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From the Legal Literature: Why States Must Consider Innocence Claims After Guilty Pleas

Francesca Laguardia

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I. Introduction

Criminal prosecutions are resolved, overwhelmingly, through plea bargains.[1] Over the years, countless problems have become apparent in relation to this fact.[2] One such problem is the chance that in-

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[1] *See* John Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 Cornell L. Rev. 157, 163 (2014). As Blume and Helm note,

> Today plea bargaining is accepted as an essential and permanent component of the American criminal justice system. Between 2008 and 2012 more than 96% of all resolved criminal cases culminated in plea bargains rather than trial. In 2012, 97% of cases that were resolved were settled through pleas, with only 3% being adjudicated in bench or jury trials. As Justice Anthony Kennedy recently observed: "the reality [is] that criminal justice today is for the most part a system of pleas, not a system of trials."

[2] *See*, *e.g.*, Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. Chi. L. Rev. 931, 932 (1983) (highlighting the emphasis on economic savings, efficiency, and tactical strategy, as opposed to human liberty and actual determinations of guilt and appropriate punishment); Stephanos Bibas, *Designing Plea Bargaining from the Ground Up: Accuracy and Fairness Without Trials as Backstops*, 57 Wm. & Mary L. Rev. 1055, 1060–61 (2015) [hereinafter Bibas, *Accuracy and Fairness*"] (arguing that the criminal justice process was developed to ensure accuracy through the jury process, and that plea bargaining allows limits on discovery, lawyers' incentives, and the workload and lack of resources of defense attorneys to "warp the bargaining process and outcomes"); Daniel Givelber, *Punishing Protestations of Innocence: Denying Responsibility and Its Consequences*, 37 Am. Crim. L. Rev. 1363, 1364–65, 1370–71, 1394–97 (2000) (highlighting the ramifications of refusing to plead guilty, that turn into punishment for "being innocent and insisting on a trial to establish that fact"); Katherine J. Strandburg, *Deterrence and the Conviction of Innocents*, 35 Conn. L. Rev. 1321, 1321, 1336–38 (2003) (suggesting that plea bargaining results in greater numbers of wrongful convictions and the less accurate determination of guilt may result in decreased deterrence); *see also* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2464, 2476–;79, 2482, 2486, 2493–;507, 2514, 2523 (2004). Plea bargaining has also been criticized for moving a large degree of power away from judges and towards prosecutors. *See* Candace McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform*, 50 Crim. L.Q. 67, 84 (2005); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 Harv. L. Rev. 2548, 2549 (2004).

nocent defendants plead guilty to avoid the possibility of a wrongful conviction and the harsh penalties that could accompany such a conviction.[3] Indeed, the development of DNA analysis has upended much of the trust scholars once had in the overall accuracy of the criminal justice process.[4] Wrongful convictions, once thought to be incredibly rare, are discovered more and more often.[5] Similarly, the assumption that innocent defendants will take their cases to trial rather than plead them out has been proven false.[6]

What is a wrongly convicted defendant to do? As Colin Miller explains,

Historically, defendants could not bring freestanding claims of actual innocence. Instead, a defendant typically had two options after being convicted. First, he could try to seek relief by presenting newly discovered evidence [within a statutorily determined time frame ranging from 21 days to two years after conviction]. Second, a defendant could combine evidence of actual innocence with evidence of a constitutional violation.[7]

Even if some other suspect confessed to the crime, the convicted defendant would have to bring his appeal based on another claim, "such as a claim that the confession was *Brady* material that the State failed to disclose before trial."[8]

But beginning in 1994, and directly in response to the development of DNA testing capabilities, many states have modified this historical limitation.[9] States have either by amended existing statutes or written new ones in order to offer the chance for defendants to appeal their convictions on the basis of claims of actual innocence, whether by obtaining DNA or because of witness recantations or other new evidence.[10]

Postconviction DNA testing is now supported by statute in every state in the United States, but only for defendants who were found

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[3]Bibas, *Accuracy and Fairness*, *supra* note 2, at 1060; Blume & Helm, *supra* note 1, at 172–75; Roger Koppl & Meghan Sacks, *The Criminal Justice System Creates Incentives for False Convictions*, 32 CRIM. JUST. ETHICS 126 (2013); Phoebe C. Ellsworth & Samuel R. Gross, *False Convictions*, *in* THE BEHAVIORAL FOUNDATIONS OF PUBLIC POLICY 163, 163 (Eldar Shafir ed., 2012).

[4]Ellsworth & Gross, *supra* note 3, at 163; *see also* Samuel R. Gross, *Convicting the Innocent*, 4 ANN. REV. L. & SOC. SCI. 173, 181 (2008).

[5]Ellsworth & Gross, *supra* note 3, at 163.

[6]Ellsworth & Gross, *supra* note 3, at 163; Gross, *supra* note 4, at 173, 183.

[7]Colin Miller, *Why States Must Consider Innocence Claims After Guilty Pleas*, 10 UC IRVINE L. REV. 671, 688 (2020).

[8]Miller, *supra* note 7, at 688.

[9]Miller, *supra* note 7, at 675–76, 688.

[10]Miller, *supra* note 7, at 675–76, 688.

guilty at trial.[11] Many innocent defendants who have pleaded guilty may be precluded from obtaining DNA evidence or using that evidence to appeal their convictions, because they pleaded guilty rather than taking the case to trial.[12] It is this problem that Miller addresses in his article, *Why States Must Consider Innocence Claims After Guilty Pleas*.[13] While others have suggested that substantive due process offers a right to prove innocence even after accepting a plea bargain, Miller points out that "these arguments have been largely foreclosed by the Supreme Court's conclusion in *District Attorney's Office for the Third Judicial District v. Osborne* that there is no substantive due process right to postconviction DNA testing."[14] But despite this hurdle, Miller argues that the Supreme Court's support of the "right to access the courts" provides a due process route to a constitutional right to appeal a guilty plea on the basis of DNA or non-DNA evidence of actual innocence.[15] His argument is reviewed below.

II. COLIN MILLER, WHY STATES MUST CONSIDER INNOCENCE CLAIMS AFTER GUILTY PLEAS, 10 UC IRVINE L. REV. 671 (2020).

The first postconviction DNA statute was passed in New York in 1994, only five years after the first instance of a convicted defendant proving his innocence through postconviction DNA testing.[16] In the quarter century that has passed since New York's statute was created, every state in the country has passed a statute addressing this issue.[17] Yet, as might be expected, the specifics of the statutes vary.

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[11]Miller, *supra* note 7, at 676, 678–88.

[12]Miller, *supra* note 7, at 678–88.

[13]Miller, *supra* note 7.

[14]Miller, *supra* note 7, at 673–74 (citing Daina Borteck, Note, *Pleas for DNA Testing: Why Lawmakers Should Amend State Postconviction DNA Testing Statutes to Apply to Prisoners Who Pled Guilty*, 25 CARDOZO L. REV. 1429 (2004); Justin Brooks & Alexander Simpson, *Blood Sugar Sex Magik: A Review of Postconviction DNA Testing Statutes and Legislative Recommendations*, 59 DRAKE L. REV. 799 (2011); Eunyung Theresa Oh, Note, *Innocence After Guilt: Postconviction DNA Relief for Innocents Who Pled Guilty*, 55 SYRACUSE L. REV. 161 (2004); Rebecca Stephens, Comment, *Disparities in Postconviction Remedies for Those Who Plead Guilty and Those Convicted at Trial: A Survey of State Statutes and Recommendations for Reform*, 103 J. CRIM. L. & CRIMINOLOGY 309 (2013); *cf.* J.H. Dingfelder Stone, *Facing the Uncomfortable Truth: The Illogic of Postconviction DNA Testing for Individuals Who Pleaded Guilty*, 45 U.S.F. L. REV. 47 (2010); *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 54, 129 S. Ct. 2308, 174 L. Ed. 2d 38 (2009).

[15]Miller, *supra* note 7, at 674.

[16]Miller, *supra* note 7, at 675.

[17]Miller, *supra* note 7, at 674.

Miller begins his discussion with an overview of the types of statutes that exist across the country.[18]

The statutes vary as to time the defendant has to bring his claim,[19] type of conviction where defendants may be allowed to seek postconviction DNA testing,[20] and burden of proof in order to obtain the testing.[21] States also vary as to the circumstances under which a new trial will be required.[22] And, finally, states vary as to their treatment of defendants who pleaded guilty rather than being found guilty at trial, with several states explicitly providing postconviction DNA testing in such cases, others explicitly rejecting it, and many working the issue out through judicial determination based on other factors.[23]

Those states that do not explicitly state whether defendants who pleaded may request postconviction DNA testing are similarly inconsistent in their methods of determining the issue. In some states, statutes require that a defendant's identity was at issue in the case for postconviction DNA testing to be authorized, and courts in six of those states have determined that defendants who pleaded guilty cannot claim that identity was an issue in their case.[24] To these judges, a guilty plea means that the defendant "did not contest the question of who committed those acts."[25] Not all such states have resolved the matter in this manner; however, a few statutes explicitly

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[18]Miller, *supra* note 7, at 675.

[19]Statutes range from Alabama's limit of one year after final conviction to states that have no statute of limitations. Miller, *supra* note 7, at 676–77 (citing ALA. CODE § 15-18-200 (2019) (within one year of conviction); ALASKA STAT. ANN. § 12.73.010 (West 2019) (no statute of limitations); CAL. PENAL CODE § 1405 (West 2018) (no statute of limitations); DEL. CODE ANN. tit. 11, § 4504 (West 2019) (within three years of final judgment); LA. CODE CRIM. PROC. ANN. art. 930.4, 930.8 (2014) (within two years); ME. REV. STAT. ANN. tit. 15, §§ 2136 to 2138 (West 2019) (within two years of conviction); MINN. STAT. ANN. §§ 590.01 to.06 (West 2019) (within two years of final judgment).

[20]For instance, some states only allow such testing in after felony convictions, or specific felony convictions, or capital cases, while other states provide for testing after convictions of any level. Miller, *supra* note 7, at 677 nn. 39-42 and accompanying text.

[21]States vary from "require[ing] a prima facie showing that the evidence to be tested is material to the conviction or the issue of guilt" to requiring the defendant to provide clear and convincing evidence that the DNA testing will prove innocence. Miller, *supra* note 7, at 677 nn. 43–45 and accompanying text.

[22]Miller describes the range as between whether it is "reasonably probable that the person would not have been convicted" had the evidence been available during trial to "a substantial possibility that the petitioner would not have been convicted." Miller, *supra* note 7, at 677–78 nn. 46–47 and accompanying text.

[23]Miller, *supra* note 7, at 678–88.

[24]Miller, *supra* note 7, at 679.

[25]Miller, *supra* note 7, at 681 (quoting *People v. Urioste*, 316 Ill. App. 3d 307, 249 Ill. Dec. 512, 736 N.E.2d 706, 714 (5th Dist. 2000)).

state that a defendant who pleaded may still apply for DNA testing even while keeping the "identity in issue" language in their statutes, while others have not yet resolved the issue.[26]

Interestingly, while some state statutes specifically refer to trials, only two states have judicially interpreted that requirement to preclude defendants who pleaded guilty from receiving postconviction DNA analysis; and both of those states later amended their statutes to allow for testing.[27] Other states with trials explicitly mentioned in their statutes have not yet resolved the issue of whether defendants who pleaded guilty are precluded from seeking postconviction DNA tests.[28]

However, many states have none of the above requirements, and courts' treatment of appellants who were convicted by plea has varied widely.[29] Many states simply have not addressed the issue, yet.[30]

DNA is not the only evidence that might exonerate a defendant after conviction, and the same trends that led to a recognition of the need for postconviction DNA testing have led to the creation of statutes to allow for freestanding innocence claims based on other sources.[31] Like in the case of postconviction DNA analysis, these statutes (and courts that interpret them) vary in their treatment of defendants who pleaded guilty.[32] Some states explicitly require a defendant to have pleaded not guilty,[33] while others explicitly provide the option for pleading defendants,[34] some state courts have interpreted statutes that are silent on the matter to preclude the option for pleading defendants,[35] and others have not yet resolved the matter.[36]

Having described the varied and contradictory state determinations of the right to seek an appeal based on actual innocence, Miller next turns to the state of constitutional doctrine.[37] As Miller describes, in the early 2000s there appeared to be a path to a due

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[26]Miller, *supra* note 7, at 681–83.

[27]Miller, *supra* note 7, at 683–84.

[28]Miller, *supra* note 7, at 684–85.

[29]Miller, *supra* note 7, at 686–88.

[30]Miller, *supra* note 7, at 688.

[31]Miller, *supra* note 7, at 688–89.

[32]Miller, *supra* note 7, at 689–92.

[33]Miller, *supra* note 7, at 689.

[34]Miller, *supra* note 7, at 691–92.

[35]Miller, *supra* note 7, at 691.

[36]Miller, *supra* note 7, at 692.

[37]Miller, *supra* note 7, at 692.

process right to postconviction DNA testing, but this path was abruptly blocked in 2009 with the Court's decision in *District Attorney's Office for the Third Judicial District. v. Osborne.*[38]

As Miller explains, in *Osborne*, the Supreme Court explicitly rejected the idea that there might be a substantive due process right to acquiring DNA evidence.[39] The Court instead adopted the framework of *Medina v. California*, under which "a state procedural rule only violates procedural due process if it 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' "[40] Two years later, the Court reinforced the presumption against a right to acquiring DNA evidence, stating "*Osborne* severely limits the federal action a state prisoner may bring for DNA testing . . . and left slim room for the prisoner to show that the governing state law denies him procedural due process."[41] In apparent response to these rulings, Miller notes, "no court has [since] found that a state's postconviction DNA testing statute violates procedural due process," and *Osborne* may well have changed the direction that New York courts were heading when *Osborne* was decided.[42] The same is true of non-DNA actual innocent statutes.[43]

Defendants have also brought equal protection challenges to limitations of postconviction DNA and non-DNA innocence claims, and Miller addresses these challenges next.[44] In the context of postconviction DNA testing, challenges have been based on the assertion that distinguishing between crimes that qualify for postconviction innocence claims violates equal protection.[45] For instance, one case was brought, and won, based on a state statute allowing postconviction DNA testing for rape convictions, but not for aggravated criminal sodomy.[46] Another was brought, and lost, for allowing postconviction DNA testing for "crimes of violence," but not

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[38]Miller, *supra* note 7, at 693 (citing *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 129 S. Ct. 2308, 174 L. Ed. 2d 38 (2009)).

[39]Miller, *supra* note 7, at 695–96.

[40]Miller, *supra* note 7, at 696 (quoting *Osborne* IV, 557 U.S. at 69–70; *Medina v. California*, 505 U.S. 437, 446, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992)).

[41]Miller, *supra* note 7, at 697 (quoting *Skinner v. Switzer*, 562 U.S. 521, 525, 131 S. Ct. 1289, 179 L. Ed. 2d 233 (2011)).

[42]Miller, *supra* note 7, at 697.

[43]Miller, *supra* note 7, at 699.

[44]Miller, *supra* note 7, at 700.

[45]Miller, *supra* note 7, at 700–02.

[46]Miller, *supra* note 7, at 700–01.

conspiracy.[47] Equal protection claims also have been brought to challenge state statutes that allow defendants to seek a new trial due to postconviction DNA testing, but not other claims of innocence.[48] These claims have not been successful.[49] Miller concludes his section on the state of constitutional claims to postconviction appeals for defendants who have pleaded guilty by summarizing that there are few such avenues currently available.[50] In the following section, he begins to explain how right of access to the courts might function to provide another, more effective such path.[51]

Doctrinally, the right of meaningful access to the courts dates back to *Griffin v. Illinois*,[52] a 1956 Supreme Court case holding that, once a state has granted a right to appeal, the state cannot allow poverty to foreclose a defendant's opportunity to utilize that right.[53] Later case clarified that this was a right to "appellate systems that are 'free of unreasoned distinctions.' "[54] Poverty being one such unreasonable distinction, the Court has expanded the right to invalidate blocks in the appellate process such as docket fees and the lack of legal research facilities.[55]

In 2005, this reasoning led the Court to invalidate a distinction between pleading and non-pleading defendants.[56] Specifically, the state of Michigan had amended its state constitution to allow courts discretion to refuse to hear the appeal of a defendant who had pleaded guilty.[57] Based on this, the state argued that indigent defendants need not be provided appellate counsel, as their right to appeal was within the discretion of the appellate courts.[58] The U.S. Supreme Court disagreed, acknowledging that the state had a rational interest to make the distinction but stating that allowing states the ability to summarily refuse to pay for appellate counsel for indigent defendants made the right to appeal "more formal than

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[47]Miller, *supra* note 7, at 701–02.

[48]Miller, *supra* note 7, at 702.

[49]Miller, *supra* note 7, at 702.

[50]Miller, *supra* note 7, at 703.

[51]Miller, *supra* note 7, at 703.

[52]*Griffin v. Illinois*, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891, 55 A.L.R.2d 1055 (1956).

[53]Miller, *supra* note 7, at 703–04.

[54]Miller, *supra* note 7, at 705.

[55]Miller, *supra* note 7, at 705–06.

[56]Miller, *supra* note 7, at 707–09.

[57]Miller, *supra* note 7, at 707.

[58]Miller, *supra* note 7, at 707.

real."[59] Miller argues that this decision stands for the proposition that, while states may make reasoned distinctions between pleading and non-pleading defendants, they may not wholly "cut off any right for pleading defendants to appeal."[60] Miller adds that this reasoning is further suggested in *Bounds v. Smith*, wherein the Court found right of access to the courts to be particularly salient in cases "raising heretofore unlitigated issues" (as do claims of actual innocence).[61] These decisions suggest that, as states have granted a right to appeal based on actual innocence, they cannot fully deny that right based solely on a defendant's decision to plead guilty.[62] Miller further notes that later circuit court cases have suggested a similar argument.[63]

Having addressed the question of whether the right exists, Miller goes on to discuss an issue challenged in New York and Maryland courts—that of the feasibility of responding to such claims.[64] He notes that both of these states have responded to the question legislatively by passing or amending statutes to allow for the claims.[65] He then turns to the question of standards by which to judge those claims, referencing the ineffective assistance of counsel test, which is routinely applied to pleading defendants.[66] As Miller notes, the standard turns to whether a defendant has been prejudiced—at trial, that is a question of whether "but for counsel's unprofessional errors, the result of the proceeding would have been different."[67] Applying that standard to pleading defendants merely changes the standard to "reasonable probability that, but for counsel's errors, he would not have pleaded guilty."[68] As Miller states, "[i]f DNA testing revealed that the hairs likely came from a serial killer in the area who was unknown to the defendant, it is probable that . . . (1) the defendant would neither have pleaded guilty nor been told to plead

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[59]Miller, *supra* note 7, at 707 (quoting *Halbert v. Michigan*, 545 U.S. 605, 620, 125 S. Ct. 2582, 162 L. Ed. 2d 552 (2005)).

[60]Miller, *supra* note 7, at 709–10.

[61]Miller, *supra* note 7, at 711 (quoting *Bounds v. Smith*, 430 U.S. 817, 827, 97 S. Ct. 1491, 52 L. Ed. 2d 72 (1977) (abrogated by, Lewis v. Casey, 518 U.S. 343, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996))).

[62]Miller, *supra* note 7, at 711.

[63]Miller, *supra* note 7, at 714–15.

[64]Miller, *supra* note 7, at 715–16.

[65]Miller, *supra* note 7, at 716.

[66]Miller, *supra* note 7, at 716–17.

[67]Miller, *supra* note 7, at 717.

[68]Miller, *supra* note 7, at 717.

guilty; and (2) the jury would not have convicted him."[69] Miller notes, further, that this standard is already being used in some states.[70]

Outside of the question of standards, the Maryland and New York courts also raised concerns about testing innocence without a trial record and threatening the system of plea bargains that today's criminal justice system relies on.[71] These issues are resolved, he argues, in the case of *Missouri v. Frye*, wherein the Supreme Court, recognizing that the vast majority of cases are decided by plea bargains, suggested that this very centrality required the protection of certain rights of pleading defendants.[72] To do otherwise would practically erase them.

Miller acknowledges that not all distinctions between pleading and non-pleading defendants are necessarily unreasonable (and therefore unacceptable).[73] He suggests that differing burdens of proof, or requiring to prove identity is in issue might be reasonable (if this question is not resolved solely on the basis that the defendant pleaded).[74] Returning to *Michigan v. Halbert,* the Supreme Court's 2005 case, Miller argues that a claim of actual innocence is clearly distinguishable from most post-plea claims (which might be reasonably distinguished from post-trial claims).[75] Unlike most post-plea claims, Miller notes, claims of actual innocence are indistinguishable from post-trial claims of actual innocence, in that both involve new evidence of actual innocence rather than violations of constitutional rights (which would have occurred prior to the plea).[76] Moreover, there is empirical evidence that claims of actual innocence, particularly in the context of DNA testing, are successful far more often than other post-plea direct appeals.[77]

In sum, Miller argues that states that have created a right to appellate review for claims of actual innocence cannot foreclose that right to pleading defendants.[78] He notes, however, that while all

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[69]Miller, *supra* note 7, at 717.

[70]Miller, *supra* note 7, at 718.

[71]Miller, *supra* note 7, at 720.

[72]Miller, *supra* note 7, at 720–21.

[73]Miller, *supra* note 7, at 722.

[74]Miller, *supra* note 7, at 722.

[75]Miller, *supra* note 7, at 724–25.

[76]Miller, *supra* note 7, at 724–25.

[77]Miller, *supra* note 7, at 725–26.

[78]Miller, *supra* note 7, at 726.

states offer this right for the sake of DNA testing, not every state offers it for other, non-DNA evidence of innocence.[79]

III. CONCLUSION

As Miller highlights in this article, the numbers of wrongfully convicted defendants have far outstripped what many of us might have expected—reaching 40% of defendants who have requested and successfully obtained DNA analysis through the Innocence Project.[80] This fact seems to be recognized in the steady movement of states and state courts towards providing the right to test DNA and appeal based on other new evidence of actual innocence.[81] And given this movement, and the prevalence of guilty pleas in the criminal justice system, distinctions between pleading and non-pleading defendants do seem ridiculous. Yet Supreme Court doctrine, thus far, has discouraged due process rights to post-plea appeals based on actual innocence.[82] Miller highlights that the right to access may require erasing the distinction between pleading and non-pleading defendants in the area of post-plea appeals based on actual innocence, particular in the context of DNA testing. His argument is convincing, and should be considered by attorneys, judges, and legislators.

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[79]Miller, *supra* note 7, at 726.

[80]Miller, *supra* note 7, at 726.

[81]*See* Miller, *supra* note 7, at 675.

[82]Miller, *supra* note 7, at 695–703.