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**CLEARLY ERRONEOUS: THE COURT OF APPEALS OF
MARYLAND'S MISGUIDED SHIFT TO A HIGHER STANDARD
FOR POST-CONVICTION DNA RELIEF**

CHRISTINE E. WHITE*

The State of Maryland has a fascinating connection to the development of post-conviction DNA testing, a connection that demonstrates the need for such testing not only to determine the true perpetrators of serious crimes but also to exonerate the wrongfully convicted.¹ Kirk Noble Bloodsworth “has the fortunate, yet sorrowful, distinction of being the first individual in the United States to be exonerated of a crime that placed him on death row.”² Convicted of rape and murder in 1985 in the Circuit Court for Baltimore County and sentenced to death,³ Mr. Bloodsworth was released from prison

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1. See *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 129 S. Ct. 2308, 2312 (2009) (“DNA testing has an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty.”); cf. *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (arguing that “a fundamental value determination of our society [is] that it is far worse to convict an innocent man than to let a guilty man go free”).

2. John T. Rago, “*Truth or Consequences*” and *Post-Conviction DNA Testing: Have You Reached Your Verdict?*, 107 DICK. L. REV. 845, 848 n.12 (2003). For an in-depth discussion of Mr. Bloodsworth’s case, see *id.* at 857–68.

3. A jury convicted Mr. Bloodsworth of first degree rape and murder in the death of nine-year-old Dawn Hamilton. *Bloodsworth v. State*, 307 Md. 164, 166–67, 173, 512 A.2d 1056, 1057, 1060 (1986). The Court of Appeals of Maryland reversed the conviction based on a finding that Mr. Bloodsworth’s *Brady* rights were violated, but in remanding the case for a new trial, the court held that the evidence presented at trial was more than sufficient to justify Mr. Bloodsworth’s conviction. The court recited the facts used to convict Mr. Bloodsworth, which included five eyewitness identifications, and concluded that “a rational trier of fact could have found beyond a reasonable doubt that [he] committed the crimes.” *Id.* at 171–76, 187, 512 A.2d at 1059–61, 1067. After the new trial, a jury convicted Mr. Bloodsworth of the same crimes, and he received two life sentences. *Bloodsworth v. State*, 76 Md. App. 23, 26, 543 A.2d 382, 384 (1988). On appeal, the Maryland Court of Special Appeals held that a rational fact finder could have found Mr. Bloodsworth guilty beyond a reasonable doubt. *Id.* at 33, 543 A.2d at 387. The Court of Appeals denied a petition for certiorari. *Bloodsworth v. State*, 313 Md. 688, 548 A.2d 128 (1988).

in 1993 after DNA testing revealed that he could not have committed the crimes.⁴ In the years after Mr. Bloodsworth's release, "Maryland adopted one of the nation's most far-reaching rules for reopening old criminal cases and giving inmates convicted of murder and rape an opportunity to prove their innocence based on DNA evidence."⁵

The Court of Appeals of Maryland granted relief to petitioners in nine of the eleven post-conviction DNA testing cases that have come before it.⁶ In the process, the court developed a petitioner-friendly approach toward reviewing requests for DNA testing.⁷ The court's decision in *Blake v. State* ("*Blake II*"),⁸ however, stands in stark contrast to this petitioner-friendly line of decisions and signals a troubling turn in the court's post-conviction DNA testing jurisprudence. In *Blake II*, the Court of Appeals addressed whether a State search for potentially exculpatory DNA evidence met the reasonableness required by Maryland's post-conviction DNA testing statute.⁹ In finding that the search was reasonable, the court affirmed the post-conviction trial court's denial of Mr. Blake's request for additional searches.¹⁰ The great concern with *Blake II*, notwithstanding the fact that Mr. Blake will most likely spend the remainder of his life in prison, is how the Court of Appeals reached its decision. Namely, the court announced that "[t]he 'clearly erroneous' standard of review is applicable to" a trial

For a discussion of Mr. Bloodsworth's case in the context of expert testimony on eyewitness identification in Maryland, see Derek Simonsen, Comment, *Teach Your Jurors Well: Using Jury Instructions to Educate Jurors About Factors Affecting the Accuracy of Eyewitness Testimony*, 70 MD. L. REV. 1044, 1044–46 (2011).

4. Rago, *supra* note 2, at 867. Polymerase chain reaction ("PCR") testing, "the most advanced type of DNA fingerprinting then known," of a semen sample from the victim's underwear "definitively excluded Kirk Bloodsworth as the donor of the sperm." TIM JUNKIN, BLOODSWORTH: THE TRUE STORY OF THE FIRST DEATH ROW INMATE EXONERATED BY DNA 245, 255 (2004).

5. Dan Rodricks, *Long Wait for Justice with DNA Testing*, BALT. SUN, Sept. 12, 2010, at 25A.

6. See *infra* Parts I.C, II.B. This Comment will discuss the following cases: *Washington v. State*, 424 Md. 632, 37 A.3d 932 (2012); *Arey v. State*, 422 Md. 328, 29 A.3d 986 (2011) [hereinafter *Arey II*]; *Blake v. State*, 418 Md. 445, 15 A.3d 787 (2011) [hereinafter *Blake II*]; *Horton v. State*, 412 Md. 1, 985 A.2d 540 (2009); *Thompson v. State*, 411 Md. 664, 985 A.2d 32 (2009) [hereinafter *Thompson II*]; *Arrington v. State*, 411 Md. 524, 983 A.2d 1071 (2009); *Simms v. State*, 409 Md. 722, 976 A.2d 1012 (2009); *Gregg v. State*, 409 Md. 698, 976 A.2d 999 (2009); *Arey v. State*, 400 Md. 491, 929 A.2d 501 (2007) [hereinafter *Arey I*]; *Thompson v. State*, 395 Md. 240, 909 A.2d 1035 (2006) [hereinafter *Thompson I*]; *Blake v. State*, 395 Md. 213, 909 A.2d 1020 (2006) [hereinafter *Blake I*].

7. See *infra* Part II.B.

8. 418 Md. 445, 15 A.3d 787 (2011).

9. *Id.* at 460, 15 A.3d at 796; see also MD. CODE ANN., CRIM. PROC. § 8-201 (LexisNexis Supp. 2011) [hereinafter § 8-201 (2009)] (effective Jan. 1, 2009) ("DNA evidence—Postconviction review").

10. *Blake II*, 418 Md. at 451–52, 15 A.3d at 791.

court's decision that the State conducted a reasonable search for DNA evidence, as required by Section 8-201.¹¹ The court affirmed that this was the appropriate standard eleven months later, in February 2012, in *Washington v. State*.¹²

This Comment will demonstrate that the decision of the Court of Appeals of Maryland to apply a “clearly erroneous” standard of review to a trial court’s determination that the State conducted a reasonable search for potentially exculpatory DNA is problematic for three reasons. First, a clearly erroneous standard is inconsistent with the intent of the Maryland General Assembly in enacting Section 8-201, the state’s post-conviction DNA testing statute.¹³ Second, in applying this standard, the Court of Appeals departed from its prior course of petitioner-friendly Section 8-201 decisions and jeopardized the potential for relief in future cases.¹⁴ Finally, a clearly erroneous standard of review fails to appreciate the significance of the issues presented by post-conviction DNA testing cases.¹⁵ The Court of Appeals should have adopted a heightened standard to review appeals from a post-conviction trial court’s finding that the State’s search for DNA evidence was reasonable. The more exacting standards adopted by the high courts of other states, particularly the bifurcated standard of review implemented in Texas, provide examples of how the Court of Appeals could have provided petitioners with relief through post-conviction DNA testing, while also according deference to the decisions of post-conviction trial courts.¹⁶ By adopting the clearly erroneous standard, however, the Court of Appeals effectively foreclosed any possibility of meaningful relief for many petitioners.

I. BACKGROUND

The capabilities of DNA technology have advanced significantly since the advent of DNA testing in criminal cases, resulting in extensive attention to the role of DNA testing in post-conviction proceedings throughout the United States.¹⁷ Maryland is among forty-nine states that have adopted DNA testing statutes to provide petitioners with greater post-conviction remedies.¹⁸ Expanding on the path

11. *Id.* at 460, 15 A.3d at 796.

12. 424 Md. 632, 37 A.3d 932, 943 (2012).

13. *See infra* Part II.A.

14. *See infra* Part II.B.

15. *See infra* Part II.C.

16. *See infra* Part II.D.

17. *See infra* Part I.A.

18. *See infra* notes 31–35 and accompanying text.

forged by the Maryland General Assembly, the Court of Appeals of Maryland has developed a body of case law that demonstrates a commitment to increasing access to post-conviction DNA testing.¹⁹ The court's decision in *Blake II*, however, to apply a clearly erroneous standard of review to determinations of the reasonableness of a search for DNA evidence represents a change of course.²⁰

A. *The Role of DNA Testing in Post-Conviction Proceedings*

Modern DNA testing was first used in criminal cases in the United States in the mid-1980s.²¹ Since then, "there have been several major advances in DNA technology, culminating in STR technology."²² Short tandem repeat ("STR") testing "is the most commonly used DNA testing in the criminal justice system."²³ It has "exponentially [increased] the reliability of forensic identification over earlier techniques[, and t]here is now widespread agreement within the scientific community that this technology, which requires literally cellular-size samples only, can distinguish between any two individuals on the planet."²⁴ As a result of these technological advances in DNA testing technology, forensic analysts can now determine with almost "near certainty" whether a suspect is a match for a particular DNA sample.²⁵

The powerful capabilities of DNA testing have become increasingly important in the context of post-conviction proceedings. In *District Attorney's Office for the Third Judicial District v. Osborne*, the United States Supreme Court, in a 5-4 decision, ruled that under the U.S. Constitution there is no substantive due process right to testing of DNA evidence.²⁶ The Court held that the task of determining "how to harness DNA's power to prove innocence without unnecessarily overthrowing the established system of criminal justice[] . . . belongs

19. See *infra* Part I.C.1-2.

20. See *infra* Part I.C.3.

21. *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 129 S. Ct. 2308, 2316 (2009).

22. *Id.*

23. *Gregg v. State*, 409 Md. 698, 720-21 n.10, 976 A.2d 999, 1012 n.10 (2009) (quoting Catherine Arcabascio, *Chimeras: Double the DNA—Double the Fun for Crime Scene Investigators, Prosecutors, and Defense Attorneys?*, 40 AKRON L. REV. 435, 449 (2007)).

24. *Harvey v. Horan*, 285 F.3d 298, 305 (4th Cir. 2002) (Luttig, J., concurring in the judgment); see *id.* at 305 n.1 (providing a detailed discussion of the capabilities of short tandem repeat DNA testing). But see *United States v. Bentham*, 414 F. Supp. 2d 472, 473 (S.D.N.Y. 2006) (acknowledging the fallibility of different types of forensic science, including DNA testing).

25. 557 U.S. 52, 129 S. Ct. 2308, 2312, 2316 (2009).

26. *Id.* at 2312, 2316.

primarily to the legislature.”²⁷ Notwithstanding the absence of a federal constitutional guarantee, Congress passed the Innocence Protection Act of 2004,²⁸ which gives federal prisoners “under a sentence of imprisonment or death pursuant to a conviction for a Federal offense” the opportunity to petition for post-conviction DNA testing.²⁹ The Innocence Protection Act also established the Kirk Bloodsworth Post-Conviction DNA Testing Grant Program, which “award[s] grants to States to help defray the costs of post-conviction DNA testing.”³⁰

On the state level, all fifty states and the District of Columbia provide some form of relief to petitioners who seek exoneration through post-conviction DNA testing. Forty-nine states and the District of Columbia have passed statutes that provide access to such testing.³¹ Oklahoma, the only state that does not have a statute providing

27. *Id.* at 2316.

28. Pub. L. 108-405, 118 Stat. 2279 (codified at 18 U.S.C. § 3600 (2006)).

29. 18 U.S.C. § 3600(a). Under the Innocence Protection Act, a petitioner can gain access to DNA testing of evidence if the court that handed down the judgment finds that certain statutorily mandated conditions are satisfied. *Id.*

30. Pub. L. 108-405, 118 Stat. 2284 (codified at 42 U.S.C. § 14136e (2004)). For a discussion of Mr. Bloodsworth’s conviction for rape and murder and his eventual exoneration in Maryland, see *supra* notes 2-4 and accompanying text.

31. ALA. CODE § 15-18-200 (LexisNexis 2011); ALASKA STAT. § 12.73.010 (2010); ARIZ. REV. STAT. ANN. § 13-4240 (2010); ARK. CODE ANN. §§ 16-112-201 to -202, -208 (2006); CAL. PENAL CODE § 1405 (West 2011); COLO. REV. STAT. ANN. §§ 18-1-411 to -416 (West 2004); CONN. GEN. STAT. ANN. §§ 54-102jj to -102kk (West 2009); DEL. CODE ANN. tit. 11, § 4504 (2007); D.C. CODE §§ 22-4131, -4133 to -4135 (Supp. 2011); FLA. STAT. ANN. §§ 925.11-.12 (West Supp. 2012); GA. CODE ANN. § 5-5-41 (Supp. 2011); HAW. REV. STAT. ANN. §§ 844D-121 to -133 (LexisNexis 2007); IDAHO CODE ANN. §§ 19-4901 to -4911 (2004 & Supp. 2011); 725 ILL. COMP. STAT. ANN. 5/116-3 (West 2008); IND. CODE ANN. §§ 35-38-7-1 to -38-7-19 (LexisNexis Supp. 2011); IOWA CODE ANN. § 81.10 (West 2009); KAN. STAT. ANN. § 21-2512 (2007); KY. REV. STAT. ANN. §§ 422.285, .287 (West 2006 & Supp. 2011); LA. CODE CRIM. PROC. ANN. art. 926.1 (2008 & Supp. 2012); ME. REV. STAT. ANN. tit. 15, §§ 2136-2138 (2003 & Supp. 2011); MD. CODE ANN., CRIM. PROC. § 8-210 (LexisNexis Supp. 2011); MASS. GEN. LAWS ch. 278A (2012); MICH. COMP. LAWS ANN. § 770.16 (West 2006 & Supp. 2011); MINN. STAT. ANN. §§ 590.01-.10 (West 2010); MISS. CODE ANN. § 99-39-5 (Supp. 2011); MO. ANN. STAT. §§ 547.035, .037 (West 2002); MONT. CODE ANN. § 46-21-110 (2011); NEB. REV. STAT. §§ 29-4116 to -4125 (2008); NEV. REV. STAT. ANN. §§ 176.0918-.0919 (LexisNexis 2011); N.H. REV. STAT. ANN. §§ 651-D:1 to :5 (LexisNexis 2007 & Supp. 2011); N.J. STAT. ANN. § 2A:84A-32a (West 2011); N.M. STAT. ANN. § 31-1A-2 (LexisNexis 2009); N.Y. CRIM. PROC. LAW §§ 440.10-.30 (McKinney 2005 & Supp. 2012); N.C. GEN. STAT. §§ 15A-269 to -270.1 (2011); N.D. CENT. CODE ANN. § 29-32.1-15 (West 2006); OHIO REV. CODE ANN. §§ 2953.71-.84 (LexisNexis 2010); OR. REV. STAT. §§ 138.690-.698 (2011); 42 PA. CONS. STAT. ANN. § 9543.1 (West 2007); R.I. GEN. LAWS §§ 10-9.1-10 to -9.1-12 (Supp. 2006); S.C. CODE ANN. §§ 17-28-10 to -28-120 (Supp. 2010); S.D. CODIFIED LAWS §§ 23-5B-1 to -17 (Supp. 2011); TENN. CODE ANN. §§ 40-30-301 to -313 (2006); TEX. CODE CRIM. PROC. ANN. art. 64.01-.05 (West 2006 & Supp. 2011); UTAH CODE ANN. §§ 78B-9-300 to -304 (LexisNexis 2008 & Supp. 2011); VT. STAT. ANN. tit. 13, §§ 5561-5570 (2009); VA. CODE ANN. § 19.2-327.1 (2008); WASH. REV. CODE ANN. § 10.73.170 (West 2002 & Supp. 2012); W.

for access to post-conviction DNA testing,³² does have judicially crafted procedures that provide petitioners with comparable relief.³³ The first state to adopt a post-conviction DNA testing statute was New York, in 1994.³⁴ The Maryland General Assembly followed suit with Section 8-201 in 2001 and has amended the statute several times since its enactment.³⁵ Like the General Assembly, the Court of Appeals of Maryland, until recently, was attuned to the importance of exonerative post-conviction DNA testing and had developed a comprehensive body of case law addressing the various issues that arise in the context of Section 8-201 petitions.³⁶

B. Procedural Requirements for Access to Post-Conviction DNA Testing in Maryland

The Maryland General Assembly adopted Section 8-201 “in line with a nationwide trend . . . to provide an avenue for the exoneration of the actually innocent.”³⁷ The current version of Section 8-201 al-

VA. CODE ANN. § 15-2B-14 (LexisNexis 2009); WIS. STAT. ANN. § 974.07 (West 2007 & Supp. 2011); WYO. STAT. ANN. §§ 7-12-302 to -12-315 (2011).

Massachusetts is the most recent state to enact a post-conviction DNA testing statute. On February 9, 2012, Senate Bill 1987, “An Act Providing Access to Forensic and Scientific Analysis,” was presented to the governor after being passed by the Senate and the House on August 1, 2011, and February 8, 2012, respectively. S.B. 1987, 187th Gen. Court (Mass. 2011). The governor signed the statute on February 17, 2012. Post Conviction Access to Forensic and Scientific Analysis, ch. 38 Acts of 2012 (codified at MASS. GEN. LAWS ch. 278A (2012)).

32. See OKLA. STAT. ANN. tit. 22, § 1371(B) (West 2003) (explaining that “the Oklahoma Indigent Defense System DNA Forensic Testing Program continue[d] until July 1, 2005” but was not renewed).

33. For example, “Curtis Edward McCarty was exonerated in 2007 [after the expiration of Oklahoma’s DNA access statute] after serving 21 years—including 19 years on death row—for a 1982 Oklahoma City murder he didn’t commit.” *Know the Cases: Curtis McCarty*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Curtis_McCarty.php (last visited Mar. 13, 2012). In addition, Robert Lee Miller, Jr., was exonerated of two rape and murder convictions in 1998, two years before Oklahoma’s DNA statute went into effect. *Know the Cases: Robert Miller*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Robert_Miller.php (last visited Mar. 13, 2012); see also *Lott v. State*, 98 P.3d 318, 359–60 (Okla. Crim. App. 2004) (stating that the Court of Criminal Appeals reversed and remanded the conviction of Miller, Lott’s co-defendant, because of new DNA evidence).

34. *Blake I*, 395 Md. 213, 219, 909 A.2d 1020, 1023 (2006); see N.Y. CRIM. PROC. LAW § 440.30(1-a)(a) (“Where the defendant’s motion [to vacate a judgment and set aside a sentence] requests the performance of a forensic DNA test on specified evidence, . . . the court shall grant the application . . . upon its determination that if a DNA test had been conducted on such evidence, and if the results had been admitted in the trial resulting in the judgment, there exists a reasonable probability that the verdict would have been more favorable to the defendant.”).

35. See *infra* Part I.B.1.

36. See *infra* Part I.C.

37. *Blake I*, 395 Md. at 219, 909 A.2d at 1023.

lows petitioners to access “DNA testing [that] has the scientific potential to produce exculpatory or mitigating evidence relevant to a claim of wrongful conviction or sentencing.”³⁸ The General Assembly has amended Section 8-201 several times to expand petitioners’ access to post-conviction DNA testing.³⁹ One of the ways that the General Assembly sought to achieve this goal is through the appellate procedure that provides for a direct appeal to the Court of Appeals of Maryland, a remedy that is only authorized in a limited number of circumstances.⁴⁰

1. *Statutory Framework of Section 8-201*

Section 8-201 originally took effect in 2001.⁴¹ Maryland was one of seventeen states to pass a post-conviction DNA access statute that year.⁴² Under Section 8-201, an individual who has been convicted of certain crimes, including murder, rape, manslaughter, or a sexual offense in the first or second degree, may file a petition requesting DNA analysis of evidence in the State’s possession or requesting a search “for the purpose of identifying the source of physical evidence used for DNA testing.”⁴³

The Court of Appeals has held that Section 8-201 is a remedial statute because “its purpose is to provide a remedy for persons convicted of serious crimes of which they are actually innocent.”⁴⁴ Thus, the court has ruled that amendments to Section 8-201 apply retroactively.⁴⁵ The General Assembly has amended Section 8-201 four times since 2001.⁴⁶ The most significant amendments occurred in 2003 and 2008. In 2003, the General Assembly amended the provision of Sec-

38. § 8-201(d)(1)(i) (2009).

39. *See infra* Part I.B.1.

40. *See infra* Part I.B.2.

41. MD. CODE ANN., CRIM. PROC. § 8-201 (LexisNexis 2001) [hereinafter § 8-201 (2001)]; *Blake I*, 395 Md. at 219, 909 A.2d at 1023.

42. *Harvey v. Horan*, 285 F.3d 298, 302 (4th Cir. 2002) (Wilkinson, J., concurring in the judgment).

43. § 8-201(b) (2009). The statute covers murder and rape in the second degree. *Id.*

44. *Gregg v. State*, 409 Md. 698, 715, 976 A.2d 999, 1009 (2009).

45. *Id.* at 715–16, 976 A.2d at 1008–09 (“Legislative enactments that have remedial effect and do not impair vested rights also are given retrospective application.” (citing *Langston v. Riffe*, 359 Md. 396, 408, 754 A.2d 389, 395 (2000))); *see also Thompson II*, 411 Md. 664, 680, 985 A.2d 32, 41 (2009) (“[T]he expanded right of appeal accorded by the 2008 statute should be applied retroactively.”); *Arrington v. State*, 411 Md. 524, 542, 983 A.2d 1071, 1081 (2009) (“[T]he common law presumption against retroactive application of statutes” does not apply to remedial statutes.).

46. *Gregg*, 409 Md. at 708 & n.5, 976 A.2d at 1004 & n.5.

tion 8-201 relating to court orders for DNA testing.⁴⁷ These amendments, which took effect October 1, 2003, “relaxed the standard the petitioner must meet to establish entitlement to testing.”⁴⁸ Whereas the version of Section 8-201 in effect prior to the 2003 amendments required a court to make six findings before granting a petitioner’s request for DNA testing,⁴⁹ the 2003 amendments limited the required findings to two. A court must grant a petitioner’s Section 8-201 request “if the court finds that: (1) a reasonable probability exists that the DNA testing has the scientific potential to produce exculpatory or mitigating evidence relevant to a claim of wrongful conviction or sentencing; and (2) the requested DNA test employs a method of testing generally accepted within the relevant scientific community.”⁵⁰

The current version of Section 8-201 no longer requires a petitioner to establish that the evidence in question “was not previously subjected to the DNA testing that is requested” or that the requested testing is different from previously conducted tests.⁵¹ Furthermore, a petitioner no longer needs to establish that there is a “reasonable probability” that the results of DNA testing could be “*materially relevant* to [an] *assertion of innocence*.”⁵² Instead, the “reasonable probability”

47. MD. CODE ANN., CRIM. PROC. § 8-201 (LexisNexis Supp. 2003) [hereinafter § 8-201 (2003)] (effective Oct. 1, 2003).

48. *Gregg*, 409 Md. at 711, 714, 976 A.2d at 1006, 1008.

49. The pre-2003 version of the court order provision stated:

[A] court shall order DNA testing if the court finds that: (1)(i) the scientific identification evidence was not previously subjected to the DNA testing that is requested for reasons beyond the control of the petitioner; or (ii) the type of DNA test being requested is different from tests previously conducted and would have a reasonable likelihood of providing a more probative result than tests previously conducted; (2) the scientific identification evidence was secured as provided in subsection (i) of this section, in relation to the crime for which the petitioner was convicted; (3) the scientific identification evidence to be tested has been subject to a chain of custody as provided under subsection (i) of this section that is sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material aspect; (4) identity was an issue in the trial that resulted in the petitioner’s conviction; (5) a reasonable probability exists that the DNA testing has the scientific potential to produce results materially relevant to the petitioner’s assertion of innocence; and (6) the requested DNA test employs a method of testing generally accepted within the relevant scientific community.

§ 8-201(c) (2001).

50. § 8-201(c) (2003). The *Gregg* court noted that “as of January 1, 2009, what was subsection (c) has been re-lettered.” *Gregg*, 409 Md. at 712, 976 A.2d at 1007. The 2008 “amendments made no change to the wording of what was subsection (c), but other changes to the statute prompted its re-lettering as subsection (d).” *Simms v. State*, 409 Md. 722, 728 n.6, 976 A.2d 1012, 1016 n.6 (2009).

51. Compare § 8-201(d) (2009), with § 8-201(c)(1)(i) (2001).

52. § 8-201(c)(5) (2001) (emphasis added).

now required is that the DNA testing could “produce exculpatory or mitigating evidence *relevant to a claim of wrongful conviction or sentencing.*”⁵³

The 2008 amendments took effect January 1, 2009, and will remain in effect through December 31, 2013.⁵⁴ Through the 2008 amendments, the General Assembly afforded petitioners the opportunity for a new trial when (1) the DNA testing produces a result that is favorable to the petitioner and (2) there is a substantial possibility “that the petitioner would not have been convicted if the DNA testing results had been known or introduced at trial.”⁵⁵ Even if there is no such possibility, a “court may order a new trial if the court determines that the action is in the interest of justice.”⁵⁶ The 2008 amendments also expanded the State’s duty to preserve scientific evidence under Section 8-201.⁵⁷ If the State cannot produce the requested DNA evidence, the petitioner is entitled to a hearing so that the trial court can “determine whether the failure to produce evidence was the result of intentional and willful destruction.”⁵⁸ Thus, the current version of Section 8-201, implemented by the 2008 amendments and in effect from 2009 through 2013, provides petitioners with more relief than was previously available or than will be available beginning in 2014.⁵⁹

53. § 8-201(d)(1)(i) (2009) (emphasis added); *see also Gregg*, 409 Md. at 708–12, 976 A.2d at 1004–07 (discussing the differences between the version of Section 8-201 in effect prior to the 2003 amendments and the current version of the statute).

54. § 8-201 (2009). On January 1, 2014, Section 8-201 reverts back to the version that was in effect before the 2008 amendments took effect. MD. CODE ANN., CRIM. PROC. § 8-201 (LexisNexis 2008 & Supp. 2011) [hereinafter § 8-201 (2014)] (effective Jan. 1, 2014).

55. § 8-201(i)(2)(iii) (2009).

56. § 8-201(i)(3).

57. The General Assembly kept the version of the statute requiring the State to preserve evidence containing DNA material added by the 2003 amendments, but added the lengthy provision concerning situations in which the State cannot produce the requested DNA evidence. *Compare* § 8-201(j)(3) (creating the procedures a court must follow when “the State is unable to produce scientific identification evidence”), *with* § 8-201(i) (2003) (creating a duty on the part of the State to preserve scientific identification evidence).

58. § 8-201(j)(3)(i) (2009). If “the failure to produce evidence was the result of intentional and willful destruction, the [post-conviction] court shall: 1. order a postconviction hearing . . . ; and 2. . . . infer that the results of the postconviction DNA testing would have been favorable to the petitioner.” § 8-201(j)(3)(ii). *But see* *Washington v. State*, 424 Md. 632, 37 A.3d 932, 950, 952 (2012) (“In reviewing the legislative history of § 8-201(j), specifically the State’s duty to preserve scientific identification evidence, it is clear that the legislature intended for this duty to be applied prospectively. . . . [S]ubsection (j), and any relief offered therein, does not apply to evidence that was lost or destroyed before the effective date of the statute on October 1, 2001.”).

59. For example, the 2009–2013 version of § 8-201 allows petitioners to file a motion for a new trial “on the grounds that the conviction was based on unreliable scientific identification evidence and a substantial possibility exists that the petitioner would not have been convicted without the evidence.” § 8-201(c) (2009). That provision, however, will be

2. *Instances of Direct Appeals to the Court of Appeals Under Section 8-201 and Other Provisions of Maryland Law*

The procedure for appealing a trial court's order denying a motion for a post-conviction search for or testing of DNA evidence is notable because Section 8-201 provides for a direct appeal of such orders to the Court of Appeals.⁶⁰ This form of appeal is relatively uncommon in Maryland, as it is only authorized in a limited number of cases. The direct appeal provision of Section 8-201 states that "[a]n appeal to the court of appeals may be taken from an order entered under this section."⁶¹ The General Assembly added the direct appeal provision to Section 8-201 in 2003.⁶² The version of Section 8-201 in effect after the 2003 amendments authorized a direct appeal to the Court of Appeals for orders entered under certain subsections,⁶³ but the current version of Section 8-201, added by the 2008 amendments and effective January 1, 2009, makes no such distinction and allows a direct appeal from any order issued pursuant to Section 8-201.⁶⁴ The Court of Appeals acknowledged the distinction between the different versions of the direct appeal provision, noting that the current version gives a "more liberal right to appeal."⁶⁵ Although Section 8-201(k)(6) states that an appeal "may be taken" to the Court of Appeals, the court has interpreted the provision to mean that "Section 8-201 *clearly affords the claimant a right to 'an appeal.'*"⁶⁶ Thus, the Court of Appeals does not require a grant of certiorari to hear an appeal brought pursuant to Section 8-201.⁶⁷

abrogated, along with the rest of the 2008 amendments on December 31, 2013. § 8-201 (2014). *But see Washington*, 37 A.3d at 952–53 (noting that the decision to grant a new trial is left to the discretion of the trial court and is only subject to review by the Court of Appeals for an abuse of discretion).

60. § 8-201(k)(6) (2009); *see Simms v. State*, 409 Md. 722, 724 n.2, 976 A.2d 1012, 1014 n.2 (2009) ("The denial of a petition under § 8-201 is subject to direct appeal to this Court.").

61. § 8-201(k)(6) (2009).

62. *Gregg v. State*, 409 Md. 698, 706 n.3, 976 A.2d 999, 1004 n.3 (2009).

63. § 8-201(j)(6) (2003) ("An appeal to the court of appeals may be taken from an order entered under subsection (c) [court orders for DNA testing], (h)(2) [DNA testing results favorable to the petitioner], or (j)(4) [written objection to the State's notice that it intends to dispose of DNA evidence] of this section.").

64. § 8-201(k)(6) (2009) ("An appeal to the court of appeals may be taken from an order entered under this section.").

65. *Arrington v. State*, 411 Md. 524, 542, 983 A.2d 1071, 1081 (2009).

66. *Id.* (emphasis added).

67. *Id.* at 541–44, 983 A.2d at 1081–83 ("[T]he dissent erroneously avers that we cannot take the merits of this cause because we did not grant *certiorari*. [There is] clear legislative intent that the *certiorari* process need not be followed . . ."). *But see id.* at 557–58, 983 A.2d at 1090 (Battaglia, J., dissenting) (noting that the court was not presented with a

The Maryland General Assembly has authorized a similar remedy for a direct appeal to the Court of Appeals in only a very limited number of other circumstances.⁶⁸ Of the four bases of jurisdiction for the Court of Appeals laid out in the Courts and Judicial Proceedings Article of the Annotated Code of Maryland, two provide for a direct appeal to the Court of Appeals.⁶⁹ The Court of Appeals has “[e]xclusive appellate jurisdiction” over (1) “question[s] of law certified to it under the Uniform Certification of Questions of Law Act”⁷⁰ and (2) any criminal cases involving sentences of death⁷¹ or an inmate

petition for certiorari and arguing that the majority “has failed to acknowledge the difference between our exclusive jurisdiction, when the Legislature mandates that we take a case on direct appeal, and our discretionary jurisdiction, when we may take an appeal [because the court’s] jurisdiction in cases such as the present under Section 8-201 can only be exercised under a certiorari grant”). Judge Battaglia made the same certiorari argument in her dissenting opinion in *Horton v. State*, 412 Md. 1, 28, 985 A.2d 540, 555–56 (2009) (Battaglia, J., dissenting). It appears that Judge Battaglia has abandoned the certiorari argument, as she did not raise it in the subsequent decisions of *Blake II* and *Washington v. State*, and she did not participate in *Arej II*.

68. See *Arrington*, 411 Md. at 561–62, 983 A.2d at 1093 (describing in detail the jurisdiction of the Court of Appeals and the cases that fall within the court’s exclusive jurisdiction).

69. MD. CODE ANN., CTS. & JUD. PROC. § 12-307 (LexisNexis 2006).

70. *Id.* § 12-307(3). The Uniform Certification of Questions of Law Act allows the Court of Appeals and the Court of Special Appeals to certify a question of law to be answered by the highest court of another state and allows the Court of Appeals to answer a question of law certified to it by a federal court or an appellate court of another state. *Id.* § 12-602 to -603. The Court of Appeals explained that “the purpose of the Uniform Certification of Questions of Law Act is to obtain authoritative decisions concerning the law of a particular state or tribe, in order to assist federal courts, Native American tribal courts, and state appellate courts in other states in their decision-making processes.” *Piselli v. 75th St. Med.*, 371 Md. 188, 202, 808 A.2d 508, 516 (2002).

71. CTS. & JUD. PROC. § 12-307(4). Importantly, appeals of orders entered under Maryland’s Uniform Postconviction Procedure Act (“UPPA”) or Maryland Rule 4-331, which governs motions for new trials in criminal cases, can only reach the Court of Appeals through the traditional certiorari process. MD. CODE ANN., CRIM. PROC. § 7-109(a) (LexisNexis 2008); MD. R. 8-202(b), -301(a). Adopted by the Maryland General Assembly in 1958, “[UPPA] protected a broad array of rights, placed limits on collateral litigation (especially through *res judicata* and ‘waiver’ provisions), and took a step toward unifying the various collateral remedies by making the postconviction process the primary means of asserting collateral claims.” Michael A. Millemann, *Collateral Remedies in Criminal Cases in Maryland: An Assessment*, 64 MD. L. REV. 968, 991–92 (2005); see also *id.* at 997 (discussing the “[q]ualified [r]ight to [a]ppeal” under UPPA). Rule 4-331 is one of “two provisions [of Maryland law] that allow some prisoners to assert newly discovered evidence, including of innocence, under limited circumstances”; Section 8-201 is the second. *Id.* at 1014–15. Among those who may file motions for a new trial under Rule 4-331(c) are “any defendant who ‘at any time’ files a motion ‘based on DNA identification testing or other generally accepted scientific techniques the results of which, if proven, would show that the defendant is innocent.’” *Id.* at 1014.

deemed to be incompetent.⁷² Not only is the appellate jurisdiction over death penalty cases mandatory for the Court of Appeals, but it is also mandatory for the defendant.⁷³ In addition to the exclusive appellate jurisdiction outlined in Section 12-307 of the Courts and Judicial Proceedings Article, the Court of Appeals has original jurisdiction to review challenges to legislative redistricting plans⁷⁴ and vacancies in the gubernatorial office,⁷⁵ and exclusive jurisdiction to hear appeals in cases of contested elections.⁷⁶

C. Court of Appeals Cases Involving Section 8-201 Petitions for DNA Testing

The Court of Appeals has addressed Section 8-201 petitions for post-conviction DNA testing in eleven cases involving eight petitioners.⁷⁷ The court decided eight cases before *Blake II*,⁷⁸ and has decided

72. CTS. & JUD. PROC. § 12-307(4). The two other bases of jurisdiction for the Court of Appeals outlined in Section 12-307 of the Courts and Judicial Proceedings Article are (1) filing a petition for certiorari from the Court of Special Appeals and (2) granting certiorari from a circuit court when review by the Court of Appeals is necessary for uniform statutory interpretation or is otherwise in the public interest. *Id.* § 12-307(1)–(2).

73. *See* MD. CODE ANN., CRIM. LAW § 2-401(a)(1) (LexisNexis Supp. 2011) (“After a death sentence is imposed and the judgment becomes final, the Court of Appeals *shall review* the sentence on the record.” (emphasis added)).

74. MD. CONST. art. II, § 6(g).

75. *Id.* art. III, § 5.

76. MD. CODE ANN., ELEC. LAW § 12-203(a)(3) (LexisNexis 2010). In addition, an appeal of an order from a circuit court administering a conservatorship or receivership that approves the transfer or sale of assets of a savings and loan association is within the “exclusive and plenary jurisdiction” of the Court of Appeals. MD. CODE ANN., FIN. INST. § 9-712(d)(2) (LexisNexis 2011).

77. The Court of Appeals discussed Section 8-201 in two additional cases, but both cases involved petitions for a writ of actual innocence in light of a claim of newly discovered evidence under Section 8-301 of the Criminal Procedure Article of the Annotated Code of Maryland. *See* *Douglas v. State*, 423 Md. 156, 163–64, 182, 31 A.3d 250, 254–55, 265 (2011) (reviewing denial of a petition for writ of innocence); *State v. Matthews*, 415 Md. 286, 294–98, 999 A.2d 1050, 1055–57 (2010) (applying Section 8-301). The court incorporated Section 8-201 into the *Douglas* and *Matthews* decisions by analogizing to its “liberal construction” of Section 8-201 in prior cases. *Douglas*, 423 Md. at 182–83, 31 A.3d at 265–66; *Matthews*, 415 Md. at 297–98, 999 A.2d at 1057.

That only eleven Section 8-201 cases have reached the Court of Appeals is not meant to suggest that few petitions are filed under Section 8-201 or that the number of petitions filed is consistent with the number of incarcerated individuals who claim innocence and seek access to DNA testing. *See* Rodricks, *supra* note 5 (referencing an interview with Michelle Nethercott, co-director of the Baltimore branch of the Innocence Project, in which Ms. Nethercott remarked that “hundreds of inmates across [Maryland have] asked [her staff] to consider their cases”).

78. The court decided the following cases prior to *Blake II*: *Horton v. State*, 412 Md. 1, 985 A.2d 540 (2009); *Thompson II*, 411 Md. 664, 985 A.2d 32 (2009); *Arrington v. State*, 411 Md. 524, 983 A.2d 1071 (2009); *Simms v. State*, 409 Md. 722, 976 A.2d 1012 (2009); *Gregg*

two cases since.⁷⁹ The eleven decisions can be separated into two groups: (1) “search for evidence” cases and (2) “evidence in hand” cases. In the “search for evidence” line of cases, the petitioners requested that the State conduct a search for potentially exculpatory DNA evidence allegedly in the State’s possession.⁸⁰ In the “evidence in hand” group, the State had the evidence in its possession, and the petitioners requested that the State test the evidence or take other action.⁸¹

1. “Search for Evidence” Cases

In October 2006, the Court of Appeals issued its first decision in a post-conviction DNA testing case involving a search for evidence—*Blake v. State* (“*Blake I*”).⁸² The court found that the Circuit Court for Baltimore City “erred in summarily dismissing” Mr. Blake’s petition because Mr. Blake was not given “an opportunity to respond to the State’s assertion that the evidence at issue no longer was in its possession.”⁸³ Remanding the case to circuit court, the Court of Appeals reasoned that Section 8-201 presumes that the requested DNA evidence exists, and therefore, does not “contemplate circumstances where the evidence has been destroyed before the adoption of the statute, or where there is a factual dispute over the existence of DNA testing evidence.”⁸⁴ The court held that “when an inmate files a petition for postconviction DNA testing, the State should make an extensive search for the [requested] evidence.”⁸⁵ Relying on a 1999 report from the National Commission on the Future of DNA Evidence

v. State, 409 Md. 698, 976 A.2d 999 (2009); *Arey I*, 400 Md. 491, 929 A.2d 501 (2007); *Thompson I*, 395 Md. 240, 909 A.2d 1035 (2006); *Blake I*, 395 Md. 213, 909 A.2d 1020 (2006).

79. *Washington v. State*, 424 Md. 632, 37 A.3d 932 (2012); *Arey II*, 422 Md. 328, 29 A.3d 986 (2011). Eight of the eleven cases originated in the Circuit Court for Baltimore City. *Arey II*, 422 Md. 328, 29 A.3d 986; *Blake II*, 418 Md. 445, 15 A.3d 787; *Thompson II*, 411 Md. 664, 985 A.2d 32; *Simms*, 409 Md. 722, 976 A.2d 1012; *Gregg*, 409 Md. 698, 976 A.2d 999; *Arey I*, 400 Md. 491, 929 A.2d 501; *Thompson I*, 395 Md. 240, 909 A.2d 1035; *Blake I*, 395 Md. 213, 909 A.2d 1020. Two of the cases originated in the Circuit Court for Montgomery County. *Horton*, 412 Md. 1, 985 A.2d 540; *Arrington*, 411 Md. 524, 983 A.2d 1071. The Court of Appeals’ eleventh and most recent Section 8-201 case originated in Wicomico County. *Washington*, 424 Md. 632, 37 A.3d 932.

80. See *infra* Part I.C.1.

81. See *infra* Part I.C.2.

82. 395 Md. 213, 909 A.2d 1020 (2006). For a more detailed discussion of *Blake I*, see *infra* Part I.C.3.a.

83. *Blake I*, 395 Md. at 222, 909 A.2d at 1025.

84. *Id.* at 223, 909 A.2d at 1026.

85. *Id.* at 232, 909 A.2d at 1031.

(“1999 Commission Report”), the court noted that “the most likely places where the evidence may be found” include:

[1] Police department evidence or property rooms [because e]vidence is often found here if the evidence was never tested or it was sent to the State crime laboratory, which then returned it.

[2] Prosecutor’s office [because e]vidence is often found here when it has been introduced at trial.

[3] State and local crime laboratories [because they] often retain slides or other pieces of evidence after conducting testing [even though they] usually return to the police department the clothing and vaginal swabs that are introduced as exhibits at trial.

[4] Hospitals, clinics, or doctors’ offices where sexual assault kits are prepared.

[5] Defense investigators.

[6] Courthouse property/evidence rooms.

[7] Offices of defense counsel in jurisdictions that require parties to preserve exhibits produced at trial.

[8] Independent crime laboratories.

[9] Clerks of court.

[10] Court reporters.⁸⁶

The Court of Appeals had its second opportunity to interpret and apply Section 8-201 nine months later in *Arej v. State* (“*Arej I*”),⁸⁷ holding that the State must “perform[] a reasonable search and demonstrate[] sufficiently a *prima facie* case . . . that the requested evidence no longer exists.”⁸⁸ In 2002, Mr. Arej filed a petition under Section 8-201, requesting that the State retest the blood evidence recovered from the shirt he was wearing when the police interrogated him.⁸⁹ Relying on *Blake I*, the Court of Appeals noted that the burden

86. *Id.* at 220–22, 909 A.2d at 1024–25 (quoting NAT’L COMM’N ON THE FUTURE OF DNA EVIDENCE, NAT’L INST. OF JUSTICE, POSTCONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS 46 (1999), available at <https://www.ncjrs.gov/pdffiles1/nij/177626.pdf>).

87. 400 Md. 491, 929 A.2d 501 (2007).

88. *Id.* at 505, 929 A.2d at 509. In 1974, Mr. Arej “was convicted of first degree murder and use of a handgun in the commission of a crime of violence,” for which he received a sentence of life imprisonment. *Id.* at 494–95, 929 A.2d at 503.

89. *Id.* at 494, 496, 929 A.2d at 503–04. Mr. Arej has blood type O and the victim was type AB. *Id.* at 496, 929 A.2d at 503–04. At his trial and throughout the duration of his Section 8-201 petition, Mr. Arej claimed that the State found blood type AB on the shirt because “he became nervous and started to pick the pimples on his face [, which] caused small amounts of blood to pool on the open sores,” and that the bacteria from the pimples

of proof is on the State to show that requested evidence does not exist.⁹⁰ The court found that an affidavit from the police officer in charge of the Baltimore Police Department's Evidence Control Unit ("ECU"), stating that he had checked the ECU database but had not found the shirt, was insufficient to prove that the evidence no longer existed.⁹¹ The Court of Appeals concluded that the State's search for potentially exculpatory DNA evidence must be *reasonable*, meaning that "the State needs to check any place the evidence could reasonably be found, unless there is a written record that the evidence had been destroyed in accordance with then existing protocol."⁹²

The Court of Appeals did not revisit the "search for evidence" line of cases until over two years later, in 2009, when it decided *Horton v. State*,⁹³ holding that although the State's search for DNA evidence "undoubtedly went several steps beyond the searches conducted in *Blake . . . and Arey*," it failed to meet the standard for a reasonable search developed in those cases.⁹⁴ Mr. Horton filed his Section 8-201 petition in 2006, requesting that the hospital where the victim had been treated "produce any physical evidence related to the victim."⁹⁵ He subsequently "requested that the State search for physical evidence collected from the victim."⁹⁶ The State could not locate the

mixed with the blood and "may have skewed the results of the blood tests." *Id.*, 929 A.2d at 504.

90. *Id.* at 502, 929 A.2d at 507.

91. *Id.* at 499, 503, 929 A.2d at 506, 508.

92. *Id.* at 503–04, 929 A.2d at 508. The court was referring to destruction of evidence protocols in place at police departments, the offices of the clerks of court, and similar offices. *Id.* at 503, 929 A.2d at 508. In addition, the court held that while a petitioner is not entitled to an evidentiary hearing on a Section 8-201 petition, a circuit court *should* hold a hearing "if the court determines that there is a *genuine* factual dispute as to whether the evidence exists." *Id.* at 507, 929 A.2d at 510. The Court of Appeals reversed the circuit court's denial of the Section 8-201 petition and remanded Mr. Arey's case. *Id.* at 494–95, 929 A.2d at 503.

93. 412 Md. 1, 985 A.2d 540 (2009).

94. *Id.* at 15, 985 A.2d at 548. In 1983, "[Mr.] Horton was convicted of first degree rape, assault with intent to maim, and burglary," for which he received a life sentence and two concurrent ten-year sentences. *Id.* at 8–9, 985 A.2d at 544. Among the evidence recovered from the crime scene were blood and semen samples, which were not tested for DNA. *Id.* at 9, 985 A.2d at 544. The medical examiner did, however, perform a blood-typing test and "determined that the samples were consistent with blood group A, which is the blood group of both Horton and the victim." *Id.*

95. *Id.*, 985 A.2d at 545. The State introduced an affidavit from the hospital and a copy of the laboratory's record retention policy, which stated that the hospital did not keep slides for longer than ten years, but the documents did not provide information on the retention policies in place at the time the incident occurred in 1982. *Id.* at 10–11, 985 A.2d at 545–46. In addition, the attorney for the hospital reported that there was no record of the victim being treated there. *Id.* at 11, 985 A.2d at 546.

96. *Id.*

evidence, but it did produce various documents that indicated the evidence “had been approved for destruction.”⁹⁷ The circuit court found that “there is no reasonable basis to believe that any further investigation is going to lead to discovery of any evidence” and dismissed the petition.⁹⁸ The Court of Appeals reversed and remanded, holding that even though the State’s search came close to the standards set in *Blake I* and *Arey I*, the circuit court should not have dismissed the petition because Mr. Horton still wished to search “narrowly tailored additional areas.”⁹⁹

Two years after *Horton*, in 2011, the Court of Appeals issued *Blake II*,¹⁰⁰ its second decision in Mr. Blake’s case, holding that the “‘clearly erroneous’ standard of review” applies to a trial court’s determination that the State conducted a reasonable search for the requested DNA evidence.¹⁰¹ Six months later, the court issued its second decision in Mr. Arey’s case, *Arey v. State* (“*Arey II*”),¹⁰² but declined to review the circuit court’s determination that the search for evidence was reasonable.¹⁰³ The court remanded Mr. Arey’s case based on its finding that the circuit court prematurely denied the Section 8-201 petition by not affording Mr. Arey an opportunity to respond to a “pivotal affidavit” from the State.¹⁰⁴

The Court of Appeals’ most recent pronouncement on the reasonableness of a search for potentially exculpatory DNA evidence is *Washington v. State*,¹⁰⁵ in which the court reaffirmed the clearly erro-

97. *Id.* at 12, 985 A.2d at 546 (internal quotation marks omitted).

98. *Id.* at 14–15, 985 A.2d at 548 (internal quotation marks omitted).

99. *Id.* at 15, 985 A.2d at 548. The Court of Appeals reasoned that the documentation “provided by the State show[ed] that evidence was authorized for destruction, but the State failed to establish that any evidence was actually destroyed.” *Id.* at 16, 985 A.2d at 549. Furthermore, the court held that the State should have tried to determine the evidence retention and destruction protocol in place in Montgomery County in 1982, as it required in *Arey I*. *Id.*, 985 A.2d at 548. *But see id.* at 24, 985 A.2d at 553 (Harrell, J., dissenting) (“*Arey* does not require that each of its enumerated locations be searched in every case. *Arey* requires only a search of locations where the record indicates relevant evidence reasonably is likely to be found.”).

100. 418 Md. 445, 15 A.3d 787 (2011).

101. *Id.* at 460, 15 A.3d at 796. For a more detailed discussion of *Blake II*, see *infra* Part I.C.3.b.

102. 422 Md. 328, 29 A.3d 986 (2011).

103. *Id.* at 334, 29 A.3d at 989 (“Arey argues that the State has failed to look through a large mass of ‘old clothing’ for the shirt and has neglected to search for the blood slides used by the crime laboratory for blood type analysis. These issues, in our view, are best left for the hearing judge . . .”). *But see id.* at 338–39, 29 A.3d at 992 (noting that “the State has taken considerable steps to conduct a reasonable search for the evidence in this case”).

104. *Id.* at 330 & n.4, 29 A.3d at 987 & n.4.

105. 424 Md. 632, 37 A.3d 932 (2012).

neous standard of review announced in *Blake II*.¹⁰⁶ The Circuit Court for Wicomico County granted Mr. Washington-Bey's Section 8-201 petition for a search for DNA evidence in 2009 and served an order "on various law enforcement agencies that may have had possession of or access to biological evidence related to [Mr. Washington-Bey's] case."¹⁰⁷ In response, the circuit court received several affidavits, which indicated that no one was able to locate any of the evidence or explain if, when, or how it had been destroyed.¹⁰⁸ In March 2011, after holding a hearing on Mr. Washington-Bey's subsequent Petition for Production and Testing of DNA Material and Motion for a New Trial, the circuit court "concluded that the evidence was destroyed prior to the time the unsuccessful searches began [in 2002]" and denied the requested relief.¹⁰⁹ On appeal, the Court of Appeals held that "it was not clearly erroneous for the hearing judge to determine that the requested scientific identification evidence no longer exists" and affirmed the circuit court's judgment.¹¹⁰ Thus, *Washington* marked the second time the Court of Appeals applied the clearly erroneous standard of review to a circuit court's finding that the State conducted a reasonable search for DNA evidence and the second

106. *Id.* at 943. The petitioner, known as Michael D. Washington-Bey, was convicted of first degree rape, second degree rape, third degree sexual offense, fourth degree sexual offense, assault, and battery in 1990 and sentenced to life in prison. *Id.* at 933 & n.1, 937. At Mr. Washington-Bey's trial, a serologist testified that Mr. Washington-Bey was "a non-secretor with blood type O," meaning that he did not "secret[e] into [his] other body fluids other than [his] blood." *Id.* at 936 (quoting the serologist). She noted that it was possible "that a non-secretor contributed to the semen found on the vaginal swabs," but "that it was impossible that the fluids on the underwear came from" Mr. Washington-Bey. *Id.*

107. *Id.* at 933. Mr. Washington-Bey sought to have the State produce the underwear the victim wore the night of the attack, vaginal swabs taken from the victim at the hospital where she was treated, and the evidence-retention policies of the hospital, crime laboratory, and police department that were in place at the time of the attack. *Id.* at 939, 947-48.

108. *Id.* at 937-39. The affidavits were produced by the Deputy State's Attorney for Wicomico County, the Maryland State Police Department, the Wicomico County Sheriff's Department, the Maryland State Police Forensic Sciences Division, and Peninsula Regional Medical Center. *Id.* at 938-39.

109. *Id.* at 939, 941-42.

110. *Id.* at 949, 952. The Court of Appeals acknowledged that the State had not produced evidence retention protocols in place at the time of Mr. Washington-Bey's conviction, even though the Wicomico County Sheriff's Office had "older versions of the evidence retention policies." *Id.* at 947. The court found, however, that "even if the protocols from the time of [Mr. Washington-Bey's] conviction to the time he filed the [Section 8-201 petition] were produced, they would only indicate that the requested scientific evidence was in the possession of the Sheriff's Office," and "[t]he hearing judge had substantial evidence before him in this case to determine . . . that [the evidence] was destroyed prior to the enactment date of the statute." *Id.* at 947, 949.

time that the court denied relief to a petitioner under Section 8-201.¹¹¹

2. “Evidence in Hand” Cases

Unlike the “search for evidence” cases, in the “evidence in hand” group, there is no dispute as to the existence of DNA evidence in the State’s possession. In this set of cases, the Court of Appeals has primarily addressed petitioners’ requests to test the DNA evidence and their motions for new trials. In *Thompson v. State* (“*Thompson I*”),¹¹² the first “evidence in hand” case, the Court of Appeals held that a trial court cannot issue an order requiring preservation of DNA evidence for future testing when “there [is] only enough material for a single test” because imposing such an order would completely preclude testing of any DNA evidence.¹¹³ In reversing the circuit court’s partial denial of Mr. Thompson’s Section 8-201 petition, the Court of Appeals reasoned that Section 8-201 “manifests a legislative intent in favor of DNA testing of potentially exculpatory physical evidence.”¹¹⁴ Thus, the court ruled that the circuit court could not order the retention of evidence, even though such an order is permitted by Section 8-201(e)(3),¹¹⁵ if doing so would prevent the petitioner from accessing the DNA testing that the legislature intended.¹¹⁶

111. See *id.* at 947, 948 (finding “that the facts of [Mr. Washington-Bey’s] case are analogous to the facts in *Blake II*” and holding “that the Circuit Court’s conclusion that the search performed by the State in this case was reasonable and was not clearly erroneous”). In addition to denying relief based on the clearly erroneous standard of review for the reasonableness of a search for DNA evidence, the Court of Appeals found that “the State’s duty to preserve scientific identification evidence . . . begins as of the date the statute was enacted and is not to be applied retroactively” and that the denial of Mr. Washington-Bey’s Motion for a New Trial “was not an abuse of discretion[because Mr. Washington-Bey] did not establish that the serological testing and results offered by the State at trial were unreliable and that there was a substantial possibility that [he] would not have been convicted without the serological evidence.” *Id.* at 934–35.

112. 395 Md. 240, 909 A.2d 1035 (2006).

113. *Id.* at 251, 909 A.2d at 1042. In 1988, Mr. Thompson was convicted “of first degree felony murder, first degree rape, burglary, and carrying a weapon with intent to injure.” *Id.* at 245, 909 A.2d at 1039. He filed a Section 8-201 petition for DNA “testing of the semen samples taken from the victim and the blood-stained blue-jeans” and for a comparison of “cytology slides containing the pubic hairs taken from [Mr. Thompson] with the pubic hairs found on the victim.” *Id.* at 246–47, 909 A.2d at 1039–40. The circuit court granted the request to test the semen samples and jeans, but not the cytology slides. *Id.* at 247, 909 A.2d at 1040.

114. *Id.* at 245, 251, 909 A.2d at 1038–39, 1042.

115. The 2008 amendments renumbered the provisions of Section 8-201, but both the pre- and post-amendment versions of the statute allow a court to issue an order requiring “the preservation of some of the sample for replicate testing and analysis.” § 8-201(f)(3)

Nearly three years later, in *Gregg v. State*,¹¹⁷ the Court of Appeals ruled that Section 8-201 is a remedial statute and that, therefore, the amendments are subject to retroactive application.¹¹⁸ The court also held that Mr. Gregg made out a *prima facie* case of entitlement to DNA testing because Section 8-201 “only requires a showing that [there is] a reasonable probability that the DNA testing . . . has the scientific potential to produce relevant exculpatory or mitigating evidence,” and does not require a showing that the jury would have returned a different verdict if it had been presented with the results of the DNA testing.¹¹⁹

(2009); *see also* § 8-201(e)(3) (2014) (Section 8-201 reverts back to the pre-2008 version on January 1, 2014).

116. *Thompson I*, 395 Md. at 251–52, 909 A.2d at 1042. The Court of Appeals also held that the trial court did not have the power to order that the DNA testing results “be precluded from use in further proceedings if samples for retesting are not retained,” reasoning “that preclusion of the use of the DNA test results is an extreme and drastic sanction under this statute [and that] exclusion of the results of DNA testing in future proceedings is tantamount to a sanction of dismissal.” *Id.* at 257, 260–61, 909 A.2d at 1046, 1048.

117. 409 Md. 698, 976 A.2d 999 (2009).

118. *Id.* at 715–16, 976 A.2d at 1008–09; *see also supra* text accompanying notes 44–45. Mr. Gregg was convicted “of first degree murder, conspiracy to commit murder, and use of a handgun in the commission of a felony” for a 2002 shooting death. *Gregg*, 409 Md. at 702, 704, 976 A.2d at 1001–02. In his Section 8-201 petition, Mr. Gregg requested “DNA testing of epithelial cells that were collected on the” trigger of the .45 caliber handgun used in the shooting. *Id.* at 701–02, 976 A.2d at 1001. The cells had not been tested for DNA before the trial. *Id.* at 703, 976 A.2d at 1002. The State contended that the version of Section 8-201 in effect before 2003, which would have required Mr. Gregg “to show that the . . . evidence was not previously tested for reasons beyond his control,” should govern the Court of Appeals’ decision. *Id.* at 712–13, 976 A.2d at 1007. Under the State’s theory, because Mr. Gregg “could have sought to have the cells subjected to DNA analysis before trial,” the trial court rightfully dismissed the Section 8-201 petition. *Id.* at 705, 976 A.2d at 1003.

119. *Id.* at 719–20, 976 A.2d at 1011. The Court of Appeals reversed the post-conviction trial court’s decision and remanded Mr. Gregg’s case with a requirement that the trial court order the DNA testing. *Id.* at 702, 976 A.2d at 1001.

The Court of Appeals issued a decision in *Simms v. State* on the same day it issued the *Gregg* decision, holding that Mr. Simms’s Section 8-201 petition should be liberally construed, not only because Mr. Simms filed the petition *pro se*, but also because “of the salutary purpose of the postconviction DNA statute . . . and the lack, so far, of rules of procedure to guide the process.” 409 Md. 722, 731–32, 976 A.2d 1012, 1018 (2009). For a discussion of the lack of procedural rules governing Section 8-201 petitions, *see infra* note 145. In 1998, Mr. Simms was convicted of two counts of first degree murder and sentenced to two consecutive terms of life imprisonment. *Simms*, 409 Md. at 724, 976 A.2d at 1013–14. In 2008, he filed a *pro se* Section 8-201 petition for DNA testing of evidence collected during the murder investigation, which the circuit court summarily denied. *Id.*, 976 A.2d at 1014. The public defender’s office represented Mr. Simms in his appeal before the Court of Appeals. *Id.* The Court of Appeals found that Mr. Simms made a *prima facie* case of entitlement to STR testing when he claimed that testing physical evidence collected from the murder scene would exclude him as the perpetrator of the crime because STR “testing is far more sensitive and discriminating than the RFLP [restriction fragment

The Court of Appeals had its first opportunity to review the denial of a motion for a new trial based on the results of newly discovered evidence from DNA testing in *Thompson v. State* (“*Thompson II*”).¹²⁰ Relying on the decisions of other state and federal courts “that have developed modern DNA postconviction jurisprudence,”¹²¹ the court emphasized the need to reevaluate a petitioner’s prior confession to a crime when DNA evidence calls the validity of that confession into question.¹²² In ruling that the 2008 amendment authorizing a direct appeal to the Court of Appeals applied retroactively,¹²³ the court held that Mr. Thompson “[was] entitled to the benefit of the more liberal [substantial possibility of acquittal] standard set by the 2008 legislation for determining his eligibility for a new trial.”¹²⁴

The Court of Appeals once again addressed the denial of a motion for a new trial in light of newly discovered DNA evidence in *Arrington v. State*.¹²⁵ The court rejected the State’s jurisdictional certi-

length polymorphism] and PCR testing that was preformed (sic) on the selected tested items.” *Id.* at 726, 732–33, 976 A.2d at 1015, 1018–19 (alteration in original) (internal quotation marks omitted). The Court of Appeals remanded the case so that the trial court could order the State to file an answer to Mr. Simms’s Section 8-201 petition. *Id.* at 734, 976 A.2d at 1020.

120. 411 Md. 664, 685, 985 A.2d 32, 44 (2009). The court granted Mr. Thompson’s request for DNA testing in *Thompson I*. *Id.* at 672, 985 A.2d at 36. The post-conviction court subsequently found that DNA testing excluded Mr. Thompson as the victim’s rapist, but denied the motion for a new trial because the results of the DNA testing did “not show that [Mr. Thompson was] innocent of the underlying crime of burglary.” *Id.* at 674–75, 985 A.2d at 38. The Court of Appeals remanded the case for the circuit court to “consider whether this highly persuasive new evidence might have made a difference to the jury as to the rape and its dual service as a predicate felony for the felony murder charge.” *Id.* at 689, 985 A.2d at 47.

121. *Id.* at 685–89, 985 A.2d 44–46.

122. *Id.* at 692–94, 985 A.2d at 48–50. Mr. Thompson admitted to the police during an interrogation and also testified at his co-conspirator’s trial that he had watched his co-conspirator rape the victim. *Id.* at 669–70, 985 A.2d at 35. In addition, the Court of Appeals focused on the “special impact” of scientific evidence in cases involving crimes of sexual assault. *Id.* at 686–89, 985 A.2d at 44–46. For a discussion of the connection between false confessions and exonerations through post-conviction DNA testing, see *infra* Part II.C.

123. *Thompson II*, 411 Md. at 680, 985 A.2d at 41. The court’s retroactivity holding allowed it to review the post-conviction court’s denial of a motion for a new trial as an appeal brought under Section 8-201, even though Section 8-201 did not have a new trial provision when Mr. Thompson filed his motion. *Id.* at 680–81, 985 A.2d at 41–42.

124. *Id.* at 667, 985 A.2d at 33–34.

125. 411 Md. 524, 527, 983 A.2d 1071, 1071–72 (2009). In 1995, Mr. Arrington was convicted of second degree murder for a stabbing death. *Id.* at 527, 983 A.2d at 1073. He filed his Section 8-201 petition in 2003, requesting that the State test blood stains found on the sweat pants he was allegedly wearing on the night of the stabbing and a sample of the victim’s blood. *Id.* at 533–34, 538, 983 A.2d at 1076, 1079. The DNA results contradicted the evidence introduced by the State at Mr. Arrington’s trial, but the post-conviction court

orari challenge, providing a detailed discussion of the direct appeal provision of Section 8-201 and the “clear legislative intent” not to follow the certiorari process.¹²⁶ Applying the “substantial possibility standard” of Section 8-201, the court concluded that “the DNA evidence obtained after [Mr. Arrington’s] conviction provides a substantial possibility that the jury would have reached a different outcome had this evidence been presented at trial” and remanded the case to the circuit court for a new trial.¹²⁷

3. *Blake I and Blake II: Review in the Court of Appeals of Mr. Blake’s Section 8-201 Petition for a Search for DNA Evidence*

George E. Blake’s case was the first case in which the Court of Appeals applied the clearly erroneous standard of review to a trial court’s determination that the State conducted a reasonable search for DNA evidence. Mr. Blake filed a Section 8-201 petition in the Circuit Court for Baltimore City on December 1, 2004, for DNA testing of evidence used to convict him of first degree rape and first degree sexual offense in January 1982.¹²⁸ In *Blake II*, the Court of Appeals ultimately affirmed the circuit court’s denial of Mr. Blake’s Section 8-201 petition by applying a clearly erroneous standard of review to the determination that the State conducted a reasonable search for potentially exculpatory DNA evidence and conclusion that no additional searches were required to satisfy the standards of Section 8-201.¹²⁹

a. *History of Mr. Blake’s Case*

On January 7, 1982, a jury in the Circuit Court for Baltimore City convicted Mr. Blake of first degree rape and first degree sexual offense for an incident that occurred on July 27, 1981.¹³⁰ He subsequently received a sentence of two consecutive life terms.¹³¹ During the trial, the State introduced a Baltimore City Police Department (“BCPD”) Laboratory Report, which identified twelve “specimens”

denied the motion for a new trial because it did not find that there was a substantial possibility that the jury would have been persuaded by the new evidence. *Id.* at 537, 983 A.2d at 1078–79.

126. *Id.* at 541–44, 983 A.2d at 1080–83; *see also supra* text accompanying notes 65–67.

127. *Arrington*, 411 Md. at 527, 550, 556, 983 A.2d at 1072, 1086, 1089. The Court of Appeals emphasized that the jury’s “keen awareness” of blood evidence in the questions submitted during deliberations after Mr. Arrington’s trial contributed to this “substantial possibility” finding. *Id.* at 552–55, 983 A.2d at 1087–89.

128. *Blake I*, 395 Md. 213, 216, 909 A.2d 1020, 1021 (2006).

129. 418 Md. 445, 460–62, 15 A.3d 787, 796–97 (2011).

130. *Id.* at 447, 15 A.3d at 788.

131. *Blake I*, 395 Md. at 216, 909 A.2d at 1022.

that had been recovered from the victim.¹³² The police also recovered eight additional pieces of evidence, including hair, sheets, and underwear.¹³³ After a laboratory examination, the BCPD filed the evidence in its Evidence Control Section under the property numbers 858944 and 858947.¹³⁴

Mr. Blake filed his Section 8-201 petition for post-conviction DNA testing in the Circuit Court for Baltimore City on December 1, 2004, and requested a hearing and DNA testing of the evidence used to convict him at trial.¹³⁵ After filing an initial motion to dismiss on January 21, 2005, the State filed a supplemental motion to dismiss on May 17, 2005, contending that the requested evidence “had been destroyed well before October 1, 2001.”¹³⁶ The circuit court summarily dismissed Mr. Blake’s petition that same day, “without holding a hearing or otherwise giving [Mr. Blake] an opportunity to respond to the State’s dispositive motion.”¹³⁷ Mr. Blake filed an appeal with the Maryland Court of Special Appeals, which transferred the appeal to the Court of Appeals, in accordance with Md. Rule 8-132.¹³⁸

In October 2006, in *Blake I*, the Court of Appeals held that the circuit court erred in summarily dismissing Mr. Blake’s petition.¹³⁹ Noting that Section 8-201 does not provide the procedures to be followed when the State alleges that the requested evidence no longer exists, the court concluded that “[f]undamental fairness” requires a trial court to “give a petitioner notice of and an opportunity to re-

132. *Blake II*, 418 Md. at 452, 15 A.3d at 791. The specimens included a micro slide, four vaginal swabs, three oral swabs, and four additional unlabeled swabs. *Id.* at 454, 15 A.3d at 793.

133. Specifically, the police recovered head hair, pubic hair, pubic combings, multicolored underwear, a multicolored fitted bedsheets, a multicolored flat bedsheets, a multicolored pillow case, and a blood sample from the victim. *Id.*

134. *Id.* at 452, 15 A.3d at 791. While the laboratory report referred to the “Evidence Control Section,” it appears that today this division of the BCPD is called the Evidence Control Unit (“ECU”). *Id.* at 451–52, 15 A.3d at 791.

135. *Blake I*, 395 Md. at 216, 909 A.2d at 1021.

136. *Id.* at 217, 909 A.2d at 1022. The supplemental motion included: (1) a letter from the Assistant State’s Attorney to the BCPD requesting that the ECU conduct a search for evidence related to Mr. Blake’s case, and (2) an internal BCPD memorandum, which stated that the ECU did not find any evidence. *Id.*

137. *Id.*

138. *Id.* Under Maryland Court Rule 8-132, “[i]f the Court of Appeals or the Court of Special Appeals determines that an appellant has improperly noted an appeal to it . . . the Court shall . . . transfer the action to the court apparently having jurisdiction.” MD. R. 8-132. Thus, Mr. Blake’s appeal to the Court of Special Appeals was unnecessary because Section 8-201 provides for a direct appeal to the Court of Appeals. See *supra* text accompanying notes 60–66.

139. *Blake I*, 395 Md. at 222, 909 A.2d at 1025.

spond to the State's allegation."¹⁴⁰ The Court of Appeals ruled that the State has the burden of establishing that it no longer has the requested DNA evidence in its possession.¹⁴¹ Citing the 1999 Commission Report, the court noted that the State should extensively search for DNA evidence, including the "nontraditional sources" among the ten locations where evidence is most likely to be found.¹⁴² The court remarked that "[s]imply asking a police officer to check an evidence unit locker is not sufficient," and that "[a]t a minimum," the State must produce an affidavit to support the claim that the requested evidence does not exist.¹⁴³

On remand, the Circuit Court for Baltimore City determined that the State had satisfied its burden of persuasion in establishing that it was not in possession of the requested DNA evidence and again dismissed Mr. Blake's petition.¹⁴⁴ In reaching this determination, the circuit court held four hearings¹⁴⁵ and ordered the State to produce "the protocols for evidence retention and/or destruction" at several facilities, including the BCPD and the State's Attorney's Office.¹⁴⁶ At the final hearing on April 7, 2010, counsel for Mr. Blake requested a new search of the police department's ECU and the State's Attorney's Office.¹⁴⁷ The State agreed to provide affidavits from staff at the ECU,

140. *Id.* at 223–28, 909 A.2d at 1026–28. The Court of Appeals found that "the failure of the Circuit Court to provide *any* notice to [Mr. Blake] violated his rights to due process." *Id.* at 230, 909 A.2d at 1030.

141. *Id.* at 232, 909 A.2d at 1031.

142. *Id.* at 232–33, 909 A.2d at 1031–32. For a list of the ten locations, see *supra* text accompanying note 86.

143. *Blake I*, 395 Md. at 232–33, 909 A.2d at 1031–32.

144. *Blake II*, 418 Md. 445, 450, 15 A.3d 787, 790 (2011).

145. *Id.* "The hearings were held on November 21, 2008, February 20, 2009, June 12, 2009, and April 7, 2010." *Id.* at 450 n.1, 15 A.3d at 790 n.1. Judge Kaye A. Allison of the Circuit Court for Baltimore City presided over all of the hearings. Apr. 7, 2010 Hearing Transcript, Ex. 18 at 1, *Blake II*, 418 Md. 445, 15 A.3d 787 (No. 58); June 12, 2009 Hearing Transcript, Ex. 11 at 1, *Blake II*, 418 Md. 445, 15 A.3d 787 (No. 58); Feb. 20, 2009 Hearing Transcript, Ex. 7 at 1, *Blake II*, 418 Md. 445, 15 A.3d 787 (No. 58); Nov. 21, 2008 Hearing Transcript, Ex. 6 at 1, *Blake II*, 418 Md. 445, 15 A.3d 787 (No. 58). At the November 21, 2008, hearing, Judge Allison acknowledged the lack of procedure surrounding searches for potentially exculpatory DNA evidence under Section 8-201, remarking that "we are basically going blind." Nov. 21, 2008 Hearing Transcript, at 22. With respect to the documentation that the State had to produce to prove that it conducted a reasonable search, Judge Allison stated, "I think that's up to [the State,]" and "I'm not going to direct [the State] exactly how to do it." *Id.* at 24–25.

146. Sept. 3, 2009 Court Order in the Cir. Ct. for Balt. City, Ex. 17, *Blake II*, 418 Md. 445, 15 A.3d 787 (No. 58). The circuit court required the State to provide the evidence retention and destruction policies dating back to the time of Mr. Blake's trial at the following locations: BCPD's ECU and offsite storage facility, State's Attorney's Office, clerk's office, court reporter's office, and Mercy Hospital, where the victim was treated. *Id.*

147. Apr. 7, 2010 Hearing Transcript, *supra* note 145, at 20–21.

Mercy Hospital emergency room and archives, and Forensic Investigations Unit of the State's Attorney's Office.¹⁴⁸ On May 17, 2010, satisfied with the State's production of the promised affidavits, the circuit court entered a final order denying Mr. Blake's petition.¹⁴⁹ Mr. Blake filed a timely appeal from the circuit court's decision with the Court of Appeals, specifically alleging that the searches of two of the ten "most likely places" mentioned in the 1999 Commission Report—the ECU and the State's Attorney's office—were inadequate.¹⁵⁰

b. Blake II: Establishing the "Clearly Erroneous" Standard of Review

In *Blake II*, the Court of Appeals affirmed the circuit court's decision to deny Mr. Blake's request that the State conduct additional searches.¹⁵¹ Writing for a unanimous court, Judge Joseph F. Murphy, Jr., found that there was "no merit" in Mr. Blake's arguments that the searches of the ECU, offsite warehouse, and State's Attorney's Office were inadequate.¹⁵² The Court of Appeals based its decision on a determination that a "*clearly erroneous* standard of review is applicable to the Circuit Court's finding that the search of the ECU was 'a reasonable search under § 8-201 of Maryland's Criminal Procedure Article.'"¹⁵³

The Court of Appeals determined that it was "reasonable to conclude that the evidence . . . was handled in conformity with the routine practice of the Circuit Court and the Police Department."¹⁵⁴ The court reviewed testimony given by Lieutenant Colonel Michael Andrew, the commanding officer of the ECU, in which he explained the procedures for searching for requested evidence and remarked that thousands of pieces of evidence in the ECU were destroyed in 2003 by

148. *Id.* at 21–24.

149. May 17, 2010 Court Order in the Cir. Ct. for Balt. City, Ex. 26, *Blake II*, 418 Md. 445, 15 A.3d 787 (No. 58). The affidavits from Mercy Hospital employees indicated that the hospital did not have any formal evidence collection or destruction policies for evidence in rape cases at the time of Mr. Blake's trial. Apr. 19, 2010 Affidavit of Dr. Charles Shubin, Ex. 21, *Blake II*, 418 Md. 445, 15 A.3d 787 (No. 58); Apr. 15, 2010 Affidavit of Debra Holbrook, Ex. 19, *Blake II*, 418 Md. 445, 15 A.3d 787 (No. 58). The affidavit from the Forensic Investigations Unit indicated that none of the requested evidence was discovered in the State's Attorney's Office. Apr. 19, 2010 Affidavit of Sharon Holback, Ex. 23, *Blake II*, 418 Md. 445, 15 A.3d 787 (No. 58).

150. *Blake II*, 418 Md. at 450–51, 15 A.3d at 790–91.

151. *Id.* at 451–52, 15 A.3d at 791.

152. *Id.* at 447, 451, 15 A.3d at 788, 791.

153. *Id.* at 460, 15 A.3d at 796 (emphasis added).

154. *Id.*

a flood from Hurricane Isabel.¹⁵⁵ Furthermore, the court accepted a tape recorded statement from the attorney who prosecuted Mr. Blake as proof that the State's Attorney's Office did not take possession of the requested evidence after Mr. Blake's trial.¹⁵⁶ According to the court, the prosecutor's statement indicated that at the end of the trial the evidence could not have gone anywhere except the ECU, and the testimony of Sergeant Bazzle, the officer who oversaw the search of the ECU, indicated that the search was reasonable.¹⁵⁷ The Court of Appeals concluded that the circuit court did not err in determining that the search for DNA evidence was reasonable and, therefore, affirmed the denial of Mr. Blake's request for additional searches.¹⁵⁸

With the numerous advancements in DNA testing technology, access to post-conviction DNA testing has garnered increasing attention from the federal and state governments.¹⁵⁹ The enactment of Section 8-201 and the subsequent amendments to the statute demonstrate that the Maryland General Assembly has sought to provide petitioners with greater post-conviction remedies through DNA testing.¹⁶⁰ Similarly, the case law of the Court of Appeals of Maryland indicates that the court appreciates the significance of post-conviction DNA testing cases.¹⁶¹ The *Blake II* decision to implement a clearly erroneous standard of review, however, deviated from this trajectory.¹⁶² The court's most recent post-conviction DNA testing case, *Washington v. State*, which reaffirmed the clearly erroneous standard of review,¹⁶³ suggests that this deviation from the petitioner-friendly approach of the prior cases creates a new—and troubling—precedent for the Court of Appeals.

155. *See id.* at 452–54, 15 A.3d at 792–93 (repeating excerpts from Lieutenant Colonel Andrew's testimony in which he stated that the police department hired an outside company to inventory the evidence in the ECU and hired another company after Hurricane Isabel to identify and “dry out the evidence and relocate it to an off-site warehouse”). Sergeant Larry Bazzle, the officer who supervised the search for evidence in Mr. Blake's case, testified that he searched for a 56 form, which documents when property arrives at the ECU, looked in the green card file, which the BCPD used in the past to document property numbers and locations for evidence, and took thirty pre-hire officers from the police department to the offsite facility to search for the property numbers in Mr. Blake's case. *Id.* at 455–58, 15 A.3d at 793–95 (citations omitted). None of the searches recovered the evidence Mr. Blake requested. *Id.*

156. *Id.* at 461–62, 15 A.3d at 797.

157. *Id.*

158. *Id.* at 462, 15 A.3d at 797.

159. *See supra* Part I.A.

160. *See supra* Part I.B.

161. *See supra* Part I.C.1–2.

162. *See supra* Part I.C.3.

163. *See supra* notes 105–111 and accompanying text.

II. ANALYSIS

The “clearly erroneous” standard of review of a post-conviction trial court’s decision that the State conducted a reasonable search for DNA evidence, announced by the Court of Appeals of Maryland in *Blake II* and reaffirmed in *Washington v. State*, is problematic for three reasons. First, the standard is inconsistent with the legislative intent behind Section 8-201 of facilitating the exoneration of innocent individuals through post-conviction DNA testing.¹⁶⁴ Second, application of the standard is a departure from the petitioner-friendly line of cases developed by the Court of Appeals in nine of its other Section 8-201 decisions and creates a significant barrier that prevents petitioners from obtaining their requested relief.¹⁶⁵ And third, a clearly erroneous standard does not provide for sufficiently meaningful review in post-conviction DNA testing cases, which present issues too serious to be subject to a highly deferential standard from a reviewing court.¹⁶⁶ The Court of Appeals should have adopted a more exacting standard for reviewing a finding that the State’s search for potentially exculpatory DNA evidence was reasonable. The standards implemented by the high courts of other states, namely the bifurcated standard of review in Texas, demonstrate how the Court of Appeals could have provided relief to petitioners while giving deference to the decisions of trial courts.¹⁶⁷

A. *The Decision to Apply a “Clearly Erroneous” Standard of Review Is Inconsistent with the Intent of the Maryland General Assembly in Enacting Section 8-201*

A clearly erroneous standard of review of a post-conviction court’s finding that the State conducted a reasonable search for DNA evidence will frustrate the legislative intent behind Section 8-201. In enacting Section 8-201, the Maryland General Assembly intended to provide imprisoned individuals who are actually innocent with a remedy through post-conviction DNA testing.¹⁶⁸ The various amend-

164. See *infra* Part II.A.

165. See *infra* Part II.B.

166. See *infra* Part II.C.

167. See *infra* Part II.D.

168. See *Gregg v. State*, 409 Md. 698, 715, 976 A.2d 999, 1008–09 (2009) (noting that the “purpose [of Section 8-201] is to provide a remedy for persons convicted of serious crimes of which they are actually innocent”); *Thompson I*, 395 Md. 240, 251, 909 A.2d 1035, 1042 (2006) (holding that Section 8-201 “manifests a legislative intent in favor of DNA testing of potentially exculpatory physical evidence”). But see *Gregg*, 409 Md. at 712, n.8, 976 A.2d at 1007 n.8 (“We have examined the bill files of both S.B. 363 and H.B. 575, and found noth-

ments to Section 8-201, specifically the direct appeal provision, support the claim that the General Assembly intended the remedies available under Section 8-201 to apply broadly, and they stand in stark contrast to the Court of Appeals' decision in *Blake II* to implement a narrow standard of review.

With each set of amendments, the General Assembly has expanded petitioners' access to post-conviction DNA testing, and, as a result, developed "one of the nation's most far-reaching" access to DNA testing statutes.¹⁶⁹ In 2003, the General Assembly reduced the requirements that petitioners must meet to establish their entitlement to DNA testing under Section 8-201 and added the provision allowing for a direct appeal to the Court of Appeals.¹⁷⁰ The Maryland Commission on Capital Punishment ("Maryland Commission"), a body created by the General Assembly for a six-month period to study application of the death penalty in Maryland and make recommendations to the General Assembly,¹⁷¹ reported that "[i]n a nutshell, the [2008] amendments broaden the universe of persons from whom DNA samples must be collected and expand post-conviction access to collected DNA evidence."¹⁷² The 2008 amendments applied the direct appeal provision to *any order* entered under Section 8-201, in addition to allowing petitioners to file a motion for new trial if the State cannot produce the requested DNA evidence.¹⁷³ Indeed, the General Assembly specifically intended for Section 8-201 to have its broadest possible effect during the five-year window from 2009 to 2013. This is

ing in either file that informs the legislative purpose behind the amendment to § 8-201(c).").

169. Rodricks, *supra* note 5, at 25A; *see also supra* text accompanying notes 46–59.

170. *See supra* text accompanying notes 47–53, 62–63; *see also Gregg*, 409 Md. at 715–16, 976 A.2d at 1009 ("The General Assembly, moreover, did not express an intent to have the 2003 amendment to § 8-201(c) apply only to persons convicted on or after its effective date.").

171. MD. CODE ANN., CORR. SERVS. § 3-910 (LexisNexis Supp. 2008), *abrogated by* Acts 2008, ch. 430, § 3 (effective Dec. 31, 2008).

172. MD. COMM'N ON CAPITAL PUNISHMENT, FINAL REPORT TO THE GENERAL ASSEMBLY 90 (2008), *available at* <http://www.goccp.maryland.gov/capital-punishment/documents/death-penalty-commission-final-report.pdf>. The Maryland Commission "commended [the General Assembly] for encouraging the use of DNA technology fairly and judiciously in criminal cases through its recent enactment of various amendments to Maryland's DNA laws." *Id.*

173. § 8-201(c), (k)(6) (2009); *see supra* text accompanying notes 54–59, 63–64; *see also* Justin Brooks & Alexander Simpson, *Blood Sugar Sex Magik: A Review of Postconviction DNA Testing Statutes and Legislative Recommendations*, 59 DRAKE L. REV. 799, 850 (2011) ("Very few states impose any meaningful remedy to the defendant if evidence is destroyed. Maryland's statute provides a meaningful remedy, but the remedy is limited to instances in which the 'failure to produce evidence was the result of intentional and willful destruction.'" (citation omitted)).

clear from the fact that the remedies introduced by the 2008 amendments will be abrogated on December 13, 2013.¹⁷⁴ The General Assembly's goal, however, will be stymied by the Court of Appeals' decision to use the highly deferential clearly erroneous standard of review.¹⁷⁵

Further proof of how the *Blake II* clearly erroneous standard of review abandoned the legislative intent behind Section 8-201 is that cases only move directly to the Court of Appeals in a limited number of circumstances. The cases that move directly to the Court of Appeals do so in one of two ways: (1) through a direct appeal or (2) through the original or exclusive appellate jurisdiction of the Court of Appeals.¹⁷⁶ These cases involve such consequential proceedings as sentences of death, uniform certification of legal questions, legislative redistricting, and contested elections.¹⁷⁷

The General Assembly added appeals from orders entered under Section 8-201 to this list in 2003.¹⁷⁸ Notably, the General Assembly did not place a direct appeal provision in the Uniform Postconviction Procedure Act ("UPPA"), so an aggrieved party that wishes to appeal a decision entered under the UPPA must "apply to the Court of Special Appeals for leave to appeal the order."¹⁷⁹ That the General Assembly deliberately chose to bypass the discretionary certiorari process for appeals under Section 8-201, but not for appeals implemented under the UPPA and Maryland Rule 4-331,¹⁸⁰ speaks to the clear legislative intent to treat appeals in post-conviction DNA testing cases differently from all other post-conviction proceedings.

Furthermore, the instances in which the General Assembly has authorized direct access to the Court of Appeals involve what the leg-

174. *See supra* text accompanying notes 54–59.

175. The Court of Appeals' decision to apply a clearly erroneous standard has already had a negative effect on petitioners' ability to obtain relief through post-conviction DNA testing during this five-year period. For example, on February 21, 2012, in *Washington v. State*, 424 Md. 632, 37 A.3d 932 (2012), the court affirmed the post-conviction trial court's denial of Mr. Washington-Bey's Section 8-201 petition on the grounds that the State conducted a reasonable search for the requested DNA evidence. *See supra* notes 105–111 and accompanying text.

176. *See supra* text accompanying notes 68–76.

177. *See supra* text accompanying notes 68–76.

178. *See supra* text accompanying note 62.

179. MD. CODE ANN., CRIM. PROC. § 7-109(a) (LexisNexis 2008); *see supra* note 71.

180. *See Gregg v. State*, 409 Md. 698, 707, 976 A.2d 999, 1004 (2009) ("The State argues that, unlike the court's denial of Appellant's requested relief under § 8-201, which is subject to direct review by this Court, the court's denial of relief under Rule 4-331 can reach us only by issuance of a writ of certiorari. Appellant, at oral argument before us, agreed with the State. So do we.").

islature has determined to be the most important issues—issues that require more than a highly deferential clearly erroneous standard of review. For example, the Court of Appeals can overturn the results of an election when there is “*some* hard evidence that the votes would have been cast in a particular manner.”¹⁸¹ In addition, the General Assembly has prescribed specific procedures for how the Court of Appeals is to review death penalty cases, which are automatically reviewed in the Court of Appeals. The court must determine whether “the imposition of the death sentence was influenced by passion, prejudice, or any other arbitrary factor” and whether “the evidence supports a finding by the court or jury that the aggravating circumstances outweigh the mitigating circumstances.”¹⁸²

The General Assembly’s decision to provide for such limited direct access to the Court of Appeals necessarily implies that the court should review the decisions of post-conviction courts regarding the reasonableness of a search for DNA evidence under a less deferential standard than clear error. Given the expansive nature of the remedies available under Section 8-201, the Court of Appeals’ decision to review a post-conviction trial court’s finding that the State conducted a reasonable search for DNA evidence under a clearly erroneous standard is undoubtedly inconsistent with the legislative intent behind the statute.

B. The “Clearly Erroneous” Standard of Review Announced in Blake II Deviated from the Court of Appeals’ Decisions in Nine of Its Other Post-Conviction DNA Testing Cases

The *Blake II* decision to implement a clearly erroneous standard of review for determinations of the reasonableness of the State’s search for potentially exculpatory DNA evidence deviated from the Court of Appeals’ earlier Section 8-201 cases. *Blake II*’s clearly erroneous standard relied on reasoning that is inconsistent with the court’s earlier Section 8-201 jurisprudence and created a troubling precedent for access to relief in future petitions.¹⁸³

Prior to *Blake II*, the Court of Appeals developed an increasingly petitioner-friendly jurisprudence regarding the remedies available

181. *Suessmann v. Lamone*, 383 Md. 697, 717, 862 A.2d 1, 12 (2004). It is important to note that “a probability of 51%, of ‘more likely than not’ or ‘reasonable likelihood,’ will not suffice to overturn an election result and institute new elections.” *Id.* at 718, 862 A.2d at 13.

182. MD. CODE ANN., CRIM. LAW § 2-401(d)(2) (LexisNexis Supp. 2011).

183. *See supra* notes 105–111 and accompanying text.

under Section 8-201.¹⁸⁴ Although *Blake II* is a “search for evidence” case, an examination of both “search for evidence” and “evidence in hand” cases is appropriate because it demonstrates the extent to which *Blake II* deviated from this petitioner-friendly line of Section 8-201 cases. The Court of Appeals issued decisions in favor of the petitioners, either reversing or vacating the post-conviction trial courts’ decisions and remanding the cases back to the circuit courts, in each of the three “search for evidence” and five “evidence in hand” cases that it decided before *Blake II*.¹⁸⁵ In announcing and applying the clearly erroneous standard of review in *Blake II*, the Court of Appeals, for the first time, affirmed a post-conviction court’s dismissal of a Section 8-201 petition and denied a petitioner relief under Section 8-201.¹⁸⁶ That the Court of Appeals subsequently granted relief to the petitioner in *Arey II*, a “search for evidence” case that did not turn on the reasonableness of the State’s search for DNA evidence,¹⁸⁷ while denying relief in *Washington* based on an application of the clearly erroneous standard of review,¹⁸⁸ demonstrates that the decision in *Blake II* to implement a clearly erroneous standard of review has shifted the course of Maryland’s post-conviction DNA testing jurisprudence away from the previously petitioner-friendly approach taken by the Court of Appeals.

The *Blake II* decision to implement a clearly erroneous standard of review, in addition to producing an outcome that is inconsistent with those in the prior Section 8-201 cases, also deviated from the line of reasoning that the Court of Appeals used to analyze its eight earlier Section 8-201 cases. For example, the clearly erroneous standard for reviewing a post-conviction court’s finding that the State conducted a reasonable search for DNA evidence is a sharp contrast from what the

184. See *supra* Part I.C.1–2.

185. See *supra* Part I.C.1–2.

186. See *supra* Part I.C.3.b.

187. See *supra* notes 102–104 and accompanying text. Although *Arey II* was a “search for evidence” case, the Court of Appeals opted to remand the case based on a finding that the circuit court prematurely denied the Section 8-201 petition. See *supra* notes 102–104 and accompanying text. The court distinguished the outcome in *Arey II* from that in *Blake II* by noting that at the final hearing on Mr. Blake’s Section 8-201 petition, counsel for Mr. Blake stated they would not have any further requests upon receipt of the final piece of information from the State, whereas counsel for Mr. Arey expressly requested additional opportunities to gather information. *Arey II*, 422 Md. 328, 337–38, 29 A.3d 986, 991–92 (2011). Interestingly, “several of the hearings for [Mr. Blake and Mr. Arey] were held jointly.” *Id.*, 29 A.3d at 991. The joint hearings included those held on February 20, 2009, and June 12, 2009. June 12, 2009 Hearing Transcript, *supra* note 145, at 1, 3; Feb. 20, 2009 Hearing Transcript, *supra* note 145, at 1, 3.

188. See *infra* notes 105–111 and accompanying text.

Court of Appeals previously held constituted a reasonable search. In *Horton v. State*, the court set a very high threshold for what constitutes a reasonable search under Section 8-201, as delineated in *Blake I* and *Arey I*.¹⁸⁹ The *Horton* court acknowledged that the State's search for evidence was "undoubtedly" more extensive than those conducted in *Blake I* and *Arey I*, but determined that it fell short of meeting the standards set by those cases.¹⁹⁰ The Court of Appeals' detailed attempt to analogize the requested evidence and subsequent search in *Horton* to the circumstances of *Blake I* and *Arey I* implies that the court used a more nuanced and less deferential standard than clear error to review the circuit court's finding that the State conducted a reasonable search for the DNA evidence.¹⁹¹

Assuming the search for DNA evidence in *Horton* was unreasonable, as the Court of Appeals suggested, then the *Blake II* decision is even more problematic because the search in Mr. Blake's case was both less extensive and less conclusive than the search in *Horton*.¹⁹²

189. *See supra* notes 93–99 and accompanying text. It appears that when Mr. Horton filed his Section 8-201 petition requesting that the hospital where the victim was treated produce any remaining physical evidence, he relied on the advice of a student volunteer from the Innocence Project. 412 Md. 1, 9–10, 985 A.2d 540, 545 (2009). The hospital provided an affidavit that stated it did not retain cytology slides past ten years, but the Court of Appeals held that the affidavit was inadequate because the retention protocol did not refer to the time period when the victim was treated. *Id.* at 10, 16, 985 A.2d at 545, 548–49. Mr. Horton also requested that the State conduct a search for physical evidence; the State could not locate any evidence but produced two documents from the Montgomery County Police Department. *Id.* at 11–13, 985 A.2d at 546–47. The first document was a notice from the Central Property Unit, which stated that the evidence in Mr. Horton's case was approved for destruction "as of March 17, 1986." *Id.* at 12, 985 A.2d at 546. The second document was a copy of a "Form 526," which was stamped "Case Closed" and stated that evidence in Mr. Horton's case had been received by the evidence unit. *Id.* at 12–13, 985 A.2d at 546–47. The Court of Appeals reversed and remanded the circuit court's denial of the Section 8-201 petition, reasoning that although the documentation indicated that the evidence was approved for destruction, it did not prove that the destruction actually occurred. *See supra* note 99.

190. *See supra* notes 93–99 and accompanying text.

191. *See Horton*, 412 Md. at 15, 985 A.2d at 548 ("The search in this case came very close to meeting the standards set by the *Blake* and *Arey* opinions. Nevertheless, . . . the Circuit Court should not have dismissed the petition.").

192. *Compare supra* notes 144–158 and accompanying text (describing the search for evidence in Mr. Blake's case), *with supra* note 189 (discussing the search for evidence in Mr. Horton's case). With respect to Mr. Blake's case, a 2003 hurricane destroyed thousands of pieces of evidence stored in the BCPD's ECU, and as a result, much of the "contaminated or mangled evidence" no longer had identifiable property numbers. Feb. 20, 2009 Hearing Transcript, *supra* note 145, at 5–6, 31–32. When the police officers searched the offsite warehouse for the requested evidence in Mr. Blake's case, they did not know the specific physical evidence for which they were searching and only searched "identifiable" property numbers. *Id.* at 16, 31–32, 45, 54. Sergeant Bazzle, the officer who supervised the ECU search, confirmed that "nobody has conducted a specific search of the unmarked

For instance, the *Horton* court held that a notice from the police department, which clearly stated that the evidence in Mr. Horton's case had been "approved for destruction," was insufficient proof that the evidence did not exist.¹⁹³ In *Blake II*, however, Sgt. Bazzle testified that he could *not even locate* an evidence destruction authorization form, but the Court of Appeals still affirmed the lower court's finding that the search was reasonable.¹⁹⁴

Blake II was the Court of Appeals' first pronouncement of the clearly erroneous standard of review and the first Section 8-201 decision to deny relief to a petitioner. The decision signaled a change in the court's willingness to grant petitioners access to post-conviction DNA testing. Indeed, the court relied on *Blake II* eleven months later in *Washington* to once again deny relief to a petitioner by applying the clearly erroneous standard of review. Unfortunately, *Blake II* was based on a line of reasoning that deviated from the court's previous analyses of what constituted a reasonable search for DNA evidence. This provides strong support for the assertion that the clearly erroneous standard of review is both inconsistent with the Court of Appeals' past Section 8-201 jurisprudence and troubling for its future.¹⁹⁵

evidence." *Id.* at 45–46. Thus, there is presumably a mass of unmarked evidence in the ECU's offsite storage unit that has not been searched merely because the evidence does not have readable property identification numbers. *Id.* at 45–48.

193. *See supra* note 189.

194. *See supra* note 155.

195. It is important to note that in *Arrington*, the Court of Appeals quoted its holding in *Wilson v. State* and noted that it "[does] not disturb the factual findings of the post-conviction court unless they are clearly erroneous." 411 Md. 524, 551, 983 A.2d 1071, 1086 (2009) (quoting *Wilson v. State*, 363 Md. 333, 348, 768 A.2d 675, 683 (2001)). The *Arrington* court also acknowledged, however, that while "factual determinations of the post-conviction court [are reviewed] under a clearly erroneous standard, [the Court of Appeals] make[s] an independent determination of relevant law and its application to the facts." *Id.*, 983 A.2d at 1086–87 (citation omitted). In addition, *Arrington* involved a complex discussion of a Section 8-201 petition, a motion under Maryland Rule 4-331 for a new trial in light of newly discovered DNA evidence, and various claims under the UPPA. *Id.* at 536–50, 983 A.2d at 1078–86. *Wilson*, however, was a pure UPPA case decided in March, 2001, almost seven months before Section 8-201 took effect. *Wilson*, 363 Md. at 337, 768 A.2d at 677. The *Wilson* court's holding that factual findings in post-conviction cases are subject to a clearly erroneous standard of review, as confirmed by the *Arrington* court, should not be read to infer support for the Court of Appeals' clearly erroneous standard in *Blake II* because the UPPA, on which the *Wilson* standard of review was based, was not at issue in *Blake II*. Furthermore, there was a clear legislative intent to treat Section 8-201 differently from the UPPA, which suggests that the standard of review deemed appropriate for the UPPA is not necessarily the standard that is appropriate under Section 8-201. *See supra* text accompanying notes 178–180 and accompanying text.

C. Post-Conviction DNA Testing Cases Involve Issues That Are Too Serious to be Subject to the Highly Deferential Clearly Erroneous Standard of Review

Finally, the Court of Appeals of Maryland erred in applying a clearly erroneous standard of review to a post-conviction court's reasonableness findings because DNA testing cases highlight crucial issues of criminal justice that warrant a less deferential standard of review. Advancements in DNA testing technology have resulted in not only greater certainty in prosecutions and convictions, but also in a significant number of exonerations. The emergence of exonerations has exposed flaws in the criminal justice system, which provides a compelling argument for the inappropriateness of a clearly erroneous standard of review.

Post-conviction DNA testing has resulted in substantial benefits both for the prosecution, in the form of more definitive convictions, and for the wrongfully convicted, in the form of exonerations.¹⁹⁶ Throughout the United States, “[f]rom the Supreme Court down, appellate courts have been mindful of the persuasive power of DNA evidence that inculpatates or exculpates defendants from criminal activity.”¹⁹⁷ In the United States, post-conviction DNA testing statutes and various judicial procedures have resulted in 289 exonerations.¹⁹⁸ The first exoneration occurred in 1989, and since 2000, 222 more individuals have been exonerated.¹⁹⁹ On average, the exonerees served thirteen years in prison before being released.²⁰⁰ In addition to validating convictions and producing exonerations, DNA testing has also identified the true perpetrators of many crimes.²⁰¹ A study conducted by

196. See *Dist. Attorney's Office for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 129 S. Ct. 2308, 2316 (2009) (“DNA testing has exonerated wrongly convicted people, and has confirmed the convictions of many others.”). For instance, DNA tests have “‘matched’ or included the primary suspect” in roughly 6,000 out of 10,000 sexual assault cases since 1989. Peter Neufeld & Barry C. Scheck, *Foreword: Commentaries on DNA Testing* to EDWARD CONNORS ET AL., NAT'L INST. OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL, at xxviii (1996), available at <https://www.ncjrs.gov/pdffiles/dnaevid.pdf>.

197. *Thompson II*, 411 Md. 664, 686, 985 A.2d 32, 44 (2009).

198. *Facts on Post-Conviction DNA Exonerations*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php (last visited Feb. 11, 2012).

199. *Id.*

200. *Innocence Project Case Profiles*, INNOCENCE PROJECT, <http://www.innocenceproject.org/know/> (last visited Feb. 11, 2012).

201. See, e.g., Susan Levine, *Ex-Death Row Inmate Hears Hoped-for Words: We Found Killer*, WASH. POST, Sept. 6, 2003, at A1 (reporting on Mr. Bloodsworth's case and writing that in 2003, “[i]n a plot twist few involved could have imagined,” Dawn Hamilton's killer, a man who Mr. Bloodsworth knew from the time he spent in prison for the crimes, was identified

members of the Innocence Network, “a group of affiliated organizations taking on claims of innocence from prisoners,”²⁰² examined 194 exonerations and found that the true perpetrators had been identified in 44 percent of the cases.²⁰³

The exonerations and subsequent “true perpetrator” identifications that have occurred as a result of DNA testing are noteworthy on their own, but they have also exposed several flaws in the criminal justice system, including false confessions and the unreliability of eyewitness identifications.²⁰⁴ For instance, “[f]alse confessions and incriminating statements lead to wrongful convictions in approximately twenty-five percent of cases.”²⁰⁵ It is also widely accepted that “[t]he overwhelming number of convictions of the innocent involve[s] eyewitness identification.”²⁰⁶ The number of wrongful convictions based on eyewitness misidentification is around 75 percent.²⁰⁷ This figure is

using DNA evidence obtained from a semen stain on underwear and “entered into state and federal DNA databases, . . . the same kind of evidence that in 1993 led to Bloodsworth’s exoneration after almost nine years of incarceration”).

202. Greg Hampikian, Emily West & Olga Akselrod, *The Genetics of Innocence: Analysis of 194 U.S. DNA Exonerations*, 12 ANN. REV. GENOMICS & HUM. GENETICS 97, 100 (2011).

203. *Id.* at 103 (noting that the true perpetrators were identified in 85 of the 194 cases). The authors noted that “intimate swab evidence,” including “oral, anal, and vaginal swabs,” contributed to exonerations in 126 of the 194 exonerations. *Id.* at 110–11. In addition, “[c]lothing evidence provided exclusionary results in approximately half of these cases [102 of 194].” *Id.* These two types of evidence, which are “the most common . . . in probative exclusions,” were among the evidence that Mr. Blake requested in his Section 8-201 petition. *Id.* at 110; see *supra* notes 132–135 and accompanying text.

204. See, e.g., Rago, *supra* note 2, at 857–68 (discussing how five eyewitnesses identified Kirk Bloodsworth as the man who raped and murdered Dawn Hamilton, leading twice to his conviction, before Mr. Bloodsworth was exonerated by DNA testing); see also Simmonsen, *supra* note 3, at 1076 (positing that “fears about wrongful convictions based on inaccurate eyewitness testimony remain a pressing concern warranting action by the legal system”).

205. *Facts on Post-Conviction DNA Exonerations*, *supra* note 198; see also Hampikian, *supra* note 202, at 103–04 (reporting that among “[t]he known factors that contributed to these 194 wrongful convictions [are] guilty pleas and/or confessions or admissions of involvement in the crimes by exonerees (30% [57 of 194])”). A discussion of false confessions factored into the Court of Appeals’ decision in *Thompson II*. See *supra* note 122 and accompanying text. For an in-depth discussion of the connection between false confessions and exonerations, see Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 88–91 (2008).

206. Garrett, *supra* note 205, at 78.

207. See Hampikian, *supra* note 202, at 103 (finding that 145 of 194 exonerees were convicted through misidentification); see also Garrett, *supra* note 205, at 78 (studying 200 exonerations and finding that identification testimony led to the wrongful convictions in “158 of 200 cases (79%)”).

even higher when looking at the number of misidentifications resulting from victim testimony.²⁰⁸

Courts are well attuned to the important role that post-conviction DNA testing plays in producing exonerations, particularly when eyewitness identifications lead to the initial conviction.²⁰⁹ In fact, courts often rely on studies like those conducted by the Innocence Network when citing statistical information concerning post-conviction DNA testing.²¹⁰ These studies and the courts' awareness of the issues they reveal make it even more surprising that the Court of Appeals adopted a clearly erroneous standard of review for a post-conviction trial court's finding that the State conducted a reasonable search for potentially exculpatory DNA evidence. The shocking nature of these statistics strongly suggests that a highly deferential standard is inappropriate for reviewing trial court findings in post-conviction DNA testing cases.

D. The Court of Appeals Should Have Adopted a More Exacting Standard for Reviewing a Post-Conviction Court's Finding That the State Conducted a Reasonable Search Under Section 8-201

The Court of Appeals of Maryland could have avoided the problematic situation created by the adoption of a clearly erroneous standard of review in *Blake II* by implementing a more exacting standard, such as the one adopted by the Supreme Court of Illinois or by the Texas Court of Criminal Appeals. The significant number of exonerations in Illinois and Texas through post-conviction DNA testing suggests that these states have developed standards of review that better achieve the intent behind post-conviction DNA access statutes. An examination of the standards of review implemented in these states indicates that the bifurcated standard adopted by the Texas Court of Criminal Appeals is a more effective solution because it achieves the goal of providing post-conviction relief, while also giving deference to the decisions of post-conviction trial courts.

208. See Hampikian, *supra* note 202, at 103 (finding that 126 of the 145 exonerees who were convicted through misidentification, or 85 percent, were misidentified by the victim).

209. See *United States v. Brownlee*, 454 F.3d 131, 141–42 (3d Cir. 2006) (“The recent availability of post-conviction DNA tests demonstrate [sic] that there have been an overwhelming number of false convictions stemming from uninformed reliance on eyewitness misidentifications.”).

210. See, e.g., *id.* at 142 (“[E]yewitness evidence presented from well-meaning and confident citizens is highly persuasive but, at the same time, is among the least reliable forms of evidence.” (citation omitted)); *Thompson I*, 395 Md. 240, 252, 909 A.2d 1035, 1043 (2006) (citing Innocence Project statistics quoted in a Maryland Senate bill in support of post-conviction DNA testing).

Like Maryland, Illinois has an interesting connection to post-conviction DNA testing. In 1989, Gary Dotson was the first person in the United States to be exonerated through DNA testing, after serving ten years in an Illinois prison.²¹¹ Just under a decade later, the Illinois General Assembly enacted the state's DNA access statute, which took effect on January 1, 1998.²¹² The Illinois statute is similar to Maryland's Section 8-201 to the extent that a trial court in Illinois grants a petitioner's motion for post-conviction DNA testing when: "(1) the result of the testing has the scientific potential to produce . . . materially relevant" evidence; and "(2) the testing requested employs a scientific method generally accepted within the relevant scientific community."²¹³ Appellate courts in Illinois, however, apply a *de novo* standard of review to denials of motions for DNA testing.²¹⁴ Illinois courts have reasoned that the "[*de novo*] standard is appropriate because the trial court's decision . . . is necessarily based upon its review of the pleadings and the trial transcripts and is not based upon its assessment of the credibility of the witnesses."²¹⁵

The adoption of the Illinois standard of review is not ideal for Maryland, however, because a *de novo* review can be problematic. Specifically, it is not always the case that a post-conviction trial court's decision is based solely on a paper record.²¹⁶ In these situations, a *de novo* standard of review can lead to confusion as to the appropriate

211. Garrett, *supra* note 205, at 63; Samuel R. Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 523 (2005). In total, forty-one individuals have been exonerated in Illinois through post-conviction DNA testing. *Exonerations by State*, INNOCENCE PROJECT, <http://www.innocenceproject.org/news/State-View.php> (last visited Feb. 11, 2012).

212. 725 ILL. COMP. STAT. ANN. 5/116-3 (West 2008).

213. *Id.* 5/116-3(c). Despite these similarities, there are significant differences between the two statutes. For example, the Illinois statute requires that "the result of the testing has the scientific potential to produce new, noncumulative evidence materially relevant to the defendant's *assertion of actual innocence* even though the results may not completely exonerate the defendant." *Id.* 5/116-3(c)(1) (emphasis added). Section 8-201, however, requires "a *reasonable probability* . . . that the DNA testing has the scientific potential to produce exculpatory or mitigating evidence relevant to a *claim of wrongful conviction or sentencing*." § 8-201(d)(1)(i) (2009) (emphasis added). In addition, the Illinois statute "requires a defendant who seeks DNA testing to present a *prima facie* case that 'identity was the issue' in the trial that led to his conviction." *People v. Hockenberry*, 737 N.E.2d 1088, 1091 (Ill. App. Ct. 2000) (citation omitted).

214. *People v. O'Connell*, 879 N.E.2d 315, 317 (Ill. 2007).

215. *Hockenberry*, 737 N.E.2d at 1091.

216. *See, e.g., Blake II*, 418 Md. 445, 450, 15 A.3d 787, 790 (2011) (noting that "[t]o resolve the issue of whether the State satisfied its ultimate burden of persuasion, the Circuit Court held four hearings, during which it received testimony, documentary evidence, affidavits, and proffered information" (footnote omitted)).

standard for reviewing decisions entered under a state's post-conviction DNA testing statute.²¹⁷

The standard of review applied in Texas provides a more effective solution to the problem posed by the clearly erroneous standard of review announced in *Blake II*. On April 5, 2001, the Texas Legislature enacted Chapter 64 of the Texas Code of Criminal Procedure ("Chapter 64"), which allows "[a] convicted person [to] submit . . . a motion for forensic DNA testing of evidence containing biological material."²¹⁸ Both before and after the enactment of Chapter 64, forty-four individuals have been exonerated through post-conviction DNA testing in Texas, more than in any other state.²¹⁹ Although the number of exonerations is noteworthy, far exceeding the number of exonerations in Maryland,²²⁰ Chapter 64 is a fairly restrictive statute. For instance, a Chapter 64 petition to test DNA evidence "must be accompanied by an affidavit, sworn to by the convicted person, containing statements of fact in support of the motion."²²¹ In addition, appeals from orders entered under Chapter 64 proceed "in the same manner as an appeal of any other criminal matter."²²²

Despite the restrictive nature of Chapter 64, the Texas Court of Criminal Appeals has adopted a standard of review that both provides for exonerations, in accordance with the intent of the Texas Legisla-

217. *Compare* *People v. Shum*, 797 N.E.2d 609, 620 (Ill. 2003) ("We review *de novo* the dismissal of a postconviction claim without an evidentiary hearing[, but w]e also review *de novo* the ruling denying a section 116-3 motion." (citations omitted)), *with* *People v. Slover*, 959 N.E.2d 72, 75 (Ill. App. Ct. 2011) ("The present case is distinguishable from previous cases applying section 116-3 in that the trial court heard testimony on defendants' motion and based its ruling, in part, on its assessment of the witnesses' credibility. We therefore agree . . . that *de novo* review is inappropriate in this case.").

218. TEX. CODE CRIM. PROC. ANN. art. 64.01-.05 (West 2006 & Supp. 2011).

219. *See Exonerations by State*, *supra* note 211 (providing an interactive map with the number of exonerations in each of the fifty states and the District of Columbia).

220. *See Maryland: Exonerations by State*, INNOCENCE PROJECT, <http://www.innocence-project.org/news/state.php?state=md> (last visited April 13, 2012) (noting that three individuals from Maryland, including Mr. Bloodsworth, have been exonerated through post-conviction DNA testing).

221. CRIM. PROC. art. 64.01(a-1). Under Chapter 64, a court may only order DNA testing if it finds that: (1) the evidence "still exists and is in a condition making DNA testing possible;" (2) the evidence "has been subjected to a chain of custody sufficient to establish that it has not been . . . altered in any material respect;" (3) "identity was or is an issue in the case;" (4) the petitioner "establishes by a preponderance of the evidence that [he] would not have been convicted if exculpatory results had been obtained through DNA testing;" and (5) the petitioner "establishes by a preponderance of the evidence that . . . the request for the proposed DNA testing is not made to unreasonably delay the execution of sentence or administration of justice." *Id.* art. 64.03(a).

222. *Id.* art. 64.05. A petitioner only receives a direct appeal to the Texas Court of Criminal Appeals under Chapter 64 when the original conviction included a sentence of death. *Id.*

ture, and gives deference to the decisions of lower courts. Appellate courts in Texas “apply a *bifurcated standard of review* to determine whether the trial court properly denied an appellant’s request for post-conviction DNA testing.”²²³ In applying the bifurcated standard of review, appellate courts “afford almost total deference to a trial court’s determination of issues of historical fact and application-of-law-to-fact issues that turn on credibility and demeanor, [but] review *de novo* other application-of-law-to-fact issues.”²²⁴ Thus, a trial court’s determination that evidence was destroyed is accorded deference by an appellate court, while a finding that the petitioner did not establish by a preponderance of the evidence that the jury would not have convicted at trial if it had access to the exculpatory DNA test results is reviewed *de novo*.²²⁵

In *Blake II*, the Court of Appeals of Maryland should have adopted a standard other than clear error to review a trial court’s finding that the State conducted a reasonable search for DNA evidence. Illinois and Texas, having produced the most exonerations through post-conviction DNA testing,²²⁶ provide examples of different standards of review that the Court of Appeals should have considered. The bifurcated standard of review adopted by the Texas Court of Criminal Appeals is a more effective standard for appeals in post-conviction DNA testing cases because it allows appellate courts to carefully examine statutory and legal requirements and ensures that purely factual determinations remain with lower courts. Thus, the bifurcated standard enables exonerations, which is the intent behind DNA access statutes, while making sure that the factual findings of trial courts receive deference.²²⁷

223. *Hooks v. State*, 203 S.W.3d 861, 863 (Tex. Crim. App. 2006) (emphasis added) (citing *Rivera v. State*, 89 S.W.3d 55, 59 (Tex. Crim. App. 2002)).

224. *Rivera*, 89 S.W.3d at 59.

225. See *Routier v. State*, 273 S.W.3d 241, 257 (Tex. Crim. App. 2008) (noting that the petitioner must “establish by a preponderance of the evidence that, assuming those [DNA] tests produce exculpatory evidence, the jury would not have convicted . . . in light of this additional, exculpatory evidence, [which] is an issue [the court] always review[s] *de novo*” (footnote omitted)); *Figueroa v. State*, No. 2-03-064-CR, 2003 WL 22674767, at *1 (Tex. App. Nov. 13, 2003) (“The trial court found that evidence possibly containing biological material had been destroyed. Deferring to this finding of historical fact, we conclude the trial court did not err in refusing to order DNA testing.”).

226. *Exonerations by State*, *supra* note 211.

227. Furthermore, if the Court of Appeals of Maryland had applied the bifurcated standard of review in *Blake II*, it is possible that the court would have reached a different outcome. The bifurcated standard involves *de novo* review of application-of-law-to-fact issues that do not involve credibility or demeanor. As a result, the *Blake II* court very well may have found upon application of the law—that the State must conduct a reasonable search for DNA evidence—to the facts of Mr. Blake’s case—that, as per Sergeant Bazzle’s testi-

III. CONCLUSION

At first glance, the cases from the Court of Appeals of Maryland that address Section 8-201 petitions for post-conviction DNA testing appear to form a petitioner-friendly set of decisions.²²⁸ Although the Court of Appeals has granted relief to petitioners in nine of its eleven Section 8-201 decisions by reversing denials of motions for DNA testing,²²⁹ the ramifications of *Blake II*, the court's first denial of relief, will reach far beyond the circumstances of that particular case, as demonstrated by the court's reliance on *Blake II* in *Washington v. State*, which resulted in the court's second denial of a Section 8-201 petition.²³⁰

The decision in *Blake II* to apply a clearly erroneous standard of review to a post-conviction trial court's finding that the State conducted a reasonable search for potentially exculpatory DNA evidence is problematic on three levels. A clearly erroneous standard of review is inconsistent with the intent of the Maryland General Assembly in enacting Section 8-201.²³¹ Furthermore, *Blake II* deviated from the Court of Appeals' prior course of action in granting relief to petitioners in Section 8-201 cases and set the stage for future denials of relief.²³² Finally, post-conviction DNA testing cases involve serious issues for which a clearly erroneous standard of review is inappropriate.²³³ The bifurcated standard of review implemented by the Texas Court of Criminal Appeals provides an example of how the Court of Appeals of Maryland could have adopted a more exacting standard that would provide petitioners with relief through post-conviction DNA testing and continue to give deference to the decisions of post-conviction trial courts.²³⁴ Ultimately, the Court of Appeals' decision in *Blake II* to apply a highly deferential standard of review to decisions on such a gravely important matter establishes a troubling precedent for the future of post-conviction DNA testing in Maryland.

mony, the police only examined evidence that had readable property numbers—that the State's search for evidence was not reasonable based on the fact that the police did not search an entire mass of evidence merely because the property numbers were not completely identifiable.

228. See *supra* Part I.C.1–2.

229. See *supra* Part I.C.1–2.

230. See *supra* notes 105–111 and accompanying text.

231. See *supra* Part II.A.

232. See *supra* Part II.B.

233. See *supra* Part II.C.

234. See *supra* Part II.D.