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## Waiving Innocence

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## Article

# Waiving Innocence

Samuel R. Wiseman<sup>†</sup>

### INTRODUCTION

When a procedural development opens a new door for criminal defendants, it has a tendency to rapidly shut. Following the Supreme Court's landmark decision in *Miranda v. Arizona*, for example, courts have whittled away at the rights announced therein until they have become little more than formalities.<sup>1</sup> The same pattern emerged after *Gideon v. Wainwright*, as subsequent decisions stretched the definition of counsel to include vastly overworked and/or underperforming attorneys.<sup>2</sup> Similarly, although the right to postconviction DNA testing has only recently become well established, backsliding has already begun.

DNA testing has enabled more than 270 wrongfully convicted individuals to prove their innocence<sup>3</sup> and has cleared

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1. See, e.g., Barry Friedman, *The Wages of Stealth Overruling With Particular Attention to Miranda v. Arizona*, 99 GEO. L.J. 1, 16–25 (2010) (describing the dismantling of *Miranda* and how cases have “invite[d] police officers to simply ignore it”); Katherine R. Kruse, *Instituting Innocence Reform: Wisconsin’s New Governance Experiment*, 2006 WIS. L. REV. 645, 667 (describing *Miranda*’s lack of protection in practice); see also *Miranda v. Arizona*, 384 U.S. 436 (1966).

2. *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963) (declaring a right to counsel); see David L. Bazelon, *The Realities of Gideon and Argersinger*, 64 GEO. L.J. 811, 818 (1976).

3. INNOCENCE PROJECT, <http://www.innocenceproject.org/> (last visited Nov. 30, 2011) (showing 280 individuals exonerated as of November 19, 2011,

countless innocent suspects at the investigative stage.<sup>4</sup> DNA evidence will, of course, not solve all of the flaws of current investigative, conviction, and sentencing procedures, but, in the ten-to-twenty percent of criminal cases where DNA evidence is available,<sup>5</sup> it is essential. If properly handled, tested, and characterized in court, DNA evidence can offer the most definitive proof of a defendant's innocence or guilt, thus providing certainty for all parties involved—including the victim.<sup>6</sup> Unlike eyewitness testimony, DNA evidence does not rely upon fuzzy human memory, which can be dangerously influenced by many factors unrelated to the identity of the perpetrator.<sup>7</sup> Nor does it rely upon the broad, often inconsistent standards governing the matching of a fingerprint<sup>8</sup> or a piece of hair to a defendant.<sup>9</sup>

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and explaining that the project works to exonerate “wrongfully convicted individuals through DNA testing”).

4. See, e.g., Katherine L. Prevost O'Connor, *Eliminating the Rape-Kit Backlog: Bringing Necessary Changes to the Criminal Justice System*, 72 UMKC L. REV. 193, 198 (2003) (discussing how testing can “quickly eliminate suspects who do not have the identified DNA blueprint”).

5. See Daniel S. Medwed, *Up the River Without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts*, 47 ARIZ. L. REV. 655, 656 (2005) (explaining that approximately eighty to ninety percent of cases lack biological evidence).

6. Cf. COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCIS. CMTY., NAT. RESEARCH COUNCIL OF THE NAT'L ACADS., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 114 (2009) (“Methods that are specified in more detail (such as DNA analysis, where particular genetic loci are to be compared) will have greater credibility and also are more amenable to systematic improvement than those that rely more heavily on the judgments of the investigator.”) *But see* Meghan J. Ryan, *Remedying Wrongful Execution*, 45 U. MICH. J.L. REFORM (forthcoming 2012) (manuscript at 12–13) (noting the limitations of DNA evidence, such as its unavailability in many cases and its degradation over time), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1902811](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1902811).

7. BRIAN L. CUTLER & STEVEN D. PENROD, MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW 55–113 (1995) (describing psychological and other factors that influence the accuracy of eyewitness testimony); C.D. Lefebvre et al., *Use of Event-Related Brain Potentials (ERPs) to Assess Eyewitness Accuracy and Deception*, 73 INT'L. J. PSYCHOPHYSIOLOGY 218, 218 (2009) (referencing the “sizable body of research that has criticized and demonstrated the unreliability of eyewitness identifications”).

8. Cf. Itiel E. Dror et al., *Contextual Information Renders Experts Vulnerable to Making Erroneous Identifications*, 156 FORENSIC SCI. INT'L 74, 75–76 (2006) (describing how out of “five fingerprint experts” with, together, “over 85 years of experience in examining fingerprints,” eighty percent identified a different fingerprint match than they had identified of the same fingerprint five years earlier, highlighting the unreliability of fingerprinting).

9. See, e.g., James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2092 (2000) (criticizing “inherently suspect hair comparisons”). Not all DNA evidence will establish guilt or innocence, of course. See

And perhaps even more importantly, DNA evidence can, in some cases, help illustrate flaws in the investigative and adjudicative processes and thereby reduce the rate of wrongful conviction in the many cases in which biological evidence is unavailable.<sup>10</sup>

As a result, DNA has provoked a small revolution in criminal procedure,<sup>11</sup> causing almost every state legislature, as well as Congress,<sup>12</sup> to rethink well-established notions of finality in order to allow for post-conviction testing and relief. Moreover, two-thirds of these jurisdictions, recognizing the thoroughly documented pressures that lead some innocent defendants to plead guilty or *nolo contendere*,<sup>13</sup> have extended the right to

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Brandon L. Garrett, *DNA and Due Process*, 78 FORDHAM L. REV. 2919, 2949 (2010) (“Most states adopt requirements that the DNA testing be potentially probative of innocence. Such a standard certainly makes sense. For example, DNA testing would serve no useful purpose in a case where the convict still concedes that he had sexual intercourse with the victim, but maintains that there was consent.”).

10. See Kruse, *supra* note 1, at 721 (describing DNA exoneration as “the ‘gold standard’ of proof that a miscarriage of justice has occurred, allowing the opportunity to examine what went wrong in specific cases of wrongful convictions and the implications that diagnosis might have for larger systemic reform”); Samuel Wiseman, *Innocence After Death*, 60 CASE W. RES. L. REV. 687, 720 (2010) (arguing that more detailed findings are important in DNA exoneration cases in order to reveal the causes of wrongful convictions and provide lessons for courts); INNOCENCE COMMISSION FOR VA., <http://www.icva.us/exonerate.org/icva/index.html> (last visited Nov. 30, 2011) (explaining that the Virginia Innocence Commission was formed “[t]o assist in examining the problems that may lead to wrongful convictions”); *Mission Statement*, STATE OF CONN. JUD. BRANCH, ADVISORY COMMISSION ON WRONGFUL CONVICTIONS, <http://www.jud.ct.gov/committees/wrongfulconviction/> (last visited Nov. 30, 2011) (explaining that the commission, based on its examinations of wrongful convictions, “will suggest best practices for law enforcement, prosecutors, defense attorneys, and judges that will decrease the possibility of convicting an innocent person”). See generally CALIFORNIA COMM. ON THE FAIR ADMIN. OF JUSTICE, FINAL REPORT (2008), available at <http://www.ccfaj.org/documents/CCFAJFinalReport.pdf> (recommending reforms based on its investigation of wrongful convictions).

11. See, e.g., *Dist. Atty’s Office v. Osborne*, 129 S. Ct. 2308, 2323 (2009) (“DNA evidence will undoubtedly lead to changes in the criminal justice system. It has done so already.”).

12. See *infra* notes 14–22.

13. See Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 430 (1998) (citing literature that documents “numerous case examples” of false confessions); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1981 (1992) (observing that innocent defendants tend to be risk averse and therefore more likely to plead guilty); *False Confessions*, THE INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/False-Confessions.php>

testing to those who did not insist on trial.<sup>14</sup> This revolution—while by no means complete—has extended to the rules govern-

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(last visited Nov. 30, 2011) (“In about 25% of DNA exoneration cases, innocent defendants made incriminating statements, delivered outright confessions or pled guilty.”). Of the first 225 DNA exonerations, the Innocence Project has identified fifty-one underlying convictions that resulted from a “[f]alse confession/admission.” *Causes of Wrongful Conviction*, THE INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/> (last visited Nov. 30, 2011). Twenty-three of these cases involved guilty pleas. *When the Innocent Plead Guilty*, THE INNOCENCE PROJECT, [http://www.innocenceproject.org/Content/When\\_the\\_Innocent\\_Plead\\_Guilty.php#](http://www.innocenceproject.org/Content/When_the_Innocent_Plead_Guilty.php#) (last visited Nov. 30, 2011).

14. In 2008, Brandon Garrett identified forty-five states in total (plus the District of Columbia) that either grant statutory access to postconviction DNA testing or have a state supreme court-recognized right to postconviction DNA testing of “newly discovered evidence of innocence.” Brandon Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1673–74 (2008). With the addition of statutes in Alabama, Alaska, and South Carolina, this number has now risen to forty-eight. See *infra* note 21. Of these forty-eight, approximately thirty allow defendants who pleaded guilty to request postconviction DNA testing. See Garrtt, *supra*, at 1680–81, 1680 n.238 (explaining that sixteen states require that “the defendant have disputed identity and have claimed innocence at . . . trial” and that additionally, New York disallows DNA testing from some guilty plea cases, and Utah impliedly requires that a defendant have previously advanced a theory of innocence at trial). Approximately fifteen statutes currently deny DNA testing to defendants who pleaded guilty. See ALA. CODE § 15-18-200 (LexisNexis Supp. 2010) (allowing testing only in capital cases and only where “forensic DNA testing was not performed on the case at the time of the initial trial”); ALASKA STAT. § 12.73.010 (2010) (allowing DNA testing only where “applicant did not admit or concede guilt under oath” but allowing a court to “waive this requirement in the interest of justice”); ARK. CODE ANN. § 16-112-202(6)(A) (2006) (allowing a motion for DNA testing where “[t]he person making a motion under this section identifies a theory of defense that . . . [i]s not inconsistent with an affirmative defense presented at the trial of the offense being challenged”); DEL. CODE ANN. tit. 11, § 4504 (2007) (allowing a motion where “[t]he movant presents a prima facie case that identity was an issue in the trial”); 725 ILL. COMP. STAT. ANN. 5 / 116-3(b)(1) (West 2008) (allowing a defendant’s motion where “identity was the issue in the trial which resulted in his [or her] conviction”); 15 ME. REV. STAT. ANN. tit. 15, § 2138(4)(D) (2003) (requiring a court to order DNA analysis if “[t]he identity of the person as the perpetrator of the crime that resulted in the conviction was at issue during the person’s trial”); MICH. COMP. LAWS ANN. § 770.16(4)(b)(iii) (West Supp. 2011) (requiring a court to order DNA testing where the defendant establishes that “[t]he identity of the defendant as the perpetrator of the crime was at issue during his trial”); MINN. STAT. ANN. § 590.01 (West 2010) (requiring defendant to make a prima facie case that “identity was an issue in the trial”); MO. ANN. STAT. § 547.035(2)(4) (West 2002) (requiring the motion to include an oath that “[i]dentity was an issue in the trial”); N.Y. CRIM. PROC. LAW § 440.30(1-a) (McKinney 2005) (requiring the court to grant the motion for DNA testing of evidence 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”); N.D. CENT. CODE § 29-32.1-15 (2006) (requiring person making the motion to present a prima

ing the legal profession,<sup>15</sup> and has provoked a welcome discussion on the role of the prosecutor in preventing wrongful convictions.<sup>16</sup> Indeed, the right to DNA testing already represents the greatest advance in criminal justice since *Gideon* and *Miranda*,<sup>17</sup> but, just as occurred with these other transformative rights, the force of the right is at risk of diminishing. The reasons for the erosion of *Miranda* and *Gideon* are complex and

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facie case that “[i]dentity was an issue in the trial”); OHIO REV. CODE ANN. § 2953.74(C)(2)(c)(3) (LexisNexis 2010) (allowing a court to accept an application for testing only if “[t]he court determines that, at the trial stage in the case . . . the identity of the person who committed the offense was an issue”); 42 PA. CONS. STAT. ANN. § 9543.1 (West 2007) (requiring a motion to show that “identity of . . . the perpetrator was at issue in the proceedings”); TEX. CODE CRIM. PROC. ANN. art. 64.03(a) (West 2006) (allowing a court to order testing only where “identity was or is an issue in the case”); UTAH CODE ANN. § 78B-9-301(2)(c) (LexisNexis 2008) (requiring an allegation that “states a theory of defense, not inconsistent with theories previously asserted at trial”). Out of the sixteen states originally identified by Garrett as requiring identity to be an issue at trial, four of the states additionally appear to allow defendants who pleaded guilty to request DNA testing. IDAHO CODE ANN. § 19-4902(c)(1), (d) (2004) (allowing a defendant’s petition where “[i]dentity was an issue in the trial which resulted in his conviction” but also allowing “[a] petitioner who pleaded guilty in the underlying case” to file a DNA-testing petition); IOWA CODE ANN. § 81.10(2)(b), (d) (West 2009) (requiring a defendant, in making a motion to state “[t]he facts of the underlying case, as proven at trial or admitted to during a guilty plea proceeding” and “[w]hether identity was at issue or contested by the defendant” (emphasis added)); N.M. STAT. ANN. § 31-1A-2(C)(5) (West 2003) (requiring petitioner to show that “identity was an issue in his case or that if the DNA testing he is requesting had been performed prior to his conviction and the results had been exculpatory, there is a reasonable probability that the petitioner would not have pled guilty or been found guilty” (emphasis added)); OR. REV. STAT. ANN. §§ 138.692, 138.694 (West2003) (only requiring identity to be at issue for counsel appointment).

15. See MODEL RULES OF PROF’L CONDUCT R. 3.8(g), (h) (2011) (requiring prosecutors to investigate and seek to remedy wrongful convictions when sufficient evidence becomes available). As of January 2011, five states had adopted the new rules in some form, and eleven jurisdictions were studying them. AM. BAR ASS’N CPR POLICY IMPLEMENTATION COMM., VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT RULE 3.8(G) AND (H) (2011), available at [http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/3\\_8\\_g\\_h.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/3_8_g_h.authcheckdam.pdf).

16. See, e.g., Alafair S. Burke, *Talking About Prosecutors*, 31 CARDOZO L. REV. 2119, 2132 (2010) (discussing prosecutors’ role in preventing wrongful convictions); Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 WASH. L. REV. 35, 37 (2009) (observing that a “key variable . . . in the ability of a criminal defendant to have a chance for success on a post-conviction claim of innocence often lies in the nature of the prosecutor’s response”).

17. See David Wolitz, *Innocence Commissions and the Future of Post-Conviction Review*, 52 ARIZ. L. REV. 1027, 1028–29 (2010) (observing that exonerations, “made possible largely because of new DNA technology, constitute the most dramatic story in American criminal law over the past two decades”).

well-documented, but in short, almost as soon as the rights were announced, police, prosecutors, legislatures, and courts began to hollow them out. Police sometimes engage in outright trickery, wearing down defendants with questioning and lies.<sup>18</sup> Legislatures, on the other hand, provide minimal funding for public defense, forcing defenders to take on unrealistic case burdens.<sup>19</sup> There is a danger that, as the novelty of DNA testing wears off—both for actors within the justice system and the general public—the right to DNA testing will follow the same path as the rights announced in *Miranda* and *Gideon*. This Article focuses on one way in which this has already begun.

In the past sixteen years<sup>20</sup> forty-eight states,<sup>21</sup> the District of Columbia,<sup>22</sup> and the federal government<sup>23</sup> have created statutory rights to DNA preservation, access, and testing.<sup>24</sup> These statutory rights are particularly important in light of the Supreme Court's recent decision in *District Attorney's Office v. Osborne*, which rejected a substantive due process right to DNA testing.<sup>25</sup> Some prosecutors, however, have found a way around them. Through plea bargaining, these prosecutors have ob-

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18. Cf. Kruse, *supra* note 1 (addressing the *Miranda* right's erosion and how "interrogators have worked their techniques around its requirements").

19. See, e.g., AM. BAR ASS'N, GIDEON'S BROKEN PROMISE, AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE iv (2004), available at [www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_bp\\_right\\_to\\_counsel\\_in\\_criminal\\_proceedings.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf) (describing testimony from thirty-two expert witnesses on indigent defense and concluding that "thousands of persons are processed through America's courts each year either with no lawyer at all or with a lawyer who does not have the time, resources, or in some cases the inclination to provide effective representation" and that "[t]he fundamental right to a lawyer that Americans assume appl[ies] to everyone accused of criminal conduct effectively does not exist in practice for countless people across the United States").

20. New York enacted the first post conviction DNA-testing statute in 1994. See Garrett, *supra* note 14, at 1722.

21. See *id.* (describing how forty-five states provided a right to postconviction DNA testing in 2008). The Innocence Project in 2011 identified a total of forty-eight; Alabama, Alaska, and Mississippi have passed testing statutes since the publication of Garrett's article. *Access to Post-Conviction DNA Testing*, THE INNOCENCE PROJECT, [http://www.innocenceproject.org/Content/Access\\_To\\_PostConviction\\_DNA\\_Testing.php#](http://www.innocenceproject.org/Content/Access_To_PostConviction_DNA_Testing.php#) (last visited Nov. 30, 2011); see ALA. CODE § 15-18-200 (LexisNexis Supp. 2010); ALASKA STAT. § 12.73.010 (2010); S.C. CODE ANN. § 17-28-30 (2010).

22. D.C. CODE §§ 22-4131 to 33 (LexisNexis 2010).

23. Innocence Protection Act of 2004, 18 U.S.C. § 3600(a) (2006).

24. The scope of these rights varies substantially. See generally Garrett, *supra* note 14, at 1675–82 (discussing differences among the various state statutes).

25. 129 S. Ct. 2308, 2323 (2009).

tained waivers of the right to DNA testing and/or the preservation of DNA evidence.<sup>26</sup> This Article collectively refers to these waivers as DNA waivers.

The number of DNA waivers obtained by state and federal prosecutors is unclear, but at the federal level, they have been sought by a number of United States Attorneys' offices during the administrations of the second President Bush and President Obama.<sup>27</sup> The federal statute that grants certain defendants access to DNA evidence expressly recognizes the possibility of defendants' waiving this statutory right by providing that the waiver must be knowing and voluntary.<sup>28</sup> A 2004 Department of Justice memorandum directed federal prosecutors to elicit waivers of these statutory DNA-testing rights from defendants,<sup>29</sup> and, until 2010, some federal districts used a standardized plea agreement that contained DNA waiver language.<sup>30</sup> In late 2010, recognizing the inconsistency and other potential pitfalls of the practice, Attorney General Eric Holder discouraged prosecutors from including DNA waivers in plea bargains unless exceptional circumstances suggest that waiver is merited.<sup>31</sup> Policy could change with future administrations, and the memorandum is not binding on state prosecutors. While there is reason to think that the idea has occurred to state prosecutors,<sup>32</sup> the evidence suggests they are not yet widely obtaining these waivers.<sup>33</sup> It is impossible to say with any certainty whether that will change, but any practice that limits challenges to prosecutors' hard-earned convictions while simultaneously trimming expenditures is likely to have strong appeal.<sup>34</sup>

Building from the literature on waivers of rights in other plea bargain contexts, this Article argues that courts are likely to deem DNA waivers generally enforceable, and that while there are valid concerns underlying their use, they are, on the

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26. See *infra* text accompanying notes 55–63.

27. The Obama Administration has moved away from the use of DNA waivers. See *infra* text accompanying note 31.

28. 18 U.S.C. § 3600(a).

29. Memorandum from Eric H. Holder, Jr., Attorney Gen., to all Fed. Prosecutors 1 (Nov. 18, 2010), available at <http://www.justice.gov/ag/ag-memo-dna-waivers111810.pdf> (describing the 2004 memorandum).

30. *Id.* at 2.

31. *Id.*

32. See *infra* text accompanying notes 66–70.

33. *Justice Department Stops Policy on DNA Waivers*, NPR (Nov. 18, 2010), <http://www.npr.org/2010/11/18/131423969/justice-to-stop-forcing-dna-waivers>.

34. See *infra* text accompanying note 316.



whole, deeply problematic. Further, waivers have a serious potential for misuse, as they could conceal failures to disclose exculpatory material, and other misconduct. Waivers also create perverse incentives for the vast majority of generally ethical prosecutors. With an assurance that a case will not be challenged with the most definitive available evidence, prosecutors may be less scrupulous in their investigation of a case and more eager to quickly dispose of it through a plea bargain.<sup>35</sup> Finally, if DNA waivers are a routine component of plea bargaining, the commitment to innocence motivating the approximately thirty state statutes that currently grant access to DNA testing to defendants who have pleaded guilty<sup>36</sup>—individuals who account for the great majority of recent convictions<sup>37</sup>—will be substantially undermined.

Set against these clear risks, there are, arguably, significant gains to be achieved through the use of DNA waivers. DNA waivers may well lead to more meaningful guilty pleas and reduce the number of unmeritorious testing claims, which financially burden the system and psychologically burden victims and their families.<sup>38</sup> Less obviously, prosecutorial demands for DNA waivers could lead some innocent defendants to insist on trial, and, perhaps, slightly increase the information available to prosecutors at the plea bargaining stage; innocent defendants who would otherwise sign a guilty plea might balk at the waiver,<sup>39</sup> thus signaling innocence, while guilty defendants may signal their guilt by more readily signing away their testing and preservation rights. Ultimately, however, the Article concludes that the costs of using DNA waivers likely outweigh their benefits.

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35. See, e.g., *infra* text accompanying notes 183, 312 (describing a prosecutor's preference for an appeal waiver and one court's denial of an appeal waiver based on the fear that waivers insulate prosecutorial errors from review).

36. See sources cited *supra* note 14.

37. Stephanos Bibas & William W. Burke-White, *International Idealism Meets Domestic-Criminal-Procedure Realism*, 59 DUKE L.J. 637, 658 (2010) ("Today, guilty pleas resolve 95 percent of adjudicated cases, and most of these result from plea bargains.").

38. See Tonja Jacobi & Gwendolyn Carroll, *Acknowledging Guilt: Forcing Self-Identification in Post-Conviction DNA Testing*, 102 NW. U. L. REV. 263, 268–69 (2008).

39. Cf. Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1384 (2003) (discussing the reasons innocent defendants plead guilty).

This Article will evaluate the scope of DNA waivers, whether and under what circumstances the waivers will be upheld, and the justifications behind their use. Part I identifies the practice of prosecutors' use of DNA waivers in plea bargaining. Part II addresses whether these waivers are enforceable, with a particular focus on the Supreme Court's recent criminal waiver jurisprudence, and Part III argues that despite the likely validity of DNA waivers in many jurisdictions (although there may be some disagreement about how "knowing" a waiver must be), they are nonetheless problematic.

## I. DNA TESTING WAIVERS: PRESENT AND FUTURE

DNA waivers are likely of minor import if they are used infrequently, although even one waiver signed by an innocent defendant would be deeply troubling. The qualitative empirical evidence suggests, however, that waivers have been pursued by prosecutors in a number of populous federal districts, and although no court has directly addressed their validity, appeals of these past waivers are likely. This Part introduces the problems underlying DNA waivers, identifies the past use of DNA waivers, and predicts future trends, suggesting that use at the state level could potentially expand.

### A. AN INTRODUCTION TO THE WAIVER PROBLEM

Despite stubborn perceptions to the contrary,<sup>40</sup> innocent defendants plead guilty.<sup>41</sup> Eight percent of the wrongfully convicted defendants exonerated by DNA initially entered guilty

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40. See John L. Barkai, *Accuracy Inquiries for All Felony and Misdemeanor Pleas: Voluntary Pleas but Innocent Defendants?*, 126 U. PA. L. REV. 88, 95–96 (1977) (describing a “presumption . . . that innocent defendants will in fact contest charges lodged against them” but describing why “[i]nnocent defendants may nonetheless offer pleas rather than contest their guilt at trial”); Erica Hashimoto, *Toward Ethical Plea Bargaining*, 30 CARDOZO L. REV. 949, 950 (2008) (describing “faulty assumptions that . . . factually innocent defendants will not plead guilty”).

41. Barkai, *supra* note 40, at 97; Josh Bowers, *The Unusual Man in the Usual Place*, 157 U. PA. L. REV. PENNUMBRA 260, 261 (2009), available at <http://www.pennumbra.com/responses/05-2009/Bowers.pdf>; Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 TUL. L. REV. 1237, 1239 (2008); cf. Kevin C. McMunigal, *Guilty Pleas, Brady Disclosure, and Wrongful Convictions*, 57 CASE W. RES. L. REV. 651, 656 (2007) (observing “that an unknown but likely troubling number of defendants pleading guilty probably” lack the knowledge of whether they are guilty or not); Schulhofer, *supra* note 13, at 1982 (noting that “some innocents will accept the relatively high offer, despite substantial probabilities for acquittal at trial”).

pleas,<sup>42</sup> and the strong incentives that push some innocent defendants to plead guilty remain, suggesting that this trend may continue.<sup>43</sup> As discussed more thoroughly in Part III, many innocent defendants—in part due to their innocence—often lack crucial information about a case<sup>44</sup> and may have trouble responding to prosecutorial claims of available implicating evidence.

Even in the absence of guilty pleas by innocents, pleas that deny access to DNA evidence and allow for its destruction have troublesome societal effects. They reflect a criminal justice system grounded in convenience, not truth.<sup>45</sup> DNA waivers also cover up prosecutorial misconduct and reduce incentives for prosecutors to thoroughly examine the accuracy of convictions,<sup>46</sup> prevent the identification of the real perpetrators of crimes,<sup>47</sup> weaken the powerful legislative commitment to factual innocence,<sup>48</sup> and incentivize guilty defendants to loudly proclaim innocence<sup>49</sup>—thus diluting true innocence claims. The systemic effects alone justify a searching investigation of the practice.

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42. See *infra* text accompanying note 293; cf. Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 536 (2005) (in a study that predated the Innocence Project figures, finding that less than six percent of wrongful convictions for rape and murder arose from guilty pleas, whereas guilty pleas led to a higher percentage of wrongful drug convictions).

43. See, e.g., Barkai, *supra* note 40, at 96–97 (providing eight factors that may push an innocent defendant to plead guilty, including, among others, the “potentially overwhelming nature of the evidence against him,” “feelings of hopelessness, powerlessness, or despair when faced with the power of the state,” and “ignorance”); cf. Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1119–20, 1132 (2008) (arguing in favor of plea bargains for innocent defendants and noting the frequency of guilty pleas by these defendants: the “best resolution” for the “typical” innocent defendant—a “recidivist facing petty charges”—“is generally a quick plea in exchange for a light, bargained-for sentence;” the “costs of proceeding to trial often dwarf plea prices”).

44. See Hashimoto, *supra* note 40, at 951 (describing how “[i]nnocent defendants . . . cannot accurately evaluate the strength of the case against them”); Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957, 971 (1989) (describing informational problems faced by defendants generally, including “defects in perception or awareness,” “defects in memory, in which the defendant cannot remember information critical to liability,” and “defects in a defendant’s expertise in resolving factual issues critical to liability”).

45. See *infra* notes 306–07 and accompanying text.

46. See *infra* notes 316–20 and accompanying text.

47. See *infra* notes 328–31 and accompanying text.

48. See *infra* notes 321–26 and accompanying text.

49. See *infra* notes 331–32 and accompanying text.

## B. RECENT USE OF DNA WAIVERS

Although there has been little scholarship on DNA waivers,<sup>50</sup> numerous United States Attorneys' offices have used them for roughly the last five years.<sup>51</sup> Like many states, the federal government allows certain defendants to request DNA testing and to use the results of this testing to bring post-conviction innocence claims. The Innocence Protection Act of 2004 provides:

Upon a written motion by an individual under a sentence of imprisonment or death pursuant to a conviction for a Federal offense (referred to in this section as the "applicant"), the court that entered the judgment of conviction shall order DNA testing of specific evidence [after having made prerequisite findings].<sup>52</sup>

Prior to the Act's passage, language allowing the right to be waived was added, apparently at the request of Republican senators:<sup>53</sup> before granting DNA testing in a federal case, a court must find that the defendant did not "knowingly and voluntarily waive the right to request DNA testing of that evidence in a court proceeding after the date of enactment of the Innocence Protection Act of 2004."<sup>54</sup> After the Act passed despite the Bush Administration's opposition, the Justice De-

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50. Several scholars have pointed to the existence of induced DNA waivers in passing, and all have relied upon newspaper articles to support this claim; none have specified whether they believe the practice occurs at the federal or state level. Seth F. Kreimer and David Rudovsky directly observe that "[p]rosecutors have attempted to induce defendants to waive their rights to the maintenance of DNA evidence . . ." Seth F. Kreimer & David Rudovsky, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, 151 U. PA. L. REV. 547, 563 (2002). Cynthia E. Jones, in turn, notes that "in an effort to preclude post-conviction DNA testing requests, a prosecutor's office recently began trying to require defendants to waive the preservation of biological evidence as a prerequisite of getting a favorable plea offer." Cynthia E. Jones, *Evidence Destroyed, Innocence Lost: The Preservation of Biological Evidence Under Innocence Protection Statutes*, 42 AM. CRIM. L. REV. 1239, 1269 (2005). Aviva Orenstein also refers to the practice in passing. See Aviva Orenstein, *Facing the Unfaceable: Dealing with Prosecutorial Denial in Postconviction Cases of Actual Innocence*, 48 SAN DIEGO L. REV. 401, 409 n.42 (2011) ("Professor Brandon Garrett rightfully observed that the policy of requiring waivers of future DNA testing as part of plea bargains in federal court sends 'a terrible message: that federal prosecutors take a dim view of truth telling.'" (citing Jerry Markon, *Justice Dept. to Review Bush Policy on DNA Test Waivers*, WASH. POST, Oct. 11, 2009, at A1)).

51. See *infra* text accompanying notes 55–63.

52. 18 U.S.C. § 3600(a) (2006).

53. Jerry Markon, *Justice Dept. to Review Bush Policy on DNA Test*, WASH. POST, Oct. 11, 2009, at A1.

54. 18 U.S.C. § 3600(a)(3)(A)(i).

partment “sent a secret memo to the nation’s 94 U.S. [A]ttorney’s offices urging them to use the waivers.”<sup>55</sup>

Although it is unclear exactly how many federal plea agreements include DNA waivers, Department of Justice documents suggest that prosecutors in several jurisdictions have sought numerous waivers since 2004. A 2010 Department of Justice memorandum notes that, as a result of the 2004 memorandum, “[s]ome districts use a standard plea agreement that contains an [Innocence Protection Act] waiver provision” (a provision foregoing future rights to DNA testing).<sup>56</sup> These waivers both preclude testing of the evidence and allow for its destruction. A standard plea agreement from the District of Columbia, for example, reads:

By entering this plea of guilty, your client waives any and all right your client may have, pursuant to 18 U.S.C. § 3600 [the federal Innocence Protection Act], to require DNA testing of any physical evidence in the possession of the Government. Your client fully understands that, as a result of this waiver, any physical evidence in this case will not be preserved by the Government and will therefore not be available for DNA testing in the future.<sup>57</sup>

Nine other plea agreements from the District of Columbia, culled from a small sample, include the same waiver language,<sup>58</sup> as does a plea offer from the District of Maryland.<sup>59</sup> DNA waivers from the Southern and Northern Districts of Illinois contain nearly identical language, which surrenders all future rights to DNA testing and preservation.<sup>60</sup> Other federal

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55. Markon, *supra* note 53, at A7.

56. Memorandum from Eric H. Holder, Jr., *supra* note 29, at 2.

57. Letter from Ronald C. Machen, Jr., U.S. Attorney, U.S. Dep’t of Justice, to William M. Sullivan, Jr. § 13 (Apr. 19, 2010) (on file with author).

58. Plea Agreement at 5, *United States v. Jones*, No. 1:06-cr-200-CKK (D.D.C. July 14, 2008); Plea Agreement § 16, *United States v. White*, No. 1:08-cr-00044-RCL (D.D.C. May 1, 2008); Plea Agreement at 5, *United States v. Bruening*, No. 1:07-cr-314-RBW (D.D.C. Feb. 1, 2008); Plea Agreement § 22, *United States v. Miller*, No. 1:06-cr-289-RMC (D.D.C. Mar. 23, 2007); Plea Agreement § 20, *United States v. Hamilton*, No. 1:06-cr-200-CKK(1) (D.D.C. Jan. 30, 2007); Plea Agreement § 19, *United States v. Montalvo*, No. 1:06-cr-201-GK (D.D.C. Nov. 30, 2006); Plea Agreement at 7, *United States v. Waziry*, No. 1:06-cr-342-ESH (D.D.C. Nov. 29, 2006); Plea Agreement § 20, *United States v. Wills*, No. 1:06-cr-200-CKK(2) (D.D.C. Nov. 16, 2006); Letter from Jeffrey A. Taylor, U.S. Dep’t of Justice, to Mark H. Tuohey and William E. Lawler, III § 14 (Feb. 5, 2009) (on file with author) (regarding *United States v. Tejada*, No. 09-MJ-77 (D.D.C.)).

59. Letter from Stuart M. Goldberg & Michael J. Leotta, U.S. Dep’t of Justice, to Joshua G. Berman, Esq. § 11 (Apr. 4, 2008) (on file with author).

60. Plea Agreement §§ 11, 12, *United States v. McPike*, No. 3:05-cr-30069-WDS (S.D. Ill. May 6, 2005) (providing that the defendant “consents to the de-

waivers do not directly grant the right to evidence destruction but suggest that destruction will occur. A waiver from the District of Connecticut, for example, provides in part:

The defendant understands his right to have all the physical evidence in this case tested for DNA, has discussed this right with his counsel, and knowingly and voluntarily waives his right to have such DNA testing performed on the physical evidence in this case. Defendant understands that, because he is waiving this right, the physical evidence in this case will likely be destroyed or will otherwise be unavailable for DNA testing in the future.<sup>61</sup>

DNA waivers from the Eastern District of Virginia similarly contain provisions that specifically bar access to future DNA evidence, but their language does not imply destruction:

The defendant also understands that Title 18, United States Code, Section 3600 affords a defendant the right to request DNA testing of evidence after conviction. Nonetheless, the defendant knowingly waives that right. The defendant further understands that this waiver applies to DNA testing of any items of evidence in this case that could be subjected to DNA testing, and that the waiver forecloses any opportunity to have evidence submitted for DNA testing in this case or in any post-conviction proceeding for any purpose, including to support a claim of innocence to the charges admitted in this plea agreement.<sup>62</sup>

Other federal plea bargains contain a range of similar language—some more detailed in its description of its waiver, and some more specific as to the destruction of the evidence.<sup>63</sup>

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struction of all items of physical evidence seized in this case” and that “he will never have another opportunity to have the evidence in this case submitted for DNA testing,” among other details); Plea Agreement § 21, *United States v. Headley*, No. 09 CR 830-3 (N.D. Ill. undated) (on file with author).

61. Letter from Nora R. Dannehy & Ann M. Nevins, U.S. Dep’t of Justice, to Arnold Kriss (Feb. 11, 2010) (on file with author) (regarding plea agreement in *United States v. Natera*, No. 3:09CR221(JCH)(HBF) (D. Conn. 2010)).

62. *E.g.*, Plea Agreement § 6, *United States v. Almanza*, No. 1:09cr430 (E.D. Va. Dec. 17, 2009); Plea Agreement § 6, *United States v. Jin*, No. 09-CR-249 (E.D. Va. Aug. 17, 2009); Plea Agreement § 6, *United States v. Eaves*, No. 1:07cr140 (E.D. Va. May 14, 2007); Plea Agreement § 6, *United States v. Gomez*, No. 1:07cr125 (E.D. Va. Apr. 20, 2007) (on file with author).

63. *See, e.g.*, Plea Agreement § 12, *United States v. Li*, No. 2:09-cr-00067-SJO (C.D. Cal. Sept. 17, 2009) (specifically listing the available evidence and surrendering the right to testing of DNA evidence); Plea Agreement § VII.D, *United States v. Ortega*, No. 2:09-CR-00517 GEB (E.D. Cal. undated) (on file with author) (listing the specific items of evidence available in the case, stating that the “defendant knowingly and voluntarily gives up [the] right [to DNA testing] with respect to both the specific items listed above and any other items of evidence there may be in this case that might be amenable to DNA testing,” and stating that the defendant will “never have another opportunity to have the evidence in this case submitted for DNA testing”).

In the short term, DNA waivers will likely diminish quickly at the federal level due to a recently announced policy discouraging the practice. In November 2010, Attorney General Holder announced to all federal prosecutors that, in a revision to the 2004 policy, “the Department should not, as a matter of general policy, seek to foreclose the possibility of postconviction DNA testing under the Innocence Protection Act (IPA), 18 U.S.C. § 3600, as part of plea agreements with defendants.”<sup>64</sup> Instead, “waivers of DNA testing pursuant to the Innocence Protection Act (IPA) [must] be sought or accepted by federal prosecutors only under exceptional circumstances.”<sup>65</sup>

At the state level, the use of DNA waivers is not as clear. Although a representative of the National District Attorneys Association has decried the practice,<sup>66</sup> evidence of state practices remains difficult to obtain,<sup>67</sup> and an informal survey produced few responses at the state level.<sup>68</sup> There is some evidence that the district attorney in Williamson County, Texas—home to approximately 400,000 people<sup>69</sup>—has advised his peers to insert permission to destroy DNA evidence into plea bargains because “innocence trumps everything.”<sup>70</sup> At present, however, the available evidence suggests that DNA waivers are not commonly used at the state level.

### C. POTENTIAL FUTURE TRENDS

Although prosecutors’ use of DNA waivers will at least temporarily decline at the federal level, there is, of course, no guarantee that future Attorneys General will not reinstate a pro-waiver policy. Moreover, as prosecutors’ offices around the country deal with budget constraints, there will be a tempta-

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64. Memorandum from Eric H. Holder, Jr., *supra* note 29.

65. *Id.*

66. Markon, *supra* note 53, at A7 (“Joshua Marquis, who sits on the executive committee of the National District Attorneys Association, said he’s never heard of DNA waivers in state court and that the organization opposes the concept. ‘I think it’s important to always leave the door open for actual proof of innocence,’ he said.”).

67. *Cf.* Anup Malani, *Habeas Settlements*, 92 VA. L. REV. 1, 26 (2006) (relying upon survey for data on habeas waivers).

68. Survey of Select Defense Attorneys and State Prosecutors (Oct. 2010 to Feb. 2011) (on file with author).

69. *Williamson County, Texas*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/48/48491.html> (last visited Nov. 30, 2011).

70. *DAs Dislike Criticisms of DNA Destruction Practices*, GRITS FOR BREAKFAST (Feb. 27, 2007), <http://gritsforbreakfast.blogspot.com/2007/02/das-dislike-criticisms-of-dna.html>.

tion to use DNA waivers to cut costs. A useful historical analogy is found in the expansion of appeal and habeas waivers in plea agreements. As Nancy King and Michael O'Neill explain, the passage of the Sentencing Reform Act of 1984<sup>71</sup> and its new sentencing guidelines created a climate of appeal, wherein "[a]ppellate review of sentencing emerged as the primary enforcement mechanism for sentencing reform in federal courts as well as in the courts of more than a dozen states."<sup>72</sup> Following the Reform Act, prosecutors and criminal defendants argued on appeal that sentences were too low or high, and judges interpreted and defined the scope of the guidelines.<sup>73</sup> With the rise of the appeal, however, quickly came practices that began to undermine its usefulness. In 1995, prosecutors began entering agreements with defendants "to drop or not to add a charge, so long as the defendant agreed in return to waive everything including the right to appeal."<sup>74</sup> These waivers served to preserve prosecutorial resources. As one prosecutor told King and O'Neill: "We were spending attorney resources on appeals [in cases that] we eventually won. We have in the office only generalists; our trial attorneys do their own appellate briefs. A couple big appeals per year can hurt your indictment productivity."<sup>75</sup>

The use of the waivers quickly spread among the circuits, and within the same year, six circuits (in addition to the three that had already validated appeal waivers) affirmed the validity of the practice.<sup>76</sup> Prosecutors' affinity for waivers was contagious. A Washington memorandum soon directed prosecutors to "consider whether the employment of appeal waivers would be a 'useful addition' in their districts,"<sup>77</sup> and by 1999, Rule 11 of the Federal Rules of Criminal Procedure had been amended to specifically recognize appeal waivers; it required judges accepting plea agreements to warn defendants in court that they were giving up their right to appeal.<sup>78</sup> Following the amendment and further favorable court decisions, "defense attorneys in districts

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71. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.).

72. Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209, 215 (2005).

73. *Id.* at 214–15.

74. *Id.* at 220.

75. *Id.* at 221.

76. *Id.*

77. *Id.*

78. *Cf.* *United States v. Borrero-Acevedo*, 533 F.3d 11, 13–14 (1st Cir. 2008) (applying Rule 11 to an appeal waiver).



where appeal waivers were still uncommon found waivers proposed as part of every plea agreement.<sup>79</sup> Waivers of habeas rights experienced a similar trajectory. A survey conducted in 2006 revealed that twenty-seven out of thirty-five federal districts and ten out of nineteen states surveyed used habeas waivers.<sup>80</sup>

As indicated by the pervasiveness of DNA waivers in certain United States Attorneys' offices in recent years, the history of the expansion of the use of appeal and habeas waivers, and the likelihood that prosecutors' offices around the country will be faced with difficult budget choices in the coming years, it is likely that at least some prosecutors will continue to seek DNA waivers. It is therefore important to understand the legal and practical implications of their use.<sup>81</sup> The following Part explores the validity of DNA waivers obtained in a variety of factual scenarios, analogizing from court decisions and legal literature addressing appeal and habeas waivers.

## II. VALIDITY AND SCOPE OF DNA WAIVERS

As established in Part I, DNA waivers were at one point relatively common at the federal level and could become common again as leadership changes; little would prevent Attorney General Holder or a future Attorney General from reversing the federal policy against DNA waivers tomorrow, or two years from now. Further, the history of appellate waivers in plea bargains and their rapid expansion from the federal to the state level suggests that DNA waivers may follow the same path. Only three states have banned the practice,<sup>82</sup> and when prosecutors have an opportunity to make their conviction more bullet-proof while simultaneously preserving their budgets, there is a good chance that some of them will seize it. Given the importance and potential prevalence of DNA waivers, this Part explores their validity. The discussion begins by addressing the

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79. King & O'Neill, *supra* note 72, at 224.

80. Malani, *supra* note 67, at 8.

81. Even with the temporary pause in waivers at the federal level, for example, courts will likely soon see legal challenges to the validity of existing waivers.

82. See *infra* notes 84–86 and accompanying text. At least one state court has held that a waiver of the right “to withdraw a plea based on a claim of innocence, any challenges to the underlying factual basis for the plea, any type of direct or collateral appeal” waived “any right to DNA testing of that evidence or court action to pursue such tests.” *State v. Bembenek*, 724 N.W.2d 685, 686 n.2, 691 (Wis. Ct. App. 2006).

constitutionality of waivers under *Osborne*, and then moves to the broader principles of criminal waiver and the “knowing and voluntary” requirement. Finally, this Part considers how the principles explored will apply to different hypothetical DNA waiver scenarios and how criminal defendants will be able to challenge these waivers after the fact, if at all.

#### A. WHETHER DNA WAIVERS ARE PER SE INVALID

No court has yet determined whether criminal defendants may validly waive their right to DNA testing through plea bargains,<sup>83</sup> and only a limited number of states have addressed the question through legislation. California,<sup>84</sup> West Virginia,<sup>85</sup> and Wyoming<sup>86</sup> have preemptively declared waivers of DNA testing rights in plea bargains (or generally) invalid. Colorado and South Dakota, on the other hand, follow the federal Innocence Protection Act by specifically allowing waivers of the “right to preservation of DNA evidence . . . at any stage of the proceed-

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83. Courts have, however, noted the existence of DNA waivers in addressing other issues. *See, e.g.*, *Smocks v. United States*, Nos. 09-0635-CV-W-FJG; 08-00108-01-CR-W-FJG, 2010 WL 1332011, at \*6 (W.D. Mo. Apr. 6, 2010) (describing how an attorney explained to his client that he would be “waiving his constitutional rights, appellate and post-conviction rights . . . and the right to request DNA testing of any biological evidence which may have been obtained by law enforcement” in agreeing to a plea); *Reese v. United States*, Criminal No. 08-16, Civil No. 09-709, 2009 WL 3286903, at \*1 (W.D. Pa. Oct. 13, 2009) (“[T]he written plea agreement required . . . [the defendant] to ‘acknowledge responsibility for the conduct charged’ . . . and waive former jeopardy or double jeopardy claims, post-conviction DNA testing and the preservation of evidence for same.”); *United States v. Holliday*, No. 5:08CR39-01, 2008 WL 4700660, at \*2 (N.D. W.Va. Oct. 21, 2008) (explaining that at the plea hearing, “the United States reviewed the terms of the plea agreement, including, among other things, that the defendant was pleading guilty to Count One . . . and that he was waiving his appellate and post-conviction rights, his right to have a jury make factual determinations, and his right to raise the issue of DNA testing”); *United States v. Akomah*, No. 06CR1096(LAP), 2007 WL 4245841, at \*5 (S.D.N.Y. Nov. 29, 2007) (noting that the lower court “specifically referred the defendant to a number of key provisions of the plea agreement—including . . . the waiver of the right to DNA testing—and the defendant indicated that he recalled each of these terms being in the plea agreement”).

84. CAL. PENAL CODE § 1405(m) (West 2011) (“Notwithstanding any other provision of law, the right to file a motion for postconviction DNA testing provided by this section is absolute and shall not be waived. This prohibition applies to, but is not limited to, a waiver that is given as part of an agreement resulting in a plea of guilty or nolo contendere.”).

85. W. VA. CODE ANN. § 15-2B-14 (m) (LexisNexis 2009) (providing language nearly identical to that of the California code).

86. WYO. STAT. ANN. § 7-12-312(a) (2011) (providing language nearly identical to that of the California code).

ing,” provided the waiver is knowing and voluntary.<sup>87</sup> Similarly, North Carolina dictates that the duty to preserve may only be waived in a court proceeding.<sup>88</sup>

Despite the lack of cases addressing the issue directly, the weight of precedent in similar contexts suggests that, with limited exceptions, the waivers will be generally enforceable so long as they are knowing and voluntary. Criminal defendants have challenged a range of other waivers contained within plea bargains and have nearly always failed.<sup>89</sup> Courts allow defendants to give up a wide variety of core constitutional and statutory rights in plea bargains, and it is unlikely that rights to postconviction DNA testing will receive different treatment.

### 1. *Osborne*

Because it is the key opinion on the right to DNA testing, the discussion of DNA waivers begins with *District Attorney’s Office v. Osborne*.<sup>90</sup> The Court in *Osborne* held that there is no substantive due process right to DNA testing.<sup>91</sup> The Court did, however, recognize that Osborne had a state-created “liberty interest in demonstrating his innocence with new evidence under state law,” and that this right could “in some circumstances, beget yet other rights to procedures essential to the realiza-

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87. COLO. REV. STAT. § 18-1-1106(2) (2011); S.D. CODIFIED LAWS § 23-5B-1 (Supp. 2011) (“Upon a written motion by any person who has been convicted of a felony offense, the court that entered the judgment of conviction for the felony offense shall order DNA testing of specific evidence if the court finds that all of the following apply: . . . the petitioner did not: (i) Knowingly and voluntarily waive the right to request DNA testing of that evidence in a court proceeding . . .”).

88. N.C. GEN. STAT. § 15A-268 (a)(5) (2009) (“The duty to preserve may not be waived knowingly and voluntarily by a defendant, without a court proceeding.”). The District of Columbia requires, under certain circumstances, a court to inform an accused that he may waive—prior to making a plea—both the right to independent DNA testing (where the state has already tested the evidence) and other general DNA testing where the biological evidence has not been tested, and to inform an accused of the potential evidentiary value of the DNA evidence and the consequences of waiver. If a defendant then waives the right to pre conviction testing, he is not eligible for post-conviction testing unless he is otherwise entitled to have the conviction set aside. D.C. CODE § 22-4132(b) (LexisNexis 2010).

89. *Cf. Schick v. United States*, 195 U.S. 65, 72 (1904) (“When there is no constitutional or statutory mandate, and no public policy prohibiting, an accused may waive any privilege which he is given the right to enjoy.”).

90. 129 S. Ct. 2308 (2009).

91. *Id.* at 2322 (concluding “in the circumstances of this case, that there is no . . . substantive due process right”).

tion of the parent right.”<sup>92</sup> The Court rejected extending the preconviction procedural due process framework to the postconviction context, holding that “the question is whether consideration of Osborne’s claim within the framework of the State’s procedures for postconviction relief ‘offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,’ or ‘transgresses any recognized principle of fundamental fairness in operation.’”<sup>93</sup> The question under *Osborne*, then, is whether allowing DNA waivers would cause a DNA testing procedure to fail this test. There is little doubt that it would not. As discussed in more detail below, the Court has allowed many fundamental rights to be waived, not least the right to a trial;<sup>94</sup> a different result is unlikely for the testing right. Moreover, in holding that Alaska’s postconviction procedures passed this test, the Court noted that in order to access DNA evidence under Alaska law, that evidence must be, inter alia, “diligently pursued”;<sup>95</sup> waiving the chance to test evidence is hardly diligent pursuit. *Osborne* presents no barrier to the enforceability of DNA waivers, so it is necessary to look to the Supreme Court’s criminal waiver jurisprudence.

## 2. *Mezzanatto* and *Hill*

Courts addressing waivers of rights in plea bargains begin with a “presumption of waivability”<sup>96</sup> that extends even to the “most fundamental protections afforded by the Constitution.”<sup>97</sup> The recent Supreme Court cases addressing this presumption merit a detailed review; these decisions, building upon a series of older waiver cases, clarify the test that will apply to the validity of DNA waivers. In *United States v. Mezzanatto*, the Supreme Court observed that for a “broad array of constitutional and statutory provisions, [r]ather than deeming waiver presumptively unavailable absent some sort of express enabling

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92. *Id.* at 2319 (citations omitted).

93. *Id.* at 2320 (quoting *Medina v. California*, 505 U.S. 437, 446, 448 (1992)).

94. See Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 831–33 (2003) (contrasting the doctrine of unconstitutional conditions with the much more permissive doctrine of criminal waiver).

95. *Osborne*, 129 S. Ct. at 2320. The Court later observed that the testing Osborne sought had been available at trial “and the state court relied on that fact in denying him testing under Alaska law.” *Id.* at 2321.

96. *United States v. Mezzanatto*, 513 U.S. 196, 202 (1995).

97. *Id.* at 201.

clause, we instead have adhered to the opposite presumption.”<sup>98</sup> In *Mezzanatto*, undercover police agents caught the defendant selling drugs,<sup>99</sup> and the prosecutor subsequently entered into plea negotiations with him, with an agreement that if he was not entirely truthful during the negotiations, his statements could be used as impeaching evidence at trial.<sup>100</sup> Negotiations broke down when the defendant made inconsistent statements,<sup>101</sup> and at trial the prosecution cross-examined the defendant using his inconsistent statements from the negotiation process.<sup>102</sup>

On appeal, the issue was whether Mezzanatto could “waive the protection of the rules barring the use of plea negotiation statements for impeachment,”<sup>103</sup> which the Ninth Circuit decided he could not, looking “to the broader context of the criminal justice system”<sup>104</sup> and the role of plea bargains within this system, and noting that “[t]o allow waiver of these rules would be contrary to all that Congress intended to achieve” and that allowing waiver “could easily have a chilling effect on the entire plea bargaining process.”<sup>105</sup> The court, in other words, focused on the systemic effects of waiver. In reversing the Ninth Circuit, the Supreme Court concluded that the Ninth Circuit’s analysis was “directly contrary” to the Court’s approach to waivers of many other statutory and constitutional rights.<sup>106</sup> The Court focused on its past decisions on waivability, noting that the “most fundamental protections afforded by the Constitution” may be waived, including rights against double jeopardy and self-incrimination and rights to jury trial, confrontation, and counsel.<sup>107</sup>

As the Court explained, an equal presumption of waivability applies to statutory rights “absent some affirmative

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98. *Id.* at 200–01.

99. *Id.* at 197–98.

100. *Id.* at 198.

101. *Id.* at 199.

102. *Id.*

103. *United States v. Mezzanatto*, 998 F.2d 1452, 1454 (9th Cir. 1993), (discussing FED. R. EVID. 410 and FED. R. CRIM. P. 11(e)(6)) *rev’d* 513 U.S. 196 (1995)).

104. *Id.*

105. *Id.* at 1455.

106. *Mezzanatto*, 513 U.S. at 200.

107. *Id.* at 201 (citing *Ricketts v. Adamson*, 483 U.S. 1, 10 (1987) (waiver of double jeopardy); *Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (waiver of rights against “compulsory self-incrimination” and rights to jury trial and confrontation); *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938) (right to counsel)).

indication of Congress's intent to preclude waiver" or an express waiver provision that suggested "that Congress intended to occupy the field and to preclude waiver under other, unstated circumstances."<sup>108</sup> The Court then cited to an array of evidentiary rules that had been validly waived through plea agreements in the past,<sup>109</sup> and it determined that, in light of the "background presumption" in favor of waivability, Mezzanatto had the burden of "identifying some affirmative basis for concluding that the plea-statement Rules depart from the presumption."<sup>110</sup> Mezzanatto put forth three bases for denying waivability, arguing that rules that "guarantee . . . fair procedure" may not be waived,<sup>111</sup> that waiver was "fundamentally inconsistent" with the goals of the rules (to encourage voluntary settlement),<sup>112</sup> and that more generally, "waiver agreements should be forbidden because they invite prosecutorial overreaching and abuse."<sup>113</sup> The Court disagreed with all three of these arguments, establishing some clear principles for future waiver decisions.<sup>114</sup>

With respect to concerns about waivers denying fair procedures, the Court conceded that some waivers may occasionally go too far. Those waivers that risk "irreparably 'discredit[ing] the federal courts'"<sup>115</sup> by, for example, allowing "trial by 12 orangutans"<sup>116</sup> or conflicted counsel,<sup>117</sup> are likely unenforceable. In defining the types of waivers that tend to overly detract from fair procedures and thus could cause "institutional harm to the federal courts,"<sup>118</sup> the Court focused on the "truth-seeking function of trials" (a function that might be substantially affected by a jury of orangutans or a conflicted attorney).<sup>119</sup> It concluded that waiver in Mezzanatto's case "*enhances* the truth-seeking

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108. *Id.*

109. *Id.* at 202 (citing waivers admitting hearsay and to admit documentary and other evidence).

110. *Id.* at 203–04.

111. *Id.* at 204.

112. *Id.* at 206.

113. *Id.* at 209.

114. *Id.* at 204–09.

115. *Id.* at 204 (alteration in original) (citing 21 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5039, at 207–08 (1977)).

116. *Id.* (citing *United States v. Josefik*, 753 F.2d 585, 588 (7th Cir. 1985)).

117. *Id.* (citing *Wheat v. United States*, 486 U.S. 153, 162 (1988)).

118. *Id.* at 205.

119. *Id.* at 204.

function of trials and will result in more accurate verdicts”<sup>120</sup> because it makes the jury aware of inconsistent statements by the testifying defendant.<sup>121</sup>

Second, addressing Mezzanatto’s concern that waiver of the rules subverted the rules’ goals by discouraging voluntary settlement—a concern also expressed by the Ninth Circuit<sup>122</sup>—the Court refused to decide whether or when “public policy” considerations such as chilling the plea bargaining process could ever justify overriding the “presumption of waivability.”<sup>123</sup> Instead, it determined that, in any case, waiver of the right at issue might even encourage plea bargaining, and relatedly, that prohibiting waiver might cause prosecutors to “decline to enter into cooperation discussions in the first place.”<sup>124</sup>

Finally, addressing the contention that waiver agreements generally should be “forbidden” due to potential prosecutorial abuse, the Court relied on its decision in *Newton v. Rumery*.<sup>125</sup> In *Newton*, the Court considered whether all agreements in which a criminal defendant releases his right to file an action under 42 U.S.C. § 1983 in return for dismissal of pending criminal charges were void as against public policy because they could lead to trumped up charges and suppressed evidence.<sup>126</sup> Rejecting a per se rule (while acknowledging that some agreements may not be informed and voluntary), a plurality of the Court stated that “the mere opportunity to act improperly does not compel an assumption that all—or even a significant number of—release-dismissal agreements stem from prosecutor[ial misconduct.]”<sup>127</sup> Building on *Newton*, the *Mezzanatto* Court held that “[t]he mere potential for abuse of prosecutorial bargaining power is an insufficient basis for foreclosing negotiation altogether.”<sup>128</sup> Rather, the Court determined that defendants could counter abuse in individual cases (by arguing that there was coercion in inducing the waiver agreement), and that “absent

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120. *Id.*

121. *Id.* at 205.

122. *United States v. Mezzanatto*, 998 F.2d 1452, 1455 (9th Cir. 1993).

123. *Mezzanatto*, 513 U.S. at 206–07.

124. *Id.* at 206.

125. *Id.* at 210 (citing *Town of Newton v. Rumery*, 480 U.S. 386 (1987)).

126. The Court answered “this question by reference to traditional common-law principles, as [it had] resolved other questions about the principles governing § 1983 actions.” *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987).

127. *Id.* at 397.

128. *Mezzanatto*, 513 U.S. at 210.

some affirmative indication that the agreement was entered into unknowingly or involuntarily, an agreement to waive the exclusionary provisions of the plea-statement Rules is valid and enforceable.”<sup>129</sup>

The Court in *New York v. Hill* further elaborated upon this waiver test.<sup>130</sup> In *Hill*, the respondent was in custody in Ohio, and officials in New York wished to charge him.<sup>131</sup> The officials therefore filed a detainer under the Interstate Agreement on Detainers (IAD), which creates “procedures for resolution of one State’s outstanding charges against a prisoner of another State”<sup>132</sup> and requires a timely trial<sup>133</sup> after a defendant has made a “request for a final disposition.”<sup>134</sup> During a scheduling hearing in open court, the prosecutor requested a later trial date (as permitted by the IAD), and Hill’s attorney stated that a trial date (which happened to be beyond the required time period under the IAD) would be “fine.”<sup>135</sup> Hill moved to dismiss the indictment,<sup>136</sup> arguing a lack of timeliness, and the trial court denied his request, citing Hill’s counsel’s waiver of timely trial.<sup>137</sup> The New York Court of Appeals ultimately ordered the indictment to be dismissed on the grounds that Hill had not

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129. *Id.*

130. Although the waiver agreed to in *Hill* was not part of a plea agreement, this distinction does not appear to matter after *Mezzanatto*, at least in dicta. *Hill*, 528 U.S. 110, 111 (2000). In a footnote in *Mezzanatto*, the Court noted that Mezzanatto argued that pretrial agreements to waive were unlike waiver agreements made while the “case is in progress.” The Court noted:

While it may be true that extrajudicial contracts made prior to litigation trigger closer judicial scrutiny than stipulations made within the context of litigation there is nothing extrajudicial about the waiver agreement at issue here. The agreement was made in the course of a plea discussion aimed at resolving the specific criminal case that was “in progress” against respondent.

*Mezzanatto*, 513 U.S. at 203 n.3 (citing 21 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5039, at 207–08 (1977)).

131. *Hill*, 528 U.S. at 112.

132. *Id.* at 111 (citing 18 U.S.C. app. 2 § 2 (1994); N.Y. CRIM. PROC. LAW § 580.20 (McKinney 1995); UNIF. POST-CONVICTION PROCEDURE ACT, 11A U.L.A. 48 (1995)).

133. *Id.* at 112 (quoting N.Y. CRIM. PROC. LAW § 580.20, Art. III(a) (McKinney 1995)).

134. *Id.* (quoting N.Y. CRIM. PROC. LAW § 580.20, Art. III(a) (McKinney 1995)).

135. *Id.* at 112–13.

136. *Id.* at 113.

137. *Id.*



waived his “speedy trial rights under the IAD.”<sup>138</sup>

On appeal, the Supreme Court began by noting that the IAD statute does not include a waiver provision for the trial timing requirements, but emphasized the presumption of waivability laid out in *Mezzanatto*.<sup>139</sup> Hill raised two objections to allowing waiver. First, he argued that “by explicitly providing for the grant of ‘good-cause continuances,’ the IAD seeks to limit the situations in which delay is permitted, and that permitting other extensions of the time period would override those limitations.”<sup>140</sup> The Court took a more accommodating stance toward “policy” arguments than it had in *Mezzanatto*, acknowledging that “waiver is not appropriate when it is inconsistent with the provision creating the right sought to be secured.”<sup>141</sup> The Court emphasized, however, the high burden of proof faced by a defendant who argues that waiver is inconsistent with the instrument that is creating the right: as established by *Mezzanatto*, the defendant must make an “affirmative indication of Congress’s intent to preclude waiver.”<sup>142</sup> Because the “good-cause continuances” provided for in the IAD were not intended to address agreed-upon extensions, “the negative implication” was “certainly not clear enough” to meet this burden.<sup>143</sup>

Second, Hill argued that “the IAD benefits not only the defendant but society generally, and that the defendant may not waive society’s rights.”<sup>144</sup> The Court again conceded that, as it had previously recognized, a “right conferred on a private party, but affecting the public interest, may not be waived or released *if such waiver or release contravenes the statutory policy*.”<sup>145</sup> But the Court emphasized that “[i]t is *not* true that any private right that also benefits society cannot be waived.”<sup>146</sup> Rather, it found that litigants within the system typically protect the public’s rights,<sup>147</sup> and in the case of trials of already-detained defendants under the IAD, the benefits of “prompt tri-

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138. *Id.*

139. *Id.* at 114.

140. *Id.* at 116.

141. *Id.*

142. *United States v. Mezzanatto*, 513 U.S. 196, 201 (1995); *see Hill*, 528 U.S. at 116.

143. *Hill*, 528 U.S. at 116.

144. *Id.*

145. *Id.* (citing *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 704 (1945)).

146. *Id.* at 117.

147. *Id.*

al” are less relevant.<sup>148</sup> Besides, the Court noted, the public’s interest in prompt trial, partially embodied within the IAD, was not “unalterable statutory policy.”<sup>149</sup>

After finding the waiver of the IAD’s rights to a timely trial to be generally valid, the court lastly addressed what was required for Hill to waive the right in this particular case. The Court noted here that “[w]hat suffices for waiver depends on the nature of the right at issue.”<sup>150</sup> The Court observed, for example, that a “defendant must personally make an informed waiver” of “certain fundamental rights,” including the right to counsel<sup>151</sup> and the right to plead not guilty.<sup>152</sup> It concluded that this analysis should not turn on a “hypertechnical distinction,” however, such as whether Hill had in fact made an “affirmative request” to waive his rights.<sup>153</sup> The agreement by Hill’s counsel to a trial date inconsistent with the IAD’s time limits was enough to constitute a waiver, and the waiver was validly made.<sup>154</sup>

Taken together, *Hill* and *Mezzanatto* pose a formidable hurdle for a criminal defendant seeking to argue that his rights are not waivable in the absence of a clear legislative statement to that effect. *Mezzanatto* emphasizes the presumption that defendants may knowingly and voluntarily waive their constitutional and statutory rights and notes only very narrow public policy and “court integrity” exceptions to this presumption.<sup>155</sup> *Hill* places a high bar on attempts to argue that a waiver undermines the statutory right “sought to be secured”<sup>156</sup>—reemphasizing that an “affirmative indication” against waiver must be found in the statute.<sup>157</sup> Further, *Hill* makes clear that where a defendant argues that a waiver is generally detrimental to society at-large, and thus against public policy, the societal interest must likely be part of the statute’s “unalterable policy” to merit invalidation of a waiver.<sup>158</sup> Finally, where a defendant challenges the particular means by which the waiver

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148. *Id.*

149. *Id.* (citing *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 704 (1945)).

150. *Id.* at 114.

151. *Id.* (citing *Johnson v. Zerbst*, 304 U.S. 458, 464–65 (1938)).

152. *Id.* (citing *Brookhart v. Janis*, 384 U.S. 1, 7–8 (1966)).

153. *Id.* at 118.

154. *Id.*

155. *See* *United States v. Mezzanatto*, 513 U.S. 196 (1995).

156. *Hill*, 528 U.S. at 116.

157. *Id.* (citing *Mezzanatto*, 513 U.S. at 201).

158. *Id.* at 117.

was entered, the nature of the right matters: the more fundamental the right, the more procedure and voluntariness is required.<sup>159</sup> As a result of the long chain of case law relied upon by the court, as well as the *Hill* and *Mezzanatto* decisions themselves, the Supreme Court is “decidedly inhospitable to the notion that any agreement by a criminal defendant to waive a right—either constitutional or statutory—could be presumptively against public policy.”<sup>160</sup>

### 3. The Likely Validity of DNA Waivers

Applying these principles to DNA waivers, federal courts are unlikely to accept arguments that they are invalid per se. The question of per se validity is more difficult, however, in the many states with postconviction DNA testing statutes that do not explicitly contemplate waiver of the testing right.

#### a. Federal Courts

Initially, a defendant opposing a DNA waiver in federal court could argue that Congress and the states, in granting DNA testing, did not intend for defendants to waive this testing. This will be an extremely difficult task because, as previously noted, the Innocence Protection Act<sup>161</sup> expressly anticipates DNA waivers.<sup>162</sup> This fact will largely foreclose the otherwise promising argument, developed below,<sup>163</sup> that Congress could not have intended to allow waiver because waiver is inconsistent with the right being granted.<sup>164</sup>

Nonetheless, a defendant could challenge DNA waivers on broader “public policy” grounds. First, he could argue from *Mezzanatto* that the waiver of DNA testing will discredit the federal courts.<sup>165</sup> This argument is definitely plausible: as will

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159. See *supra* note 152 and accompanying text.

160. Robert K. Calhoun, *Waiver of the Right to Appeal*, 23 HASTINGS CONST. L.Q. 127, 160 (1995).

161. See 18 U.S.C. § 3600(a)(3) (2006) (allowing DNA testing only where the defendant did not “knowingly and voluntarily waive the right to request DNA testing of that evidence in a court proceeding after the date of enactment of the Innocence Protection Act of 2004”).

162. See *supra* note 89 and accompanying text.

163. See *infra* Part II.A.3.b.

164. See *New York v. Hill*, 528 U.S. 110, 116 (2000).

165. *United States v. Mezzanatto*, 513 U.S. 196, 204 (1995) (quoting 21 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5039, 207–08 (1977)).

be addressed in greater detail below,<sup>166</sup> allowing prosecutors to prevent potentially conclusive evidence of innocence from coming to light will damage public confidence in the courts. And *Mezzanatto* emphasized that plea statements can be admitted as impeachment evidence at trial without “discrediting the federal courts” because impeaching evidence “*enhances* the truth-seeking function of trials and will result in more accurate verdicts.”<sup>167</sup> But the *Mezzanatto* Court seemed leery of a “contract to deprive the court of relevant testimony,”<sup>168</sup> which is exactly analogous to the effect of a DNA waiver—particularly where the waiver also allows the destruction of evidence. Unfortunately, however, the Court’s interest in accuracy at trial has not extended to the pretrial period,<sup>169</sup> and DNA waivers, while perhaps distasteful, are not as shocking as a jury of lower primates.<sup>170</sup>

A defendant could also make a second public policy argument against DNA waivers—that DNA-testing statutes affect the public interest, and allowing waiver contravenes statutory policy. It is certainly true that society has an interest in testing: beyond freeing the innocent, testing often leads to the apprehension of the actual perpetrator.<sup>171</sup> This interest could be thwarted by DNA waivers. But it may be difficult to say that waiver truly contravenes statutory policy in light of the fact that many testing statutes—mindful of the monetary and emotional costs to disturbing finality—already impose meaningful, and sometimes insuperable, barriers to testing, including, *inter alia*, “guilty plea exclusions, custody requirements, due diligence requirements, and requirements that the technology has changed since the time of trial.”<sup>172</sup> Enforcing waivers is entirely consistent with this approach.

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166. See *infra* notes 328–31 and accompanying text.

167. *Mezzanatto*, 513 U.S. at 204.

168. *Id.* (quoting Note, *Contracts to Alter the Rules of Evidence*, 46 HARV. L. REV. 138, 142–43 (1933)); see also Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist’s Guide to Loss, Abandonment and Alienation*, 68 FORDHAM L. REV. 2011, 2080–81 (2000) (arguing that the *Brady* right, as a structural right, “is simply not the defendant’s right to alienate” and that the “recognition that such ‘structural protections’ are inalienable can be found in cases cited by the Supreme Court in *Mezzanatto*”).

169. See *infra* notes 232–42 and accompanying text.

170. See *Mezzanatto*, 513 U.S. at 204.

171. See, e.g., *Facts on Post-Conviction DNA Exonerations*, THE INNOCENCE PROJECT, [http://www.innocenceproject.org/Content/Facts\\_on\\_PostConviction\\_DNA\\_Exonerations.php](http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php) (last visited Nov. 30, 2011) (“The true suspects and/or perpetrators have been identified in 124 of the DNA exoneration cases.”).

172. Garrett, *supra* note 14, at 1680.

Third, a defendant could argue that enforcing DNA waivers would create an unacceptable risk of police and prosecutorial misconduct, as waivers could be used to bar testing and dispose of the evidence of a host of misdeeds. But despite the appeal of this approach, it is foreclosed by *Mezzanatto* and *Rumery*, which squarely hold that the mere potential for misuse is insufficient to render a waiver per se invalid.<sup>173</sup> There are, in sum, strong public policy arguments to be made for opposing the use of waivers; these arguments will be considered at greater length below. Some state courts, if presented with the question, may be persuaded to hold DNA waivers generally unenforceable.<sup>174</sup> The Supreme Court, however, is unlikely to find these arguments sufficiently compelling to overcome its affinity for waiver, and particularly for waivers in plea agreements.

The conclusion that federal courts are unlikely to generally invalidate DNA waivers is reinforced by the lower federal courts' approach to the waiver of rights similar to the right to postconviction DNA testing and preservation: the right to appeal and to seek postconviction review through habeas. These waivers, which are now commonplace, are analogous to DNA waivers because they limit a defendant's right to a form of post-plea review. And in all three cases—for habeas, appeal, and DNA waivers—a strong argument can be made that allowing waiver is against public policy because it is inconsistent with the purpose of the right itself (remedying error) and the potential for abuse by unscrupulous prosecutors seeking to cover up wrongdoing.<sup>175</sup> Nonetheless, while the Supreme Court has not directly addressed the validity of these waivers, twelve circuit courts of appeals have upheld appeal waivers,<sup>176</sup> and habeas waivers have “been accepted in all but one of the jurisdictions (Indiana) that have considered them.”<sup>177</sup> In refusing to create a

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173. *Mezzanatto*, 513 U.S. at 210; *Town of Newton v. Rumery*, 480 U.S. 386, 397 (1987).

174. See *infra* notes 177, 183 and accompanying text (discussing states not allowing appeal and habeas waivers).

175. See *infra* note 316 and accompanying text.

176. See, e.g., *United States v. Borrero-Acevedo*, 533 F.3d 11, 14 (1st Cir. 2008); *United States v. Wiggins*, 905 F.2d 51, 53 (4th Cir. 1990); see also FED. R. CRIM. P. 11(b) (amended in 1999 to implicitly allow for appeal waivers, providing that “[b]efore the court accepts a plea of guilty . . . the court must address the defendant personally in open court” and must inform the defendant of “the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence,” among other rights surrendered).

177. Malani, *supra* note 67, at 12. The Supreme Court of Indiana held

blanket ban on appeal and habeas waivers, lower courts have relied on the same factors voiced in *Mezzanatto* and *Hill*. In *United States v. Wiggins*, one of the earliest decisions to address waiver of the right to appeal,<sup>178</sup> the Fourth Circuit made a typical observation: “[I]f defendants can waive fundamental constitutional rights such as the right to counsel, or the right to a jury trial, surely they are not precluded from waiving procedural rights granted by statute.”<sup>179</sup>

Similarly, courts have found appeal waivers to be generally justifiable on public policy grounds. In *United States v. Teeter*, the First Circuit concluded that public policy supports appeal waivers for a number of reasons: “[A] defendant is unlikely to waive this right unless she believes that some feature of a proffered plea agreement makes it worth her while to do so,” waivers offer a criminal defendant an “additional bargaining chip in negotiations with the prosecution,” prosecutors might be unwilling to enter the plea bargaining process without waivers, waivers preserve prosecutorial and judicial resources by limiting baseless appeals and, relatedly, they support finality.<sup>180</sup>

Turning to the argument that presentence appeal waivers can never be “knowing” because the value of the right is unclear—that is, the defendant cannot know how useful the appellate right will be—the *Teeter* court’s approach is typical. After noting that an appeal waiver “typically embraces all determinations later made by the sentencing court . . . some of which may be quite different than either [the government or the defendant] thought possible,”<sup>181</sup> the court noted that criminal defendants may knowingly waive their rights, and in guilty pleas—which waive “numerous rights”—defendants often give up rights that could potentially arise in future events, such as a jury trial. Thus, the “prospective nature” of waivers does not “place them off limits” or make them unknowing.<sup>182</sup>

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waivers of postconviction review unenforceable in *Creech v. State*, 887 N.E.2d 73, 76 (Ind. 2008).

178. See *Blank*, *supra* note 168, at 2030.

179. 905 F.2d 51, 53 (4th Cir. 1990) (quoting *United States v. Clark*, 865 F.2d 1433, 1437 (4th Cir. 1989)).

180. 257 F.3d 14, 22 (1st Cir. 2001).

181. *Id.* at 21; see also *United States v. Rutan*, 956 F.2d 827, 830 (8th Cir. 1992) (“While Rutan may not have known the exact dimension of the sentence, he knew he had a right to appeal his sentence and that he was giving up that right.”), *overruled in part on other grounds by United States v. Andis*, 333 F.3d 886 (8th Cir. 2003).

182. *Teeter*, 257 F.3d at 21.

The lower courts' general acceptance of appeal and habeas waivers reinforces the conclusion that DNA waivers are unlikely to be held *per se* invalid in most federal jurisdictions. Just as courts addressing facial challenges to habeas and appeal waivers presume their validity despite the potential for mischief in the plea bargaining process, DNA waivers will likely receive similar treatment—particularly at the federal level.

*b. State Courts*

States have generally followed the federal courts in the criminal waiver context—nearly all states to have considered the issue, for example, enforce appeal and habeas waivers.<sup>183</sup> On this basis alone, it would seem likely that the great majority of states will also enforce DNA waivers. Significantly, however, most state statutes, unlike the federal Innocence Protection Act, do not explicitly contemplate waiver—only Colorado, North Carolina, and South Dakota expressly allow defendants

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183. At least one state, however, refuses to enforce appeal waivers on public policy grounds, and the policy reasons provided by other states that have banned appeal and habeas waivers are similar. Arizona, which has banned appeal waivers *per se*, has found that “public policy forbids a prosecutor from insulating himself from review by bargaining away a defendant’s appeal rights.” *State v. Ethington*, 592 P.2d 768, 769–70 (Ariz. 1979) (“We hold that the right to appeal is not negotiable in plea bargaining, and that as a matter of public policy a defendant will be permitted to bring a timely appeal from a conviction notwithstanding an agreement not to appeal.”). Michigan, in previously banning appeal waivers, similarly worried about waivers’ “chilling effect on the right to appeal.” *People v. Butler*, 204 N.W.2d 325, 330 (Mich. Ct. App. 1972). Indiana, Michigan, and Arizona all invalidate appeal waivers, Malani, *supra* note 67, at 14, but it appears that currently only Arizona invalidates these waivers *per se*. See *Creech v. State*, 887 N.E.2d 73, 75–76 (Ind. 2008) (holding that a “defendant may waive the right to appellate review of his sentence as part of a written plea agreement” provided that the waiver is not “unintelligent or coerced” but disallowing waivers of postconviction relief). After *People v. Butler*, where the Michigan Court of Appeals described the right to appeal as an “absolute right founded on a provision of our State Constitution” and held that allowing “the prosecution to induce defendant to waive his right to appeal in exchange for a plea agreement . . . is constitutionally impermissible,” 204 N.W.2d at 330, the court reversed itself. See *People v. Rodriguez*, 480 N.W.2d 287, 291 (Mich. Ct. App. 1991) (“We find the position espoused in *Butler* . . . that the inclusion of the waiver of appeal in a plea agreement constitutes inherent coercion against the exercise of the right to appeal is at odds with the widely accepted underpinnings of the plea bargaining system. While it is an important right, the right to appeal is no more fundamental than the right to a jury trial, which a defendant may waive by pleading guilty as long as it is done knowingly and voluntarily.”). Indiana also now allows appellate waivers. See *Creech*, 887 N.E.2d at 75–76.

to waive DNA-testing rights.<sup>184</sup> In the absence of clear evidence of legislative intent to allow DNA waivers, the argument against them becomes much stronger.

Extending the right to postconviction DNA testing to those who pleaded guilty is somewhat counterintuitive and sometimes controversial.<sup>185</sup> The conventional wisdom, which still claims a significant number of adherents, is that innocent people do not plead guilty, or at least only exceedingly rarely.<sup>186</sup> Who, after all, would knowingly submit to undeserved punishment? Viewed from this perspective, not requiring conviction by trial as a prerequisite to postconviction testing would be, at best, a poor use of government resources.<sup>187</sup>

As will be discussed in greater depth below, however, it is well-established that, for a variety of reasons, innocent people do plead guilty<sup>188</sup>—and it requires little imagination to conclude that, compared to pleading guilty, signing a DNA waiver is often a comparatively small step.<sup>189</sup> Indeed, one thing that can be said with certainty about innocent defendants who plead guilty is that they have demonstrated a willingness to give up a chance to contest guilt, typically in exchange for reduced pun-

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184. See *supra* notes 87–88 and accompanying text (describing Colorado’s, North Carolina’s, and South Dakota’s anticipation of DNA waivers).

185. See, e.g., J.H. Dingfelder Stone, *Facing the Uncomfortable Truth: The Illogic of Post-Conviction DNA Testing for Individuals Who Pleaded Guilty*, 45 U.S.F. L. REV. 47, 48–49 (2010) (arguing that defendants who pleaded guilty should have no right to DNA testing); Kreimer & Rudovsky, *supra* note 50, at 562 n.51 (describing a prosecutor’s argument that allowing a defendant who pleaded guilty to obtain testing and “rescind his or her plea” would “make[] a mockery of the criminal justice system” (quoting Response Brief for Fla. Prosecuting Att’y’s Ass’n, Inc. as Amicus Curiae at 8, Amendment to Fla. Rules of Criminal Procedure Creating Rule 3.853 (DNA Testing), 807 So. 2d 633 (Fla. 2001) (Nos. SC01-363 & SC01-1649), available at <http://www.law.fsu.edu/library/flsupct/sc01-363/comment4.pdf>).

186. See, e.g., Daina Borteck, *Pleas for DNA Testing: Why Lawmakers Should Amend State Post-Conviction DNA Testing Statutes to Apply to Prisoners Who Pled Guilty*, 25 CARDOZO L. REV. 1429, 1433 (2004) (“Across society, many people refuse to believe that a person would confess to a crime that he did not commit, even though empirical data confirms that false confessions do occur in the American criminal justice system.”); Kreimer & Rudovsky, *supra* note 50, at 562–63 (describing the “unshakable belief in the accuracy of the guilty verdict”).

187. See *infra* Part III.B.

188. See *North Carolina v. Alford*, 400 U.S. 25, 37–38 (1970) (recognizing that innocents plead guilty); Schulhofer, *supra* note 13 (describing why innocents plead guilty); *infra* Part III.A.

189. See *infra* Part III.A.



ishment.<sup>190</sup> Therefore, as a matter of legislative intent,<sup>191</sup> it seems implausible that a legislature, having recognized this problem, and having taken the extraordinary step of creating a statutory right to postconviction testing in order to address it, would choose to allow its chosen remedy to be undermined by the very factors underlying the problem itself. Or to put the argument into the *Mezzanatto/Hill* framework, allowing waiver is so clearly “inconsistent with the provision creating the right sought to be secured”<sup>192</sup> as to amount to an “affirmative indication of [legislative] intent to preclude waiver.”<sup>193</sup>

Despite this argument’s considerable appeal, however, history suggests it will not enjoy wide success. Too often, the courts have failed to recognize—or adapt to—DNA’s unique properties and potential.<sup>194</sup> Indeed, the very existence of fifty DNA statutes reflects, in part, courts’ unwillingness or inability to accommodate testing.<sup>195</sup> This trend, combined with the widespread acceptance of appeal waivers, strongly suggests that courts will enforce DNA waivers even in the absence of express legislative intent to allow them.

#### B. INDIVIDUAL CHALLENGES TO DNA WAIVERS

Even if DNA waivers are not per se invalid, individual waivers of these rights may be unenforceable. Possible challenges include contending that the waiver was not knowing and voluntary, that enforcing it would be a “miscarriage of justice,” and that the entire plea should be withdrawn due to ineffective

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190. See Schulhofer, *supra* note 13.

191. See *New York v. Hill*, 528 U.S. 110, 116 (2000) (acknowledging that in some cases, allowing waivers could subvert legislative intent); *United States v. Mezzanatto*, 513 U.S. 196, 207 (1995) (making a similar acknowledgment).

192. *Hill*, 528 U.S. at 116.

193. *Mezzanatto*, 513 U.S. at 201.

194. See, e.g., *Skinner v. Switzer*, 131 S. Ct. 1289, 1295–96 (2011) (describing Texas courts’ and the Fifth Circuit’s consistent refusals to grant DNA testing under Texas’s testing statute); *Dist. Atty’s Office v. Osborne*, 129 S. Ct. 2308, 2314–16 (2009) (describing a similar history of testing denials in Alaska); Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 61–62 (2008) (describing how, in the cases of innocent defendants ultimately exonerated by DNA, courts consistently denied relief); Daniel S. Medwed, *Emotionally Charged: The Prosecutorial Charging Decision and the Innocence Revolution*, 31 CARDOZO L. REV. 2187, 2201–04 (2010) (describing problems with prosecutorial tunnel vision and confirmation bias following the filing of charges).

195. Cf. Medwed, *supra* note 5, at 675–86 (describing the numerous hurdles to newly discovered evidence claims—those required for access to DNA testing before testing statutes created legislative rights to access).

assistance of counsel or, perhaps, a *Brady v. United States* violation.<sup>196</sup> This Section explores these potential individual challenges to DNA waivers. (Of course, many DNA waivers include language allowing the prosecutor to destroy the DNA evidence—in these cases, a challenge would have to be made very quickly to be effective.)

### 1. The Knowing and Voluntary Requirement

Courts' general treatment of appellate and habeas waivers, which presumes them to be valid in the absence of certain limited exceptions, will likely inform courts' consideration of DNA waivers when and if they are challenged. Looking to *Mezzanatto* and *Hill*, courts will recognize the presumptive validity of waivers and, in the individual case, look to the nature of the right to determine what suffices for waiver.<sup>197</sup> Because the right to DNA testing is similar to the right to appeal and to habeas review, courts will likely rely upon decisions addressing the knowing and voluntary requirement for waiver of those rights prior to the 1999 amendments to the Rules of Criminal Procedure,<sup>198</sup> which largely ended the debate over necessary procedure for waivers by requiring courts to inform defendants that they were waiving an appeal or a right to a collateral attack on a sentence before accepting defendants' plea bargains.<sup>199</sup>

To generally enter a plea knowingly and voluntarily, the defendant must be "aware of the nature of the charges against him, including the elements" of the . . . charge,<sup>200</sup> and that defendant must have chosen "among the alternative courses of action open" to him.<sup>201</sup> In investigating the voluntariness of a plea, the courts look to "all of the relevant circumstances surrounding it," such as the strength of a case against a defendant, and "the possibility of a heavier sentence following a guilty verdict after a trial."<sup>202</sup> A prosecutor's revealing this type of information to a defendant does not create an involuntary plea. Rather, "the agents of the State may not produce a plea by actual or threatened physical harm or by mental coercion over-

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196. See 397 U.S. 742 (1970).

197. *Hill*, 528 U.S. at 114.

198. See *United States v. Borrero-Acevedo*, 533 F.3d 11, 13 (1st Cir. 2008).

199. FED. R. CRIM. P. 11(b)(1)(N) (2010). As yet, there is no specific provision in the federal rules requiring courts to inform a defendant during the plea colloquy that he is giving up DNA testing right.

200. *Bradshaw v. Stumpf*, 545 U.S. 175, 182–83 (2005).

201. *North Carolina v. Alford*, 400 U.S. 25, 31 (1970).

202. *Brady v. United States*, 397 U.S. 742, 749 (1970).

bearing the will of the defendant.”<sup>203</sup> As the Court in *Brady* recognized, involuntariness may also arise where the defendant “was so gripped by fear of the death penalty or hope of leniency that he did not or could not, with the help of counsel, rationally weigh the advantages of going to trial against the advantages of pleading guilty.”<sup>204</sup>

In the appeal waiver context—prior to the 1999 amendments—courts generally imposed a similar requirement for a waiver to be knowing and voluntary.<sup>205</sup> An appeal waiver was knowing and voluntary, for example, where a court alerted the

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203. *Id.* at 750.

204. *Id.*

205. Since 1999, whether a waiver of an appeal or habeas right is “knowing and voluntary” is partially defined by statute. Rule 11(b) of the Federal Rules of Criminal Procedure requires a court entering the plea to inform the defendant in open court of “the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.” FED. R. CRIM. P. 11(b)(1)(N) (2010). Since the addition of this rule in 1999, courts have generally found that a failure to inform the defendant of the appeal waiver results in the invalidation of the waiver in the plea. *See, e.g.*, *United States v. Smith*, 618 F.3d 657, 664–65 (7th Cir. 2010) (holding, on plain error review, that an appeal waiver was unenforceable when the court had “only obliquely” referred to the defendant’s appeal waiver under the Rule 11 colloquy); *United States v. Teeter*, 257 F.3d 14, 26–27 (1st Cir. 2001) (holding where a court did not “direct” the defendant’s “attention to the waiver provision” as required under Rule 11, severing “the waiver of appellate rights from the remainder of the plea agreement . . .”). When the defendant fails to preserve the Rule 11(b)(1)(N) claim, courts generally apply the plain error standard, requiring the defendant to show “a reasonable probability that he would not have entered the plea had the error not been made.” *U.S. v. Borrero-Acevedo*, 533 F.3d 11, 14 (1st Cir. 2008); *see also United States v. Vonn*, 535 U.S. 55, 59 (2002) (holding that “a silent defendant has the burden to satisfy the plain-error rule”). “However, the court is not required to conduct a specific dialogue with the defendant concerning the appeal waiver, so long as the record contains sufficient evidence to determine whether the defendant’s acceptance of the waiver was knowing and voluntary.” *Jones v. United States*, 167 F.3d 1142, 1144 (7th Cir. 1999). Further, even where a court has not provided the proper Rule 11 information to the defendant, courts will sometimes affirm appeal and habeas waivers so long as they were knowing and voluntary. *See, e.g.*, *United States v. Lara-Joglar*, 400 F. App’x 565, 570 (1st Cir. 2010) (citing *United States v. Ward*, 518 F.3d 75, 82 (1st Cir. 2008)) (validating an appeal waiver and determining that “[a]lthough Rule 11 does require the court to ‘address the defendant personally in open court and determine that the plea is voluntary,’ FED. R. CRIM. P. 11(b)(2) (2010) . . . even that general inquiry is not constitutionally mandated.”); *United States v. Polak*, 573 F.3d 428, 431–32 (7th Cir. 2009) (affirming an appeal waiver on plain error review where the court had failed to ask about the defendant’s “understanding” of that waiver but the defendant had, among other factors indicating knowledge, “gone over the agreement with his attorney” and signed the agreement below a statement indicating that he had “reviewed all aspects of the plea”).

defendant in court that as part of the plea agreement, “defendant . . . expressly waives the right to appeal his sentence on any ground” and the plea language itself stated, “Realizing the uncertainty in estimating what sentence he will ultimately receive, the defendant knowingly waives his right to appeal the sentence . . . in exchange for the concessions made by the government in this agreement.”<sup>206</sup> Similarly, where a court warned a defendant of the constitutional rights that he was giving up in a plea, the plea and the appeal waiver within the plea were made knowingly and voluntarily because the defendant “knew he was giving up possible appeals, even if he did not know exactly what the nature of those appeals might be.”<sup>207</sup>

Many DNA waivers contain very specific text describing the nature of the right given up, and courts will likely generally find them valid. Even the shortest DNA waiver found in any of the plea agreements investigated in this Article states that the client is waiving “any and all rights” that he “may have, pursuant to 18 U.S.C. § 3600, to require DNA testing of any physical evidence” and that the evidence will be unavailable for testing in the future.<sup>208</sup> This certainly informs the defendant of the nature of the appeals that he is giving up (by referring specifically to the DNA testing provision), and it at least generally alerts him to the existence of DNA evidence. Other DNA waivers are even more explicit—describing, for example, the specific hair and blood samples available in the case,<sup>209</sup> warning that the defendant is “giving up any ability to request DNA testing of evidence in this case in the current proceeding, in any proceeding after conviction under 18 U.S.C. § 3600, and in any proceeding of any type,”<sup>210</sup> and informing the defendant that “by giving up this right, the defendant will never have another opportunity to have the evidence in the case submitted to DNA testing, or to employ the results of DNA testing to support a claim that defendant is innocent.”<sup>211</sup> Assuming the defendant has actually

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206. *United States v. Wiggins*, 905 F.2d 51, 53 (4th Cir. 1990) (omissions in original) (internal citation omitted).

207. *United States v. Navarro-Botello*, 912 F.2d 318, 320 (9th Cir. 1990).

208. Plea Agreement at 6, *United States v. Bloch*, No. 10-cr-215-M-01 (Apr. 27, 210).

209. *See, e.g.*, Plea Agreement at 11, *United States v. McPike*, No. 05-30069-WDS (May 6, 2009).

210. Plea Agreement at 5, *United States v. James*, No. SA CR 05-214-CJC (Dec. 14, 2007).

211. *Id.*

read and understood these provisions, waiver is very likely knowing and voluntary.

If the DNA waiver is found to be knowing and voluntary, a defendant challenging the validity of the waiver will have to fall back on other factors, including, at least in some courts, an argument that the denial of waiver would work individual injustice in the case.

## 2. The Miscarriage of Justice Exception

Some federal courts invalidate appeal and habeas waivers where they result in a “miscarriage of justice.” The First Circuit has noted, for example, that because appeal “waivers are made before any manifestation of sentencing error emerges, appellate courts must remain free to grant relief from them in egregious cases”<sup>212</sup>—where a “miscarriage of justice occurs.”<sup>213</sup> This principle is distinct from the public policy arguments that could cause waivers of some rights to be invalid on their face.<sup>214</sup> A miscarriage of justice, unlike a public policy violation, arises in individual cases when enforcing a waiver would lead to a result the court finds unacceptable, such as, in the appeal waiver context, leaving in place a racially motivated sentence.<sup>215</sup>

Whether a court’s refusal to withdraw or sever a waiver will result in a miscarriage of justice is determined by

the clarity of the error, its gravity, its character (e.g., whether it concerns a fact issue, a sentencing guideline, or a statutory maximum), the impact of the error on the defendant, the impact of correcting the error on the government, and the extent to which the defendant acquiesced in the result.<sup>216</sup>

The Eighth Circuit, for example, has found a miscarriage of justice where the district court imposed an “illegal sentence,” which is a sentence “not authorized by the judgment of conviction” or “greater or less than the permissible statutory penalty for the crime.”<sup>217</sup> The Tenth Circuit similarly finds a miscarriage of justice where “the sentence exceeds the statutory maximum,” where “the district court relied on an impermissible factor such as race,” where the defendant received ineffective

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212. *United States v. Teeter*, 257 F.3d 14, 25 (1st Cir. 2001).

213. *Id.* at 26.

214. *See supra* notes 96–154 and accompanying text (discussing *Mezzanatto’s* and *Hill’s* approach to the permissibility of waiver).

215. *See infra* notes 216–19 and accompanying text.

216. *Teeter*, 257 F.3d at 26.

217. *United States v. Andis*, 333 F.3d 886, 892 (8th Cir. 2003) (citation omitted) (internal quotation marks omitted).

assistance of counsel in the negotiation of the waiver, and “where the waiver is otherwise unlawful.”<sup>218</sup> The Tenth Circuit also finds a miscarriage of justice where the waiver is the result of ineffective assistance of counsel.<sup>219</sup> Other circuits have found that enforcing appeal waivers would result in a miscarriage of justice in a variety of these same circumstances.<sup>220</sup>

If this doctrine is taken unaltered from the appeal waiver context, it would, for obvious reasons, have little application to DNA waivers. Courts may, however, adapt it to the DNA waiver context. Indeed, because of DNA waivers’ considerable potential to lead to injustice, such a development would be highly desirable. For example, a miscarriage of justice may exist where the defendant could show that the existence of the evidence was deliberately suppressed (even if this would not violate due process under *Brady*, as described in Part 3.a below), or where the defendant is able to independently demonstrate compelling proof of innocence, such as a credible confession by a third party, which could be verified by DNA testing. Courts’ willingness to extend this principle to DNA waivers is, of course, entirely speculative.

### 3. Withdrawing the Plea

In addition to arguing that a DNA waiver itself was entered into unknowingly or involuntarily or that enforcement of the waiver will result in a miscarriage of justice, a defendant wishing to challenge the validity of a DNA waiver may also seek to withdraw the entire plea. The test for determining the validity of a guilty plea is “whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.”<sup>221</sup> A full exploration of the factors rendering a plea invalid, such as, for example, ineffective assis-

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218. *United States v. Hahn*, 359 F.3d 1315, 1327 (10th Cir. 2004).

219. *Id.*

220. *Jones v. United States*, 167 F.3d 1142, 1144 (7th Cir. 1999) (“We have recognized that the right to appeal survives where the agreement is involuntary, or the trial court relied on a constitutionally impermissible factor (such as race), or (as the waiver here specifically provides) the sentence exceeded the statutory maximum.”); *United States v. Schuman*, 127 F.3d 815 n.\* (9th Cir. 1997) (Kozinski, J., concurring) (per curiam) (listing the circumstances where an appeal waiver may be invalid, including sentencing based on race, illegal sentences, breaches of plea agreements, and disparity of sentences among codefendants).

221. *North Carolina v. Alford*, 400 U.S. 25, 31 (1970).

tance of counsel, is impossible.<sup>222</sup> Because of its special relevance to the topic, however, one type of possible claim is worth addressing: the *Brady* violation.<sup>223</sup>

a. *Brady* Violations

Defendants who have signed DNA waivers may seek to withdraw the plea itself by claiming that prosecutors failed to disclose potentially exculpatory evidence prior to eliciting a waiver of the right to test this evidence.<sup>224</sup> Like a *Strickland* challenge to a guilty plea,<sup>225</sup> a *Brady* challenge must assert that the failure to disclose affected the plea itself; all other constitutional challenges, after all, are surrendered in entering the guilty plea.<sup>226</sup> A somewhat extended discussion of the applica-

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222. See *United States v. Teeter*, 257 F.3d 14, 26 (1st Cir. 2001) (noting that “the term ‘miscarriage of justice’ is more a concept than a constant,” and that “[o]ther considerations will doubtless suggest themselves in specific cases”).

223. A challenge to the plea itself will be much more likely to succeed on direct appeal than it will through collateral attack. See *Bousley v. United States*, 523 U.S. 614, 621 (1998) (“We have strictly limited the circumstances under which a guilty plea may be attacked on collateral review. It is well settled that a voluntary and intelligent plea of guilty made by an accused person, who has been advised by competent counsel, may not be collaterally attacked. Even the voluntariness and intelligence of a guilty plea can be attacked on collateral review only if first challenged on direct review.” (quoting *Mabry v. Johnson*, 467 U.S. 504, 508 (1984))).

224. See *United States v. Bagley*, 473 U.S. 667, 682 (1985) (plurality opinion) (finding that favorable evidence is material, and constitutional error results from its suppression by the government, “only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different”); *id.* at 685 (White, J., concurring in part and concurring in judgment); *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (“[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”).

225. See *Hill v. Lockhart*, 474 U.S. 53, 57–60 (1985) (applying *Strickland*’s ineffective assistance of counsel test to a plea challenge); *cf.* *Strickland v. Washington*, 466 U.S. 668, 687–88, 694 (1984) (holding that a convicted defendant must show that “counsel’s representation fell below an objective standard of reasonableness” and that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different”).

226. See *Tollett v. Henderson*, 411 U.S. 258, 267 (1973) (holding that following a guilty plea, a defendant “may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea”); *United States v. Conroy*, 567 F.3d 174, 178 (5th Cir. 2009) (finding that “a guilty plea precludes the defendant from asserting a *Brady* violation”).

tion of *Brady* to the pretrial period is merited in light of its implications for DNA waivers. As the right to pretrial discovery decreases, DNA waivers potentially become both more troubling and more difficult to challenge.

A number of federal and state courts have historically recognized pretrial *Brady* due process rights. In a comprehensive survey of the cases, Kevin McMunigal identified three circuits, one federal district court, and eight state appellate courts that found a “due process duty to disclose *Brady* material prior to the entry of a guilty plea.”<sup>227</sup> Prosecutors generally had to provide not only exculpatory evidence “going to the heart of the defendant’s guilt or innocence,” but also “evidence that is useful for impeachment, i.e., having the potential to alter the jury’s assessment of the credibility of a significant prosecution witness.”<sup>228</sup> Importantly, this disclosure obligation was generally “pertinent not only to an accused’s preparation for trial but also to his determination of whether or not to plead guilty.”<sup>229</sup> Indeed, *Brady* made clear that “suppression by the prosecution of evidence *favorable to an accused* upon request violates due process” where such evidence is material, regardless of whether the prosecutor suppressed the evidence in good or bad faith.<sup>230</sup> Only one federal court of appeals—the Fifth Circuit—and several state courts had denied the pretrial *Brady* right.<sup>231</sup>

A 2002 Supreme Court decision substantially changed this landscape. In *United States v. Ruiz*, the Court held that “the Constitution does not require the Government to disclose material impeachment evidence,” or any information regarding any affirmative defense, “prior to entering a plea agreement with a criminal defendant.”<sup>232</sup> In reaching this conclusion, the Court observed that a guilty plea could be voluntary without these disclosures because “impeachment information is special in relation to the *fairness of a trial*, not in respect to whether a plea is *voluntary*.”<sup>233</sup> Moreover, a defendant need not know exactly what impeachment information he would receive at trial before giving up the right to that information because “the law ordinarily considers a waiver knowing, intelligent, and sufficiently

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227. McMunigal, *supra* note 41, at 653.

228. *United States v. Avellino*, 136 F.3d 249, 255 (2d Cir. 1988).

229. *Id.*

230. *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (emphasis added).

231. McMunigal, *supra* note 41, at 653–54.

232. *United States v. Ruiz*, 536 U.S. 622, 633 (2002).

233. *Id.* at 628.



aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances—even though the defendant may not know the *specific detailed* consequences of invoking it.<sup>234</sup> The Court found it “particularly difficult to characterize impeachment information as critical information of which the defendant must always be aware prior to pleading guilty,” because its importance depends on the defendant’s knowledge of the strength and contents of the prosecutor’s potential case.<sup>235</sup>

The Court in *Ruiz* also found no relevant distinction between ignorance of impeachment evidence and the many other types of ignorance, such as ignorance of the strength of the state’s case or the admissibility of a confession the Court had sanctioned in the past.<sup>236</sup> Finally, weighing the value of the asserted right against the cost to the government’s interest,<sup>237</sup> the Court concluded that the *Brady* right would be of little value to defendants in the plea process, noting that “in any case, as the proposed plea agreement at issue here specifies, the Government will provide ‘any information establishing the factual innocence of the defendant,’” and that “[t]hat fact, along with [Federal Rule of Criminal Procedure 11] diminishes the force of Ruiz’s concern that, in the absence of impeachment information, innocent individuals, accused of crimes, will plead guilty.”<sup>238</sup> It then described the heavy burdens that a right to pre-plea impeachment evidence would place on prosecutors, worrying that it “could seriously interfere with the Government’s interest in securing those guilty pleas that are factually justified”<sup>239</sup> and could “force the Government to abandon its general practice of not disclosing to a defendant pleading guilty information that would reveal the identities of cooperating informants, undercover investigators, or other prospective witnesses.”<sup>240</sup> The Court noted that “most (though not all) of the reasons” given for refusing to recognize a preguilty plea right to disclosure of impeachment information applied to information

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234. *Id.*

235. *Id.* at 630.

236. *Id.* at 631.

237. *Id.* (“[D]ue process considerations include not only (1) the nature of the private interest at stake, but also (2) the value of the additional safeguard, and (3) the adverse impact of the requirement upon the Government’s interests.” (citing *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985))).

238. *Id.*

239. *Id.*

240. *Id.* at 632 (internal quotations omitted).

regarding affirmative defenses as well.<sup>241</sup> Notably, Justice Thomas concurred in the judgment on the grounds that *Brady* does not apply at all at the plea stage.<sup>242</sup>

The extent to which the logic of *Ruiz* applies to exculpatory information is unclear, and the issue has split the courts of appeals. A number of subsequent decisions suggest that *Ruiz* should be limited to its narrow impeachment-based holding, and some have even held that *Ruiz* implies a right to pre-plea “factual evidence of innocence.”<sup>243</sup> In *McCann v. Mangialardi*, for example, the Seventh Circuit determined that where prosecutors fail to disclose exonerating evidence prior to a guilty plea, “*Ruiz* strongly suggests that a *Brady*-type disclosure might be required under the circumstances”<sup>244</sup> because exculpatory evidence is “entirely different.”<sup>245</sup> It concluded that “*Ruiz* indicates a significant distinction between impeachment information and exculpatory evidence of actual innocence” and that, therefore, “it is highly likely that the Supreme Court would find a violation of the Due Process Clause if prosecutors or other relevant government actors have actual knowledge of a criminal defendant’s factual innocence but fail to disclose such information to a defendant before he enters into a guilty plea.”<sup>246</sup>

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241. *Id.* at 633.

242. *Id.* at 633–34 (Thomas, J., concurring) (“The principle supporting *Brady* was ‘avoidance of an unfair trial to the accused.’ That concern is not implicated at the plea stage . . . .” (quoting *Brady v. Maryland*, 373 U.S. 83, 87 (1963))).

243. *Compare In re Miranda*, 182 P.3d 513, 542–43 (Cal. 2008) (“*Ruiz* by its terms applies only to material *impeachment* evidence, and the high court emphasized that the government there had agreed to ‘provide any information establishing the factual innocence of the defendant’ regardless.”), *with* *Ollins v. O’Brien*, No. 03 C 5795, 03 C 7175, 2005 WL 730987, at \*11 (N.D. Ill. Mar. 28, 2005) (holding that “due process requires the disclosure of information of factual innocence during the plea bargaining process”).

244. 337 F.3d 782, 787 (7th Cir. 2003).

245. *Id.*

246. *Id.* at 788. The Tenth Circuit followed this approach in an unpublished decision. In *United States v. Ohiri*, the court looked to *McCann* and concluded that “the Supreme Court [in *Ruiz*] did not imply that the government may avoid the consequence of a *Brady* violation if the defendant accepts an eleventh-hour plea agreement while ignorant of withheld exculpatory evidence in the government’s possession.” 133 F. App’x 555, 562 (10th Cir. 2005). *Ohiri* noted two important factors that distinguish *Ruiz* from other plea agreements. First, the *Ruiz* plea was a fast-track, federal plea prior to indictment in contrast to *Ohiri*’s “eleventh-hour plea” on the day of jury selection; and second, like the *McCann* court, the Tenth Circuit found an important difference between the impeachment evidence in *Ruiz* and exculpatory evidence. *Id.*

Some federal district and state courts have also continued to follow their pre-*Ruiz* *Brady* holdings in favor of requiring disclosure of exculpatory evidence prior to plea bargains. The Northern District of Oklahoma, for example, recently required the prosecution to produce exculpatory evidence following a motion to vacate a conviction from a guilty plea, citing a *Brady* duty to disclose.<sup>247</sup> The Wisconsin Court of Appeals similarly found “the thrust of the Supreme Court’s holding in *Ruiz* to be rooted in its desire to preserve the federal ‘fast track’ plea bargain process,” and has applied *Brady* rights where a defendant “made both a *Brady* demand and a statutory demand for exculpatory evidence” before pleading guilty.<sup>248</sup>

The Fifth Circuit has reached the opposite conclusion, determining that “*Ruiz* never makes such a distinction” between types of pretrial evidence and that a distinction between impeachment and exculpatory evidence cannot be “implied from its discussion.”<sup>249</sup> This is not surprising, given that prior to *Ruiz* the circuit identified no pretrial *Brady* rights, finding that because *Brady* protects against “potential effects of undisclosed information on a judge’s or jury’s assessment of guilt . . . the failure of a prosecutor to disclose exculpatory information to an individual waiving his right to trial is not a constitutional violation.”<sup>250</sup> The Second Circuit agrees, for the most part with the Fifth Circuit, finding no distinction between impeachment and exculpatory evidence, and hinting that *Ruiz*’s limitation of pretrial *Brady* rights extends to exculpatory materials. It recently noted that “the Supreme Court has consistently treated exculpatory and impeachment evidence in the same way for the purpose of defining the obligation of a prosecutor to provide *Brady* material prior to trial,”<sup>251</sup> and that *Ruiz* might preclude any

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247. *United States v. Crawford*, No. 07-CR-41-GKF, 2010 WL 5071039, at \*4 (N.D. Okla. Dec. 7, 2010) (“[T]he Court nonetheless reminds the Government of its duty under *Brady* to provide *Crawford* with any and all exculpatory evidence.”).

248. *State v. Harris*, 667 N.W.2d 813, 821 (Wis. Ct. App. 2003), *aff’d* 680 N.W.2d 737 (Wis. 2004); *see also* *State v. Sturgeon*, 605 N.W.2d 589, 590 (Wis. Ct. App. 1999) (reversing the circuit court’s denial of a request to withdraw a guilty plea “[b]ecause the State failed to provide *Sturgeon* with exculpatory evidence related to his confession to the policy and because such failure caused *Sturgeon* to plead guilty”).

249. *United States v. Conroy*, 567 F.3d 174, 179 (5th Cir. 2009).

250. *Matthew v. Johnson*, 201 F.3d 353, 361–62 (5th Cir. 2000).

251. *Friedman v. Rehal*, 618 F.3d 142, 154 (2d Cir. 2010).

*Brady* right to exculpatory evidence prior to a guilty plea.<sup>252</sup> Finally, it appears that the Fourth Circuit will take the Fifth and Second Circuit's route. It has hinted that *Ruiz* extends to exculpatory evidence, referring to its holding just after *Ruiz* that a prosecutor's withholding "potentially relevant mitigation evidence" prior to a plea does not merit invalidation of a guilty plea.<sup>253</sup>

Even if *Brady* does not apply pretrial,<sup>254</sup> some courts have suggested that a defendant may nonetheless be able to challenge the voluntariness of a plea due to a failure to disclose evidence. The First Circuit, for example, has noted in addressing alleged misconduct during plea bargaining that "[u]nder limited circumstances . . . the prosecution's failure to disclose evidence may be sufficiently outrageous to constitute the sort of impermissible conduct that is needed to ground a challenge to the validity of a guilty plea"<sup>255</sup>—regardless of the *Brady* standard. The Fifth Circuit has employed similar reasoning.<sup>256</sup>

Ultimately, *Ruiz* and subsequent opinions do not provide a clear answer as to the scope of pretrial rights to disclosure evidence. Indeed, *Ruiz*'s lack of clarity on this point may have helped it attract eight votes. While its focus on the usefulness of the information to the defendant and its identification of the government's interest in securing a "factually justified" guilty plea suggest a disclosure requirement with respect to exculpa-

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252. *Id.* (finding that "the reasoning underlying *Ruiz* could support a similar ruling [regarding exculpatory evidence] for a prosecutor's obligations prior to a guilty plea"). This represents a change in position for the Second Circuit, which formerly recognized pretrial *Brady* rights to exculpatory material. *See, e.g.,* *United States v. Avellino*, 136 F.3d 249, 255 (2d Cir. 1998) ("The government's obligation [under *Brady*] is pertinent not only to an accused's preparation for trial but also to his determination of whether or not to plead guilty.").

253. *United States v. Moussaoui*, 591 F.3d 263, 286 (4th Cir. 2010) (citing *Jones v. Cooper*, 311 F.3d 306, 315 n.5 (4th Cir. 2002)).

254. For an argument that *Brady* rights are, in any case, of little value to defendants who plead guilty, see John C. Douglass, *Fatal Attraction? The Uneasy Courtship of Brady and Plea Bargaining*, 50 EMORY L.J. 437, 445 (2001) (explaining that *Brady* may be of little use to in challenges to plea agreements and noting that "defendants who enter pleas to especially favorable deals may be those who receive the least protection in post-plea *Brady* challenges" because the prosecution's offer, not the evidence, had the most impact on the plea, yet these are the defendants most at risk of being coerced into a deal).

255. *Ferrera v. United States*, 456 F.3d 278, 291 (1st Cir. 2006).

256. *See Matthew v. Johnson*, 201 F.3d 353, 364 n.15 (5th Cir. 2000) (stating that "[e]ven if the nondisclosure is not a *Brady* violation," failure to disclose evidence pretrial may sometimes make it "impossible for [a defendant] to enter a knowing and intelligent plea").

tory evidence, its broader reasoning on the validity of guilty pleas despite defendants' ignorance of important facts and its holding on information supporting any affirmative defense<sup>257</sup> cuts the other way.<sup>258</sup> This uncertainty will make *Brady* claims by state prisoners particularly difficult on federal habeas review because a federal habeas petitioner bringing an exhausted state claim is often required to show that the state court decision was contrary to, or an unreasonable application of, clearly established federal law.<sup>259</sup> It will also make it more likely that some defendants will sign DNA waivers without knowing what evidence exists.

### C. WAIVERS APPLIED

As established above, any court reviewing a defendant's challenge to a plea bargain with a DNA waiver will begin by presuming validity.<sup>260</sup> Depending on a defendant's challenge to the waiver, however, the court must also ask whether the defendant knowingly and voluntarily waived the right to DNA testing, whether (perhaps) the waiver is a miscarriage of justice, or whether the plea as a whole—as a result of *Strickland* or *Brady*—may be withdrawn. Building on the discussion above, but not addressing the possibility of ineffective assistance of counsel, this Section explores the likelihood that a court would enforce a DNA waiver in a range of possible factual scenarios.<sup>261</sup> In each scenario, three factors are considered: first,

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257. See, e.g., *Rehal*, 618 F.3d at 154 & n.5 (noting that Ruiz's rejection of "the argument that the Constitution requires the pre-plea disclosure of information supporting any affirmative defense" supports the conclusion that prosecutors do not have an obligation to provide Brady material prior to a guilty plea).

258. Even if there is a pretrial *Brady* right, some courts have taken the position that untested DNA evidence does not meet the materiality standard. See *infra* notes 277–78 and accompanying text.

259. See 28 U.S.C. § 2254(d)(1) (2006) ("An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law . . .").

260. See *supra* note 96 and accompanying text.

261. It is worth emphasizing again that a defendant may have no remedy for destruction of DNA evidence pursuant to an apparently valid waiver later deemed unenforceable. Cf. *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988) ("[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.").

the prosecutor's and defendant's knowledge of the evidence and testing technologies; second, whether DNA testing has already been done; and third, the degree of detail in the description of the evidence in the waiver itself.

1. Complete Defendant and Prosecutor Knowledge of Evidence, Thorough Testing, and a Specific Description of Present and Possible Future Evidence in the Waiver

In the first hypothetical bargaining scenario, a prosecutor or the police (the distinction is largely irrelevant as a result of *Kyles v. Whitley*)<sup>262</sup> have all of the evidence from the crime scene and have thoroughly tested it. It is unlikely, based on what both sides know, that further evidence will appear or become testable by improved technology in the foreseeable future. Both the prosecution and the defendant are aware of all of the evidence from the scene and the testing results, and the results are clearly inculpatory. Both the nonbiological and DNA evidence point strongly to the defendant's guilt, and both the defendant and the prosecutor know this. The language of the DNA waiver itself also refers directly to the items of evidence identified, tested, and known to both parties. Further, the DNA waiver makes clear that if future evidence or testing were to be available, the defendant would have no rights to it. No waivers identified for this Article satisfy all of these criteria, but one waiver in the Southern District of Illinois comes close to meeting this standard. The waiver identifies "physical evidence in this case which may have biological evidence, such as semen, blood, saliva, hair, skin, tissue, or other identifiable biological material, that could be subjected to DNA testing either now or in the future."<sup>263</sup>

In this scenario, the defendant is aware and has knowledge of the evidence and has likely carefully thought through its implications for his case. He knows that identification of further evidence is unlikely and that even if further evidence were unearthed, it would not do much good. All that the criminal defendant will therefore give up in a DNA waiver is the right to further, independent testing of DNA evidence that has already

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262. See *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (holding that because the prosecutor is responsible for determining when the "net effect" requires disclosure of evidence, the "prosecutor has a duty to learn of any favorable evidence known to . . . the police").

263. Plea Agreement § 7, *United States v. McPike*, Criminal No. 05-30069-WDS (S.D. Ill., May 6, 2005).

been tested thoroughly by the state, and the defendant will likely take the deal. A court, in turn, will have few, if any, reasons to question the knowing and voluntary nature of the waiver; nor is there any miscarriage of justice. Finally, there is no *Brady* violation because no exculpatory evidence has been withheld. In this scenario, a DNA waiver is almost certain to be enforced.

## 2. Complete Prosecutor and Defendant Knowledge of Evidence, No Testing, and Specific Description of Evidence in the Waiver

The second hypothetical DNA waiver scenario is identical to the first, with the exception of testing. The prosecutor has collected all of the evidence from the crime scene. It is unlikely that more evidence will emerge, but the prosecutor has identified and revealed to the defendant specific items that could potentially be available or subject to better testing in the future, if any are known. Both the prosecutor and defendant are fully aware of the evidence and its nature, and the DNA waiver specifically describes the evidence as well as specific possible future pieces of evidence and future available testing. Again, the language of the waiver makes clear that the defendant is giving up the right both to have access to and test specific existing evidence and potential future evidence. In this scenario, however, the prosecutor has not tested the available DNA evidence. This scenario is similar to the facts reflected in a federal plea bargain in the Southern District of California, with a waiver that reads as follows:

Defendant has been advised that the government may have in its possession items of physical evidence that could be subjected to DNA testing. The defendant understands that the government does not intend to conduct DNA testing of any of these items. Defendant understands that, before entering guilty pleas pursuant to this Plea Agreement, he could request DNA testing of evidence in this case. The defendant further understands that, with respect to the offenses to which he is pleading guilty pursuant to this Plea Agreement, he would have the right to request DNA testing of evidence after conviction under the conditions specified in 18 U.S.C. § 3600. Knowing and understanding his right to request DNA testing, the defendant knowingly and voluntarily gives up that right with respect to both the specific items listed above and any other items of evidence there may be in this case that might be amenable to DNA testing. . . . The defendant further understands and acknowledges that by giving up this right, he will never have another opportunity to have the evidence in this case, whether or not listed above, submitted for DNA testing, or

to employ the results of DNA testing to support a claim that defendant is innocent of the offenses to which he is pleading guilty.<sup>264</sup>

The Supreme Court has held that when a prosecutor has evidence but has not tested it or otherwise determined its exculpatory or inculpatory nature, the prosecutor's failure to test does not, in itself, violate the Constitution.<sup>265</sup> Further, the failure to test likely does not prevent the defendant's plea from being voluntary. First, the defendant has been specifically informed that the government "does not intend" to conduct the testing but that, absent the waiver, the defendant could request it. This situation is roughly analogous to cases prior to the 1999 Rule 11 amendments where defendants who knew generally about their rights to appeal but not about all specific potential appeals were found to have entered an appeal waiver knowingly and voluntarily.<sup>266</sup> Defendants need not know all possible options. Nor is there a *Brady* problem, as the prosecutor has disclosed the evidence. Assuming that there is adequate proof that the defendant understood the waiver, it is very likely to be enforced. If a court recognizes a miscarriage of justice exception, however, it may find one here if the defendant is able to raise serious doubts about his guilt.

### 3. No Prosecutor or Defendant Knowledge of Evidence, no Testing, General Description of Evidence in the Waiver

In a third, less happy scenario, neither the prosecutor nor the defendant possesses biological evidence from the crime scene at the time of the plea; alternately, both parties have access to evidence, but it is not currently testable. In either case, the prosecutor has not tested the evidence and therefore does not know whether it is inculpatory, exculpatory, or indeterminate. Due to the lack of currently testable evidence, the waiver does not refer to specific items, but is as specific as the facts allow: it warns the defendant that he is giving up a right to test any evidence that may be available in the future, or current evidence that is untestable now but may be testable in the future.

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264. Plea Agreement at 11–12, *United States v. Ortega*, No. 2:09-CR-00517 GEB (E.D. Cal. Jan. 14, 2010) (on file with author).

265. See *Youngblood*, 488 U.S. at 59 (1988) (holding that "the police do not have a constitutional duty to perform any particular tests"); cf. *infra* note 278 and accompanying text (arguing that untested but potentially exculpatory material must be disclosed under *Brady*).

266. See *United States v. Navarro-Botello*, 912 F.2d 318, 320 (9th Cir. 1990) (holding that the defendant's appeal waiver was made knowingly, even though he may not have known the exact nature of the appeals he had given up).



Most DNA waivers do not appear to be this explicit with respect to future testing, but some are—providing, for example, that “the physical evidence in this case will . . . be unavailable for DNA testing in the future.”<sup>267</sup>

As in the previous two scenarios, this DNA waiver is likely valid. The defendant here has sufficient knowledge of various potential outcomes of the case and can likely make a reasonable assessment of his chances under the circumstances. The fact that the evidence itself or certain testing techniques are not currently available will not change the outcome. If defendants can knowingly and voluntarily waive their rights while operating under a misapprehension of “the quality of the State’s case,”<sup>268</sup> then they can certainly waive rights when both the prosecutor and defendant face unknowable facts. And if an advanced testing technology later emerges that casts doubt on the defendant’s guilt, “a plea’s validity may not be collaterally attacked merely because the defendant made what turned out, in retrospect, to be a poor deal.”<sup>269</sup> If, on the other hand, the waiver is vague with respect to evidence not currently in the government’s possession, a court may not enforce it with respect to newly discovered evidence.<sup>270</sup>

As in scenario two, there is also no *Brady* violation here, as no evidence has been suppressed. If the defendant is able to produce testable evidence, however, a miscarriage of justice standard is stronger because of the apparent unfairness of a bar on testing newly available evidence.

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267. Plea Agreement at 7, *United States v. Natera*, No. 3:09-CR-221 JBH HBF (C.D. Conn. Feb. 11, 2010); *see also, e.g.*, Plea Agreement at 5, *United States v. Almanza*, No. 1:09-CR-430 (E.D. Va. Dec. 17, 2009) (on file with author) (“[T]he waiver forecloses any opportunity to have evidence submitted for DNA testing in this case or in any post-conviction proceeding for any purpose . . .”).

268. *Brady v. United States*, 397 U.S. 742, 757 (1970) (finding “no requirement in the Constitution that a defendant must be permitted to disown his solemn admission in open court that he committed the act with which he is charged simply because it later develops that the State would have had a weaker case than the defendant had thought”).

269. *Bradshaw v. Stumpf*, 545 U.S. 175, 186 (2005).

270. *See, e.g.*, Plea Agreement at 7, *United States v. White*, No. 1:07-CR-314-RCL (D.D.C. May 1, 2008) (on file with author) (providing that defendant “waives any and all right . . . to require DNA testing of any physical evidence in the possession of the Government”).

#### 4. Concealed Prosecutor Knowledge of Evidence, Evidence Not Tested, No Specific Description of Evidence in the Waiver

Moving toward more legally tenuous ground, in the fourth factual DNA waiver hypothetical, the facts are similar to scenario two above. There is specific evidence in the case, and the prosecutor has knowledge of the evidence but has not tested it. In this scenario, though, the prosecution embarks upon two questionable courses of action. First, she does not tell the defendant that the evidence exists, and second, she does not specifically refer to the evidence in the DNA waiver. Instead, she simply states that the defendant waives “any evidence that the prosecution might have.” One waiver in the Eastern District of Virginia—in a case in which, presumably, no evidence was concealed—used this type of ambiguous language, stating, “The defendant . . . understands that this waiver applies to DNA testing of any items of evidence in this case that could be subjected to DNA testing . . . .”<sup>271</sup> This language, unlike previous waiver examples, does not necessarily make clear that there is any biological evidence in the case (although it should give competent counsel reason to wonder) and also does not make clear whether any of the evidence could or has been subjected to DNA testing.

Although the failure to test will not make the DNA waiver unknowing or involuntary—since the prosecutor him or herself does not know how valuable the DNA may be—the failure to specifically describe the evidence in the plea bargain may invalidate the DNA waiver by rendering it unknowing.<sup>272</sup> Even though courts have found that general descriptions of rights can make a waiver of those rights sufficiently knowing and voluntary,<sup>273</sup> the right to DNA testing is quite specific.<sup>274</sup> In contrast to the appeal waiver scenario, in which a defendant generally apprised of appeal rights will have enough information to know, in general, what he is giving up, a defendant who is entirely unaware of the existence of potentially testable DNA evidence will arguably not know that he is actually giving up any-

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271. Plea Agreement § 6, at 5, *United States v. Jin*, Criminal No. 09-CR-249 (E.D. Va. Aug. 17, 2009).

272. *Cf. Matthew v. Johnson*, 201 F.3d 353, 364 n.15 (5th Cir. 2000) (noting that “[e]ven if the nondisclosure is not a *Brady* violation,” failure to disclose evidence pretrial may sometimes make it “impossible for [a defendant] to enter a knowing and intelligent plea”).

273. *See, e.g., supra* text accompanying note 207.

274. *See supra* Part II.B.1.

thing—let alone the specifics of that right. Despite the appeal of this argument, however, it is very similar to the one rejected in *Ruiz*, in which the Court emphasized that “the law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances—even though the defendant may not know the *specific detailed* consequences of invoking it.”<sup>275</sup>

There may be a *Brady* violation, however, assuming any such right exists prior to the entry of a guilty plea.<sup>276</sup> The prosecutor has evidence, but she has not told the defendant about the evidence or tested it to determine whether it is exculpatory; she is also requesting in the waiver that the evidence be destroyed. Because the prosecution has not tested the evidence, and therefore does not know whether or not it is exculpatory, some courts considering similar scenarios have held that the evidence is not material under *Brady*.<sup>277</sup> As has been persuasively argued, however, “[s]uggestions that DNA need not be tested because ‘it is not now known whether the biological evidence being sought by [the defendant] would be favorable or unfavorable to him’ and could have been denied at trial mis-

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275. *United States v. Ruiz*, 536 U.S. 622, 629 (2002).

276. *See supra* Part II.B.3.a (discussing *Brady* challenges to waivers of DNA testing).

277. *See, e.g., Harvey v. Horan*, 278 F.3d 370, 385 (4th Cir. 2002) (King, J., concurring) (“Harvey’s denial of access to the [untested] biological evidence after his conviction and sentencing, standing alone, fails to contravene *Brady*.”); *Richard v. Girdich*, No. 9:03-CV-920, 2009 WL 2045685, at \*12 (N.D.N.Y. July 10, 2009) (“Since the biological evidence that forms the basis of these habeas claims was *not* subjected to forensic testing—and was, therefore, not necessarily exculpatory—Petitioner is not entitled to habeas intervention on his claims that the District Attorney did not preserve such potentially exculpatory evidence. . . . Furthermore, because the forensic evidence about which Petitioner now complains was not subject to DNA testing, his claims that the prosecutor necessarily suppressed *exculpatory* evidence . . . is necessarily rooted in speculation.”); *Nelson v. Blades*, No. CV 04-001-S-LMB, 2009 WL 790172, at \*11 (D. Idaho Mar. 23, 2009) (“[Petitioner] does not have a valid claim under [*Brady*] because there is no indication that any non-disclosed item actually held exculpatory value to him. More to the point, Petitioner does not have any evidence that the towels did *not* contain an oily substance or his genetic material, or that the testing of any other items would have been favorable to him. The most that can be said is that some items might have been potentially useful.”); *Roughley v. Dretke*, No. 3:04-CV-1667-N, 2004 WL 2468520, at \*2 (N.D. Tex. Nov. 2, 2004) (“It also is conceded that DNA testing was not performed on any tangible evidence prior to his criminal trial, thus there was no ‘*Brady*’ material which could have been withheld.”).

read Supreme Court precedent and exalt willful ignorance.”<sup>278</sup> Nonetheless, as John Douglass has observed: “Volumes of *Brady* opinions demonstrate that reviewing courts are reluctant to find nondisclosures ‘material’ when it means upsetting a jury verdict. It is not hard to imagine, then, how skeptical judges will be when a defendant demands to take back his own open-court confession of guilt.”<sup>279</sup>

Even if a defendant is unable to make a successful *Brady* claim here, a court, following reasoning similar to that employed by the First and Fifth Circuits,<sup>280</sup> might still find the failure to disclose the evidence to be “outrageous”<sup>281</sup> and refuse to affirm the plea. And if the court recognizes a miscarriage of justice exception, this scenario would be a strong candidate.<sup>282</sup>

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278. Kreimer & Rudovsky, *supra* note 50, at 587 (footnote omitted).

279. Douglass, *supra* note 254, at 478.

280. See *supra* notes 255–56 and accompanying text.

281. Ferrara v. United States, 456 F.3d 278, 291 (1st Cir. 2006); Matthew v. Johnson, 201 F.3d 353, 364 n.15 (5th Cir. 2000) (“Even if the nondisclosure is not a *Brady* violation, it may be argued . . . that it made it impossible for [the defendant] to enter a knowing and intelligent plea.”); see also text accompanying notes 255–256.

282. See *supra* Part II.B.2. Also note that a prosecutor who deliberately conceals untested DNA evidence prior to a plea bargain has likely violated the ABA’s Model Rule of Professional Conduct 3.8(d), which, in concert with a subsequent ABA Formal Opinion, appears to require timely disclosure of evidence prior to guilty pleas. MODEL RULES OF PROF’L CONDUCT R. 3.8(d) (2010); ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 9-454, (2009) (providing that “prior to a guilty plea, to enable the defendant to make a well-advised plea at the time of arraignment, a prosecutor must disclose known evidence and information that would be relevant or useful to establishing a defense or negating the prosecution’s proof”). Indeed, at least one state supreme court has suspended a prosecutor for failing to disclose potentially useful DNA evidence prior to a guilty plea, citing rules of professional responsibility and not *Brady*. Office of Disciplinary Counsel v. Wrenn, 790 N.E.2d 1195, 1196–97 (Ohio 2003) (“[The] Office of Disciplinary Counsel, charged [the prosecutor] with misconduct in violation of the Code of Professional Responsibility.”). But even that court subsequently held that the ethical duty of disclosure was no greater than the constitutional and duty, raising, once again the *Brady* question. Disciplinary Council v. Kellogg-Martin, 923 N.E.2d 125, 130 (Ohio 2010) (“We decline to construe [the ethics rules] as requiring a grater scope of disclosure than *Brady* . . . .”); see also Kevin C. McMunigal, *The (Lack of) Enforcement of Prosecutor Disclosure Rules*, 38 HOFSTRA L. REV. 847, 860–62 (2010) (discussing *Kellogg-Martin* as an example of the reluctance of courts to enforce disclosure rules). Beyond that, “disciplinary authorities rarely proceed against prosecutors in cases that raise interpretive questions under Rule 3.8(d),” ABA Comm. on Ethics & Prof’l Responsibility, *supra*, and there may be sufficient doubt as to the materiality of untested evidence to allow prosecutors to generally escape sanction.

5. Concealed Prosecutor Knowledge of Evidence, Evidence Tested and Exculpatory, No Specific Description of Evidence in Waiver

In the final scenario, in which the arguments are strongest for invalidity, the facts are identical to scenario four, but now the prosecutor has the evidence, has tested it and knows that it is exculpatory, and has still not revealed the evidence to the defendant. Nor has the prosecutor specifically referred to the existence of the specific evidence in the waiver. Rather, she has once again used general language in the waiver, stating that the defendant “waives any evidence that the prosecution might have.” In this case, the argument that the waiver is unknowing and involuntary is similar to that in scenario four, albeit perhaps more compelling due to the obvious unfairness at work.<sup>283</sup>

This factual scenario would also present a true test of whether *Brady* rights extend to the pretrial context.<sup>284</sup> Any court that has interpreted *Ruiz* to leave room for a pretrial *Brady* right to exculpatory evidence would likely find that the prosecution’s failure to disclose exculpatory evidence violated the defendant’s constitutional right.<sup>285</sup> Assuming the evidence is conclusive, the defendant could also likely show a “reasonable probability that but for the failure to produce such information the defendant would not have entered the plea but instead would have insisted on going to trial.”<sup>286</sup>

As in scenario four, even if a defendant is unable to make a successful *Brady* claim here, some courts might still find the failure to disclose the evidence to be sufficiently shocking to render the plea involuntary.<sup>287</sup> And, again, if the jurisdiction

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283. In scenario four, the prosecutor concealed knowledge of the evidence, but did not test it. Here, the prosecutor has tested the evidence and knows it is exculpatory.

284. See *supra* Part II.B.3.a (discussing *Brady* challenges to waivers of DNA testing and discussing how some courts have recognized *Brady* rights prior to a guilty plea).

285. See *McCann v. Mangialardi*, 337 F.3d 782, 787–88 (7th Cir. 2003) (“*Ruiz* strongly suggest that a *Brady*-type disclosure might be required under the circumstances . . . . *Ruiz* indicates a significant distinction between impeachment information and exculpatory evidence of actual innocence.”); *supra* Part II.B.3.a (discussing *Ruiz* and its interpretation in the circuit courts).

286. *United States v. Avellino*, 136 F.3d 249, 256 (2d. Cir. 1998) (quoting *Tate v. Wood*, 963 F.2d 20, 24 (2d. Cir. 1992)); see also *Hashimoto*, *supra* note 40, at 955 n.33 (discussing the *Brady* materiality standard as applied to plea bargains).

287. See *supra* Part II.C.4 (discussing the “outrageous” standard as applied to a similar fact pattern).

recognizes a miscarriage of justice exception, this scenario would be extremely likely to qualify.<sup>288</sup>

In sum, DNA waivers are likely to survive challenges in a variety of factual scenarios—including, depending on the jurisdiction, some that are fairly disturbing. Up to this point, this Article has provided a descriptive account of DNA waivers. It has identified their relatively common use at the federal level through 2010, has suggested that they may expand to the states if they have not already, and has explored their validity in anticipation of likely challenges to DNA waivers in courts. The following Part presents a normative account of DNA waivers, considering arguments both for and against their use and suggesting that on balance, prosecutors' use of waivers is problematic in most circumstances.

### III. DNA TESTING WAIVERS AS POLICY

Although no court has directly addressed the issue, as discussed in Part II, DNA waivers are likely to be enforceable under at least some circumstances.<sup>289</sup> The question remains, however, when, if ever, are they desirable. As the Department of Justice has already done in at least two circumstances,<sup>290</sup> the federal government can encourage or discourage the use of DNA waivers for policy reasons, as can state prosecutors' offices. This Part explores the arguments both for and against DNA waivers.

#### A. AGAINST WAIVERS

DNA waivers destroy biological evidence or, at minimum, preclude defendants from accessing this evidence following their plea bargain.<sup>291</sup> This leads, or could lead, to several undesirable results for defendants and society as a whole. Because there is reason to believe that some innocent defendants will both plead guilty and agree to a DNA waiver, DNA waivers will likely keep some innocent defendants in prison. In doing so, waivers may cover up prosecutorial misconduct. Even in the

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288. See *supra* Part II.C.4 (arguing that the miscarriage of justice standard could apply to a similar fact pattern).

289. See *supra* notes 174–79 and accompanying text (discussing the validity of DNA waivers).

290. See *supra* notes 29, 31 and accompanying text (discussing Department of Justice memoranda on the use of DNA waivers).

291. See *supra* notes 57–63 and accompanying text (giving examples of plea agreements).

absence of prosecutorial wrongdoing, the public's interest in uncovering wrongful convictions—both to apprehend the true criminals and to isolate flaws in the system—is thwarted. Moreover, DNA waivers undermine confidence in the criminal justice system as a whole: the use of waivers suggests to the public that subjecting conviction to the most powerful test of truth available is a thing to be avoided. And by turning the right to DNA testing into yet another bargaining chip, DNA waivers weaken the societal commitment to innocence—a commitment embodied in fifty DNA testing statutes.<sup>292</sup>

### 1. Preventing Relief for the Wrongfully Convicted

As introduced in Part I, it is well-established that some innocent defendants plead guilty. Of the 266 wrongfully convicted defendants who had been exonerated by DNA as of February 2011, twenty-two pleaded guilty,<sup>293</sup> and even more made false admissions.<sup>294</sup> It is likely that the same motivations that drive people to falsely profess their guilt will often also drive them to sign away their right to prove their innocence.

A criminal defendant considering a guilty plea calculates, to the best of his knowledge, the likelihood of conviction, the likelihood of receiving a less desirable sentence outside of the bargaining process, and the importance of the trial process to the defendant, for example.<sup>295</sup> When making the value-probability consideration, however, the defendant often has very limited information to work with, and “[i]nnocent defendants often have less information about the case against them than guilty defendants.”<sup>296</sup> Where a defendant was not at the crime scene, for example, he may not know whether there were eyewitnesses.<sup>297</sup> Other defendants who may have been near or at the crime scene with other people may not themselves know

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292. See *supra* note 14 (providing examples of state DNA testing statutes).

293. *When the Innocent Plead Guilty*, THE INNOCENCE PROJECT, [http://www.innocenceproject.org/Content/When\\_the\\_Innocent\\_Plead\\_Guilty.php#](http://www.innocenceproject.org/Content/When_the_Innocent_Plead_Guilty.php#) (last visited Nov. 30, 2011).

294. See Leo & Ofshe, *supra* note 13, at 444–49 (analyzing the likelihood that defendants in sixty different cases made false confessions).

295. See Allison D. Redlich, *The Susceptibility of Juveniles to False Confessions and False Guilty Pleas*, 62 RUTGERS L. REV. 943, 945 (2010) (“[Defendants’] decision is presumably based on numerous factors, including their understanding of the law, the probability of conviction at trial, the value of the plea offer . . . advice and perceived effectiveness of attorneys, perceptions of procedural justice, etc.”).

296. Hashimoto, *supra* note 40, at 951.

297. *Id.*

“whether they committed the offense,” for example—if they were intoxicated, or mentally ill or handicapped.<sup>298</sup> And beyond informational limitations, the literature has begun to document other factors that may influence the decision to plead guilty, including factors such as “race, ethnicity, [and] gender,” as well as age;<sup>299</sup> pressure from family members; and, more generally, an overwhelming sense of “despair” when faced with the power of the State.<sup>300</sup> Innocent defendants may also be more risk averse, in which case “[p]rosecutorial bluffing is likely to work particularly well” against them.<sup>301</sup> Finally, innocent defendants, especially those who are indigent, may be pushed to take a plea by their lawyers: “defense attorneys have powerful incentives to avoid trial, even when a trial would be in the client’s interest.”<sup>302</sup> In sum, there are sound reasons to believe that the plea bargaining system induces innocent people to plead guilty,<sup>303</sup> and the available evidence supports this belief.

Very likely, the same factors that drive innocent defendants to plead guilty will drive some of them to agree to a DNA waiver. Compared to pleading guilty, a DNA waiver may be a small concession, if it is deliberated over at all.<sup>304</sup> This is especially likely to be true if the defendant is not aware of any evidence to be tested. And for those innocent defendants who sign

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298. *Id.*

299. Redlich, *supra* note 295.

300. Barkai, *supra* note 40, at 96–97.

301. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2495 (2004); *see also* F. Andrew Hessick III & Reshma Saujani, *Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 BYU J. PUB. L. 189, 199 (2002) (explaining that for innocent defendants, “[t]he prosecutor will offer increasingly enticing bargains to the defendant because the evidence does not bear out [the charges]” and “[e]ventually there may come a point where, even for the innocent, accepting the prosecutor’s offer may seem more attractive than the risk of trial”).

302. Schulhofer, *supra* note 13, at 1988; *see also* Eunyung Theresa Oh, Note, *Innocence After “Guilt”: Postconviction DNA Relief for Innocents Who Pled Guilty*, 55 SYRACUSE L. REV. 161, 167–68 (2004) (explaining that indigent defendants’ attorneys often encourage guilty pleas and, when they meet their client for the first time, “bring a negotiated plea with them”).

303. *See* John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 12–19 (1978) (discussing the parallels between medieval torture and the modern plea bargaining system, and characterizing the modern American system as one in which the state “coerce[s] the accused against whom we find probable cause to confess [their] guilt”).

304. On the other hand, as discussed below, prosecutorial insistence on a DNA waiver may push some innocent defendants to demand trial. *See infra* Part III.B.2.



them, DNA waivers will significantly limit their ability to access exculpatory evidence.<sup>305</sup>

Where DNA waivers do prevent the wrongfully convicted from establishing their innocence, moreover, it is not only the defendant who suffers, but the public as well.<sup>306</sup> Exonerations frequently lead to the apprehension of the actual perpetrator,<sup>307</sup> and the public has a strong interest in ensuring that innocent defendants are not wrongfully imprisoned.<sup>308</sup> Where an innocent defendant is able to prove a wrongful conviction on appeal or through habeas, each court decision reversing a conviction also adds to the body of the literature describing the flaws that led to the wrongful conviction.<sup>309</sup> Although most court decisions do not describe these flaws in detail, innocence commissions often investigate the cases after-the-fact to identify causal factors such as false confessions, erroneous eyewitness testimony, and flawed forensic techniques.<sup>310</sup> Reducing the number of exonerations, then, reduces the available data on which to base reform.<sup>311</sup>

## 2. Increasing the Likelihood of Wrongful Convictions by Concealing Wrongdoing, Eliminating Review, and Eroding the Commitment to Innocence

DNA waivers will increase the likelihood of wrongful convictions at the plea bargaining stage in several ways. First, and most obviously, DNA waivers have the potential to conceal po-

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305. See *supra* notes 57–63 and accompanying text (providing examples of DNA waivers and discussing their effect on access to and preservation of evidence).

306. See Wiseman, *supra* note 10, at 702–08 (discussing the benefits of exonerations for families, victims, and communities).

307. *Facts on Post-Conviction DNA Exonerations*, THE INNOCENCE PROJECT, [http://www.innocenceproject.org/Content/Facts\\_on\\_PostConviction\\_DNA\\_Exonerations.php](http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php) (last visited Nov. 30, 2011) (“The true suspects and/or perpetrators have been identified in 124 of the DNA exoneration cases.”); see also Wiseman, *supra* note 10, at 695–702 (describing several identifications of real perpetrators following DNA exonerations).

308. See Wiseman, *supra* note 10, at 705 (discussing the benefits of posthumous exonerations, including that they are “important to the community and its sense of fairness and justice”).

309. *Id.* at 702 (“[P]osthumous exonerations can serve a valuable role in the effort to prevent wrongful convictions by producing instructive findings on their causes . . .”).

310. See Wiseman, *supra* note 10, at 726–35 (describing the role and practices of innocence commissions).

311. See *id.* at 717–18 (“Without posthumous exoneration, the lessons that could be gleaned from their misfortunes die with them.”).

lice and prosecutorial misconduct, including the failure to turn over exculpatory DNA evidence, whether deliberate or through negligence.<sup>312</sup> This is particularly true for those waivers that allow for the immediate destruction of evidence and those that apply to evidence which the defendant is unaware of and which may not have been available or testable at the time of the plea. For example, many of the DNA waivers used by federal prosecutors cause the defendant to waive “any opportunity to have evidence submitted for DNA testing in this case or in any post-conviction proceeding for any purpose.”<sup>313</sup> Others waive “any and all right” to “require DNA testing of any physical evidence in the possession of the Government” and to the preservation of “any physical evidence in this case.”<sup>314</sup> Literally applied, such a waiver would bar testing whether the defendant knew that there was testable material or not when he signed. This is especially troubling in light of the uncertainty over the existence of a pretrial right to exculpatory evidence.<sup>315</sup>

More subtly, DNA waivers may also lead to reduced accuracy in plea bargaining by reducing prosecutors’ incentives for convicting only the guilty. Waivers of DNA testing, like appeal and habeas waivers, protect prosecutors from review. As one attorney has described appeal waivers, they “have the advantage of putting an end to it. It’s peace of mind, nice to know you’re not going to end up in two years arguing” a collateral challenge.<sup>316</sup> This protection may be especially valuable to prosecutors because being proven to have convicted an innocent defendant has negative professional, and perhaps psychological,

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312. Cf. King & O’Neill, *supra* note 72, at 247 (“[O]ne concern with full blanket [appeal] waivers is that attorneys will not be as careful as they should be if they know their past and future mistakes are protected from scrutiny.”).

313. *E.g.*, Plea Agreement § 6, at 5, United States v. Almanza, No. 1:09cr430 (E.D. Va. Dec. 17, 2009); Plea Agreement § 6, at 5, United States v. Gomez, No. 1:07cr125 (E.D. Va. Apr. 20, 2007).

314. Plea Agreement § 21, at 31, United States v. Headley, No. 09 CR 830-3 (N.D. Ill.) (using identical language); Letter from Jeffrey A. Taylor, U.S. Attorney, Dep’t. of Justice, to Jerry Ray Smith, Esquire 6 (Jan. 19, 2007) (using identical language); *see also* Plea Agreement § III.7.A., at 11, United States v. McPike, Criminal No. 05-30069-WDS (S.D. Ill. May 6, 2005) (defendant cedes all right to testing of “physical evidence in this case which may have biological evidence, such as semen, blood, saliva, hair, skin tissue, or other identifiable biological material, that could be subjected to DNA testing either now or in the future”).

315. *See supra* notes 232–42 and accompanying text.

316. King & O’Neill, *supra* note 72, at 245–46 (quoting telephone interview with Defender #21).

consequences for a prosecutor.<sup>317</sup> Indeed, this may help explain why prosecutors will sometimes vigorously oppose postconviction DNA testing when it would be highly probative and even continue to assert the defendant's guilt after exculpatory results.<sup>318</sup> These consequences give prosecutors an additional incentive to be sure of the defendant's guilt before prosecuting. If the prosecutor is able to routinely obtain DNA waivers,<sup>319</sup> this incentive disappears, and the rate of wrongful convictions may rise.<sup>320</sup>

Finally, DNA waivers may also increase the likelihood of wrongful convictions by eroding the burgeoning commitment to treating the right to establish innocence, at least by conclusive DNA evidence, as qualitatively different. This commitment is expressed in state and federal testing statutes,<sup>321</sup> as well as recent changes to the rules of professional conduct<sup>322</sup> and the Supreme Court's apparent, grudging acceptance of the existence of a habeas claim founded on actual innocence.<sup>323</sup> As many have

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317. See Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 138 (2004) (describing the psychological and personal factors that affect prosecutors' views of post-conviction innocence claims).

318. See *id.* at 129 ("Likewise, qualitative evidence of prosecutorial indifference and, on occasion, hostility to even the most meritorious of post-conviction innocence claims is alarming.")

319. A refusal to sign a waiver, though, may, to some extent, help innocent defendants signal their innocence at the pretrial stage. See *infra* notes 345–47 and accompanying text.

320. This very concern has led a few courts to prohibit appeal waivers, holding, for example, that "public policy forbids the prosecutor from insulating himself from review by either implicitly or explicitly bargaining away a defendant's right to appeal." *People v. Stevenson*, 231 N.W.2d 476, 477 (Mich. Ct. App. 1975); see also *United States v. Perez*, 46 F. Supp. 2d 59, 61 (D. Mass. 1999) ("[T]he market for plea bargains, like every other market, should not be so deregulated that the conditions essential to assuring basic fairness are undermined.")

321. See *supra* note 14 (describing the fifty state, federal, and District of Columbia statutes).

322. See *supra* note 15 (discussing the ABA Model Rules of Professional Conduct R. 3.8(g), (h)).

323. See, e.g., *In re Davis*, 130 S. Ct. 1 (2009) (mem.) (transferring Troy Davis's petition for an original writ of habeas corpus to the United States District Court for the Southern District of Georgia for "hearing and determination" and directing that court to "receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of trial clearly establishes petitioner's innocence"); *Dist. Atty's Office v. Osborne*, 129 S. Ct. 2308, 2321–22 (2009) (noting that it is an "open question" whether a "federal constitutional right to be released upon proof of 'actual innocence'" exists); *House v. Bell*, 547 U.S. 518, 536–38, 555 (2006) (assuming *arguendo* that

noted, although the law allows, and even requires, the continued imprisonment of those whose convictions were obtained in violation of the Constitution,<sup>324</sup> there is a general consensus that when convincing evidence of innocence exists, convictions should be overturned.<sup>325</sup> While this focus on factual innocence may do little directly for the majority of defendants who are accused of crimes for which no biological evidence is available,<sup>326</sup> indirectly, it reinforces the ideal of punishing only the guilty—and all innocent defendants benefit from widespread commitment to this ideal. The use of DNA waivers, however, is inconsistent with this ideal. Commodifying the right to prove innocence through DNA waivers risks the loss of its sanctity.<sup>327</sup> Like the right to impeachment evidence, to trial, or to an appeal, it becomes just another bargaining chip.

### 3. Reducing Public Confidence

Convicting innocent defendants—although perhaps not entirely unavoidable—is deeply morally troublesome; so is leaving them in prison when proof of their innocence might be, or could have been, available. Even if DNA waivers never prevent a single exoneration or lead to even one wrongful conviction, however, they still may impose significant social costs.<sup>328</sup> As has been

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freestanding innocence claims are possible, and holding that they require at least “more convincing proof of innocence” than a showing that it is more likely than not that no reasonable juror would have found the petitioner guilty beyond a reasonable doubt had the new evidence been available at trial); *Herrera v. Collins*, 506 U.S. 390, 417 (1993) (“We may assume . . . that in a capital case a truly persuasive demonstration of ‘actual innocence’ made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief . . .”); see also *In re Davis*, No. CV409-130, 2010 WL 3385081, at \*1 (S.D. Ga. Aug. 24, 2010) (concluding that “while executing an innocent person would violate the United States Constitution, Mr. Davis has failed to prove his innocence”). The Supreme Court denied Mr. Davis’s petition for habeas corpus. *In re Davis*, 131 S. Ct. 1808 (2011) (mem.).

324. See, e.g., 28 U.S.C. § 2254(d)(1) (2006) (allowing federal courts to grant habeas relief from state convictions in only very limited circumstances).

325. See, e.g., Medwed, *supra* note 317, at 127 (“Frequently . . . the public rhetoric and personal beliefs expressed by prosecutors condemn the idea that any district attorney would willingly permit an innocent person to languish in prison.”).

326. See Daniel S. Medwed, *Innocentrism*, 2008 U. ILL. L. REV. 1549, 1571–72 (“[O]nly an estimated 10 to 20 percent of criminal cases have biological evidence available for testing . . .”).

327. See Margaret Jane Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56, 57–62 (1993) (contrasting “commodified” forms of compensation for wrongdoing with “noncommodified conceptions” of “corrective justice”).

328. Bibas, *supra* note 39, at 1386 (“[J]ustice and punishment are classic

noted in another context, “[p]ublic confidence and faith in the justice system are essential to the law’s democratic legitimacy, moral force, and popular obedience.”<sup>329</sup> The criminal justice system should, therefore, “forestall cynicism by forbidding practices that openly promote injustice or public doubts about guilt.”<sup>330</sup> DNA waivers, however, promote doubt and cynicism. They send the message that the government is more interested in cost savings and administrative convenience—or worse, covering up wrongdoing—than in using the most powerful evidence of truth available.<sup>331</sup>

The damage, moreover, will be compounded by the natural consequences of DNA waivers: guilty defendants with plausible innocence claims will be able to proclaim their innocence without fear of contradiction. These claims can be extremely convincing. As the director of the organization that sought to exonerate Richard Coleman, whose guilt was posthumously confirmed by DNA evidence, said of witnessing Coleman’s execution, at which Coleman continued to proclaim his innocence: “How can somebody, with such equanimity, such dignity, such quiet confidence, make those his final words even though he is guilty?”<sup>332</sup> Although prisoners have always loudly and falsely asserted their innocence—even when their claims can be disproven<sup>333</sup>—the government’s refusal to perform testing will look like a cover-up. In short, the fact that more than 260 people<sup>334</sup> have been exonerated by DNA despite the paucity of available evidence and numerous procedural hurdles has hurt public con-

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public goods.” (citing Schulhofer, *supra* note 13, at 1985)).

329. *Id.* at 1387; see also Gregory M. Dyer & Brendan Judge, Note, *Criminal Defendants’ Waiver of the Right to Appeal—An Unacceptable Condition of a Negotiated Sentence or Plea Bargain*, 65 NOTRE DAME L. REV. 649, 664 (1990) (arguing that “[b]y allowing prosecutors to secure from defendants a waiver of their rights to appeal, courts are becoming accomplices to police violations and trial court errors”).

330. Bibas, *supra* note 39, at 1387.

331. See, e.g., Editorial, *Truth and Plea Bargains*, N.Y. TIMES, Dec. 5, 2010, at WK7 (praising the Justice Department’s decision to limit the use of DNA waivers in plea agreements and stating that the decision sends “a valuable message to all prosecutors that while the finality of convictions is important, justice must take priority”).

332. Michael D. Shear and Maria Glod, *DNA Tests Support 1992 Virginia Execution*, WASH. POST, Jan. 13, 2006, at B1 (quoting James C. McCloskey).

333. Jacobi & Carroll, *supra* note 38, at 270 (“Even among those cases vetted and supported by innocence projects, in an estimated fifty to sixty percent, testing further implicate[s] the defendant.” (citations omitted) (internal quotation marks omitted)).

334. See *supra* note 3.

fidence in the justice system; the use of DNA waivers will do the same.

## B. JUSTIFICATIONS

As seen, there are strong reasons to be skeptical of DNA waivers. There are also, of course, potential benefits to their use. This Section will consider these justifications before the Article concludes with an evaluation of the merits of DNA waivers. First, DNA waivers may preserve scarce testing resources by screening out the truly guilty. Second, and relatedly, DNA waivers may slightly reduce the number of innocent people who plead guilty by increasing the cost of doing so. Finally, waivers may produce more meaningful guilty pleas: defendants who plead guilty without giving up the right to future DNA testing may still cling, publicly and privately, to fantasies of innocence.

### 1. Reducing Unmeritorious Claims

To the extent that it is true that, faced with a demand for a DNA waiver, most innocent defendants will accept a harsher punishment or insist on trial, DNA waivers may provide a worthwhile mechanism to prevent the truly guilty from wasting testing resources.<sup>335</sup> As the First Circuit has noted in the appeal waiver context, “With court-appointed counsel freely available and nothing to lose by trying, a defendant, unfettered by a waiver agreement, is quite likely to appeal on a wing and a prayer.”<sup>336</sup> Tonja Jacobi and Gwendolyn Carroll have argued convincingly that the same is true of requests for DNA testing.<sup>337</sup> This is because “[t]he chance of a false negative result, however small, creates the possibility that guilty parties will benefit from seeking post-conviction DNA testing.”<sup>338</sup> Thus, in the absence of any disincentive, guilty prisoners will seek test-

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335. On similar grounds, some authors have argued that DNA testing should not be available to those who have pleaded guilty.

336. *United States v. Teeter*, 257 F.3d 14, 22 (1st Cir. 2001).

337. Jacobi & Carroll, *supra* note 38, at 270 (“Even among those cases vetted and supported by innocence projects, in an estimated fifty to sixty percent, testing ‘further implicate[s] the defendant.’ However, even these figures understate the problem. These figures do not mean that forty to fifty percent of those granted post-conviction DNA testing are exonerated by the tests. Many results are neither exculpatory nor guilt-confirming; they are inconclusive.” (quoting Stephanie Simon, *DNA Tests for Inmates Debated*, L.A. TIMES, Feb. 10, 2003, at A10)).

338. *Id.* at 275.

ing, despite the fact that it is extremely likely to inculcate them further. This is a problem, because requests for DNA testing can be expensive in terms of the cost of tests themselves and prosecutorial resources devoted to screening, thus potentially crowding out meritorious claims.<sup>339</sup> In addition, false claims can impose costs on victims and their families—costs that pre-DNA rules of finality functioned to avoid.<sup>340</sup> Some disincentive is needed, then, to prevent false claims of innocence from “overwhelming the . . . system.”<sup>341</sup> Allowing DNA waivers could provide this disincentive in the form of the additional penalty (or perhaps a trial) that a prosecutor would demand in exchange for a defendant’s refusal to sign.

The danger, of course, is that as discussed above, some of the few innocent defendants who plead guilty will—along with the many truly guilty—choose to sign the waivers rather than pay the price for not doing so. This is a significant cost in a system that is designed, after all, to protect the rare wrongfully convicted defendant. As Professor Alschuler has observed in a different context: “Forcing all defendants who submit *Alford* pleas to confess at gunpoint or entering automatic guilty pleas on their behalf would similarly improve the accuracy of the ‘typical’ defendant’s statement. Aggregate accuracy of this sort belongs in *Alice in Wonderland*.”<sup>342</sup> The same may be said of pushing all defendants who plead guilty to sign DNA waivers.

## 2. Reducing False Guilty Pleas

Although the potential of DNA waivers to prevent the exonerated of wrongfully convicted defendants is straightforward, their availability may, less obviously, benefit innocent defendants at the pretrial stage. For the innocent, giving up the right to future DNA testing is, even if there is no evidence immediately available for testing, an extremely costly concession;

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339. See *id.* at 268–69; see also Stone, *supra* note 185, at 62–67 (explaining that DNA testing in one case may cost “from \$2,500 to \$5,000” and describing the preservation and manpower costs associated with DNA testing).

340. See Jacobi & Carroll, *supra* note 337, at 268–69 (explaining the costs to victims presented by DNA testing).

341. *Id.* at 270. Jacobi and Carroll’s proposed solution to this problem is to punish false innocence claims with further incarceration. *Id.* at 276 (“This Part [of the article] provides an economic model that illustrates that, by punishing prisoners with additional incarceration if DNA tests confirm their guilt, states can structure incentives such that innocent prisoners will seek post-conviction DNA testing and guilty prisoners will not.”).

342. Albert W. Alschuler, *Straining at Gnats and Swallowing Camels: The Selective Morality of Professor Bibas*, 88 CORNELL L. REV. 1412, 1417 (2003).

for the guilty, it is virtually costless.<sup>343</sup> Reluctance to sign a DNA waiver may therefore act as a signal of innocence, and this additional information could help guide prosecutors in borderline cases.<sup>344</sup> On the other hand, the value of this signal will likely be greatly diminished by truly guilty defendants attempting to mimic “innocent” behavior by refusing to agree to a waiver—and, perhaps, by those who are unwilling to take that final step towards truly acknowledging their guilt.

There is a chance that that prosecutorial insistence on a DNA waiver may cause some innocent defendants to elect to go to trial.<sup>345</sup> At minimum, in a very limited number of the cases the DNA waiver may jolt an innocent defendant planning to plead guilty into reconsidering that decision.<sup>346</sup> The waiver reminds the defendant that he is not just giving up a right to trial, but the right to establish his innocence should the means be available. As one waiver in the Southern District of Illinois provides:

The Defendant states that knowing and understanding his right to request DNA testing, he knowingly and voluntarily waives and gives up that right. . . . He further understands that he is waiving the right to request DNA testing of evidence in this case in the current proceeding, in any proceeding following conviction under . . . [the Innocence Protection Act] and in any other type of proceeding in which DNA testing may be requested. He fully understands that, as a result of his waiver . . . that he will *never have another opportunity* to have the evidence in this case submitted for DNA testing or to employ the results of DNA testing to support a claim that he is actually innocent of the offense(s) to which he pleads guilty pursuant to this Plea Agreement.<sup>347</sup>

Nonetheless, it seems doubtful that the existence *vel non* of a speculative future opportunity to establish their innocence is

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343. See Jacobi & Carroll, *supra* note 38, at 270–76 (explaining that, due to the small possibility of a false negative, truly guilty prisoners have an incentive to seek DNA testing even though it will very likely inculcate them further).

344. Cf. Daniel J. Seidmann & Alex Stein, *The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege*, 114 HARV. L. REV. 430, 503 (2000) (“[T]he right to silence helps factfinders distinguish between factually innocent and guilty suspects and defendants. . . . [U]nder the right-to-silence regime . . . innocents still tell the truth, whereas guilty suspects separate themselves by rationally exercising the right.”).

345. Cf. Bibas, *supra* note 39, at 1382 (“If the law made it harder for innocent defendants to plead guilty, it would minimize both actual and perceived injustices.”).

346. Cf. King & O’Neill, *supra* note 72, at 231 (discussing the empirical evidence that some defendants avoid plea agreements that include appeal waivers).

347. Plea Agreement § III.7.A., at 11, *United States v. McPike*, Criminal No. 05-30069-WDS (S.D. Ill. May 6, 2005) (emphasis added).



a meaningful factor for many of the innocent defendants who plead guilty.

### 3. Encouraging Stronger Admissions of Guilt

Finally, a guilty plea unaccompanied by a waiver of DNA testing may weaken the strength of the guilt admission because it leaves room for the defendant to revisit this admission in the future.<sup>348</sup> In this respect, the debate mirrors that over the use of *nolo contendere* and *Alford* pleas. A guilty plea is supposed to be a full admission that the defendant is guilty.<sup>349</sup> Every factor that makes the plea any less of a full admission of guilt may be viewed as weakening that admission—both when the admission is made and in the future, when the defendant may change his mind and decide to challenge his conviction through DNA testing.

As Professor Stephanos Bibas has noted, “[T]he criminal law seeks to lead offenders to repent by humbling them, to exact moral sanctions, and then to return them to the community as equals. Offenders cannot accept responsibility and repent until they admit their actions.”<sup>350</sup> Offenders, however, sometimes resist the “painful truth by lying to themselves and others.”<sup>351</sup> The availability of postconviction DNA testing may allow guilty defendants to cling to the idea that they will one day prove their innocence, thus delaying coming to terms with their guilt or avoiding it altogether. Pushing offenders to give up the right to testing, then, could help them reach “catharsis.”<sup>352</sup>

Whether or not DNA waivers might prove therapeutic for some guilty defendants, however, the treatment is clearly harmful to the innocent. As Professor Albert Alschuler ob-

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348. See Daina Bortek, *Pleas for DNA Testing: Why Lawmakers Should Amend State Post-Conviction DNA Testing Statutes to Apply to Prisoners Who Pled Guilty*, 25 CARDOZO L. REV. 1429, 1439 (2004) (“Giving a defendant who pled guilty access to post-conviction DNA testing suggests that the defendant lied about his guilt when entering his plea, thus undermining the basic assumption that guilty pleas are voluntary, intelligent and truthful.”).

349. See, e.g., *United States v. Broce*, 488 U.S. 563, 569 (1989) (“A plea of guilty and the ensuing conviction comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence.”).

350. Bibas, *supra* note 39, at 1393.

351. *Id.*; see also David B. Wexler, *Therapeutic Jurisprudence and the Criminal Courts*, 35 WM. & MARY L. REV. 279, 285 (1993) (“The acceptance of *nolo* and *Alford* pleas from sex offenders, however, may reinforce cognitive distortions and denial.”).

352. Bibas, *supra* note 39, at 1400.

served in his response to Professor Bibas, “[i]f the time for shattering pride ever comes, it comes only after a determination of guilt.”<sup>353</sup> Similarly, if the law can be used to help the truly guilty, surely it should not do so at the expense of the truly innocent.

### CONCLUSION

The right to DNA testing in the United States has become well-established. Forty-eight states, the District of Columbia, and the federal government allow some defendants limited access to postconviction DNA testing.<sup>354</sup> These rights are the exception to the normal rules of finality, granted because of DNA’s exceptional accuracy. This accuracy, and the exonerations it has produced, have led to a reconsideration of cherished, but empirically untested, notions of the reliability of the criminal justice system. They have also, albeit incompletely, provoked a renewed commitment—reflected in new ethical rules, compensation schemes, and the testing statutes themselves—to the protection of innocence. But there is a danger that, as has happened with other advances in the protections afforded to the accused, the scope of DNA testing rights, and the spirit embodied in them, will erode as they lose their novelty. There is evidence that this has already begun. DNA waivers—through which a defendant gives up the right to the testing, and possibly preservation, of DNA evidence—were sought by federal prosecutors in several populous districts between 2004 and early 2010. The history of similar innovations in plea bargaining also suggests that the use of DNA waivers may spread to the states. It is therefore important to evaluate the validity of these waivers and to consider their implications for defendants, prosecutors, the public, and the criminal justice system as a whole.

The great weight of federal precedent suggests that DNA waivers are valid. The Supreme Court has emphasized that the validity of waiver is to be presumed for even the most fundamental of constitutional and statutory rights. Waivers must be knowing and voluntary, but in the criminal context this standard tolerates ignorance of many critical facts—including, possibly, the existence of exculpatory evidence. Some lower courts have fashioned a “miscarriage of justice” exception to the en-

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353. Alschuler, *supra* note 342, at 1421.

354. *See supra* notes 21–23.

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forceability of similar waivers, but the extension of this doctrine to the DNA waiver is as speculative as it is desirable.

If, then, DNA waivers are likely to be generally enforceable, are they good policy? The risks are clear: for the same reasons some innocent people plead guilty—including the suppression of evidence—some innocent people will also sign DNA waivers, perpetuating the injustice. If these were the only costs, DNA waivers, if used judiciously, might be justifiable. This is because their benefits are also clear: spurious postconviction innocence claims waste valuable resources and cause needless harm to victims and families, and claims by those who have both pleaded guilty and waived their right to future testing may be especially likely to be spurious. Moreover, the use of waivers may discourage some innocent defendants from pleading guilty and push the truly guilty towards a fuller admission of their culpability. Indeed, in cases in which a defendant's guilt has already been conclusively established by DNA evidence, there is very little likelihood of injustice resulting from a denial of future testing; these may be the "exceptional" cases the Justice Department's new waiver policy contemplates.

The risk of preventing the exoneration of some innocent defendants is not the only cost of DNA waivers, however. The removal of the check provided by DNA testing will eliminate an incentive for accuracy and ethical behavior among prosecutors. The commodification of the right to proof of innocence will erode the renewed commitment to preventing wrongful convictions that has, to an extent, emerged in recent years. And perhaps most importantly, the use of DNA waivers will devastate public confidence in the justice system. What could be, on its face, more contrary to the ideal of justice than to seek a guarantee that the most conclusive evidence of truth remain untested? Ultimately, although the ills DNA waivers seek to address are real, the treatment is worse than the disease.