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Maryland Makes New Evidence Postconviction Review Provisions Available to Defendants with Plea Deals

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MARYLAND MAKES NEW EVIDENCE POSTCONVICTION REVIEW PROVISIONS AVAILABLE TO DEFENDANTS WITH PLEA DEALS

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INTRODUCTION

A guilty plea is not a confession, and defendants who accept plea deals are often wrongfully convicted.[1] For many years, Maryland permitted inmates who made plea deals to use newly discovered evidence, such as DNA, to argue that they were entitled to postconviction relief because they were innocent.[2] When the Maryland Court of Appeals suddenly permitted only defendants convicted at trial to access the new evidence postconviction provisions, the Maryland legislature promptly acted to restore this access to defendants with plea deals.[3] The first attempt by the General Assembly to reinstate new evidence postconviction review for defendants with plea deals ran into resistance from key Maryland stakeholders, but the General Assembly satisfied their concerns and amended the law during the next legislative session.[4]

Part I will discuss (A) why guilty pleas often lead to wrongfully convicted defendants;[5] (B) that defendants with plea deals were not previously barred from using the new evidence postconviction review provisions;[6] (C) why the Court of Appeals decided to narrowly interpret those provisions with respect to defendants with plea deals;[7] and (D) how the General Assembly thereafter restored the new evidence postconviction review mechanisms for these defendants.[8] Part II will discuss (A) that the legislature sat-

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1. Brandon L. Garrett, *Why Plea Bargains Are Not Confessions*, 57 WM. & MARY L. REV. 1415 (2016); *see infra* Section I.A.
2. *See infra* Section I.B.
3. *See infra* Sections I.C–D.
4. *See infra* Section I.D; *see also* S. 423, 2018 Leg., 438th Sess. (Md. 2018) (voting record).
5. *See infra* Section I.A.
6. *See infra* Section I.B.
7. *See infra* Section I.C.
8. *See infra* Section I.D.

isfied the concerns of the judiciary regarding issues of procedural guidance and protection of judicial resources;[9] (B) that the legislature satisfied the concerns of the State over building a case from the minimalist factual record of plea deal cases;[10] and (C) how new evidence favors substantive accuracy over finality.[11]

I. BACKGROUND

The Maryland legislature enacted postconviction review[12] provisions specific to claims involving newly discovered DNA and other evidence of innocence in 2001 and 2009, but the statutes did not include language specific to defendants with plea deals.[13] Consequently, for many years defendants with plea deals were not precluded from availing themselves of these innocence mechanisms when new potentially exculpatory evidence emerged.[14] When the Court of Appeals abruptly ended this practice in 2016, the General Assembly acted quickly to amend the statutes to restore access to the new evidence postconviction remedies for these defendants.[15] Section A evaluates why plea deals often lead to wrongfully convicted defendants for whom postconviction review could result in exoneration.[16] Next, Section B discusses that, prior to 2016, defendants with plea deals could use the new evidence postconviction review mechanisms to argue their innocence.[17] Then, Section C reviews why the Court of Appeals decided to interpret the statutes as barring access to the new evidence postconviction review provisions for these defendants.[18] Finally, Section D discusses how the legislature amended the postconviction review statutes to

9. *See infra* Section II.A.

10. *See infra* Section II.B.

11. *See infra* Section II.C.

12. Postconviction review allows a defendant to challenge their conviction by petitioning for a new case. Nancy J. King, *Judicial Review: Appeals and Postconviction Proceedings*, *in* EXAMINING WRONGFUL CONVICTIONS 217 (Alison D. Redlich et al. eds., 2014).

13. MD. CODE ANN., CRIM. PROC. § 8-201 (LexisNexis 2001); MD. CODE ANN., CRIM. PROC. § 8-301 (LexisNexis 2009).

14. *See infra* Section I.B. For fourteen years after the 2001 and 2009 statutes were enacted, defendants with plea deals offered new evidence in six Maryland cases. State v. Matthews, 415 Md. 286, 999 A.2d 1050 (2010); Thompson v. State, 411 Md. 664, 985 A.2d 32 (2009); Gregg v. State, 409 Md. 698, 976 A.2d 999 (2009); Simms v. State, 409 Md. 722, 976 A.2d 1012 (2009); Arey v. State, 400 Md. 491, 929 A.2d 501 (2007); Blake v. State, 395 Md. 213, 909 A.2d 1020 (2006). In five of these cases, the court granted the defendant's petition for postconviction review. *Matthews*, 415 Md. at 312, 999 A.2d at 1066; *Thompson*, 411 Md. at 694, 985 A.2d at 50; *Gregg*, 409 Md. at 721, 976 A.2d at 1012; *Simms*, 409 Md. at 734, 976 A.2d at 1020; *Arey*, 400 Md. at 509, 929 A.2d at 512. In the sixth case, however, the court denied the defendant's petition on procedural grounds. *Blake*, 395 Md. at 238, 909 A.2d at 1035.

15. *See infra* Sections I.C–D.

16. *See infra* Section I.A.

17. *See infra* Section I.B.

18. *See infra* Section I.C.

provide a permanent means for defendants with plea deals to help prove their innocence with newly discovered evidence.[19]

A. Guilty Pleas Often Lead to Wrongfully Convicted Defendants

It is axiomatic in criminal law that many "innocent people will plead guilty rather than risk going to trial."[20] This is because "innocent defendants who plead guilty almost always get lighter sentences than those who are convicted at trial"—forcing defendants to conduct a crucial cost-benefit analysis.[21] Of the 1,702 exonerations compiled by the National Registry of Exonerations as of November 2015, 261 (15%) of exonerees pleaded guilty.[22] In its 2018 testimony to the Maryland General Assembly, the Innocence Project, a non-profit organization that works to overturn wrongful convictions, reported that, based on DNA evidence, "over 10% of exonerees were wrongfully convicted as the result of a guilty plea."[23] Further, the Innocence Project maintained that the true criminal perpetrator was identified in 84% of these cases, largely because of postconviction DNA testing.[24]

A guilty plea generally provides a mutual advantage for the defendant and the state, which may explain why 95% of federal and state felony cases are resolved using plea deals.[25] The defendant is incentivized to plead guilty in lieu of going to trial because of the possibility of a "lesser penalty than the sentence that could be imposed after a trial and a verdict of guilty."[26] The state is incentivized to offer this bargain because the state no longer carries the burden of proof at trial, and thereby eases its administrative workload.[27]

A guilty plea, however, provides a disproportionate disadvantage for the defendant relative to the state. For the state, the disadvantage is the risk

19. *See infra* Section I.D.

20. Amshula Jayaram, Policy Advocate, Innocence Project, Testimony for Hearing on S.B. 423 Before the S. Judicial Proceedings Comm. in Support of Postconviction DNA Testing and Petition for Writ of Actual Innocence, 2018 Leg., 438th Sess. 1 (Md. 2018) [hereinafter Jayaram, Testimony on S.B. 423] (on file with author).

21. NAT'L REGISTRY OF EXONERATIONS, INNOCENTS WHO PLEAD GUILTY 1 (2015), https://www.law.umich.edu/special/exoneration/Documents/NRE.Guilty.Plea.Article1.pdf.

22. *Id.*

23. Michele Nethercott et al., Univ. Balt. Innocence Clinic, Letter to S. Judicial Proceedings Comm. Concerning S.B. 675 and S.B. 677, 2017 Leg., 437th Sess. 7 (Md. 2017) [hereinafter Nethercott et al., Letter Concerning S.B. 675 and S.B. 677] (on file with author).

24. *Id.*; NAT'L CONFERENCE OF STATE LEGISLATURES, POST CONVICTION DNA TESTING 1 (2013), http://www.ncsl.org/Documents/cj/PostConvictionDNATesting.pdf.

25. Brady v. United States, 397 U.S. 742, 752 (1970); *see also* Class v. United States, 138 S. Ct. 798, 807 (2018) (Alito, J., dissenting).

26. Brady, 397 U.S. at 751.

27. Robert N. Shwartz, *The Guilty Plea as a Waiver of "Present but Unknowable" Constitutional Rights: The Aftermath of the* Brady *Trilogy*, 74 COLUM. L. REV. 1435, 1460 (1974).

of a postconviction challenge to the conviction and the "arduous task" of building a case from the minimalist factual record of the plea deal,[28] possibly years after the original indictment.[29] For the defendant, who (1) may have limited financial and legal resources; (2) is pressured by a hurried criminal justice system; or (3) is possibly coerced into accepting a plea deal, the huge disadvantages of a guilty plea include life imprisonment or possibly death for a crime they did not commit.[30]

In the late 1980s, because of a growing number of DNA-linked exonerations, DNA testing became a powerful forensic tool for wrongfully convicted defendants.[31] Private industry, international academia, and legal entities collaborated to create testing standards and DNA testing methods that are now highly sensitive, efficient, and reproducible.[32] The predominant DNA testing method in use by law enforcement is the analysis of thirteen genetic markers using small lengths of DNA called short tandem repeats ("STR").[33] The thirteen STR markers for a given individual's DNA may be (1) represented as one marker (the same trait inherited from both parents); or (2) represented as two markers (a different trait inherited from each parent).[34] The likelihood that two people will share all thirteen STR markers is one in a billion.[35] Thus, in a forensics context, if the suspect's DNA matches the DNA found at the crime scene, the chances that the crime scene DNA came from someone other than the suspect is "at most one in a billion."[36] Moreover, in addition to the inculpatory value of DNA testing, 11.6% of wrongful convictions "yield[] exculpatory DNA evidence that would be supportive of the convicted suspect's exoneration."[37] Hence, when guilty

28. Although the Maryland procedural rule is vague regarding the amount of evidence that the State must gather for the plea deal case record, the court requires enough evidence in the record to inquire "into the factual basis for the plea." MD. R. 4-242(c) (2018); Jacqueline E. Ross, *The Entrenched Position of Plea Bargaining in United States Legal Practice*, 54 AM. J. COMP. L. 717, 721 (2006).

29. Peter Westen, *Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 MICH. L. REV. 1214, 1236 n.46 (1977) (citing United States v. Sams, 521 F.2d 421, 426 (3d Cir, 1975)).

30. Jayaram, Testimony on S.B. 423, *supra* note 20, at 6; Nethercott et al., Letter Concerning S.B. 675 and S.B. 677, *supra* note 23, at 2.

31. Emily West & Vanessa Meterko, *Innocence Project: DNA Exonerations, 1989–2014: Review of Data and Findings from the First 25 Years*, 79 ALB. L. REV. 717, 717 (2016). Over these twenty-five years, DNA testing exonerated 325 wrongfully convicted defendants. *Id.*

32. Lutz Roewer, *DNA Fingerprinting in Forensics: Past, Present, Future*, 4 INVESTIGATIVE GENETICS, Dec. 2013, at 2, 3.

33. *Id.*

34. NAT'L FORENSIC SCI. TECH. CTR., A SIMPLIFIED GUIDE TO DNA EVIDENCE (2013), http://www.forensicsciencesimplified.org/dna/how.html.

35. Roewer, *supra* note 32, at 4.

36. *Id.*

37. KELLY WALSH ET AL., URBAN INST., ESTIMATING THE PREVALENCE OF WRONGFUL CONVICTION 10 (2017), https://www.ncjrs.gov/pdffiles1/nij/grants/251115.pdf. This work refined a previous Urban Institute study (JOHN ROMAN ET AL., URBAN INST., POST-CONVICTION DNA

pleas lead to wrongful convictions, postconviction review predicated on new evidence, such as DNA, can be exonerating.

B. For Fourteen Years, Postconviction Review with Newly Discovered Evidence Was Available to Defendants with Plea Deals

In 2001[38] and 2009,[39] the Maryland legislature enacted two statutes that created mechanisms for postconviction review when new evidence emerged. DNA Evidence—Postconviction Review, Section 8-201, and Petition for Writ of Actual Innocence, Section 8-301, were an acknowledgement by the legislature that modern forensics, such as DNA testing, played an increasingly critical role in exonerating wrongfully convicted defendants.[40] The legislature in 2001 and 2009, however, was sensitive to the risk of overburdening the Maryland court system with frivolous postconviction review challenges; therefore, it limited the use of these statutes to new *exculpatory* evidence: (1) Section 8-201 required that "a reasonable probability exists that the DNA testing has the scientific potential to produce results materially relevant to the petitioner's assertion of innocence;"[41] and (2) Section 8-301 required that the newly discovered evidence "creates a substantial or significant possibility that the result may have been different" had the evidence been introduced prior to conviction.[42]

From 2001 until 2016, defendants who accepted plea deals were not specifically precluded from seeking new evidence postconviction review under the plain language of Sections 8-201 and 8-301.[43] Such was the case for two Maryland defendants, Jerry Lee Jenkins and Anthony Gray, who accepted plea deals but were later exonerated using postconviction review.[44] In 1986, Jerry Lee Jenkins maintained he was innocent of raping a

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TESTING AND WRONGFUL CONVICTION (2012), https://www.ncjrs.gov/pdffiles1/nij/grants/238816.pdf) by adding felony case processing records "to reclassify case outcomes and calculate an estimated rate of wrongful conviction for similar convictions in Virginia." *Id.* at 2. This data was externally validated by comparing it to 1985 felony cases from forty-three states. *Id.*

38. MD. CODE ANN., CRIM. PROC. § 8-201 (LexisNexis 2001).

39. MD. CODE ANN., CRIM. PROC. § 8-301 (LexisNexis 2009).

40. With the initial passage of Section 8-201, Maryland joined the "nationwide trend" of adopting DNA testing as a vehicle for exonerating the actually innocent. *See* Yonga v. State, 446 Md. 183, 197, 130 A.3d 486, 494 n.12 (2016) (citing Blake v. State, 395 Md. 213, 218–19, 909 A.2d 1020, 1023 (2006)). *Compare Actually Innocent*, BLACK'S LAW DICTIONARY (10th ed. 2014) (where the facts do not support the criminal sentence), *with Legally Innocent*, BLACK'S LAW DICTIONARY (10th ed. 2014) (where one or more legal bases to support the criminal sentence are absent). With the passage of Section 8-301, the legislature intended that actually innocent defendants be given an opportunity to seek postconviction review whenever new evidence emerged. *Yonga*, 446 Md. at 198, 130 A.3d at 494.

41. § 8-201(a)(5) (2001).

42. § 8-301(a)(1) (2009).

43. MD. CODE ANN., CRIM. PROC. §§ 8-201, 8-301 (LexisNexis 2015).

44. Nethercott et al., Letter Concerning S.B. 675 and S.B. 677, *supra* note 23, at 3.

real estate agent at a model home in Waldorf, Maryland.[45] The 1986 rape closely resembled another rape from 1984 that took place a few miles away, and the police believed they were dealing with a serial rapist.[46] However, soon after Jenkins was interviewed about the 1986 rape, biological evidence from the 1984 rape excluded him.[47] Subsequently, the police dropped the serial rapist theory and charged Jenkins with the 1986 rape.[48] Prior to trial, the rape victim could not affirmatively identify Jenkins in a photo lineup, and during the trial, the victim "admitted to the jury, 'I cannot say that I can positively identify him.'"[49] Jenkins was convicted of the 1986 rape and sentenced to life in prison.[50]

In 1988, just before Jenkins's sentencing hearing, DNA testing of biological evidence from the 1986 crime scene was inconclusive.[51] In 1995, Jenkins attempted to have the biological evidence reanalyzed using more modern DNA methods, but the motion was denied.[52] On a separate motion for a new trial that was also denied, the judge remarked that "there could be no stronger evidence for the defendant than evidence that two similar crimes were committed, and that the defendant couldn't possibly have committed one of them."[53] In 2000, Jenkins filed another motion for a new trial, but the prosecution, mindful of the weakness of its case against Jenkins, offered to vacate the conviction and recommend a forty-year prison sentence if Jenkins entered an Alford plea.[54] Jenkins accepted the plea deal and, pursuant to the deal, was released from prison in 2010.[55] In 2011, the biological evidence from the 1986 rape was tested using present day DNA techniques and revealed that Jenkins could not have been the perpetrator.[56] Jenkins was re-tried in 2013, and his case was dismissed.[57]

45. Maurice Possley, *Jerry Lee Jenkins*, NAT'L REGISTRY OF EXONERATIONS (June 7, 2013), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4191; Maryland v. Jenkins, No. 08-K-86-000423 (Cir. Court Charles Cty. Oct. 3, 1986).

46. Possley, *supra* note 45.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. A defendant knowingly and voluntarily enters an Alford plea as part of a plea deal but does not admit guilt. *Alford plea*, BLACK'S LAW DICTIONARY (10th ed. 2014); *see* Possley, *supra* note 45.

55. Possley, *supra* note 45.

56. *Id.*

57. *Id.*

In 1991, during a robbery, Linda May Pellicano was raped and murdered in her home in Calvert County, Maryland.[58] Anthony Gray and two other suspects were arrested and charged with the rape and murder.[59] Gray, who had an I.Q. of seventy-nine and was enrolled in a "special education" program, was incarcerated and interrogated without legal representation for nearly two months.[60] Although Gray initially denied involvement in the crime, he eventually confessed, and, in exchange for testifying against his supposed co-conspirators, Gray pleaded guilty to first-degree rape and was sentenced to life in prison.[61] Seven and a half years into Gray's sentence, "the State's attorney located Mrs. Pellicano's actual murderer by matching the DNA collected in this case to that of [another individual] and, subsequently, obtained a conviction with respect to that individual."[62] Gray was granted a new trial, but due to lack of evidence, Gray's case was dismissed in 1999.[63] For Jenkins and Gray, justice was restored because, under the 2001 and 2009 Section 8-201 and 8-301 statutes, these defendants could seek postconviction relief using new evidence and notwithstanding their previous plea deals.

C. In 2016, the Maryland Court of Appeals Barred Postconviction Review Using New Evidence for Defendants with Plea Deals

What had been an expectation that newly discovered evidence would provide an additional means for defendants with plea deals to seek postconviction review, became a bar to access when the Maryland Court of Appeals handed down its decisions in two seminal cases in 2016. The case, *Yonga v. State*,[64] began in 2006 when Sam Yonga was a twenty-five-year-old immigrant from Sierra Leone who became acquainted with thirteen-year-old, "T.R.," on a telephone chat line.[65] After T.R. invited Yonga to her home, the two started to engage in sexual activity, when the couple was interrupted by T.R's mother.[66] Yonga dropped his cell phone as he rushed to leave, and T.R.'s mother contacted the police.[67] Yonga was arrested and pleaded

58. Gray v. Maryland, 228 F. Supp. 2d 628, 632 (D. Md. 2002); Maurice Possley, *Anthony Gray*, NAT'L REGISTRY OF EXONERATIONS (Aug. 26, 2017), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3254.

59. *Gray*, 228 F. Supp. 2d at 632.

60. *Id.*

61. *Id.* at 632–33. Life imprisonment was Gray's reduced sentence for his plea, and the court did not inform Gray of the maximum penalty under his plea deal. Amended Complaint ¶ 36, *Gray*, 228 F. Supp. 2d 628 (No. CCB-02-CV-385).

62. *Gray*, 228 F. Supp. 2d at 633.

63. *Id.* at 633–34.

64. 446 Md. 183, 130 A.3d 486 (2016).

65. *Id.* at 185, 130 A.3d at 487.

66. *Id.* at 186, 130 A.3d at 487.

67. *Id.*

guilty to a third-degree sexual offense.[68] Six years later, T.R. recanted, and Yonga petitioned for a writ of actual innocence under Section 8-301.[69] In his petition, Yonga challenged the conviction by asserting that T.R.'s retraction was newly discovered evidence of his innocence.[70]

In denying Yonga's petition, the Court of Appeals noted that Maryland Rule 4-331(c)(1),[71] which allows a court to grant a new trial for newly discovered evidence, had previously never been asserted in a motion for a trial after a plea deal.[72] Further, even in the cases where there had been a trial prior to conviction, courts "grappled with whether there was a substantial [or significant] possibility that a different result would have occurred in the trial" had the newly discovered evidence been known at the time.[73] In extending this reasoning to the application of Maryland Rule 4-332, Writ of Actual Innocence,[74] which directly implements Section 8-301, the court added "only a conviction garnered after a bench or jury trial can provide the fodder against which the standard in Section 8-301(a)(1) can be measured."[75] Hence, the court held that "a person who has pled guilty may not later avail [themselves] of the relief afforded by the Petition for a Writ of Actual Innocence" because there was no trial against which to compare the new evidence.[76]

Later that same year, in *Jamison v. State*,[77] the Court of Appeals extended the *Yonga* rationale to Section 8-201, regarding DNA testing for a defendant with an Alford plea.[78] This case began in 1990, when William Todd Jamison was arrested for "impersonat[ing] a police officer and pull[ing] over a young woman in the Towson area of Baltimore County."[79] Jamison was accused of handcuffing the woman and placing her in the back

68. *Id.* at 188–89, 130 A.3d at 489.

69. *Id.* at 192–93, 130 A.3d at 491–92.

70. *Id.*

71. MD. R. 4-331(c)(1) (2018). *See* MD. R. 4-331(c)(1)(A)–(B) ("Newly Discovered Evidence. The court may grant a new trial or other appropriate relief on the ground of newly discovered evidence which could not have been discovered by due diligence [within ten days of a verdict] . . . on motion filed within one year after the later of (A) the date the court imposed sentence or (B) the date the court received a mandate issued by the final appellate court to consider . . . a belated appeal permitted as postconviction relief.").

72. *Yonga*, 446 Md. at 208, 130 A.3d at 500.

73. *Id.*

74. MD. R. 4-332 (2018).

75. *Yonga*, 446 Md. at 213, 130 A.3d at 503.

76. *Id.* at 217, 506.

77. 450 Md. 387, 148 A.3d 1267 (2016).

78. *Id.* at 414, 148 A.3d at 1284; *see also supra* note 54.

79. Scott D. Shellenberger, State's Attorney for Balt. Cty., Testimony for Hearing on S.B. 675 Before the S. Judicial Proceedings Comm. in Opposition to S.B. 675, Petition for Writ of Actual Innocence, 2017 Leg., 437th Sess. 1 (Md. 2017) [hereinafter Shellenberger, Testimony on S.B. 675] (on file with author). Mr. Shellenberger was the lead prosecutor in the *Jamison* case. *Id.*

of his car, driving to another area, removing the woman from his car, and then brutally raping, strangling, and beating her for thirty minutes.[80] Jamison was indicted on fifteen charges and sentenced to life plus thirty years after he entered an Alford plea to first degree rape and kidnapping.[81] In 2008 (eighteen years into his sentence), Jamison filed a petition for DNA testing after "slides containing cellular material from swabs taken from the victim's vulva, vagina, and endocervix" were newly discovered.[82]

In denying Jamison's petition, the court reasoned that Section 8-201 implicitly prohibited postconviction DNA testing for defendants with plea deals because the statute was silent on the matter.[83] Further, the court equated an Alford plea to a guilty plea: "[A]n *Alford* plea is the functional equivalent of a guilty plea because [l]ike a guilty plea, . . . the *Alford* plea waives challenges to adverse rulings on pretrial motions and all procedural objections, . . . limiting appeals to jurisdictional defects and challenges based on the propriety of the trial court's acceptance of the plea."[84] Moreover, the court reasoned that a 2008 amendment to Section 8-201, that added language requiring a substantial possibility that the defendant would not have been convicted had the DNA evidence been known at trial, was an inapplicable standard for defendants with guilty pleas.[85] Using the same reasoning from *Yonga*, the court "emphasized the evaluative component of the standard of substantial or significant possibility that the result may have been different" and determined that newly introduced DNA evidence could not be compared against a trial that never occurred.[86] Thus, the court held "a person who has pled guilty cannot avail [themselves] of post-conviction DNA testing under Section 8-201."[87] The consequence of the *Jamison* decision, with the earlier *Yonga* decision, was to disrupt the "status quo that existed prior to 201[6] . . . [that] allowed people who had been convicted as a result of pleas to pursue DNA testing and to present new evidence of innocence under . . . certain circumstances."[88]

80. *Id.*

81. *Jamison*, 450 Md. at 389, 148 A.3d at 1268.

82. *Id.* at 390, 148 A.3d at 1268–69.

83. *Id.* at 395–96, 148 A.3d at 1272–73.

84. *Id.* at 397, 148 A.3d at 1273 (citing Bishop v. State, 417 Md. 1, 20, 7 A.3d 1074, 1085 (2010)).

85. *Id.* at 409, 148 A.3d at 1281; MD. CODE ANN., CRIM. PROC. § 8-201(c) (LexisNexis 2008).

86. *Jamison*, 450 Md. at 410, 148 A.3d at 1281.

87. *Id.* at 414, 148 A.3d at 1284.

88. Statement of Michele Nethercott, U. Balt. Innocence Clinic at 29:55–30:15, Post-Conviction–DNA Testing and Petition for Actual Innocence: Hearing on S.B. 423 Before the S. Judicial Proceedings Comm., 2018 Leg., 438th Sess. (Md. 2018) [hereinafter Statement of Michele Nethercott], http://mgahouse.maryland.gov/mga/play/f00eff80-d946-4174-a43f-14e1bd4a9a82/?catalog/03e481c7-8a42-4438-a7da-93ff74bdaa4c.

D. In 2018, the Maryland Legislature Restored the New Evidence Postconviction Review Mechanisms to Defendants with Plea Deals

After the Court of Appeals handed down its decisions in *Yonga* and *Jamison* prohibiting the use of Sections 8-201 and 8-301 for defendants with plea deals, the Maryland legislature immediately acted to reestablish the pre-2016 status quo by amending the statutes. The effort to restore access to these postconviction remedies (1) stalled in the first year with opposition from key Maryland stakeholders[89] but (2) passed in the second year.[90]

1. Statutory Amendment First Attempt

In 2017, the Maryland General Assembly introduced Senate Bills 675 ("S.B. 675") and 677 ("S.B. 677") to affirmatively extend Sections 8-201 and 8-301 to defendants with plea deals, but the effort stalled.[91] In support of the statutory amendments, Senator Delores Kelley, who had been the lead sponsor for the 2009 Petition for Writ of Actual Innocence (Section 8-301), testified, "[I]t was not the intent of the legislature to limit this mode of post-conviction relief to only defendants convicted by a trial."[92] Senator Kelley further testified, "A blanket dismissal of all petitions for post-conviction DNA testing is a threat to public safety, and can leave serial offenders at large who could have been otherwise identified and subsequently tried for their offenses."[93]

Senate Bills 675 and 677 generated concern from key stakeholders, such as the Maryland Judicial Conference and the Maryland Office of the Attorney General ("OAG"), both of whom opposed amending the statutes on the ground that the minimalist factual record at the time of pleading could not be properly weighed at a subsequent trial.[94] The State's Attorney for Baltimore County specifically opposed the Section 8-301 amendment and cautioned that allowing new evidence postconviction review for defendants with plea deals would mean "there is no finality for victims any-

89. *See infra* Section I.D.1.

90. *See infra* Section I.D.2.

91. S. 675, 2017 Leg., 437th Sess. (Md. 2017) (referred to interim study by Judicial Proceedings Comm., Apr. 10, 2017); S. 677, 2017 Leg., 437th Sess. (Md. 2017) (referred to interim study by Judicial Proceedings Comm., Apr. 10, 2017).

92. Delores G. Kelley, Sen., Testimony for Hearing on S.B. 675 Before the S. Judicial Proceedings Comm. in Support of Criminal Petition for Writ of Actual Innocence-Non-Trial Conviction, 2017 Leg., 437th Sess. 2 (Md. 2017) (on file with author).

93. Delores G. Kelley, Sen., Testimony for Hearing on S.B. 677 Before the S. Judicial Proceedings Comm. in Support of DNA Testing-Post-Conviction Review, 2017 Leg., 437th Sess. 3 (Md. 2017) [hereinafter Sen. Kelley, Testimony on S.B. 677] (on file with author).

94. Md. Judicial Conference, Letter to S. Judicial Proceedings Comm. Opposing S.B. 675, 2017 Leg., 437th Sess. (Md. 2017) (on file with author); Md. Office of the Att'y Gen., Letter to S. Judicial Proceedings Comm. Opposing S.B. 677, 2017 Leg., 437th Sess. (Md. 2017) [hereinafter Letter from Md. Office of the Att'y Gen. Opposing S.B. 677] (on file with author).

more."[95] Finally, the Maryland Chiefs of Police Association and the Maryland Sheriffs' Association opposed the amendment to Section 8-201 and questioned the need for a procedural change to the law when, under the existing statute, law enforcement already had access to DNA databases that could "identify[] the source of physical evidence used for DNA testing."[96]

The Innocence Project supported amending Sections 8-201 and 8-301.[97] In addition to proffering statistics, such as 84% of wrongfully convicted defendants with plea deals are exonerated, the Innocence Project pointed out that Maryland was one of only five states (the other states being: Kentucky, Michigan, Ohio, and Pennsylvania) that barred postconviction DNA testing for these defendants.[98] According to Amshula Jayaram of the Innocence Project and Michele Nethercott of the University of Baltimore Innocence Clinic, a new evidence postconviction relief mechanism for defendants who accept plea deals (1) promotes public safety by focusing resources on identifying the real perpetrators, (2) enhances judicial efficiency by "provid[ing] a clear and proper channel for [postconviction] relief,"[99] and (3) gives the public confidence that the criminal justice system is "willing to get it right" by reconsidering convictions when exculpatory evidence is newly discovered.[100]

The General Assembly did not pass the amendments to Sections 8-201 and 8-301 in 2017 and instead voted to refer the matter to the Task Force to Study Erroneous Conviction and Imprisonment established during the 2017 legislative session.[101] The purpose of the Task Force was threefold: (1) to study current Maryland processes for determining erroneous conviction; (2) to study other state processes for the same; and (3) to make recommendations for process improvements in Maryland.[102] The Task Force held three

95. Shellenberger, Testimony on S.B. 675, *supra* note 79, at 2.

96. Md. Chiefs of Police Ass'n & Md. Sheriffs' Ass'n, Letter to the S. Judicial Proceedings Comm. Opposing S.B. 677, 2017 Leg., 437th Sess. (Md. 2017) (on file with author).

97. Nethercott et al., Letter Concerning S.B. 675 and S.B. 677, *supra* note 23.

98. *Id.* at 7; *see* KY. REV. STAT. ANN. § 422.285(5)(d) (West 2018); MICH. COMP. LAWS ANN. § 770.16(1) (West 2018); OHIO REV. CODE ANN. § 2953.71(F) (LexisNexis 2018). *But see* 42 PA. CONST. STAT. ANN. § 9543.1(a)(5) (West 2018) (amending the Pennsylvania postconviction DNA testing statute in December 2018 to allow defendants with plea deals to assert actual innocence under the statute).

99. Nethercott et al., Letter Concerning S.B. 675 and S.B. 677, *supra* note 23, at 4.

100. Statement of Amshula Jayaram, Innocence Project, Policy Advocate at 14:50, Post-Conviction–DNA Testing and Petition for Actual Innocence: Hearing on S.B. 423 Before the S. Judicial Proceedings Comm., 2018 Leg., 438th Sess. (Md. 2018), http://mgahouse.maryland.gov/mga/play/f00eff80-d946-4174-a43f-14e1bd4a9a82/?catalog/03e481c7-8a42-4438-a7da-93ff74bdaa4c .

101. S. 675, 2017 Leg., 437th Sess. (Md. 2017) (voting record); S. 677, 2017 Leg., 437th Sess. (Md. 2017) (voting record).

102. Letter from V. Glenn Fueston, Jr., Exec. Dir., Governor's Office of Crime Control & Prevention, to Hon. Larry Hogan et al. (Dec. 28, 2017), http://goccp.maryland.gov/wp-content/uploads/erroneous-conviction-imprisonment-20171228-letter.pdf.

meetings from October 2017 to September 2018 and issued its final report in December 2018.[103] Although members of the Task Force played a role in amending Sections 8-201 and 8-301 in 2018, the legislature's effort to extend the statutes in 2017 stalled.[104]

2. Statutory Amendment Second Attempt

In 2018, the General Assembly returned from its recess, again took up the matter of amending Sections 8-201 and 8-301, and, this time, succeeded.[105] Senator Robert Zirkin introduced Senate Bill 423 ("S.B. 423") that combined the two Bills, S.B. 675 and S.B. 677, from the previous year.[106] The legislative intent of S.B. 423 was to (1) amend Sections 8-201 and 8-301 jointly; (2) provide similar procedures to allow postconviction DNA testing and petition for writ of actual innocence for defendants with plea deals;[107] and (3) create a comprehensive postconviction review process where Maryland defendants "would have the ability to challenge unlawful and unjust convictions."[108]

Once again, several Maryland stakeholders expressed their concerns over the proposed Section 8-201 and 8-301 amendments. The Maryland Judicial Conference opposed S.B. 423 on the same grounds as in 2017.[109] The State's Attorney for Baltimore County asked the legislature to "[l]et the Task Force [to Study Erroneous Conviction and Imprisonment] do its job" of further studying the issue of postconviction review.[110] The Maryland Crime Victims' Resource Center ("MCVRC") opposed the amendments over the issue of finality and urged the General Assembly to avoid the "upending of final, proper convictions" by using postconviction review "as a pretext to obtain untimely judicial review and potentially reopen cases es-

103. GOVERNOR'S OFFICE OF CRIME CONTROL & PREVENTION, 2018 FINAL REPORT OF THE TASK FORCE TO STUDY ERRONEOUS CONVICTION AND IMPRISONMENT (2018), http://goccp.maryland.gov/wp-content/uploads/erroneous-conviction-imprisonment-20181201-final-report.pdf.

104. *Id.* at 13.

105. Act of May 15, 2018, ch. 602, sec. 1–2, 2018 Md. Laws 3127, 3128–37 (codified as amended at MD. CODE ANN., CRIM. PROC. §§ 8-201, 8-301 (LexisNexis 2018)).

106. S. JUDICIAL PROCEEDINGS COMM., FLOOR REPORT: SENATE BILL 423, 2018 Leg., 438th Sess. (Md. 2018).

107. *Id.*

108. S.J. Res. 10, 2018 Leg., 438th Sess., at 2 (Md. 2018).

109. Md. Judicial Conference, Letter to S. Judicial Proceedings Comm. Opposing S.B. 423, 2018 Leg., 438th Sess. (Md. 2018) [hereinafter Letter from Md. Judicial Conference on S.B. 423] (on file with author).

110. Scott D. Shellenberger, State's Attorney for Balt. Cty., Testimony for Hearing on S.B. 423 Before the S. Judicial Proceedings Comm. in Opposition to DNA Testing-Postconviction Review, 2018 Leg., 438th Sess. 2 (Md. 2018) [hereinafter Shellenberger, Testimony on S.B. 423] (on file with author).

pecially long after the case can be effectively retried."[111] The Maryland State Bar Association ("MSBA") opposed the Bill over its concern regarding excessive use of judicial resources that would burden the judicial system and negatively impact the judiciary's ability to fulfill its mandate.[112] The only favorable testimony came from the Innocence Project, which renewed its support for the Section 8-201 and 8-301 amendments on the same grounds as in 2017.[113] On March 21, 2018, the General Assembly unanimously passed S.B. 423 and permanently granted access to the new evidence postconviction review mechanisms for defendants with plea deals.[114]

II. ANALYSIS

The Maryland legislature's proposal to affirmatively extend Sections 8-201 and 8-301 to postconviction review of plea deals using new evidence had its detractors, but the legislature listened to their concerns and adjusted the language of S.B. 423 accordingly.[115] Moreover, Senator Zirkin made clear that he was less interested in continuing to study the issue of postconviction review, as had been recommended by the State's Attorney for Baltimore County,[116] and more interested in incorporating language into S.B. 423 that supported the legislature's intent to establish a permanent mechanism for wrongfully convicted defendants to prove their innocence.[117] Section A reviews how the legislature satisfied the concerns of the judiciary by providing procedural guidance and giving the court discretionary authority to protect judicial resources.[118] Section B analyzes how the legislature satisfied the State's burden of building a postconviction review case from a

111. Md. Crime Victims' Res. Ctr., Inc., Testimony for Hearing on S.B. 423 Before the S. Judicial Proceedings Comm. in Opposition to Postconviction–DNA Testing and Petition for Writ of Actual Innocence, 2018 Leg., 438th Sess. 1 (Md. 2018) [hereinafter Md. Crime Victims' Res. Ctr., Inc., Testimony on S.B. 423] (on file with author).

112. Md. State Bar Ass'n, Letter to the S. Judicial Proceedings Comm. Opposing S.B. 423, 2018 Leg., 438th Sess. (Md. 2018) [hereinafter Letter from Md. State Bar Ass'n Opposing S.B. 423] (on file with author); *see also* RICHARD A. MONTGOMERY III, MD. STATE BAR ASS'N, MSBA BILL POSITIONS AND FINAL BILL STATUS 5–6 (2018), https://www.msba.org/content/uploads/sites/7/2018/05/MSBA-Bill-Positions-2018.pdf (stating that MSBA supports S.B. 423 overall but the broad provisions of the Bill risk overwhelming limited judicial resources).

113. Jayaram, Testimony on S.B. 423, *supra* note 20, at 1.

114. S. JUDICIAL PROCEEDINGS COMM., VOTING RECORD: SENATE BILL 423, 2018 Leg., 438th Sess. (Md. 2018).

115. *See infra* Sections II.A–B.

116. Shellenberger, Testimony on S.B. 423, *supra* note 110, at 2.

117. Statement of Sen. Robert Zirkin at 1:09:30–1:10:50, Post-Conviction–DNA Testing and Petition for Actual Innocence: Hearing on S.B. 423 Before the S. Judicial Proceedings Comm., 2018 Leg., 438th Sess. (Md. 2018) [hereinafter Statement of Sen. Zirkin], http://mgahouse.maryland.gov/mga/play/f00eff80-d946-4174-a43f-14e1bd4a9a82/?catalog/03e481c7-8a42-4438-a7da-93ff74bdaa4c.

118. *See infra* Section II.A.1–2.

minimalist factual record.[119] Section C explains how newly discovered evidence favors substantive accuracy over finality.[120] Ultimately, the amendments to Sections 8-201 and 8-301 that permitted access to the new evidence postconviction review mechanisms for defendants with plea deals satisfied detractors of the legislation and aligned with the Maryland legislature's intent.

A. The Maryland Legislature Satisfied the Judiciary's Procedural Guidance and Resources Concerns

The General Assembly made several adjustments to S.B. 423 to protect the interests of the Maryland judiciary. The General Assembly modified S.B. 423 to (1) establish judicial procedures for postconviction review of plea deals using newly discovered evidence;[121] and (2) give the court discretionary authority over petitions for new evidence postconviction review in order to protect judicial resources.[122]

1. The Legislature Provided Procedural Guidance

The Maryland judiciary was concerned that postconviction review of pleas deals lacked sufficient procedural guidance to evaluate newly discovered evidence.[123] The judiciary based its opposition to the Section 8-201 and 8-301 amendments on the court's inability "to determine what weight to give" the minimalist factual record in a plea deal at a subsequent trial.[124] This was the same concern articulated by the Court of Appeals in *Yonga* when the court reiterated its previous holding that "there was a dearth of 'rules of procedure to guide the process'" for a trial under Section 8-301 for a defendant who accepted a plea deal.[125] Moreover, in *Jamison*, the court posited that "legislative action may be more appropriate, should the Legislature choose to act, because of the numerous variables that need to be considered to define the boundaries of post-conviction DNA testing, were the petitioner to have pled guilty."[126] The General Assembly understood these concerns to be a request from the judiciary for statutory guidance on the evaluation of newly discovered evidence at postconviction review.[127] The

119. *See infra* Section II.B.1–2.

120. *See infra* Section II.C.

121. *See infra* Section II.A.1.

122. *See infra* Section II.A.2.

123. Letter from Md. Judicial Conference Opposing S.B. 423, *supra* note 109.

124. *Id.*

125. 446 Md. 183, 209, 130 A.3d 486, 501 (2015) (citing State v. Matthews, 415 Md. 286, 298, 999 A.2d 1050, 1057 (2010)).

126. 450 Md. 387, 414, 148 A.3d 1267, 1284 (2016).

127. Statement of Sen. Delores G. Kelley at 25:45, 26:33, Post-Conviction–DNA Testing and Petition for Actual Innocence: Hearing on S.B. 423 Before the S. Judicial Proceedings Comm.,

Floor Report for S.B. 423, therefore, summarized the purpose of the Bill as "*establish[ing] procedures* for postconviction DNA testing . . . when a verdict of guilty was reached as a result of a plea of guilty, an Alford plea, or a plea of nolo contendere . . . [and] *establish[ing] similar procedures* in connection with a petition for writ of actual innocence"[128]

In Maryland, a defendant may seek a judicial remedy for a wrongful conviction via a direct appeal, a motion for a new trial, or a postconviction review.[129] Of these three judicial remedies, postconviction review is the preferred method for seeking redress for a defendant with a plea deal because (1) a direct appeal is limited to the minimalist factual record; (2) time constraints on filing a motion for a new trial may preclude the discovery of new evidence; and (3) postconviction review "allows a person to challenge [their] conviction using grounds that could not have been raised on direct appeal" or on a motion for a new trial.[130] For crimes under Maryland law, one such ground for postconviction review is newly discovered evidence and, particularly, DNA evidence.[131]

The United States Supreme Court noted in *District Attorney's Office for the Third Judicial District v. Osborne*[132] that "DNA evidence will undoubtedly lead to changes in the criminal justice system," but the Court did not specify whether the legislature or the judiciary would revise the rules of criminal procedure to keep up with these changes.[133] In Maryland, the legislature took the lead by enacting procedural rules for postconviction review that included (1) managing untimely postconviction reviews;[134] (2) adopting the Post-Conviction DNA Testing Rule to specify additional procedures for introducing and evaluating DNA evidence;[135] and (3) making several clarifying amendments to Sections 8-201 and 8-301 that incrementally broadened the scope of each statute.[136] Then, in response to the Court of

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2018 Leg., 438th Sess. (Md. 2018), http://mgahouse.maryland.gov/mga/play/f00eff80-d946-4174-a43f-14e1bd4a9a82/?catalog/03e481c7-8a42-4438-a7da-93ff74bdaa4c.

128. S. JUDICIAL PROCEEDINGS COMM., FLOOR REPORT: SENATE BILL 423, 2018 Reg. Sess., at 1 (Md. 2018) (emphasis added).

129. MD. R. 8-131 (2018); MD. R. 7-101–109 (2018); MD. R. 4-331 (2018).

130. King, *supra* note 12, at 1–2, 4.

131. MD. CODE ANN., CRIM. PROC. §§ 8-201, 8-301 (LexisNexis 2018).

132. 557 U.S. 52 (2009).

133. *Id.* at 74.

134. Rule 4-331(c)(1), which permits newly discovered evidence to trigger a belated appeal; Rule 4-331(c)(2), which mandates no time requirement for DNA testing; Rule 4-332(c), which allows a petition for writ of actual innocence to be filed at any time.

135. *See* MD. R. 4-701–711 (2018) (specifying the procedural rules for postconviction DNA testing); MD. R. 4-331(d) (2018) ("DNA Evidence. If the defendant seeks a new trial or other appropriate relief under . . . § 8-201, the defendant shall proceed in accordance with Rules 4-701 through 4-711.").

136. *See* MD. CODE ANN., CRIM. PROC. § 8-201 (LexisNexis 2018) (amended 2002, 2003, 2004, 2009, 2015) (focusing on the following broadening amendments: (1) mandating the preservation of biological evidence for use in DNA testing; (2) requiring a law enforcement database

Appeal's rulings in *Yonga* and *Jamison*, the legislature amended Sections 8-201 and 8-301 to provide broad procedural guidance for postconviction review of plea deals when new evidence emerges.[137] With this latest guidance, the legislature gave the court a higher evidentiary standard against which to weigh newly discovered evidence and expanded the admissible evidence for postconviction review.[138] Thus, the legislature provided the statutory guidance that the judiciary requested to evaluate new evidence at postconviction review.

2. The Legislature Gave the Court Discretionary Authority to Protect Judicial Resources

Expressing a perceived need to protect judicial resources, the MSBA opposed the Section 8-201 and 8-301 amendments due to its concern that postconviction review of plea deals using new evidence would overly burden the judicial system.[139] This concern manifested itself in the original version of S.B. 423 that limited a court to two options when newly discovered evidence met the evidentiary standard in the statute: ordering a new trial or vacating a conviction.[140] The OAG objected to this language on the grounds that a court could not use its own discretion in determining which cases qualify for postconviction review.[141] In its testimony, the OAG noted that courts routinely see petitions for new trials many years after conviction, and the ability to effectively prosecute these cases depends on caseload and budgetary constraints.[142] Hence, it may be inferred that depriving a court of its discretion on whether or not to hear cases could overly burden the judicial system with petitions for postconviction review.[143] The General As-

search if there is a reasonable probability that the evidence is exculpatory or mitigating; and (3) directing the court to order a new trial if there is a substantial possibility that the defendant would not have been convicted had the DNA been available at trial); MD. CODE ANN., CRIM. PROC. § 8-301 (LexisNexis 2018) (amended 2010, 2017) (broadening § 8-301 by (1) allowing defendants to petition for a writ of innocence after indictment; (2) mandating the State to respond to a petition within ninety days; (3) requiring notification of the victim representative; and (4) permitting the State's Attorney to certify a conviction in error).

137. §§ 8-201(i)(4)(i)–(iii), 8-301(f)(2)(i)–(iii) (2018).

138. *Id.*

139. Letter from Md. State Bar Ass'n Opposing S.B. 423, *supra* note 112.

140. S. 423, 2018 Leg., 438th Sess. (Md. 2018) (as amended by S. Judicial Proceedings Comm., Jan. 25, 2018).

141. Statement of Carrie Williams, Md. Office of the Att'y Gen. at 40:38, Post-Conviction–DNA Testing and Petition for Actual Innocence: Hearing on S.B. 423 Before the S. Judicial Proceedings Comm., 2018 Leg., 438th Sess. (Md. 2018) [hereinafter Statement of Carrie Williams], http://mgahouse.maryland.gov/mga/play/f00eff80-d946-4174-a43f-14e1bd4a9a82/?catalog/03e481c7-8a42-4438-a7da-93ff74bdaa4c.

142. *Id.* at 43:20; Letter from Md. Office of the Att'y Gen. Opposing S.B. 677, *supra* note 94, at 2.

143. Statement of Carrie Williams, *supra* note 141; Letter from Md. Office of the Att'y Gen. Opposing S.B. 677, *supra* note 94, at 2.

sembly subsequently struck the provisions requiring a new trial or vacating a conviction and gave the court the discretion to hear postconviction review cases as the court deems appropriate.[144]

To further ensure the protection of judicial resources, the General Assembly conducted a fiscal impact study of S.B. 423.[145] The General Assembly determined that the Section 8-201 and 8-301 amendments "[are] not expected to materially affect State finances . . . [and are] not expected to materially affect local finances or circuit court caseloads."[146] Finally, the Innocence Project quelled concerns that postconviction review of plea deals when new evidence emerges would result in a "flood of litigation" because, after 2001 and 2009 when Sections 8-201 and 8-301 were passed, the judicial system had not experienced a surge in postconviction review litigation.[147] Hence, by giving the Maryland judiciary the discretion on whether or not to hear postconviction review of plea deals using newly discovered evidence, the General Assembly adequately ensured that judicial system resources would not be overburdened.

B. The Maryland Legislature Satisfied the State's Concerns About the Minimalist Factual Record

The General Assembly acknowledged that the minimalist factual record of a plea deal is "the challenge of this Bill" when it made several adjustments to S.B. 423 to protect the interests of the State of Maryland.[148] The General Assembly addressed the issue of building a postconviction review case from the minimalist factual record by (1) rejecting the substantial and significant possibility evidentiary standard for newly discovered evidence;[149] and (2) relaxing the admissibility of evidence in postconviction review of plea deals.[150]

1. The Legislature Rejected the Substantial and Significant Possibility Evidentiary Standard for Postconviction Review

In the first draft of S.B. 423, the evidentiary standard for newly discovered evidence was a substantial or significant possibility that the defendant would not have been convicted had the evidence been known at the

144. MD. CODE ANN., CRIM. PROC. §§ 8-201(i)(4)(i)(1)–(3), 8-301(f)(2)(ii)(1)–(2) (LexisNexis 2018).

145. S. JUDICIAL PROCEEDINGS COMM., FLOOR REPORT: SENATE BILL 423, 2018 Leg., 438th Sess. (Md. 2018).

146. *Id.* at 5.

147. Jayaram, Testimony on S.B. 423, *supra* note 20, at 6; *see also supra* note 14 (demonstrating that only six petitions for new evidence postconviction review came before the Maryland courts beginning with the passage of §§ 8-201, 8-301 and ending in 2016).

148. Statement of Sen. Zirkin, *supra* note 117, at 29:02–29:28.

149. *See infra* Section II.B.1.

150. *See infra* Section II.B.2.

time of conviction.[151] In *Yonga*, when the court stated, "No case has been located . . . in which a motion for new trial under Rule 4-331(c)(1) has been asserted when the proponent pled guilty," the court reasoned that the substantial or significant possibility standard[152] under Section 8-301 for introducing new evidence at postconviction review only applied to trials.[153] In its *Yonga* and *Jamison* decisions, the Court of Appeals cited the Court of Special Appeals for its description of the "process of determining 'substantial or significant possibility,'" also known as the "before and after" test:[154]

> In every newly discovered evidence case, including newly discovered DNA evidence or other newly discovered evidence of actual innocence, there is a universally recognized procedure for measuring the persuasive weight of such newly discovered evidence. That is the "before and after" test. We first look at the evidence of guilt before the jury at the trial that led to the conviction. We then look at the newly discovered evidence. The acid test is to ask whether, if that jury had had the benefit of the newly discovered evidence as well as the evidence that was before them, would there be "a substantial or significant possibility that the result would have been different?" There is no way that such a test can be applied, however, to a conviction based on a guilty plea rather than upon a trial. The minimalist statement of facts offered in factual support of a guilty plea is no equivalent of or substitute for an actual trial. It was never intended to be.[155]

The State enters only a minimalist factual record in support of a plea deal because the State is relieved of its burden of proof to show that the defendant is guilty beyond a reasonable doubt.[156] In contrast to a conviction by trial, in a plea deal the defendant admits to the elements of the crime but essentially agrees to a "criminal settlement" without factual findings or the resolution of legal claims.[157] Although no jury actually sees the evidentiary record at postconviction review, the court attempts to get inside the hypothetical jury's head and determine whether an average juror "could have convicted the defendant on the evidence presented."[158] Hence, the court

151. S. 423, 2018 Leg., 438th Sess. (Md. 2018) (as amended by S. Judicial Proceedings Comm., Jan. 25, 2018).

152. As previously noted, § 8-201 also contained a *substantial possibility* standard for postconviction review of new DNA evidence. *See supra* notes 85–86 and accompanying text.

153. 446 Md. 183, 208, 130 A.3d 486, 500 (2016); *see supra* notes 72–73 and accompanying text.

154. Jamison v. State, 450 Md. 387, 410, 411, 148 A.3d 1267, 1281, 1282 (2016) (quoting Yonga v. State, 221 Md. App. 45, 68, 69, 108 A.3d 448, 461, 462 (2015)).

155. *Yonga*, 221 Md. App. at 69, 108 A.3d at 462.

156. Statement of Carrie Williams, *supra* note 141, at 41:35.

157. Garrett, *supra* note 1, at 1422.

158. Sigmund G. Popko, *Putting Finality in Perspective: Collateral Review of Criminal Judgments in the DNA Era*, 1 L.J. SOC. JUST. 75, 80 (2011).

must make this determination based on a minimalist factual record and possibly years after conviction when "[w]itnesses [may] have died, memories [may] have faded, [and] evidence [may have] been lost or destroyed. A case that may have been ironclad on the day of the guilty plea may now be impossible to try."[159]

When the General Assembly introduced S.B. 423 in January 2018, the Bill established a "substantial or significant" evidentiary standard for new evidence introduced in the postconviction review of plea deals.[160] In support of this standard, Senator Kelley, on behalf of the General Assembly, asserted the following:

> While a statement of facts offered by the State in support of a plea is necessarily shorter than a trial record, the statement of facts tendered by the State in support of a plea is typically a lengthy, comprehensive, and detailed summary of all incriminating evidence available to the State at the time of the plea . . . .[161]

In her testimony on behalf of the OAG, however, Carrie Williams objected to the substantial or significant possibility standard on the grounds that it established a lower burden of proof for new evidence, thus affecting the State's ability to effectively prosecute a plea deal case from the minimalist factual record.[162] Moreover, the OAG asserted that this standard for postconviction review of plea deals was not used by the vast majority of other jurisdictions.[163] The General Assembly asked the OAG to suggest an appropriate evidentiary standard for use in Maryland, and the OAG offered a standard that combined language from the federal,[164] Arizona,[165] and Delaware[166] postconviction statutes, as follows:

159. Letter from Md. Office of the Att'y Gen. Opposing S.B. 677, *supra* note 94, at 2.

160. S. 423, 2018 Leg., 438th Sess. (Md. 2018) (as amended by S. Judicial Proceedings Comm., Jan. 25, 2018).

161. S.J. Res. 10, 2018 Leg., 438th Sess., at 2 (Md. 2018).

162. Statement of Carrie Williams, *supra* note 141, at 40:38, 43:40–44:10.

163. *Id.* at 43:18.

164. 18 U.S.C. § 3600(a)(10)(B)(iii) (2012) ("There shall be a rebuttable presumption against timeliness for any motion . . . [and] may be rebutted upon the court's finding . . . that the applicant's motion is not based solely upon the applicant's own assertion of innocence and, after considering all relevant facts and circumstances surrounding the motion, a denial would result in a manifest injustice."). "[T]he term 'manifest' means that which is unmistakable, clear, plain, or indisputable and requires that the opposite conclusion be clearly evident." 18 U.S.C. § 3600(a)(10)(C)(ii) (2012).

165. ARIZ. REV. STAT. ANN. § 13-4238(C) (2010) ("The defendant has the burden of proving the allegations of fact by a *preponderance* of the evidence." (emphasis added)).

166. DEL. CODE ANN. tit. 11, § 4504(b) (2015) ("The court may grant a new trial if the person establishes by *clear and convincing* evidence that no reasonable trier of fact, considering the evidence presented at trial, evidence that was available at trial but was not presented or was excluded, and the evidence obtained pursuant to subsection (a) of this section would have convicted the person." (emphasis added)).

> [C]onsidering all of the admissible evidence, whether or not proffered in support of the guilty plea, there is compelling evidence that no reasonable jury would convict the defendant, in light of the newly discovered evidence, the DNA testing, and all of the evidence that the State has whether or not it was admitted in support of the guilty plea.[167]

Subsequent to the OAG's testimony, the General Assembly struck out the substantial or significant possibility standard from S.B. 423 and replaced it with "establish[] by clear and convincing evidence the petitioner's actual innocence of the offense."[168] The General Assembly approved this higher burden of proof for new evidence and thereby eased the State's burden in making its case using the minimalist factual record at postconviction review.[169]

2. The Legislature Relaxed the Admissibility of Evidence for the State

In oral testimony, the OAG advised the General Assembly that because the plea deal factual record is designed to be minimalist, the State does not include all of its admissible evidence in the case record at pleading.[170] The OAG further observed that S.B. 423 lacked language allowing the prosecution to subsequently introduce this evidence at postconviction review.[171] Consequently, the General Assembly modified S.B. 423 to permit, after obtaining the court's approval, the submission of (1) evidence from the factual record at pleading; (2) any admissible evidence that was in the possession of law enforcement but was not added to the factual record at the time of pleading; and (3) any relevant evidence that came into existence after the plea was entered.[172] By including this language in the amendments to Sections 8-201 and 8-301, the General Assembly aided the State's ability to build on the minimalist factual record by relaxing the admissibility of evidence and "[d]eveloping more facts as part of the record at the guilt phase" to better withstand postconviction review.[173]

167. Statement of Carrie Williams, *supra* note 141, at 46:07–46:21.

168. S. 423, 2018 Leg., 438th Sess. (Md. 2018) (as amended by S. Judicial Proceedings Comm., Mar. 21, 2018).

169. S. JUDICIAL PROCEEDINGS COMM., VOTING RECORD: SENATE BILL 423, 2018 Leg., 438th Sess. (Md. 2018).

170. Statement of Carrie Williams, *supra* note 141, at 41:35.

171. *Id.* at 43:18.

172. §§ 8-201(i)(4)(ii)–(iii), 8-301(f)(2)(i), (iii) (2018).

173. Garrett, *supra* note 1, at 1440–41.

C. Newly Discovered Evidence Favors Substantive Accuracy over Finality

Finality in American jurisprudence recognizes that "we can never know with 100% certainty that no error of law or fact was made during trial or appellate proceedings."[174] The pursuit of finality relies on a legal system that "provide[s] a reasoned and acceptable probability that justice will be done, that the facts found will be 'true' and the law applied 'correct.'"[175] Litigation, however, must end because, without finality, wealthy parties could use their resources to postpone final judgment and bring the justice system to a standstill.[176] Although it is impossible to know for certain that justice is done in every case, the introduction of new evidence at postconviction review has the potential to improve the substantive accuracy of convictions.[177] In the case of DNA, defendants are identified from the biological material they leave behind at the crime scene.[178] DNA evidence may not only inculpate a defendant who was at the crime scene, but it may exculpate a defendant who was not at the crime scene and, thus, call into question the identity of the actual perpetrator.[179] Hence, newly discovered evidence favors substantive accuracy over finality.

Placing accuracy above finality is a problem for victim groups, like the MCVRC, that warned the General Assembly against the "wrongful upending of final, proper convictions" in the postconviction review of plea deals when new evidence is discovered.[180] MCVRC acknowledged that innocent defendants may have reasons for taking plea deals, but MCVRC emphasized "[c]rime victims, likewise, have an interest in avoiding unnecessary confrontations with those who perpetrated crimes against them and their loved ones."[181] To ensure that S.B. 423 protected finality, MCVRC proposed five amendments to the Bill[182] that the General Assembly chose not to incorporate into the S.B. 423 amendments.[183]

174. Popko, *supra* note 158, at 76 (footnote omitted) (paraphrasing Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963)).

175. Bator, *supra* note 174, at 448.

176. Popko, *supra* note 158, at 75.

177. Sarah Lucy Cooper, *Judicial Responses to Shifting Scientific Opinion in Forensic Identification Evidence and Newly Discovered Evidence Claims in the United States: The Influence of Finality and Legal Process Theory*, 4 BRIT. J. AM. LEGAL STUD. 649, 673 (2015).

178. Theodore Tibbitts, *Post-Conviction Access to DNA Testing: Why Massachusetts's 278A Statute Should Be the Model for the Future*, 36 B.C. J.L. & SOC. JUST. 355, 363 (2016).

179. *Id.*

180. Md. Crime Victims' Res. Ctr., Inc., Testimony on S.B. 423, *supra* note 111, at 1.

181. *Id.* at 1.

182. *Id.* at 3–4.

183. Act of May 15, 2018, ch. 602, sec. 1, 2018 Md. Laws 3127, 3128–37.

Although reopening cases for wrongfully convicted defendants can be painful to victims and their families,[184] failing to do so risks public safety by "leav[ing] serial offenders at large who could have been otherwise identified and subsequently tried for their offenses."[185] When asked about the impact on victims of a notice of rehearing in a plea deal, the Innocence Project testified that, in spite of the pain of a rehearing, no victim had ever said that they would prefer that an innocent defendant remain incarcerated.[186] Therefore, newly discovered evidence that favors substantive accuracy over finality has the potential to identify wrongfully convicted defendants and bring the real criminal perpetrators to justice.[187]

III. CONCLUSION

The Maryland legislature intended that wrongfully convicted defendants with plea deals should have the "ability to challenge unlawful and unjust convictions."[188] The legislature initiated an effort to amend the statues governing newly discovered evidence at postconviction review after the judiciary barred access to these mechanisms for defendants with plea deals.[189] When the Bill stalled in its first passage attempt in 2017,[190] the legislature subsequently satisfied the concerns of key Maryland stakeholders and ultimately passed the Section 8-201 and 8-301 new evidence postconviction review amendments in 2018.[191]

184. Jayaram, Testimony on S.B. 423, *supra* note 20, at 6.

185. Sen. Kelley, Testimony on S.B. 677, *supra* note 93, at 3.

186. Statement of Michele Nethercott, *supra* note 88, at 34:16, 35:29.

187. Jayaram, Testimony on S.B. 423, *supra* note 20, at 6.

188. S.J. Res. 10, 2018 Leg., 438th Sess., at 2 (Md. 2018).

189. *See supra* Section I.C–D.

190. *See supra* Section I.D.1.

191. *See supra* Sections I.D.2, II.A–B; MD. CODE ANN., CRIM. PROC. §§ 8-201, 8-301 (LexisNexis 2018).