *See id.*

identical.[17] Thus, an accurate analysis of the remaining 0.1% of the sequence is crucial.

A match of two sequences in a DNA test can mean one of three things: "(1) the samples came from the same individual; (2) the samples came from identical twins; or (3) the samples came from different individuals but, by pure chance, the DNA segments examined match."[18] Thus, a match does not conclusively mean that the person was the donor of the genetic evidence. A match only means that the person *could have* produced the evidence.[19] Methods used to determine the probability of a match coming from the same person vary among laboratories and were, at one time, not admissible as evidence in Arizona.[20] However, while a match may only signify that the individual could have been the donor, the lack of a match definitively signifies that the individual could *not* have been the donor. Samples that do not match must have come from different people.[21] Therefore, the lack of a match in DNA testing provides more concrete evidence than the presence of a match.

Two types of DNA testing are commonly used today. The first, Restriction Fragment Length Polymorphism (RFLP), is used by the principal forensic DNA laboratories in the country: Cellmark, Lifecodes and the Federal

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17. *See id.* at 1179–80 (citing D. H. Kaye, *The Admissibility of DNA Testing*, 13 CARDOZO L. REV. 353, 354 (1991)).

> An autorad, [an x-ray film that is a final product of DNA testing of a sample], contains several bands...representing different polymorphic DNA segments. To determine whether two samples match, [the lab] first visually compares the samples' banding patterns.... A match is declared if each band varies in position less than one or two millimeters from the corresponding band in the other sample.

Id. at 1184.

18. *Id.* at 1185.

19. *See id.* at 1193.

20. *See id.* at 1188. The method of ascertaining the random match *probability* figures, in this case used by Cellmark, was found not to be generally accepted with the relevant scientific community at the time, and therefore failed the *Frye* test. *See id.* at 1188–89. However, the theory of DNA itself, the principles underlying DNA testing and the match *criteria* pass the *Frye* test and are admissible. *See id.* at 1190. The *Frye* test comes from *United States v. Frye*, 293 F. 1013 (D.C. Cir. 1923). In this case, the defendant's attorney argued against the admissibility of results from a "systolic blood pressure deception test," which measured the rate of a person's blood pressure while being questioned and which purported to show if a person was telling the truth or not. *See id.* at 1013–14. The court found that to be admissible, there must be a showing that such a test has been accepted among the relevant scientific community as valid. *See id.* In other words, in order for an expert to testify as to the results of a test, which the average person would be incapable of determining on their own, there must first be a showing that the test is generally accepted among the relevant scientific community. *See id.* at 1014.

21. *See Bible*, 858 P.2d at 1184.

Bureau of Investigation.[22] The other, newer method is the Polymerase Chain Reaction (PCR) amplification method.[23] PCR-based testing, which can amplify miniscule amounts of trace evidence that would not be receptive to RFLP testing, is also being used in the major forensic labs as well as local and state crime laboratories.[24]

The last ten years have seen great advancements in the field of DNA technology. With such advancements, the United States has seen an increase in the number of persons being released from prison when modern DNA tests show that they could not have committed the crime. DNA post-conviction testing has revealed some troubling factors present in our legal system. In Illinois, twelve people have been released from death row after being exonerated by DNA testing; the same number have been executed since the death penalty was reintroduced in Illinois in 1977.[25] Such disparaging statistics led the Governor of Illinois to announce a moratorium on the death penalty.[26] Other states have been less receptive to DNA testing at the post-conviction stage. Clyde Charles, convicted on false accusations of rape in Louisiana, was required to waive any claim for monetary damages for wrongful imprisonment before local prosecutors would allow him to take the DNA test that proved his innocence.[27] North Carolina officials let a man twice convicted of murder have DNA tests done on the semen found in the victim's body.[28] Although the man was excluded as the source of the semen, state prosecutors and judges chose to disregard the evidence since the defendant was never charged with rape or any sexual offense; to them, there was still enough evidence to show that the man robbed, kidnapped and killed the woman even if he was not her rapist.[29]

Although many states have allowed post-conviction DNA testing through statutes pertaining to newly discovered evidence,[30] two states, Illinois and New York, were pioneers in the field by enacting statutes that deal specifically with

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22. *See* Barry Scheck, *DNA and Daubert*, 15 CARDOZO L. REV. 1959, 1963 (1994).

23. *See Bible*, 858 P.2d at 1185; *see also* Gianelli, *supra* note 12, at 443.

24. *See Bible*, 858 P.2d at 1185; *see also* Gianelli, *supra* note 12, at 443.

25. *See* Ray Long, *Revamp Likely in Process for Death Penalty*, CHI. TRIB., May 18, 1999, at 20, *available at* 1999 WL 2874455.

26. *See Foes of Death Penalty Honor Gov. Ryan*, CHI. TRIB., Mar. 11, 2002, at 3, *available at* 2002 WL 2632523.

27. *See* Riley, *supra* note 5, at 25. "The only 'compensation' Mr. Charles is entitled to is what is left of the 22 cents an hour he earned working in the cotton fields at the Angola State Penitentiary." *Id.*

28. *See* John Hinton, *DNA Testing Can Confound Authorities, Defendants Alike; Forsyth Cases Support a Pattern of Mixed Results*, WINSTON-SALEM J. (N.C.), Feb. 18, 2001, at 13, *available at* 2001 WL 3041100.

29. *See id.*

30. *See* text accompanying *infra* note 33.

DNA testing after conviction.[31] Not surprisingly, Illinois and New York have also had the most exonerations based on DNA testing.[32] Since then, states have begun to follow suit by enacting similar statutes.[33] However, since the majority of these statutes are too new to have generated interpretory case law, this Note will focus primarily on the Illinois and New York statutes, with some concluding analysis of the newly-enacted Arizona statute.

II. THE ILLINOIS STATUTE

A. The Language of the Statute

Enacted in 1997, the Illinois statute[34] allows a convicted defendant to make a motion before the trial court to have DNA evidence tested if the evidence "was secured in relation to the trial which resulted in his or her conviction, but which was not subject to the testing which is now requested because the technology for the testing was not available at the time of trial."[35] In addition to requiring reasonable notice to the state, the statute mandates that a defendant *must* present a *prima facie* case that "(1) identity was the issue in the trial which resulted in his or her conviction; and (2) the evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material aspect."[36] If the defendant can meet the prima facie burden, the court shall allow the testing if "(1) the result of testing has the scientific potential to produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence; [and] (2) the testing requested employs a scientific method generally accepted within the relevant scientific community."[37] A successful appeal under the statute depends only on the defendant meeting the *prima facie* burden and the court finding that the test will lead to evidence relevant to the defendant's claim of actual innocence;

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31. *See* 725 ILL. COMP. STAT. ANN. 5/116-3 (West 2000); *see also* N.Y. CRIM. PROC. LAW § 440.30(1-a) (McKinney 1994).

32. *See* DWYER ET AL., *supra* note 10, at 246.

33. Other states that have enacted statutes dealing specifically with post-conviction DNA testing include: Arizona (ARIZ. REV. STAT. § 13-4240 (2001)); Arkansas (ARK. CODE ANN. § 16-112-202 (Michie 2001)); California (CAL. PENAL CODE § 1405 (West 2000)); Indiana (IND. CODE §§ 35-38-7-1 to 35-38-7-19 (2001)); Louisiana (LA. CODE CRIM. PROC. ANN. art. 926.1 (West 2001)); Maine (ME. REV. STAT. ANN. tit. 15, § 2137 (West 2001)); Maryland (MD. CODE ANN., CRIM. PROC. § 8-201 (2001)); Michigan (MICH. COMP. LAWS § 770.16 (2001)); Nebraska (NEB. REV. STAT. § 29-4120 (2001)); New Mexico (N.M. STAT. ANN. § 31-1a-1 (Michie 2001)); Tennessee (TENN. CODE ANN. §§ 40-30-401 to 40-30-413 (2001)); and Utah (UTAH CODE ANN. § 78-35a-301 (2001)). This list is not meant to be exhaustive.

34. 725 ILL. COMP. STAT. ANN. 5/116-3 (West 2000).

35. *Id.*

36. *Id.*

37. *Id.*

retesting under the statute does not take into account the strength of the State's evidence against the defendant.[38]

B. When is Post-Conviction DNA Testing "Materially Relevant?"

Since the statute's enactment, there have been several appellate cases that interpret its language. The first case, *State v. Gholston*,[39] discussed a situation where evidence from DNA testing would not be considered "materially relevant" for purposes of the statute. Defendant Kenneth Gholston had been convicted in 1981 of various sexual offenses in addition to robbery and aggravated battery.[40] The fifteen-year-old victim had been sexually assaulted by at least six different men and had identified Gholston as the first to engage in forcible vaginal intercourse with her.[41] The trial court denied Gholston's motion to compel testing of the samples taken, from the victim, which were contained in the Vitullo kit,[42] holding that he could not base his claim on an argument of actual innocence.[43] In affirming the trial court, the appellate court, first district, found that testing of the DNA recovered from the victim would not be "material" to the defendant's actual innocence claim.[44] Because ejaculation was not an "essential element" of the defendant's crimes, "the absence of defendant's DNA from the Vitullo kit could establish that defendant did not ejaculate during the sexual assault, but could not conclusively establish that defendant did not sexually assault the victim."[45] Since DNA testing could not conclusively exclude Gholston as a perpetrator of the sexual assault, the court viewed the evidence as insufficient "to override the witness identifications and self-incriminating statements defendant made about his participation in the crime."[46] Thus, the court interpreted "materially relevant" to mean that the evidence gained from a retest of DNA must be of enough weight to

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38. *See* State v. Urioste, 736 N.E.2d 706 (Ill. App. Ct. 2000) "We agree with Urioste when he argues that the strength of the State's case was not a hurdle that he had to overcome in order to meet the statute's requirements for post-conviction forensic testing." *Id.* at 711; *see also* State v. Savory, 722 N.E.2d 220 (Ill. App. Ct. 1999). "A claim of 'actual innocence' under section 116-3 does not involve an analysis of whether a defendant was proved guilty beyond a reasonable doubt at the original trial." *Id.* at 225.

39. 697 N.E.2d 375 (Ill. App. Ct. 1998).

40. *See id.* at 376.

41. *See id.* at 377.

42. *See id.* at 376–77. A Vitullo kit, a typical rape kit, is used throughout hospitals in the United States. Most kits contain oral, vaginal and anal swabs, a comb, a tube for a blood sample and sterile paper envelopes in which to place the evidence.

43. *See id.* at 376.

44. *Id.* at 378. "[T]he victim did not testify that the defendant ejaculated." *Id.* at 379.

45. *Id.* at 379.

46. *Id.* The self-incriminating statements made by Gholston related to his presence at the scene of the crime and his participation in the robbery and battery of the victim's two male companions. *See id.* at 416.

prove the defendant innocent of the crime.[47] In a gang-rape rape conviction, a defendant is unlikely to prove his innocence using DNA. Not only must the DNA evidence exclude all the perpetrators, there must be proof that all perpetrators ejaculated.

The appellate court, second district, came to a different conclusion when construing the term "materially relevant."[48] In determining whether the defendant, Richard Hockenberry, should be allowed to pursue post-conviction DNA testing under the statute, the court held that the language of the statute does not limit testing to only those situations where the test would result in "total vindication" of the defendant.[49] Hockenberry had been convicted of home invasion and aggravated criminal sexual assault of his ex-wife.[50] Because he had admitted to being present in the victim's residence, the court did not let him proceed under the DNA statute as to the home invasion charge.[51] However, the court found that Hockenberry had presented a *prima facie* case as to the sexual assault charge even though the State argued that the seminal fluid present in the victim and on her sheets could have come from a consensual encounter with a third party.[52] That is, the fact that the semen came from another source would not prove that the defendant had not sexually assaulted the victim. The court stated, however, that the exclusion of the defendant as the source of the semen had the "potential" to produce evidence that was "materially relevant" to the defendant's claim of actual innocence.[53] According to the second district, "[t]o permit additional scientific testing only in those instances where the testing would result in the defendant's absolute and total vindication would unnecessarily preclude the production of new evidence directly related to the defendant's assertion of innocence."[54] Thus, while the appellate court, first district, seems to hold that to be "materially relevant," the evidence must show that the defendant was innocent of the crime, the second district sets a broader standard in that the evidence need only corroborate the defendant's claim of innocence.

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47. *See id.* at 380. The court "[holds] that any evidence that could be obtained via DNA testing would not be material to this particular defendant's actual innocence and *would not be of such conclusive character as to probably change the result on retrial.*" *Id.* (emphasis added).

48. *See* State v. Hockenberry, 737 N.E.2d 1088 (Ill. App. Ct. 2000).

49. *Id.* at 1093.

50. *See id.* at 1090.

51. *See id.* at 1092.

52. *See id.* at 1092–93. The State's contention was that the presence of seminal fluid of a third party could not establish the actual innocence of the defendant. *See id.* at 1092. The defendant testified that he had had no sexual contact with the victim whatsoever, not that the contact had been consensual. *See id.*

53. *See id.*; *see also* 725 ILCS 5/116-3(c)(1).

54. *Hockenberry*, 737 N.E.2d at 1093–94.

C. What Constitutes "Actual Innocence?"

In *State v. Savory*, using the *Gholston* case as precedent, the appellate court interpreted the section 116-3 meaning of "actual innocence."[55] In 1977, Johnny Lee Savory was convicted of the stabbing deaths of a brother and sister, James Robinson and Connie Cooper.[56] A pair of pants stained with type A blood, the same type as Connie's, was found at Savory's home and was used against him at trial.[57] Twenty years later, Savory moved to have the pants and fingernail scrapings tested under section 116-3, seeking to establish that the blood on the pants did not come from Connie and that any DNA recovered from under the victims' fingernails could not be attributed to him.[58]

The appellate court affirmed the trial court's denial of Savory's motion on two grounds.[59] The court reasoned that a DNA test on the pants resulting in a negative match would at most show that "[the] defendant did not wear these particular pants at the time of the murders."[60] Likewise, a negative result from DNA testing of the fingernail scrapings would not exonerate the defendant, especially since "[t]here [was] no evidence that either of the victims' fingernails ever came in contact with the perpetrator."[61] Thus, the appellate court found that the trial court did not err in denying the defendant's motion since negative results of the DNA tests would not change the results of Savory's conviction.[62] The court found that "in using the term 'actual innocence,' the legislature intended to limit the scope of section 116-3, allowing for scientific testing *only where it has the potential to exonerate a defendant.*"[63] Thus, as in *Gholston*, the majority of the court believed that a motion under section 116-3 may be properly granted only when the results of the requested DNA test have a strong chance of vindicating the defendant.[64]

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55. State v. Savory, 722 N.E.2d 220, 225 (Ill. App. Ct. 1999).

56. *See id.* at 222.

57. *See id.*

58. *See id.*

59. *See id.* at 225–26.

60. *Id.* at 225.

61. *Id.* at 225–26. The court also discussed problems with the chain of custody relating to the fingernail scrapings; the court held that Savory had not met his burden of proving that any evidence from the scrapings still existed. *See id.*

62. *See id.* at 226.

63. *Id.* at 225 (emphasis added).

64. *See id.* at 225. Justice Holdridge disagreed with the majority's analysis and felt that testing should be ordered where results of such testing have the "potential" to be "materially relevant" to the defendant's actual innocence claim. *See id.* at 226 (Holdridge, J., dissenting). He believed that "[i]f the legislature had intended this statute to only be available where the scientific evidence would lead to 'total vindication,' it could have easily said so." *Id. But see* State v. Hockenberry, 737 N.E.2d 1088, 1093 (Ill. App. Ct. 2000) (following Justice Hodridge's dissent and lowering the standard so as not to require total vindication).

D. Jurisdiction, the Right to Counsel and Time Limitations

In addition to the interpretation of "actual innocence," the *Savory* court established two other important holdings regarding the application of section 116-3. First, the court held that an appellate court has jurisdiction to review a denial of a section 116-3 motion.[65] The court found that the denial of a motion for DNA testing under section 116-3 constitutes a final order since a defendant has no alternatives once the motion is denied.[66] Second, *Savory* held that the appropriate standard of review is *de novo*.[67] Since the trial court's determination in a section 116-3 motion is necessarily based on pleadings and transcripts, "the trial court [is] in no better position that this [appellate] court is to decide the merits of defendant's motion."[68]

State v. Love[69] established another important holding in the interpretation of section 116-3. In *Love*, the defendant was convicted of home invasion and armed violence in May of 1988.[70] Ten years later, Love moved for forensic testing of blood found at the scene of the crime.[71] The court allowed him to file a motion for the appointment of counsel.[72] At the hearing on the motion, the State claimed that the blood had been destroyed.[73] Appointed counsel conceded and the court denied the motion.[74]

On appeal, Love argued that he had received inadequate assistance of counsel because appointed counsel had conceded to the State despite the fact that the blood's destruction had not yet been established.[75] The appellate court rejected Love's claim. First, the court determined that Love had no constitutional right to counsel at this post-conviction point in his appeal.[76] Second, the court found that "a plain reading of section 116-3 of the Code reveals that it too conveys no right to counsel."[77] Thus, because neither the Constitution nor section 116-3 provides a

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65. *See Savory*, 722 N.E.2d at 223.

66. *See id.*

67. *See id.*

68. *Id.* at 223.

69. 727 N.E.2d 680 (Ill. App. Ct. 2000).

70. *See id.* at 681.

71. *See id.* at 682.

72. *See id.* (appointed counsel filed an amended motion that merely restated defendant's original motion).

73. *See id.*

74. *See id.*

75. *See id.*

76. *Id.* at 682–3. "It is well settled that the constitutional right to counsel (U.S. Const., amends. VI, XIV) applies during defendant's trial and first appeal of right, and no further." *Id.* at 683 (citations omitted).

77. *Id.*

right to counsel, a defendant does not have a right to challenge a denial of a section 116-3 motion based on inadequate assistance of counsel.[78]

An additional important precedent dealing with section 116-3 was established in *State v. Rokita*.[79] In 1994, Frederick M. Rokita was convicted of, among other charges, five counts of aggravated criminal sexual assault resulting from an attack on a woman in her mobile home in 1993.[80] The victim testified that her attacker had not ejaculated; however, a rectal swab taken at the hospital revealed the presence of sperm cells and a vaginal swab revealed the presence of semen.[81] Although the genetic evidence was forwarded to the state lab for testing, the only DNA profile the test could produce was that of the victim.[82] In April, 1999, Rokita filed a section 116-3 motion for forensic testing, alleging that he met his *prima facie* burden under the statute.[83] The trial court denied his motion, believing that the outcome of the trial would have been the same, regardless of the results of the DNA test.[84] On appeal, the State "[urged] the court to impose a time limitation on a defendant's ability to seek forensic testing pursuant to section 116-3" by asserting that a section 116-3 motion should only be proper "in connection with a timely post-conviction petition or one that is excusably late."[85] The appellate court, looking at the plain language of section 116-3 and the legislative history surrounding the statute, found nothing to indicate that the legislature intended there be a time limit for filing a motion for post-conviction forensic

78. *See id.*

79. 736 N.E.2d 205 (Ill. App. Ct. 2000)

80. *See id.* at 206–07.

81. *See id.* at 207.

82. *See id.* (test used was "restriction fragment length polymorphism" (RFPL)).

83. *See id.* at 208 (alleging (1) identity was an issue at trial, (2) evidence had been subject to a chain of custody, (3) "polymerase chain reaction" (PCR) test had been developed and had the potential to produce materially relevant evidence, and (4) PCR testing was accepted in the scientific community). The motion did not expressly aver that PCR testing had not been available at the time of trial, but the State conceded that the short-tandem repeat type of PCR testing was not available. *See id.* at 210. *Cf.* State v. Franks, 752 N.E.2d 1274 (Ill. App. Ct. 2001). In *Franks*, the defendant attempted to bring a motion by arguing that the biological evidence in his case *had not been tested* at the time of trial. *See id.* at 1276. The court found his motion to be "wholly insufficient." *Id.* Thus, a showing that the evidence was not tested, as opposed to the test being unavailable, will not allow a defendant to bring a successful motion under the statute.

84. *See Rokita*, 736 N.E.2d at 208. "The [trial] court also expressed its concern...that defendants might continually seek DNA testing under section 116-3 each time a new DNA test was developed, resulting in lack of finality to their convictions." *Id.*

85. *Id.* at 212 (citing People v. Dunn, 713 N.E.2d 568 (Ill. App. Ct. 1999)).

testing.[86] Thus, no time limit shall be imposed on a defendant seeking post-conviction relief under section 116-3.[87]

Interestingly, this court, the court of appeals for the fifth district, criticized both *Gholston* and *Savory* and rejected their interpretations of "materially relevant" and "actual innocence."[88] The *Rokita* court expressed concern that the *Savory* court ignored the plain language of section 116-3 in holding that DNA testing is appropriate only where the new evidence would be conclusive as to the defendant's guilt or innocence.[89] Instead, the *Rokita* court agreed with the *Savory* dissent and held that the language of the statute indicates that the legislature "chose to allow testing in any case where the results might be materially relevant."[90] Consequently, the court reversed the determination of the trial court and held that Rokita's motion to compel testing should be granted since "[a] conclusive determination of whether Rokita's DNA matches the sample taken from the victim would be both new and noncumulative and would be materially relevant to assertion of actual innocence."[91] Thus, the appellate courts in Illinois are split as to the standard to apply in determining the effect of DNA evidence on a defendant's case.

E. Identity of the Perpetrator

Illinois courts have likewise had the opportunity to interpret section 116-3 regarding the defendant's *prima facie* burden to show that identity was at issue at trial. The first case involved Mark Urioste, who had been found guilty, but mentally ill, of the stabbing death of his neighbor in 1987.[92] The victim's mother, responding to strange sounds upstairs, entered her daughter's room to find the defendant on top of her daughter, attempting to have sexual intercourse.[93] When Urioste stood up at the mother's request, the mother noticed that Urioste had a

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86. *See id.* at 213.

87. See *State v. McLaughlin*, 755 N.E.2d 82 (Ill. App. Ct. 2001), where the court held that the different limitations periods applicable to those seeking post-conviction relief do not violate the defendants' due process or equal protection rights. *See id.* at 88. The defendant had argued that "certainly relief may not be limited only to those wrongfully-convicted defendants whose convictions involve fingerprints or forensic evidence." *Id.* at 89.

88. *See Rokita*, 736 N.E.2d at 211.

89. *See id.* at 212. "Section 116-3 does not require that the requested DNA testing produce evidence of such a conclusive character as would probably change the results on a retrial. Instead, the statute requires only that it has the '*potential* to produce new, noncumulative evidence *materially relevant* to the defendant's assertion of actual innocence.'" *Id.* (citation omitted); *see also* State v. Hockenberry, 737 N.E.2d 1088, 1091 (Ill. App. Ct. 2000).

90. *Rokita*, 736 N.E.2d at 212.

91. *Id.*

92. State v. Urioste, 736 N.E.2d 706, 710 (Ill. App. Ct. 2000).

93. *See id.* at 709.

knife and that he and her daughter were covered with blood.[94] Urioste ran out the front door, but the police soon found him hiding in his bed, covered with blood.[95] Both the blood on Urioste and on a knife found outside his home matched the blood type of the victim, but not of the defendant.[96]

At trial, Urioste pled the affirmative defense of not guilty by reason of insanity.[97] The trial judge found Urioste mentally ill but not insane and imposed long prison terms.[98] In August of 1999, Urioste filed a section 116-3 motion to determine whether or not the blood on his clothing and on the knife matched the DNA profile of the victim.[99] The trial judge granted the State's motion to dismiss, finding that Urioste was precluded from using section 116-3 because identity had not been an issue at his trial.[100] The appellate court, in affirming the trial court, rejected arguments made by both the State and Urioste. The State had argued that "[b]y its use of the language 'identity was *the* issue in the trial,' the legislature intended to afford post-conviction DNA testing only to those whose trials tested solely the issue of who committed the crime." [101] In other words, the State urged a holding that any defendant who contested any issue at trial other than identity would be precluded from the remedy of section 116-3. The court rejected the State's narrow interpretation, not wanting to limit the issues a defendant may litigate during trial.[102] In the court's view, the language used by the legislature "confined the statutory remedy to trials where identity was a legitimate contested issue, but not necessarily the only issue litigated."[103] However, the court accepted the State's argument that identity was not at issue at Urioste's trial and thereby rejected Urioste's attempt to argue that identity was still an issue even after his plea of insanity.[104] According to the court, identity ceased to be an issue when

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94. *See id.*

95. *See id.*

96. *See id.* Other evidence implicating Urioste included his palm print found on the bathtub (the perpetrator had gained access to the house through the bathroom), eyewitness testimony from the mother, sister and neighbors, and incriminating statements made by Urioste to the police and the judge.

97. *See id.* at 709. Urioste had suffered brain damage as a result of a closed head injury in 1981. *See id.* As a result of the injury, "he exhibited a lingering decrease in control over impulses, especially sexual ones." *Id.* In addition, while in treatment, Urioste had climbed through another patient's window and had raped her. *See id.*

98. *Id.* at 710.

99. *See id.*

100. *See id.*

101. *Id.* at 711.

102. *See id.* at 712.

103. *Id.*

104. *See id.* at 714. The court characterized Urioste's argument as follows:

> I did not commit the acts that caused the death of Rebecca Rodgers and whoever did is still at liberty. However, had I committed those acts instead of whoever did, I would not have been criminally responsible. I

Urioste entered his plea of not guilty by reason of insanity. Accordingly, "[i]nsanity is like an affirmative defense in the sense that the defendant *admits to the charged conduct* but claims that he is not criminally responsible for that conduct because of a mental disease or defect." [105] Thus, where a defendant decides to forego an attack on identity and instead chooses an affirmative defense, the defendant is precluded from invoking section 116-3 at the post-conviction stage.[106]

The fourth district also had the opportunity to construe the "identity was at issue at trial" prong of section 116-3; here, however, the defendant had not pled an affirmative defense.[107] The defendant, Stevens, some acquaintances and the victim rented a hotel room after meeting at a bowling alley.[108] After the victim passed out during a card game, Stevens attacked the victim, alternately beating and choking him.[109] One of the acquaintances threw Stevens a pillowcase, which he used, along with a telephone cord, to choke the victim to death.[110] Stevens then carried the victim to the third-floor balcony and threw the body off, apparently trying to throw the body into a dumpster.[111] He missed, however, and the group was confronted by the police when the body was discovered on the ground near the dumpster.[112] After being convicted, Stevens attempted to bring a motion under section 116-3 to have the bloody fingerprints on the pillowcase tested.[113] The trial court found that identity had not been at issue at trial.[114] In their *de novo* review of the trial court's holding, the appellate court likewise found that Steven's identity had not been disputed at trial.[115] The court noted that Stevens "admitted in his statement to the police that he was in the hotel room...and that he took the victim

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was legally insane before, during, and after someone else stabbed Rebecca Rodgers.

Id.

105. *Id.* at 714 (citations omitted). The court also reasoned that identity ceases to be an issue in cases involving affirmative defenses such as "self-defense, compulsion, entrapment, [or] necessity...." *Id.*

106. *See id.* "[The legislature] did not want defendants who tendered unsuccessful affirmative defenses at their trial to later disavow the commission of the acts charged, just so they could obtain postconviction testing of evidence meaningless to how they contested their guilt." *Id.*

107. State v. Stevens, 733 N.E.2d 1283, 1285 (Ill. App. Ct. 2000).

108. *See id* at 1284.

109. *See id.*

110. *See id.*

111. *See id.*

112. *See id.*

113. *See id.* at 1285. Stevens conceded that the requisite technology was available at the time of trial, but argued that he did not have a chance to test the pillowcase because the prosecution had failed disclose the existence of the pillowcase until the time of the trial. *See id.*

114. *See id.*

115. *See id.* at 1285–86.

to the balcony;" the State likewise produced uncontradicted evidence to that effect.[116] The results of a DNA test simply could not negate Stevens' presence in the hotel room and his act of carrying the victim to the balcony. Stevens' identity was therefore not at issue at trial.

F. Summary of the Illinois Statute

Thus, the various holdings of the Illinois appellate courts indicate that section 116-3 makes the remedy of post-conviction DNA testing available only to those defendants whose identity was *an* issue at trial.[117] However, such defendants do not have a right to counsel in preparing a motion under section 116-3, and they therefore cannot complain of inadequate assistance of counsel.[118] An appellate court has jurisdiction to review a trial court's decision relating to a section 116-3 motion, and the court should review the decision *de novo*.[119] A defendant's section 116-3 motion is not subject to any time constraints.[120] However, one cannot be sure how to interpret the "materially relevant" and "actual innocence" aspects of the statute because of the conflicting decisions of the first, second and fifth Districts.

III. THE NEW YORK STATUTE

A. Language and History of the Statute

The state of New York has likewise created a statutory response to the problem of wrongful convictions and exculpatory DNA evidence.[121] As part of a larger piece of legislation, enacted to set higher standards for state and local

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116. *Id.* at 1286.

117. *See* State v. Urioste, 736 N.E.2d 706 (Ill. App. Ct. 2000).

118. *See* State v. Love, 727 N.E.2d 680, 683 (Ill. App. Ct. 2000).

119. *See* State v. Savory, 722 N.E.2d 220, 223 (Ill. App. Ct. 1999).

120. *See* State v. Rokita, 736 N.E.2d 205, 213 (Ill. App. Ct. 2000).

121. Before the creation of a statutory right to post-conviction DNA testing, the chances of a judge granting a post-conviction defendant's motion to test evidence were slim. One line of cases held that because there was no statutory basis for post-conviction discovery, a defendant was precluded from petitioning the court to have biological evidence tested after trial. *See, e.g.*, State v. Brown, 618 N.Y.S.2d 188, 190 (1994). The court was especially unsympathetic to the defendant's petition for post-conviction testing since DNA testing had been available at the time of trial. *See id.* The other line of cases allowed a defendant to have biological evidence tested after conviction under the "newly discovered evidence" rationale of N.Y. CRIM. PROC. LAW § 440.10(1)(g) (McKinney 1994), which allows for the vacatur of judgment where the evidence "could not have been produced by the defendant at the trial even with due diligence..." and where such evidence had a high probability of creating a verdict more favorable to the defendant. *See id.*; *see also* State v. Callace, 573 N.Y.S.2d 137, 138 (N.Y. Sup. Ct. 1991).

forensic laboratories and to create a DNA databank,[122] New York added part 1-a to section 440.30,[123] which became effective August 2, 1994.[124] Part 1-a contains the cut-off date of January 1, 1996, which coincides with the compliance date for local and state forensic laboratories to meet accreditation standards.[125] If a defendant was convicted before the date and meets other requirements laid out in the statute, the defendant can move to have DNA evidence tested.[126] After determining that DNA evidence was secured in connection with the trial resulting in the conviction of the defendant, the court will grant a defendant's motion to have the DNA tested if the court can hypothesize that "if a DNA test had been conducted on such evidence, and if the results had been admitted in the trial resulting in the judgment, there exists a reasonable probability that the verdict would have been more favorable to the defendant."[127]

B. First Attempt in Construing the Statute—Does it Allow for Private Testing?

The first case to interpret the 1994 addition of part 1-a was *State v. Chichester*.[128] Here, Henry Chichester, III, moved to compel the District Attorney to have physical evidence held by the DA's office turned over to the defendant's expert for forensic testing.[129] The State opposed the defendant's motion on the grounds that part 1-a refers to "the *performance* of a forensic DNA test on the specified evidence."[130] Thus, the State argued, the language of the statute refers only to testing done by state and local laboratories and precludes the defendant from testing the material at his own expense.[131] The court held that the statute provided a defendant with a narrow right to request forensic testing from state or local governmental laboratories, but that the statute "[was] silent" as to a defendant's right to have such testing done at the defendant's own expense at a private facility.[132] In the court's words:

> There is no provision in any of the newly enacted legislation that in any way relates to DNA testing done at private expense by a private laboratory. Consequently, this court cannot interpret CPL 440.30 (1-a) so as to limit the defendant's right to attempt to demonstrate

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122. *See* State v. Tookes, 639 N.Y.S.2d 913, 914 (1996); *see also* N.Y. EXEC. LAW § 995(a)–(e) (McKinney 1996).

123. NY CRIM. PROC. LAW § 440.30(1-a) (McKinney 1994) (section 440.30 is entitled 'Motion to vacate judgment and to set aside sentence; procedure').

124. *See In re* Washpon v. N.Y. State Dist. Attorney, 625 N.Y.S.2d 874, 876 (1995).

125. *See id.* at 877.

126. *See* N.Y. CRIM. PROC. LAW § 440.30(1-a) (McKinney 1994).

127. N.Y. CRIM. PROC. LAW § 440.30(1-a) (McKinney 1994).

128. 618 N.Y.S.2d 201, 202 (N.Y. Sup. Ct. 1994).

129. *See id.*

130. *Id.* at 202.

131. *See id.* at 202–03.

132. *Id.* at 203.

> actual innocence though the performance of tests made at his own expense.[133]

Thus, the court granted the defendant's motion and gave him thirty days to contact the DA's office to arrange for private forensic testing at his own expense.[134]

C. Private Testing Is Covered, but at Whose Expense?

While the *Chichester* court's ultimate holding allowed for post-conviction DNA testing, the court's flawed analysis regarding the new statute was thoroughly discussed in a subsequent case, *In re Washpon v. N.Y. State District Attorney*.[135] The *Washpon* court criticized the *Chichester* court's determination that part 1-a did not apply to private testing at the expense of the defendant.[136] Looking at the legislative history of the statute, and at the larger Executive Law article 49-B, the *Washpon* court determined that part 1-a "must and does envision private testing...."[137] As noted above, part 1-a was enacted as part of a larger piece of legislation created to accredit state and local governmental forensic laboratories;a although such laboratories need not have been accredited by January 1, 1996, part 1-a uses January 1, 1996 as a cut-off date for convictions.[138] According to the *Washpon* court, "[t]he intent of the new CPL 440.30(1-a) is to provide an immediate means for DNA testing of evidence before state and locally run laboratories receive accreditation from the newly-created commission."[139] Thus, a defendant who was convicted before the state's accreditation program was in place can avail himself to any DNA testing laboratory approved by the court.[140]

After holding that the purpose of part 1-a is to allow a defendant to move for forensic testing at a private facility, the court turned to the question of who should pay for the expensive DNA testing under the statute.[141] The court again looked at the budget report in the Bill Jacket and noticed that no money was set aside for DNA tests of evidence that resulted in convictions prior to January 1, 1996.[142] "This lends weight to the supposition that since testing is being done at the request and by motion of the defendant, it is presumed to be done at the defendant's expense as well."[143] However, if a defendant can properly prove indigency, fairness requires that the State pay for the testing.[144]

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133. *Id.*
134. *See id.*
135. 625 N.Y.S.2d 874, 876–77 (N.Y. Sup. Ct. 1995).
136. *See id.* at 877.
137. *Id.*
138. *See id.*; *see also* N.Y. EXEC. LAW § 995 (Mckinney 1994).
139. *Washpon*, 625 N.Y.S.2d at 877.
140. *See id.*
141. *See id.* at 878.
142. *See id.*
143. *Id.*
144. *See id.*

D. Identity May Not Have Been the Issue at Trial—Does the Statute Still Apply?

Having established the propriety of using part 1-a for private testing at a defendant's own expense, the *Washpon* court further shed insight as to when a 1-a motion should be granted. The court held that after a defendant has shown that evidence still exists in an amount that can be tested, "a judicial determination must be made as to whether a reasonable probability exists of a more favorable verdict."[145]

Samuel Washpon had been convicted of rape in the first degree in 1984; his cousin alleged that instead of driving her home as she requested, he had taken her to a secluded spot and assaulted her.[146] A rape kit was made at the hospital soon after the attack, but the semen on the vaginal swabs and on the victim's jumpsuit "was never scientifically connected to the defendant."[147] The victim claimed that she had not engaged in sexual intercourse with anyone else on the night of the assault.[148] Recall that under the Illinois statute, the identity of the defendant had to be at issue at trial before Illinois would allow for post-conviction DNA testing.[149] Here, however, the victim knew the defendant quite well as she was related to him. Thus, misidentification was not an issue. Nevertheless, the New York court held that post-conviction DNA testing would be proper once the defendant showed that the DNA evidence was still available in an amount sufficient to be tested.[150] Because the victim claimed to have had no other sexual partners, the court noted that the fact that the semen did not belong to the defendant may have been significant at trial:

> If tests of the semen stains on her clothing and on the swabs taken in a vaginal inspection prove not to belong to the defendant, [the victim's] credibility would have been considerably weakened....

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145. *Id.* at 878.

146. *See id.* at 875–76.

147. *Id.* at 876.

148. *See id.* at 878.

149. *See supra* text accompanying notes 100–04.

150. *See Washpon*, 625 N.Y.S.2d at 879; *see also* State v. Ahlers, 285 A.D.2d 664 (N.Y. App. Div. 2001). The New York Supreme Court, Appellate Division, Third, firmly held that the burden is on the defendant to show that the evidence is still in existence. *See Ahlers*, 285 A.D.2d at 665. Ahlers, who had been convicted of multiple sex offenses, sought to have a "green striped towel" that the perpetrator had allegedly used to wipe up ejaculations tested, even though the towel had not been used as evidence at trial. *Id.* at 664–65. The court denied his motion because he had failed to show that the towel was still in existence. *Id.* at 665. A question existed as to whether the towel had ever been "secured" as evidence in the first place; if it had been, the towel had long since been destroyed. *Id.* at 665. The court also held that the State does not have to maintain evidence after all of the defendant's appeals have been exhausted. *See id.* at 665.

> There exists a reasonable probability the jury would not have credited the rest of her story as well.[151]

Thus, unlike a defendant in Illinois, a defendant in New York wishing to avail himself of post-conviction DNA testing under part 1-a does not have to prove that identity was at issue at trial. Post-conviction DNA testing can be used to attack witness credibility if the circumstances of the case so allow.

E. When Will a Verdict Be "More Favorable" to a Defendant?

Witness credibility issues alone will not support a part 1-a motion. Cases following *Washpon* have clearly demonstrated that the granting of a part 1-a motion is proper only when the results of the DNA testing, if such results had been admitted at trial, would result in a verdict more favorable to the defendant. In *State v. de Oliviera*,[152] the court examined a motion made by a defendant who had been convicted of second-degree murder in 1983 for the strangulation death of his wife.[153] The night of the murder, the wife had been with the defendant until 1:00 a.m.; after leaving the defendant, her whereabouts were unknown until 4:00 a.m. when she went to her boyfriend's apartment, where he refused to engage in sex with her.[154] According to the State's evidence, she was killed sometime around 5:00 a.m.[155] The defendant moved under part 1-a to have semen evidence collected from his wife tested; "[he] reasons that there would not have been time for her to have had sexual relations with another person after leaving her paramour and then been strangled by the defendant, as the prosecution contends."[156]

The court rejected his argument for two reasons. First, because semen can be present in the vagina for several days after being deposited, a DNA test could not establish when the semen had been deposited in the victim, and thus could not support defendant's theory.[157] Second, even if defendant was excluded as the source of the semen, "there was no evidence that the killing was part of a sexual encounter and, importantly, *there was no critical testimony that could be seriously impeached by the test results.*"[158] Thus, in denying the defendant's motion, the New York court established a standard that is much wider in scope than the Illinois statute. Granting a defendant's part 1-a motion is proper when any critical testimony can be seriously impeached. Accordingly, post-conviction DNA evidence can potentially be used to exculpate a defendant who has been convicted as a result of misidentification, witness perjury or false accusations when such testimony can be refuted or seriously compromised by showing the defendant was not the source of the DNA evidence.

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151. *Washpon*, 625 N.Y.S.2d at 878–79.
152. 223 A.D.2d 766 (N.Y. App. Div. 1996).
153. *See id.* at 766–77.
154. *See id.* at 767–68.
155. *See id.* at 767.
156. *Id.*
157. *See id.* at 767–68.
158. *Id.* at 768 (emphasis added).

While witness impeachment can be an important function of the statute, a court should look to the totality of the circumstances when granting a part 1-a motion. A New York court had the opportunity to examine a case where the defendant had claimed that he had been falsely accused but where post-conviction testing of DNA evidence was *not* proper.[159] In *Tookes*, the defendant had been convicted in 1986 of the first-degree rape of a woman that he had known for several years.[160] At trial, the defendant claimed that the victim had made up the entire incident in order to get back at him "for his alleged complicity in the murder of her friend four years earlier."[161] After the enactment of part 1-a, the defendant moved to have vaginal swabs, panties and a bed sheet tested.[162] The court rejected the motion on several grounds.

First, the defendant's contention that the victim had fabricated the whole story was highly improbable in light of other evidence.[163] The police who arrived at the scene testified to the victim's "bruised and hysterical condition" and to "the ransacked condition of the apartment, including the cords hanging from the bedpost which...the assailant had used to bind her."[164] The physician who examined the victim after the assault found injury to her vaginal wall "consistent with forcible penetration."[165] Additionally, the victim identified the defendant on the day of her attack; a false identification made out of malice to the defendant would have meant that the real assailant, in possession of her keys, was still on the loose.[166]

Second, the court reasoned that even if the defendant were excluded as the source of the semen on the swabs, panties and sheet, he could not be excluded as the assailant since the semen could have been deposited by someone other than the attacker.[167] The chemist who examined the samples testified that the semen on the swab could be as old as two weeks and that the age of the semen on the bed sheet could not be established since it could have survived laundering.[168] Thus, without testimony that the victim had not had sexual contact with anyone other than the defendant for at least a fortnight, exclusion of the defendant as the donor would not have been probative.

Finally, the court looked to the blood and saliva samples of both parties that had been introduced by the State, which demonstrated only that the defendant could not be excluded as the source of the recovered biological evidence because

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159. *See* State v. Tookes, 639 N.Y.S.2d 913, 916 (1996).
160. *See id.* at 914–15.
161. *Id.* at 915.
162. *See id.* at 914, 916.
163. *See id.* at 916.
164. *Id.* at 915.
165. *Id.*
166. *See id.* at 916.
167. *See id.*
168. *See id.*

both he and the victim were Type A secretors.[169] The court found the fact that the defendant did not pursue a more specialized enzyme analysis available at the time significant since the test "potentially could have excluded the defendant as the source...."[170] According to the court, "the Legislature intended that DNA testing be ordered only upon a court's threshold determination, in the context of the trial evidence, that the testing results carry a reasonable potential for exculpation."[171] The defendant did not meet his burden here since the probability of a verdict of not guilty, in light of all the evidence against him, was quite low even if favorable results of a DNA test had been introduced.

F. Statutory Construction and the "Due Diligence" Requirement

Although the appeal was later dismissed by the highest court in New York,[172] the New York Supreme Court, Appellate Division case of *State v. Kellar*[173] provides insight into the due diligence requirement of part 1-a as part of the larger statutory scheme regarding post-conviction relief. In 1989, Rae Kellar was convicted for raping a sixteen-year-old girl.[174] Kellar's defense was that he had participated in some consensual sexual activity with the girl, but that the activity did not amount to sexual intercourse.[175] During the analysis of the victim's rape kit, the police crime laboratory found two dead sperm cells in the victim's vaginal secretions.[176] The specimens were not tested at the time of trial, and the defendant moved in the present case to have the sperm cells tested.[177] His theory was that because the victim had testified that she had told defendant she was a virgin during the encounter, testing of the sperm cells would show that 1) he was not the donor, and 2) the victim's testimony was not credible.[178] The court, however, denied his motion. During her exam after the attack, the victim had told the physician that the assailant had not ejaculated.[179] Therefore, the fact that the defendant's sperm was not present could not exculpate him. Moreover, the victim had testified that she *had told the defendant* that she was a virgin, not that she *was*

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169. *See id.*

170. *Id.*

171. *Id.* at 915.

172. *See* State v. Kellar, 678 N.E.2d 464 (N.Y. 1997). "When the Legislature enacted CPL 440.30 (1-a) in 1994, it made no provision for appeal of orders emanating from applications for relief under that remedial section, nor did it add to the list of prescribed authorizations for appeals under CPL 450.10 or 450.15." *Id.* at 464. Thus, a denial of a part 1-a motion is not appealable as a matter of right, though later cases have allowed for appeals. *See, e.g.*, State v. Smith, 245 A.D.2d 79 (N.Y. App. Div. 1997).

173. 218 A.D.2d 406 (N.Y. App. Div. 1996).

174. *See id.* at 407.

175. *See id.*

176. *See id.*

177. *See id.* at 407–08.

178. *See id.* at 408–09.

179. *See id.* at 407.

a virgin.[180] The presence of sperm cells, which could be several days old, "would be probative of little more than the victim's prior sexual activity."[181] Again, even if a DNA test excluded the defendant, it could not exculpate him in this particular situation.

The *Kellar* court went one step further in the denial of the defendant's motion. DNA testing had been available to the defendant at the time of trial, and he and his counsel looked into the possibility of such a test, but did not pursue it.[182] This factor made the court much less sympathetic to the defendant's request to have testing done at this late point. "We do not read CPL 440.30(1-a) as granting a second opportunity to those who have failed to take advantage of available DNA testing prior to trial."[183] According to the court, CPL 440.30(1-a) must be read in conjunction with CPL 440.10, which covers the grounds for an application to vacate judgment.[184] Section 440.10(1)(g) reaffirmes the "due diligence" requirement whereby a defendant must show that the newly discovered evidence he wishes to introduce could not have been discovered though due diligence at trial.[185] Here, the court asserts, DNA testing was available at trial.[186] Therefore, the defendant cannot claim that the evidence was undiscoverable at trial. "[The court] conclude[s] that in enacting CPL 440.30(1-a), the Legislature did not intend to abrogate the 'due diligence' requirement with regard to this one species of newly discovered evidence."[187] Therefore, like the Illinois statute, a defendant wishing to avail himself of post-conviction DNA testing under part 1-a must show that the same scientific test was not available to him at the time of the trial. Otherwise, the defendant will be precluded for failure to exercise his "due diligence" in the discovery of evidence at trial.

The court in *State v. Smith*[188] used much of the same reasoning in the denial of a motion made under part 1-a. In *Smith*, the defendant had been convicted of rape and had moved for DNA testing.[189] The defendant then moved to vacate the judgment under CPL 440.10(1)(g), but the court denied the motion, holding that the test results would most likely have not resulted in a verdict more favorable to the defendant.[190] "The fact that defendant was not the source of the

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180. *See id.* at 408.

181. *Id.* at 409.

182. *See id.* at 410.

183. *Id.*; *see also* State v. Brown, 618 N.Y.S.2d 188 (N.Y. Sup. Ct. 1994).

184. *See Kellar*, 218 A.D.2d at 410. "We note that, while the new subdivision (1-a) was added to CPL 440.30, which details the *procedure* to be followed in connection with a motion to vacate the judgment, CPL 440.10(1), which sets forth the actual *grounds* for the application, was left unchanged." *Id.*

185. *See id.*

186. *See id.* at 410–11.

187. *Id.* at 410.

188. 245 A.D.2d 79 (N.Y. App. Div. 1997).

189. *See id.* at 79.

190. *See id.* at 79.

semen is entirely consistent with the victim's testimony that she had intercourse with her boyfriend shortly before the rape, and that she did not know if the defendant ejaculated."[191] Further, the court reasoned, the fact that a defendant's part 1-a motion is granted and the DNA results exclude the defendant does not mean that a vacation of judgment is automatic when the results, like the ones here, are not exculpatory in nature; "the court's decision to order a post-conviction DNA test pursuant to CPL 440.30(1-a) [does] not necessarily require it to grant the motion pursuant to CPL 440.10(1)(g) [to vacate the judgment] upon receipt of a test result favorable to the defendant."[192]

G. The Preservation of Biological Evidence

In all the above-mentioned cases, biological evidence collected from the crime scene and from the victim was still available in an amount sufficient to be tested.[193] In *State v. Trama*,[194] a New York court had occasion to determine if the enactment of part 1-a affected the State's duty to preserve evidence. The defendant in *Trama* had been convicted in 1987 of several counts of rape and sodomy in the first degree.[195] He appealed several times after his conviction without success; his final appeal was denied on April 3, 1991.[196] In 1992, the court allowed the defendant to have blood withdrawn in order to complete a DNA analysis of certain items of evidence.[197] The DNA test, which excluded the defendant as the source of blood found on the victim's jeans, was irrelevant because the blood was most likely the victim's, since she had been the only one injured during the attack.[198] The defendant, who had wanted other items from the scene tested, was advised in January, 1994, "that on September 20, 1990 the State Police had destroyed a rape

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191. *Id.* Interestingly, neither the court in *Smith*, nor the courts in *Kellar* or *Tookes*, discussed whether or not the victim's consensual partners had been tested and excluded as the source of the semen. For example, if the victim in *Smith* had testified that she had had intercourse only with her boyfriend and the defendant within the time frame of the rape, and both her boyfriend and the defendant had been excluded as donors of the semen, then, logically, some unknown third party would have been the donor and would have been the assailant. *See* Cynthia Bryant, Note, *When One Man's DNA Is Another Man's Exonerating Evidence: Compelling Consensual Sexual Partners of Rape Victims to Provide DNA Samples to Postconviction Petitioners*, 33 COLUM. J.L. & SOC. PROBS. 113 (2000).

192. *Smith*, 245 A.D.2d at 79.

193. Recall that in order for a defendant to avail himself of testing under part 1-a, the court must determine that "evidence containing deoxyribonucleic acid ("DNA") was secured in connection with the trial resulting in the judgment." N.Y. CRIM. PROC. LAW § 440.30(1-a) (McKinney 1994). Thus, no relief is available under this statute if the evidence is destroyed.

194. 636 N.Y.S.2d 982 (N.Y. Sup. Ct. 1995).

195. *See id.* at 982.

196. *See id.* at 983.

197. *See id.*

198. *See id.* at 983.

kit, a pair of panties, and a pair of jeans.... Later, it was also revealed that on December 1, 1992 the State Police destroyed 11 items, including [the] victim's sweatshirt."[199] Thus, all evidence of the crime that could potentially have been used to exonerate the defendant had been destroyed.

In the current case, the defendant moved to "reopen the case," pursuant to CPL 440.10, in order to determine the validity of the destruction of the evidence by the State.[200] The court found that in the defendant's particular situation, "no legal consequence flows from the destruction of a rape kit, jeans and panties."[201] First, the court looked to previous case law and determined that the State has an affirmative duty to prevent the destruction of evidence until all appeals have been exhausted, which "includes the 30 days succeeding a defendant's final appeal, a motion for leave to appeal, or any other motion."[202] The court found that the defendant's thirty-day window had expired before the destruction of evidence took place.[203]

Second, the court reasoned that even if the destruction of evidence occurred before all appellate avenues had been used, the defendant was not entitled to legal relief because "[n]o demand had been made for the [rape kit, jeans and panties] during the period during which preservation was required, nor did the People have any reason to believe that they would be."[204] The earliest the State could have been aware of the defendant's post-conviction investigation was in July 1992, when the defendant requested that his blood be drawn.[205] Thus, the State had no notice, until long after defendant's appellate rights had been exhausted, that the defendant intended to pursue further testing of the scientific evidence in his case. The court held that part 1-a "does not, in and of itself, extend or enlarge the People's duty to preserve evidence beyond the exhaustion of one's appellate rights."[206] Thus, the defendant has no legal remedy against the State for the destruction of evidence that, had the evidence not been destroyed, the defendant could have had tested pursuant to part 1-a. The court does recognize, however, that the result may have been different if the State had known, or had reason to believe, that the defendant was pursuing post-conviction discovery.[207]

H. Summary of the New York Statute

Thus, from the cases interpreting part 1-a, one can ascertain that post-conviction DNA testing in New York operates under a major time restraint. The conviction had to take place before January 1, 1996 in order for the defendant to

199. *Id.*
200. *See id.*
201. *Id.* at 984.
202. *Id.*
203. *See id.*
204. *Id.*
205. *See id.*
206. *Id.*
207. *See id.* at 985.

avail himself of the statute.[208] However, the date of the conviction alone will not guarantee that a defendant's post-conviction request will be granted. In addition, the defendant must demonstrate "due diligence" in that the test he is requesting was not available at the time of trial.[209] Accordingly, if a defendant can succeed in having DNA evidence of the crime tested, the results of the test can do more than just demonstrate the misidentification of the defendant. Test results can be used to attack victim or witness testimony, including false accusations, if such testimony can be discredited by showing that the defendant was not the source of the biological evidence.[210] However, the defendant still must demonstrate that had the desired outcome of the DNA test been introduced at trial, the verdict would have been more favorable to the defendant.[211]

IV. THE FUTURE IN ARIZONA

Arizona, too, has enacted a statute dealing specifically with post-conviction DNA testing,[212] and while the statute contains many similarities with both the Illinois and New York statutes, there are many important differences. Although the statute is too new to have generated any case law, a discussion of the statute, with lessons from Illinois and New York in mind, may prove insightful.

A. Who May Avail Themselves of the Statute?

The Arizona statute first requires that the defendant be "convicted of *and* sentenced for a felony offense."[213] This has two important implications. First, the defendant must await sentencing before bringing a motion under the statute. The statute likely envisions that the defendant would have long since been sentenced, but there is nothing in the statute setting a specific date for conviction as in New York.[214] Second, the defendant must have been convicted of a felony. One can reasonably conclude that the legislature likely did not want to waste court time and expense on situations where the defendant is facing a minimal sentence.[215]

Next, the statute requires that the evidence be in the possession of the state and that such evidence be related to the investigation *or* the prosecution of the defendant, which resulted in his conviction.[216] Thus, the statute allows for testing even when the evidence was collected only in the investigation of the defendant and not used in his prosecution.[217] This means that if the defendant can

208. *See supra* text accompanying note 125.
209. *See supra* text accompanying note 185.
210. *See supra* text accompanying note 158.
211. *See supra* text accompanying note 127.
212. *See* ARIZ. REV. STAT. § 13-4240 (2001).
213. *Id.* § 13-4240(A) (emphasis added).
214. *See supra* text accompanying note 125.
215. A search of legislative history regarding the statute reveals no indication of legislative intent with respect to the theory behind the enactment.
216. *See* ARIZ. REV. STAT. § 13-4240(A) (2001).
217. *See supra* text accompanying note 150.

meet the requirements of the rest of the statute, he can move to have evidence tested even if the defendant had been prosecuted and convicted regardless of the evidence. The State's potential argument that the evidence was not relevant to the conviction will not be fatal to a defendant bringing a successful motion under the statute.

B. Mandatory vs. Discretionary Aspects of the Statute

Unlike the Illinois or New York statute, the Arizona statute contains two provisions under which the defendant may make a showing to avail himself of the statute.[218] If the court makes a finding under subsection B, a DNA test is mandatory.[219] However, if the court makes a finding under subsection C, the court has discretion to allow or to deny a DNA test.[220] Both subsections B and C have three prongs.[221] The language in prongs 2 and 3 is identical. Prong 2 states that the court must find that the evidence still exists and that the evidence must be in a condition to allow for DNA testing.[222] Prong 3 states that a finding must be made that the evidence has not previously been subject to DNA testing or that the test now desired was not in existence at the time of the previous testing.[223] A finding under prong 1 of either subsection B or subsection C therefore governs whether or not the testing will be mandatory or discretionary. Prong 1 of subsection B states that if "a reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through [DNA] testing," then the court *shall* order such testing if prongs 2 and 3 are also met.[224] Prong 1 to subsection C, however, states that if "[a] reasonable probability exists that either: (a) the petitioner's verdict or sentence would have been more favorable if the results of [DNA] testing had been available at the trial leading to the judgment or conviction [or] (b) [DNA] testing will produce exculpatory evidence," then the court *may* order DNA testing.[225]

Thus, prong 1 of subsection B envisions a scenario where the defendant would not have been prosecuted or convicted had the results of a DNA test been available while prong 1(a) of subsection C envisions a scenario where the results at trial may have been more favorable to the defendant, but where the defendant would likely have been convicted of some element of a crime as in the home invasion/sexual assault case in Illinois.[226]

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218. *See* ARIZ. REV. STAT. § 13-4240(B)–(C) (2001).

219. *See id.*

220. *See id.*

221. *See id.*

222. *See id.*

223. *See id.* The test now requested must also resolve an issue that was unresolvable by the previous testing.

224. *Id.* § 13-4240(B)(1).

225. *Id.* § 13-4240(C)(1).

226. *See supra* text accompanying notes 46–50.

Prong 1(b) to subsection C will likely produce significant confusion. The court has discretion to allow a DNA test if the "test will produce exculpatory evidence" but no discretion if "the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through" a test.[227] Confusion will likely arise in interpreting the difference between exculpatory evidence and exculpatory results. Exculpatory evidence is that which tends to establish the defendant's innocence "as differentiated from that which although favorable, is merely collateral or impeaching."[228] Perhaps prong 1(b) of subsection C envisions a scenario where a defendant was convicted after a plea bargain or a plea of nolo contendre but where DNA testing has the probability of exculpating him of the crime. Because a defendant will want a post-conviction DNA test to be mandatory rather than discretionary, one can envision subsections B and C of the statute causing conflict within the courts in the future.

C. Who Pays in Arizona?

Another reason why subsections B and C are likely to cause conflict centers around who is required to pay for the test. Unlike New York,[229] Arizona's statute attempts to address the question of payment for post-conviction DNA testing. If a court makes a finding under subsection C, the court "may require the petitioner to pay the costs of testing."[230] If, however, the court orders testing under subsection B, "the court shall order the method and responsibility for the payment, if necessary."[231] The language is unclear as to whether or not the court can order the defendant to pay for the test if the finding was made under subsection B. The language is likewise unclear as to whether the court shall order the method for payment if the finding was made under subsection C. Thus, courts will likely have cause to interpret subsection D, which deals with the method and responsibility for payment of the test, as well.[232]

D. Preservation of Evidence

Once a petition is brought under the statute, the court must order the State to preserve the evidence the defendant wishes to be tested while the petition is pending.[233] If the evidence is then intentionally destroyed, the court may impose sanctions such as criminal contempt.[234] This is, of course, no help to the defendant, but may deter state actors from intentionally destroying evidence. In the usual criminal trial, the proper remedy for the bad-faith destruction of evidence is

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227. ARIZ. REV. STAT. § 13-4240(B)–(C) (2001).
228. BLACK'S LAW DICTIONARY 566 (6th ed. 1990).
229. *See supra* Part III.B.
230. ARIZ. REV. STAT. § 13-4240(D) (2001).
231. *Id.*
232. *See* ARIZ. REV. STAT. § 13-4240(D) (2001).
233. *See* ARIZ. REV. STAT. § 13-4240(H) (2001).
234. *See id.*

suppression of the evidence.[235] At the post-conviction stage, where suppression is of little use to the defendant, the statute at least provides some redress for intentional destruction of evidence.

E. More Court Discretion.

The Arizona statute is quite flexible in providing the court with discretion to tailor an order to a particular situation.[236] For example, the court can order the type of DNA testing to be used and can order that certain procedures be followed while the testing is performed.[237] Likewise, if the testing is not likely to destroy the entire sample, the court can order that some of the sample be preserved for retesting.[238] Thus, if mistakes occur during the testing procedure or if testing results are lost, the defendant still has an avenue of pursuit for relief under the statute. Additionally, the court can order "[e]limination samples from third parties."[239] This is very important in a situation where a sexual assault victim claimed to have had consensual sex before the attack. If the defendant and the consensual partner can be eliminated as sources of the semen, for example, then some third party must have been responsible for the act.[240] Ordering consensual partners to provide DNA samples will likely not infringe on that partner's Fifth Amendment rights,[241] but there may be some Fourth Amendment concerns relating to unreasonable searches. Still, since a DNA sample can be obtained by swabbing the mouth, the benefit to the community will likely outweigh the personal invasion of privacy.[242] In any event, allowing the court discretion to custom-tailor the order will allow more room for relief under the statute.

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235. *See, e.g.*, Arizona v. Youngblood, 488 U.S. 51 (1988). Youngblood was convicted of child molestation, sexual assault and kidnapping. The Supreme Court upheld Youngblood's conviction because he could not show that the State destroyed certain biological evidence in bad faith. *See id.* at 58. Interestingly, Youngblood was later exonerated when DNA tests on different evidence showed that he could not have been the perpetrator. *See* Jim Dwyer, *No DNA Test Can Correct Court's Crime*, N.Y. DAILY NEWS, Jan. 21, 2001, at 30, *available at* 2001 WL 4674370.

236. *See* ARIZ. REV. STAT. § 13-4240(I) (2001).

237. *See id.*

238. *See id.*

239. *Id.*

240. *See supra* text accompanying note 191.

241. *See* Schmerber v. California, 384 U.S. 757 (1966). In *Schmerber*, the Court held that "[s]ince...blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on privilege grounds." *Id.* at 765. The third party can also apply for a protective order under the Arizona Rules of Civil Procedure, Rule 26(c).

242. For a thorough discussion of Fourth and Fifth Amendment implications of ordering third parties to provide DNA samples, see Bryant, *supra* note 187.

F. Penalties for Unfavorable Results.

Finally, a defendant wanting to avail himself of the relief offered under the statute better be sure that relief is likely to follow. If results of DNA testing come back unfavorable to the defendant, the court has discretion to "make further orders as it deems appropriate" and can notify the board of executive clemency or the department of probation of the results of the test.[243] The court can also request that the defendant's DNA sample be added to the "federal combined DNA index system offender database," which could possibly implicate the defendant in other crimes.[244] Additionally, the court can notify the victim or the victim's family of the results; the DNA test can therefore provide valuable evidence in a civil suit against the defendant.[245] Thus, while the Arizona legislature clearly wanted to provide some relief to those wrongfully convicted, the statute also serves as a warning against the filing of frivolous motions.

G. Summary of the Arizona Statute

Not every section of the statute has been discussed in this Note. While the featured sections show that Arizona has learned some important lessons by looking to the statutes from other states, the Arizona statute is not perfectly clear and leaves open some doors for future court interpretation. Yet, the mere fact that Arizona, like many other states, is following the lead of Illinois and New York demonstrates a commitment to using new technology to redress past wrongs and to improving the judicial system in general.

V. CONCLUSION

Every time an innocent person is put in prison, or worse, put to death, our justice system fails. Allowing a wrongly convicted defendant recourse through post-conviction DNA testing is a step toward curing these failures and mitigating the damage. DNA testing cannot save everyone. The majority of wrongly convicted people simply do not have genetic evidence attached to their crimes, or if they once did, the evidence has long since been destroyed. There is, however, a small group of people who can avail themselves of statutes such as the ones discussed in this Note. Those wrongly convicted persons can never get back the years spent in prison, yet their exonerations can be valuable to everyone.

243. *See* ARIZ. REV. STAT. § 13-4240(J) (2001).

244. *Id.*

245. *See id.*