THE INADEQUACY OF THE IMPOSSIBLE: OBTAINING POST-CONVICTION DNA TESTING IN ALABAMA

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TABLE OF CONTENTS

† Note Editor, Cardozo Law Review (Vol. 42). J.D., Benjamin N. Cardozo School of Law; M.S. Fordham University (2015); M.A. New York University (2012); B.A. University of California, Davis (2009). I would like to thank Professor Alexander Reinert for his incredible advice, wisdom, and help on this Note. I must also thank my Supervising Attorney at the Innocence Project, Adnan Sultan, who inspired me to write this Note by giving me the apparently impossible task of "finding a way into court in Alabama." I would also like to thank my husband, family, and friends, who endured months of my unending obsession and frustration with Alabama's criminal procedure laws. Finally, I would like to dedicate this Note to all the men and woman in prison who maintain but cannot prove their innocence due to inadequate legislation.

INTRODUCTION

In July of 2019, Christopher Tapp stepped out of an Idaho courthouse as a free man, after spending over twenty years in prison for a crime he did not commit.[1] Mr. Tapp was convicted in 1998 of the rape and murder of Angie Dodge, despite the fact that DNA testing excluded him prior to trial.[2] After more than thirty hours of interrogation, Mr. Tapp confessed to the crime.[3] That confession, however, was later determined to be coerced.[4] Mr. Tapp was sentenced to life in prison plus fifteen years, his conviction was upheld on appeal, and his petitions for post-conviction relief were denied.[5] Post-conviction DNA testing not only affirmed Mr. Tapp's innocence but matched to the true perpetrator: Brian Dripps.[6] By the time he was exonerated, even Ms. Dodge's family believed Mr. Tapp was innocent and had joined the fight to exonerate him.[7] At the post-conviction hearing, both the judge and the district attorney supported vacating Mr. Tapp's conviction—that is, treating the original conviction as if it never happened.[8] If Mr. Tapp had lived in Alabama, however, rather than Idaho, Mr. Tapp would likely still be in prison.[9]

While every state in the Union—as well as the federal government—has passed some form of statute creating a right to post-conviction DNA testing,[10] some states limit the applicability of that

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1 Innocence Staff, *DNA Testing Identifies Actual Perpetrator in 1996 Idaho Falls Rape and Murder, Confirming Christopher Tapp's Innocence*, INNOCENCE PROJECT (July 17, 2019), https://www.innocenceproject.org/christopher-tapp-exoneration [https://perma.cc/P62G-CNH5] [hereinafter *DNA Testing Identifies Actual Perpetrator*].

2 *Id.*

3 *Id.*

4 *Id.*

5 *Id.*; Tapp v. State, No. 41056, 2014 WL 4177464 (Idaho Ct. App. Aug. 22, 2014).

6 *DNA Testing Identifies Actual Perpetrator*, *supra* note 1.

7 Ken Otterbourg, *Christopher Tapp*, INNOCENCE PROJECT, https://www.innocenceproject.org/cases/christopher-tapp [https://perma.cc/9P56-BVXG].

8 *Id.*

9 *See generally* discussion *infra* Sections I.D and II.A–C for an analysis of the ways in which Alabama limits petitions such as Christopher Tapp's.

10 *See* Justice for All Act of 2004, Pub. L. No. 108-45, 118 Stat. 2260 (codified as amended at 18 U.S.C. § 3600); N.Y. CRIM. PROC. LAW §§ 440.10 to 440.40 (McKinney 2019); 725 ILL. COMP.

right to certain groups of people.[11] Alabama's post-conviction DNA statute—section 15-18-200—provides access to DNA testing only for capital offenders, provided they meet certain other criteria.[12] Prior to the enactment of section 15-18-200, anyone seeking post-conviction DNA testing, capital or otherwise, had to bring a petition under Alabama's general post-conviction relief statute—Rule 32 of Alabama's Rules of Criminal Procedure—alleging that DNA technology was newly discovered evidence.[13]

The enactment of section 15-18-200 in 2009 created a statutory right for capital offenders to seek DNA testing but left non-capital offenders with only Rule 32 as a potential mechanism for testing.[14] Capital offenders who are unable to meet the statutory requirements of

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STAT. 5/116-3 (2019); ALA. CODE § 15-18-200 (2019); ALASKA STAT. § 12.73.010 (2019); ARIZ. REV. STAT. ANN. § 13-4240 (2019); ARK. CODE ANN. § 16-112-202 (2019); CAL. PENAL CODE § 1405 (West 2019); COLO. REV. STAT. §§ 18-1-410 to 18-1-417 (2019); CONN. GEN. STAT. § 54-102kk (2019); DEL. CODE ANN. tit. 11, § 4504 (2019); D.C. CODE §§ 22-4133, 22-4135 (2019); FLA. STAT. §§ 925.11 to 925.12, 943.3251 (2019); GA. CODE ANN. § 5-5-41 (2019); HAW. REV. STAT. §§ 844D-121 to 844D-133 (2019); IDAHO CODE § 19-4902 (2019); IND. CODE §§ 35-38-7-1 to 35-38-7-19 (2019); IOWA CODE § 81.10 (2019); KAN. STAT. ANN.§ 21-2512 (West 2018); KY. REV. STAT. ANN. § 422.285 (West 2019); LA. CODE CRIM. PROC. ANN. art. 926.1 (2019); ME. STAT. tit. 15, §§ 2136–2138 (2017); MD. CODE ANN., CRIM. PROC. § 8-201 (West 2019); MASS. GEN. LAWS ANN. ch. 278A, §§ 1–18 (West 2019); MICH. COMP. LAWS § 770.16 (2019); MINN. STAT. §§ 590.01–590.06 (2019); MISS. CODE ANN. § 99-39-5 (2019); MO. REV. STAT. §§ 547.035, 547.037 (2019); MONT. CODE ANN. § 46-21-110 (2019); NEB. REV. STAT. ANN. §§ 29-4116 to 29-4125 (West 2019); NEV. REV. STAT. §§ 176.0918, 176.09183, 176.09187, 176.0919 (2019); N.H. REV. STAT. ANN. §§ 651-D:1 to 651-D:5 (2019); N.J. STAT. ANN. §§ 2A:84A-32a to 2A:84A-32d (West 2019); N.M. STAT. ANN. § 31-1a-2 (2019); N.C. GEN. STAT. § 15A-269 to 15A-270.1 (2019); N.D. CENT. CODE ANN. § 29-32.1-15 (2019); OHIO REV. CODE ANN. §§ 2953.71–2953.75 (West 2019); OKLA. STAT. tit. 22, §§ 1373.2, 2953.76 to 2953.84 (2019); OR. REV. STAT. §§ 138.690–138.698 (2019); 42 PA. CONS. STAT. § 9543.1 (2019); 10 R.I. GEN. LAWS §§ 10-9.1-10 to 10-9.1-12 (2019); S.C. CODE ANN. § 17-28-10 (2019); S.D. CODIFIED LAWS § 23-5B-1 (2019); TENN. CODE ANN. §§ 40-30-301 to 40-30-313 (2019); TEX. CODE CRIM. PROC. ANN. art. 64.01–64.05 (West 2017); UTAH CODE ANN. §§ 78B-9-301 to 78B-9-304 (West 2019); VT. STAT. ANN. tit. 13, § 5561 (2019); VA. CODE ANN. § 19.2-327.1 (2019); WASH. REV. CODE § 10.73.170 (2019); W. VA. CODE ANN. § 15-2B-14 (2019); WIS. STAT. §§ 974.02, 974.06, 974.07 (2019); WYO. STAT. ANN. § 7-12-302 to 7-12-315 (2019).

11 *Compare* ALASKA STAT. § 12.73.010 (2019) (limiting DNA testing to those convicted of certain felonies), *with* OHIO REV. CODE ANN. § 2953.72 (West 2019) (limiting DNA testing to exclude those who pleaded guilty at trial).

12 ALA. CODE § 15-18-200 (2019).

13 ALA. R. CRIM. P. 32.1(e); Lloyd v. State, 144 So. 3d 510, 515 (Ala. Crim. App. 2013) ("Thus, in both *Dowdell* and *Barbour*, this Court recognized that a postconviction request for DNA testing could be made in a Rule 32 petition within the confines of newly discovered material facts under Rule 32.1(e). Although § 15-18-200, enacted in 2009, clearly took postconviction requests for DNA testing for individuals convicted of capital offenses out of the realm of Rule 32, we do not believe that § 15-18-200 affected the ability of individuals convicted of noncapital offenses to seek DNA testing through Rule 32.").

14 *Lloyd*, 144 So. 3d at 515.

section 15-18-200 must also resort to Rule 32.[15] To date, there have only been *three* DNA exonerations in Alabama—and those cases appear to be outliers—the outcomes of which relied on the unique circumstances of each case and *not* on the effectiveness of Rule 32 as a mechanism for relief.[16]

The Alabama courts—as well as the United States Court of Appeals for the Eleventh Circuit[17]—have consistently maintained that Rule 32 is the *only* mechanism to obtain DNA testing in non-capital cases, while also, consistently declining to grant those Rule 32 petitions, summarily dismissing most petitions without even an evidentiary hearing.[18] Analyzing the constitutionality of the Rule, the Eleventh Circuit—while Alabama was enacting section 15-18-200[19]—ruled in *Cunningham v. District Attorney's Office for Escambia County*[20] (*Cunningham I*) that Rule 32 provided minimally adequate procedures to obtain post-conviction DNA testing in Alabama and thus did not violate due process.[21] The Court based its decision, however, on a set of

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15 While both capital and non-capital offenders have been unsuccessful at obtaining post-conviction DNA testing under both section 15-18-200 and Rule 32, this Note will focus largely on non-capital offenders who *cannot* bring a petition under section 15-18-200. In order to demonstrate the procedural bars the Alabama courts have read into Rule 32, regardless of who brings the petition, this Note will also make reference to cases of capital offenders whose section 15-18-200 claims were time-barred and sought relief under Rule 32.

16 *See All Cases: Alabama*, INNOCENCE PROJECT, https://www.innocenceproject.org/all-cases/#alabama [https://perma.cc/3MBU-D3WE]. For example, two of the three cases involved brothers who were convicted and exonerated at the same time. An interview with their post-conviction attorney revealed that the District Attorney did not challenge their petition for post-conviction relief. According to their attorney, relief was likely only granted due to this lack of opposition. Clayton Tartt, Note, *Procedure Trumps Justice: Judicial Inactivism in Alabama and its Unjust Result*—Fagan v. Alabama, 13 JONES L. REV. 127, 131 (2009) (citing a telephone interview with Dan King, the trial attorney on that case). In the third case, the petitioner already had access to the DNA results that proved actual innocence. Maurice Possley, *Jeffrey Holemon*, NAT'L REGISTRY OF EXONERATIONS (June 2012), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3300 [https://perma.cc/X7GG-QXQ4].

17 Cunningham v. Dist. Att'y's Off. for Escambia Cnty. (*Cunningham I*), 592 F.3d 1237, 1263–66 (11th Cir. 2010).

18 *See Lloyd*, 144 So. 3d at 512–18; Barbour v. State, 903 So. 2d 858 (Ala. Crim. App. 2004) (denying Rule 32 petition for post-conviction DNA testing but also finding that it is possible to get such testing under the rule); Dowdell v. State, 854 So. 2d 1195 (Ala. Crim. App. 2002) (holding that Rule 32 is the appropriate mechanism in which to bring a petition for post-conviction DNA testing, although testing was not granted in this case); Gilley v. State, 841 So. 2d 315 (Ala. Crim. App. 2002) (mem.) (denying Rule 32 petition for post-conviction DNA testing); Winborn v. State, 848 So. 2d 273 (Ala. Crim. App. 2002) (mem.) (same).

19 Section 15-18-200 went into effect, in part, in August 2009, while *Cunningham* was decided in January 2010. *Compare* ALA. CODE § 15-18-200, *with Cunningham I*, 592 F.3d at 1237 (decided on Jan. 6, 2010).

20 *Cunningham I*, 592 F.3d 1237.

21 *Id.* at 1269–71.

assumptions and presumptions that are inaccurate—as this Note will demonstrate through an analysis of Rule 32 petitions and orders at the trial court level.[22] As applied,[23] Rule 32 did not provide minimally adequate procedures at the time *Cunningham I* was decided and does not today.[24] As this Note will show, the procedural barriers both on the face of the Rule and as applied by the courts have rendered the Rule futile.[25] In the decade since that decision, the Alabama courts have neither granted Rule 32 petitions for post-conviction DNA testing nor provided post-conviction relief, despite their insistence that it is possible on the face of the Rule.[26]

This Note proceeds in three parts. Part I frames Alabama's DNA testing framework by (1) outlining the mechanisms for and barriers to obtaining post-conviction DNA testing in Alabama through Rule 32 of the Alabama Rules of Criminal Procedure and section 15-18-200 of Alabama's Code, (2) discussing the primary cases—*Osborne* and *Cunningham*—governing the constitutionality of post-conviction DNA testing as it pertains to Alabama, and (3) illustrating the procedural barriers to obtaining post-conviction DNA testing in Alabama, specifically for non-capital offenders. Part II demonstrates the ways that DNA testing has been denied in Alabama by discussing (1) the cases that led up to the decision in *Cunningham I*, (2) the cases that have attempted to obtain testing in its wake, including Cunningham's own petition, (3) the ways in which Alabama courts arbitrarily deny DNA testing, and (4) the futility of the post-conviction relief statute. Part III proposes two amendments to Alabama's statutes that would expand the category of people who can obtain post-conviction DNA testing and when they are allowed to access it.

I. BACKGROUND

A. *DNA Statutes and the Innocence Movement*

In recent decades, judges, practitioners, and much of the criminal justice system writ large have recognized the incredible power of DNA

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22 *See* discussion *infra* Sections II.A–B.

23 Although the Eleventh Circuit has largely done away with as-applied challenges to state DNA statutes under the *Rooker-Feldman* doctrine, such a discussion is beyond the scope of this Note. *See* Alvarez v. Att'y Gen. for Fla., 679 F.3d 1257, 1263–64 (11th Cir. 2012) (holding that an as-applied challenge to a state DNA statute is barred by the *Rooker-Feldman* doctrine).

24 *See* discussion *infra* Sections II.A–B.

25 *See* discussion *infra* Sections I.D.1–4; *see also* discussion *infra* Sections II.A–B.

26 *See* discussion *infra* Sections II.A–B.

to identify the perpetrators of crimes and exonerate the innocent.[27] This recognition is evident in the "innocence movement" and the push nationwide to create statutory procedures to obtain post-conviction DNA testing to prove one's innocence.[28] New York and Illinois became the first states in the nation to pass such statutes, and every state in the nation, as well as the federal government, followed suit.[29] The statutes vary in their requirements from state to state, some denying testing to those who pled guilty, some with varying custody requirements, some with strict statutes of limitations, and at least one limiting testing to only those convicted of capital offenses.[30] To date, there have been 375 DNA exonerations nationwide.[31] With the increase in public awareness surrounding the need for post-conviction DNA testing, however, comes the awareness that many of the statutes have procedural limitations that bar relief in many instances.[32] As petitioners around the country try to obtain DNA testing, gaps in the statutes—either on the face of the statute or as interpreted by the judges who apply them—have become clear.[33] Some states have sought to amend their statutes to fill these gaps, but many other states have moved in the opposite direction, limiting access to post-conviction DNA testing.[34]

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27 *See* Dist. Att'y's Off. v. Osborne, 557 U.S. 52, 62 (2009) (finding that "[m]odern DNA testing can provide powerful new evidence unlike anything known before."); *see also id.* at 98–99 (Stevens, J., dissenting) (explaining that "DNA evidence has led to an extraordinary series of exonerations, not only in cases where the trial evidence was weak, but also in cases where the convicted parties confessed their guilt and where the trial evidence against them appeared overwhelming.").

28 *Cf.* sources cited *supra* note 10.

29 *See* sources cited *supra* note 10.

30 *Access to Post-Conviction DNA Testing*, INNOCENCE PROJECT, https://www.innocenceproject.org/causes/access-post-conviction-dna-testing [https://perma.cc/8FXZ-UP8P]; *see, e.g.*, ALA. CODE § 15-18-200 (2019).

31 *DNA Exonerations in the United States*, INNOCENCE PROJECT, https://www.innocenceproject.org/dna-exonerations-in-the-united-states [https://perma.cc/BZ95-NQYR].

32 *See, e.g.*, Justin Brooks & Alexander Simpson, *Blood Sugar Sex Magik: A Review of Postconviction DNA Testing Statutes and Legislative Recommendations*, 59 DRAKE L. REV. 799, 807–11 (2011); Daina Borteck, Note, *Pleas for DNA Testing: Why Lawmakers Should Amend State Post-Conviction DNA Testing Statutes to Apply to Prisoners Who Pled Guilty*, 25 CARDOZO L. REV. 1429, 1430–31 (2004).

33 *See* cases cited *supra* note 18.

34 *Compare* Smallwood v. State, 451 Md. 290, 315–20 (2017) (discussing Maryland's post-conviction DNA statute and the legislative history indicating a more inclusive intent on the part of the legislature to grant access to testing), *with* 2 TEX. SENATE RSCH. CTR., HIGHLIGHTS OF THE 84TH TEXAS LEGISLATURE: A SUMMARY OF ENROLLED LEGISLATION 469 (2015), https://texashistory.unt.edu/ark:/67531/metapth839362/m2/1/high_res_d/UNT_2016_0002_0018.pdf [https://perma.cc/ET6Q-C3P8] (discussing the ways in which the Texas Court of Criminal Appeals decision in the case of Larry Swearingen was the impetus for the changing statute).

B. *Alabama's Post-Conviction DNA Testing Framework*

1. Rule 32

In Alabama, all individuals convicted of non-capital offenses seeking post-conviction DNA testing must petition the court through Rule 32 of the Alabama Rules of Criminal Procedure.[35] Rule 32 is Alabama's general post-conviction relief statute, allowing a petitioner to launch a collateral attack on his conviction on a number of grounds.[36] Until 2009—when Alabama created a separate DNA statute for capital offenders, discussed *infra* Section I.B.2—Rule 32 was the only means of obtaining post-conviction DNA testing for both capital and non-capital offenders alike.[37] While petitioners have attempted to bring a motion for DNA testing outside of Rule 32, courts have consistently treated such motions as Rule 32 petitions, regardless of the mechanism by which the petitioner brought the case.[38] Alabama has consistently maintained that Rule 32 is the proper mechanism for post-conviction DNA testing in non-capital cases because it creates an avenue for a deserving applicant to access evidence supporting his claim of innocence.[39] The Alabama courts, however, have yet to find a deserving applicant.[40]

In relevant part, Rule 32.1(e) provides a mechanism for individuals to seek post-conviction relief when newly discovered facts—in this case, DNA technology—exist that require a conviction be vacated because: (1) the facts were unknown and could not be discovered through due diligence at the time of trial or in any collateral proceeding; (2) the facts are not merely cumulative; (3) the facts are not merely impeachment evidence; (4) if the facts were known at trial, the outcome would have

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35 ALA. R. CRIM. P. 32; Fagan v. State, 957 So. 2d 1159 (Ala. Crim. App. 2007).

36 *See generally* ALA. R. CRIM. P. 32. For example, Rule 32 allows a petitioner to seek relief if the petitioner is being held in prison in violation of the Constitution, if the sentencing court did not have jurisdiction over the original case, or if the sentence imposed is in excess of the maximum authorized by law. *Id.*

37 Barbour v. State, 903 So. 2d 858, 862 (Ala. Crim. App. 2004).

38 *See, e.g.*, Lloyd v. State, 144 So. 3d 510, 512–13 (Ala. Crim. App. 2013). Lloyd petitioned the court through a motion for DNA testing under § 15-18-200 but the court treated it as a Rule 32 petition because he was convicted of a non-capital offense. *Id.*

39 Motion for Access to Biological and Forensic Evidence for DNA Testing at 5, State v. Cunningham, No. CC-1995-0439 (Ala. Cir. Ct. 2012) [hereinafter Cunningham Petition] (citing State's Supplemental Brief at 4, 9, Cunningham v. Dist. Att'y's Off. for Escambia Cnty. (*Cunningham I*), 592 F.3d 1237 (11th Cir. 2010) (No. 07-10808) (stating that Rule 32 "provides a mechanism by which a deserving applicant may obtain access to evidence to support a claim of actual innocence")).

40 *See* discussion *infra* Sections II.A–C.

been different; *and* (5) the facts establish that the individual is innocent.[41] A claim for relief based on newly discovered evidence must meet all five requirements of Rule 32.1(e).[42]

2. Section 15-18-200

Alabama was one of the last states in the Union to create a DNA statute, doing so finally in 2009.[43] That statute—section 15-18-200—allows individuals convicted of a capital offense to obtain DNA testing if the results would show the individual's actual innocence.[44] Once an individual has the exculpatory DNA results, he may then present the results to a court within six months as newly discovered evidence, pursuant to Rule 32.1(e) and 32.2(c), discussed *infra* Section I.D.3.[45] Although section 15-18-200 created a statutory right to DNA testing when the results could show innocence, it limited DNA testing only to those convicted of a capital offense, and further provided that testing would only be available for one year following the enactment of the statute or within one year of conviction.[46] Thus, any petitioner seeking post-conviction DNA testing, even in capital cases, who did not file a motion in the one year time period following the enactment of section 15-18-200 is time-barred.[47] If such an individual wishes to obtain DNA testing, he must do so in the same manner as those convicted of non-capital offenses—through Rule 32—by claiming that DNA technology is newly discovered evidence.[48]

Since the enactment of section 15-18-200, few capital offenders have been able to successfully obtain DNA testing and none have been granted post-conviction relief.[49] Irrespective of the limitations in the statute for capital offenders, however, non-capital offenders are excluded from any remedy that the DNA statute may provide.[50] Despite

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41 ALA. R. CRIM. P. 32.1(e)(1)–(5).

42 *Lloyd*, 144 So. 3d at 516.

43 *See* ALA. CODE § 15-18-200. Only Alaska, Massachusetts, Mississippi, and Oklahoma came after Alabama. *See generally* sources cited *supra* note 10.

44 ALA. CODE § 15-18-200(a).

45 *Id.* § 15-18-200(h)(2).

46 *Id.* § 15-18-200(f)(1)(c).

47 *Id.*

48 *See* discussion, *supra* Section I.B.1.

49 *See* sources and accompanying text, *supra* note 16 (all three DNA exonerations in Alabama occurred prior to the enactment of § 15-18-200).

50 *See* ALA. CODE § 15-18-200(a); Lloyd v. State, 144 So. 3d 510, 512–13 (Ala. Crim. App. 2013) (finding that non-capital offenders are not included in section 15-18-200).

the push nationwide to make DNA testing more available to those alleging innocence, Alabama continues to deny such testing.[51]

C. *Cunningham v. District Attorney's Office for Escambia County*

Dewayne Cunningham was convicted in 1996 of the rape of Alicia Brown after Brown identified Cunningham as her assailant.[52] After losing his appeals, Cunningham challenged his conviction several times in both federal and state court between 1999 and 2004, alleging primarily ineffective assistance of counsel and actual innocence, but he did not request DNA testing.[53] In 2006, Cunningham filed a claim under 42 U.S.C. § 1983 in federal court seeking DNA testing of a condom wrapper, fingernail scrapings, and pubic hair combings, which he argued could prove his innocence.[54] Cunningham alleged that Alabama's refusal to grant him access to post-conviction DNA testing amounted to an unconstitutional violation of due process, access to courts, and equal protection.[55] The district court dismissed his claim, Cunningham appealed, and in 2010, the Eleventh Circuit affirmed.[56]

The Eleventh Circuit considered Cunningham's claim in light of the Supreme Court's then-recent decision in *District Attorney's Office for the Third Judicial District v. Osborne*.[57] Osborne, like Cunningham, sought DNA testing to prove his innocence and alleged that Alaska's denial of DNA testing violated his due process rights.[58] The Supreme Court held that individuals have no substantive due process right to post-conviction DNA testing.[59] Even so, when a state chooses to create a mechanism entitling individuals to post-conviction DNA testing through its statutes, it must also create minimally adequate procedures

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51 *See* discussion, *infra* Section II.B.

52 Cunningham v. Dist. Att'y's Off. for Escambia Cnty. (*Cunningham I*), 592 F.3d 1237, 1241, 1246–47 (11th Cir. 2010).

53 *Id.* at 1251–53.

54 *Id.* at 1253–54.

55 *Id.* at 1254.

56 *Id.* at 1254–55.

57 *Id.*; Dist. Att'y's Off. v. Osborne, 557 U.S. 52 (2009).

58 *Osborne*, 557 U.S. at 60.

59 *Id.* at 72 ("Osborne seeks access to state evidence so that he can apply new DNA-testing technology that might prove him innocent. There is no long history of such a right, and '[t]he mere novelty of such a claim is reason enough to doubt that "substantive due process" sustains it.'"). Although Substantive Due Process has been articulated in a number of ways, it generally refers to the respect of those rights so fundamental that they are inherent in the basic concepts of liberty. *See* Rochin v. California, 342 U.S. 165, 169 (1952).

to actually access the testing and must not arbitrarily deny relief.[60] When a state does create such a statutory right, but does not adequately provide procedures to access the right, it is a procedural violation of due process.[61] Generally speaking, federal courts will only disrupt a state's post-conviction relief statute if the statute is inadequate to provide those convicted with their substantive rights.[62] In other words, as long as the state's statute has a procedure to seek relief that a federal court deems "adequate," the federal courts will not strike down the state law on the basis of procedural due process concerns.[63] The Supreme Court found Alaska's post-conviction relief procedure adequate in *Osborne* because it allowed for relief when there was a compelling showing of actual innocence; exempted those claims from any time limitations; and provided discovery in post-conviction proceedings.[64]

Applying the same reasoning of the Supreme Court, the *Cunningham I* Court ruled that because Alabama provides a mechanism for post-conviction relief under Rule 32, Alabama had adopted minimally adequate procedures to access DNA testing.[65] The Court based its decision, however, on at least one basic assumption that is inherently flawed: that Rule 32 is actually adequate.[66] The Court undermined its own holding by acknowledging that if Cunningham were to bring a Rule 32 petition seeking DNA testing in state court it would likely be denied on procedural grounds.[67] The Court nevertheless declined to find that Rule 32 was facially inadequate.[68] As this Note demonstrates, Rule 32 was inadequate when *Cunningham I* was decided and remains so today.[69]

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60 *Osborne*, 557 U.S. at 67–68; *see id.* at 89–90 (Stevens, J., dissenting) (finding that "[a]lthough States are under no obligation to provide mechanisms for postconviction relief, when they choose to do so, the procedures they employ must comport with the demands of the Due Process Clause . . . by providing litigants with fair opportunity to assert their state-created rights"); *see also Cunningham I*, 592 F.3d at 1262.

61 *Osborne*, 557 U.S. at 89–90 (Stevens, J., dissenting).

62 *Id.* at 69 (majority opinion).

63 *Id.* at 69–70.

64 *Id.* at 69–71.

65 *Cunningham I*, 592 F.3d at 1263–64.

66 *See* discussion *infra* Sections I.D.1–4; *see also* discussion *infra* Section II.A.

67 *Cunningham I*, 592 F.3d at 1269–71.

68 *Id.*

69 *See* discussion *infra* Sections II.A–C.

D. *Barriers to Post-Conviction Relief Under Rule 32*

This Section outlines some of the barriers within Rule 32 that make it impossible to obtain post-conviction DNA testing under the Rule. Rule 32 has strict pleading requirements, discussed *infra* Section I.D.2, that often render most petitions dead on arrival, especially for *pro se* prisoners.[70] Furthermore, even for a well-pled petition, obtaining DNA testing under Rule 32 requires first obtaining the physical evidence from the state in order to conduct testing.[71] While Rule 32 allows for discovery of state evidence, it does so on a "good cause" standard, which, for DNA cases, creates a catch-22 that renders it nearly impossible to actually conduct testing.[72] Finally, even for petitions that are well-pled and present good cause to obtain discovery, Rule 32 bars successive petitions and requires that a petitioner bring their claim within six months of discovering the DNA technology they seek to use—a feat that is impossible for technology that is now well-established.[73]

This Section concludes by discussing an exception to Rule 32's time limitations that some Alabama courts have suggested may allow relief in some instances: equitable tolling.[74] Even where a court has acknowledged the potential for equitable tolling, however, it has also found that the petitioner did not exercise due diligence—that is, should have known to request DNA testing sooner— and has thus denied relief.[75] These barriers within Rule 32 work together, as this Section demonstrates, to render Rule 32 inadequate to access the right to DNA testing that Alabama has statutorily created and judicially affirmed.[76]

1. Rule 32 Pleading Requirements

A Rule 32 petitioner has the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle him to relief.[77] Additionally, a Rule 32 petition must allege, clearly and with

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70 *See* discussion *infra* Section II.C; *see also* discussion and sources cited *infra* note 222.

71 *See* ALA R. CRIM. P. 32.1(e).

72 *See* discussion *infra* Section I.D.3.

73 *See* discussion *infra* Section I.D.4; *see also* discussion *infra* Part II.

74 *See* discussion *infra* Section I.D.4.

75 *See, e.g.*, Order at 14–15, State v. Cunningham, No. CC-95-439 (Ala. Cir. Ct. Dec. 12, 2012) [hereinafter Cunningham Order] ("Cunningham would have known to at least attempt to request DNA testing of the scrapings and hair in the rape kit long before 2004.").

76 *See, e.g.*, discussion and cases cited *infra* Section II.C.

77 ALA. R. CRIM. P. 32.3.

specific and sufficient detail, all the grounds for relief, including more than bare conclusions and allegations.[78] Petitions that are determined to be insufficiently specific, include boiler-plate language, or fail to state an adequate claim for relief are summarily dismissed by circuit courts.[79] For DNA petitions, the claim for relief must clearly allege that DNA can prove a petitioner's innocence and that he was unaware of the evidence he seeks to test at the time of trial.[80] Because Rule 32 petitions resemble complaints rather than motions,[81] the pleading requirements are interpreted strictly and petitions are often summarily dismissed due to inadequate pleading.[82] Rule 32.1(e)(5) does not require that an individual plead *actual* innocence but requires only that the newly discovered fact must bear on the issue of innocence, rather than on an issue not directly tied to innocence, such as a procedural violation.[83]

2. Rule 32 Post-Conviction Discovery: A Catch-22

Newly discovered evidence must come in the form of actual DNA results that exonerate a defendant, which may be obtained through post-conviction discovery at the discretion of the trial court where justice requires.[84] Obtaining the DNA results, however, requires access to the evidence, so a defendant can only bring a Rule 32 petition challenging his conviction based on newly discovered exculpatory DNA evidence once he has *first* obtained post-conviction discovery of the DNA evidence.[85] Post-conviction discovery motions are judged on a "good cause" standard.[86] If a claim is meritorious on its face—i.e., it

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78 *Id.* at 32.6(b) ("[T]he petition must contain a clear and specific statement of the grounds upon which relief is sought," and must include more than a "bare allegation . . . and mere conclusions of law.").

79 *Id.* at 32.7(d); Lloyd v. State, 144 So. 3d 510, 517 (Ala. Crim. App. 2013) (finding that a petition that did not specifically allege that the petitioner was unaware of certain facts at trial did not meet the pleading requirement for newly discovered evidence under 32.1(e)(1)).

80 *See Lloyd*, 144 So. 3d at 517.

81 *See generally, e.g.*, Petition for Relief from Judgment Pursuant to Rule 32 of the Alabama Rules of Criminal Procedure at 1–2, Craft v. State, No. CC-2004-326.62 (Ala. Cir. Ct. 2016) [hereinafter Craft Petition].

82 *See, e.g.*, Barbour v. State, 903 So. 2d 858, 868–69 (Ala. Crim. App. 2004) (finding, in part, that Barbour's claim was not sufficiently pleaded because it did not contend any factual specificity); *see also* cases cited *supra* note 18.

83 *Lloyd*, 144 So. 3d at 517 (explaining that the newly discovered fact must "'go to the issue of the defendant's actual innocence . . . as opposed to a procedural violation not directly bearing on guilt or innocence'") (quoting *Ex parte* Ward, 89 So. 3d 720, 727 (Ala. 2011).

84 Dowdell v. State, 854 So. 2d 1195, 1201–02 (Ala. Crim. App. 2004) (Shaw, J., concurring).

85 *Id.* at 1200.

86 *Ex parte* Land, 775 So. 2d 847, 852 (Ala. 2000).

contains "matters and allegations . . . which, if true, entitle the petitioner to relief"—then an evidentiary hearing must be held.[87] In order to determine if there is good cause, courts consider: issues presented in the petition; the scope of the requested discovery; the length of time between the conviction and the post-conviction proceeding; the burden of discovery; and the availability of the evidence through other means.[88] Courts have emphasized that discovery requests must be appropriately narrow and limited in scope and amount to more than just a fishing expedition.[89] Courts examine a showing of good cause based on the elements of the claim for which discovery is requested; for example, when seeking discovery based upon ineffective assistance of counsel, a petitioner must satisfy the *Strickland* test.[90]

Therefore, in order to avoid dismissal at the pleading stage of a Rule 32 petition *and* obtain discovery of DNA evidence, one must not only plead "a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds," but must also "allege facts that, if proved, would entitle him or her to the relief sought before he or she can seek discovery in support of the ground alleged."[91] Trial courts have discretion in discovery orders and post-conviction courts will only compel discovery in rare and unusual cases.[92]

Some Alabama judges have expressed skepticism that a successful Rule 32.1(e)(1) claim could realistically be brought.[93] This skepticism is due to an apparent catch-22: a petitioner is unable to obtain DNA results without a valid claim but does not have a valid claim until DNA results are obtained.[94] Most opinions, however, have dismissed this

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87 *Dowdell*, 854 So. 2d at 1201 (Shaw, J., concurring) (quoting *Ex parte* Boatwright, 471 So. 2d 1257, 1258 (Ala. 1985)).

88 *See Ex parte* Perkins, 920 So. 2d 599, 602 (Ala. Crim. App. 2005).

89 *Id.* at 603.

90 Strickland v. Washington, 466 U.S. 668, 687 (1984) (holding that a claim of ineffective assistance of counsel must show deficient performance and prejudice); *Perkins*, 920 So. 2d. at 603.

91 ALA. R. CRIM. P. 32.6(b); Dowdell v. State, 854 So. 2d 1195, 102 (Ala. Crim. App. 2004) (Shaw, J., concurring).

92 *Perkins*, 920 So. 2d at 602.

93 *See Dowdell*, 854 So. 2d at 1198, 1202 (Shaw, J., concurring) (arguing that "[o]ur system fails every time an innocent person is convicted, no matter how meticulously the procedural requirements governing criminal trials are followed," and expressing concern that "there is no mechanism available for [a petitioner] to challenge his conviction based upon allegedly exculpatory DNA test results") (internal citations and quotations omitted).

94 *Id.* at 1202 (Shaw, J., concurring).

concern and indicated a willingness to consider post-conviction discovery as a means of obtaining DNA testing if good cause is shown.[95]

In discussing Alabama case law regarding post-conviction discovery, the Eleventh Circuit in *Cunningham I* noted that there were several decisions from Alabama that show that it is theoretically possible to use Rule 32 discovery to obtain and test physical evidence.[96] The court then went on to provide several examples of cases where post-conviction Rule 32 discovery was used to obtain evidence for forensic testing.[97] In *Ex parte Perkins*,[98] the petitioner successfully sought discovery to perform testing of blood evidence as part of his claim that his counsel was ineffective for failing to obtain testing at the time of trial.[99] In *Stallworth v. State*,[100] the petitioner successfully sought discovery to retest blood evidence as part of his claim of prosecutorial misconduct and ineffective assistance of counsel.[101] Most notably for purposes of this Note, in *Arthur v. State*,[102] the petitioner used Rule 32 discovery to obtain DNA testing of crime scene evidence in an effort to prove his claim that someone else committed the crime.[103]

In all of the cases cited by the Eleventh Circuit in *Cunningham I*, each of the Rule 32 discovery requests accompanied and were supported by other new evidence already available or were part of a separate claim.[104] The *Cunningham I* court acknowledged that while there has

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95 *See, e.g.*, Cunningham v. Dist. Att'y's Off. for Escambia Cnty. (*Cunningham I*), 592 F.3d 1237, 1267–68 (11th Cir. 2010).

96 *Id.* at 1265–66 ("Several additional orders and decisions make clear that Rule 32 discovery can be used to obtain physical evidence for forensic testing.").

97 *Id.*

98 *Ex parte* Perkins, 920 So. 2d 599 (Ala. Crim. App. 2005).

99 *See generally id.*

100 Order, Stallworth v. State, No. CC-98-0113.60 (Ala. Cir. Ct. Dec. 10, 2013) [hereinafter Stallworth Order].

101 *See generally* Amended Petition for Relief from Judgment Pursuant to Rule 32 of the Alabama Rules of Criminal Procedure, *Stallworth*, No. CC-98-0113.60 (Ala. Cir. Ct. Oct. 11, 2005) [hereinafter Stallworth Petition].

102 Arthur v. State, 71 So. 3d 733 (Ala. Crim. App. 2010).

103 *Id.* at 738–39. The petitioner presented a confession by another man as newly discovered evidence and sought DNA testing through discovery in order to support this claim. *Id.*

104 *See id.* (presenting another man's confession as newly discovered evidence to show that he, not the petitioner, committed the crime and seeking DNA testing to corroborate the confession); *Perkins*, 920 So. 2d at 603–04, 606, 607 (seeking discovery of blood and fingerprint evidence, hospital records, criminal records, and notes from voir dire in the possession of the State to support the petitioner's claim of ineffective assistance of counsel, jury misconduct, and mitigating circumstances); Stallworth Petition, *supra* note 101, at 35–37 (seeking discovery of biological materials to accompany the petitioner's claim that the prosecution withheld material evidence). The *Stallworth* court granted an evidentiary hearing on the claim of ineffective assistance of counsel but dismissed all other claims and did not order discovery of the biological materials. Order at 1–3, *Stallworth*, No. CC-98-0113.60 (Ala. Cir. Ct. May 10, 2007).

not been a single case where an Alabama judge granted discovery based solely on the claim that DNA testing will establish innocence, there is nothing in the case law to indicate that a Rule 32 discovery request brought on the sole claim that DNA testing will prove innocence will inevitably fail.[105] Put another way, while courts have not granted Rule 32 discovery requests for DNA testing as stand-alone claims, they have also not explicitly said the claim will fail on its face.[106] The Eleventh Circuit indicated that Cunningham might successfully bring a Rule 32 discovery petition, as his claim was narrowly focused on specific pieces of evidence and it was clear what he believed the evidence would show.[107] The Court then went on to acknowledge that his Rule 32 petition would likely fail on procedural grounds.[108] It nonetheless ruled that Rule 32 was the proper and adequate avenue for Cunningham's claims, despite the fact that his petition would likely fail.[109]

Even when a court orders discovery as part of a Rule 32 post-conviction DNA testing petition, it does not always (and in fact rarely, if ever, does) grant relief to the petitioner.[110] In the few cases cited above, even after the judges granted the discovery orders, the judges then either denied the petitions summarily or after an evidentiary hearing.[111] In *Stallworth,* the court ordered discovery of certain items of evidence as part of his ineffective assistance of counsel claim, but Stallworth did not question his attorney at the evidentiary hearing.[112] The court determined that this failure to question the attorney meant that Stallworth did not have adequate evidence to establish that his attorney was in fact ineffective and dismissed his petition.[113] In *Arthur*, the court ordered discovery of some of the crime scene evidence and held an evidentiary hearing but ruled that the DNA results—which excluded

105 Cunningham v. Dist. Att'y's Off. for Escambia Cnty. (*Cunningham I*), 592 F.3d 1237, 1266 (11th Cir. 2010).

106 *Id.*

107 *Id.* at 1269. Cunningham's claim at the Eleventh Circuit was that the procedures in Alabama were in violation of the Constitution, but because Cunningham had not previously filed a Rule 32 petition, pursuant to *District Attorney's Office for the Third Judicial District v. Osborne*, 557 U.S. 52 (2009), the Eleventh Circuit dismissed Cunningham's § 1983 claim and instructed him to first pursue all Alabama post-conviction procedures. *Id.*

108 *Id.* at 1269–70.

109 *Id.* at 1271.

110 *See, e.g.*, Arthur v. State, 71 So. 3d 733, 748–49 (Ala. Crim. App. 2010) (finding that the DNA results showed that the confession of another man was not credible, and Arthur was thus not entitled to relief). It should also be noted that Arthur sought further discovery of the biological evidence, but the court denied this discovery request, finding that his underlying claim had already been proved false, and did not present good cause. *Id.* at 751.

111 *See* sources and accompanying text, *supra* notes 87–103.

112 Stallworth Order at 10, *supra* note 100.

113 *Id.*

the man Arthur claimed admitted to the crime—proved that Arthur's claim that someone else committed the crime had no merit and dismissed the petition without ordering further discovery.[114] In *Perkins*, the Alabama Court of Appeals ordered discovery of *some* of the documents Perkins sought, but denied all others.[115] After years of hearings and appeals, the Alabama Court of Criminal Appeals affirmed the denial of post-conviction discovery and relief.[116]

3. Preclusion of Remedy: "Newly Discovered," Statute of Limitations, and Successive Petitions

Even if one meets the requirements in the text of Rule 32.1, Rule 32.2 limits the class of people who may bring an otherwise valid claim by providing additional barriers to post-conviction relief.[117] Under Rule 32.2(b), successive petitions will be denied relief if the petition alleges similar grounds as a prior petition.[118] A successive petition on different grounds will only be granted if the petition shows good cause why the new grounds were unknown or could not have been discovered through due diligence at the time of the first petition, and shows that a failure to allow the successive petition would amount to a miscarriage of justice.[119]

As it relates to post-conviction DNA testing, if a petitioner has previously filed a Rule 32 petition seeking post-conviction relief on different grounds, a new petition will be summarily dismissed if the petition does not allege that the new grounds—DNA technology available with the ability to prove innocence—could not have been ascertained through reasonable diligence when the first petition was heard.[120] In other words, if the DNA technology was available during a prior petition, the successive petition will be denied, as the court will find that it could have been ascertained through due diligence.[121]

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114 *Arthur*, 71 So. 3d at 755 ("The circuit court determined that it had sufficient evidence upon which to make its findings . . . Therefore, there is no need for further DNA testing, and Arthur is not entitled to any additional discovery or any other relief.").

115 *Ex parte* Perkins, 920 So. 2d 599, 606–07 (Ala. Crim. App. 2005).

116 Perkins v. State, 144 So. 3d 457, 499 (Ala. Crim. App. 2012).

117 ALA. R. CRIM. P. 32.2.

118 *Id.* at (b)(1).

119 *Id.* at (b)(2) (stating that a successive petition will only be allowed if "the petitioner shows both that good cause exists why the new ground or grounds were not known or could not have been ascertained through reasonable diligence when the first petition was heard, and that failure to entertain the petition will result in a miscarriage of justice").

120 Lloyd v. State, 144 So. 3d 510, 517 (Ala. Crim. App. 2013).

121 *See, e.g.*, Cunningham Order, *supra* note 75, at 14–15.

Therefore, because DNA technology has been generally available for at least two decades, if a petitioner sought to challenge his conviction on *any grounds* during the last two decades, he did so while DNA technology was available.[122] A court would then likely determine that his failure to seek DNA testing at the same time as his prior petition was a failure to exercise due diligence and any subsequent petition would therefore be barred by Rule 32.2(b).[123]

Perhaps the greatest barrier to post-conviction relief in Alabama is Rule 32.2(c), which provides that any petition for post-conviction relief is subject to a one-year statute of limitations.[124] Claims of newly discovered evidence are not time-barred in the same manner, and can be brought at any time post-conviction, but they must be brought within six months of discovering the new evidence.[125] A Rule 32 petitioner claiming newly discovered DNA technology, therefore, must bring his petition within six months of discovering the new technology.[126] In *Dowdell v. Alabama*,[127] the Court found that DNA technology had been available for over a decade before Dowdell brought his Rule 32 petition and dismissed the petition as time-barred.[128] In *Barbour v. Alabama*,[129] the court found that the petition was not time-barred because Barbour was arguing *new* advancements in DNA technology, but dismissed the petition on different grounds.[130] The Escambia County Circuit Court in *Cunningham v. State*[131] (*Cunningham II*) outlined the dates on which modern DNA technology became widely known: STR-DNA in 1996;[132] mt-DNA in 1996;[133] Y-

122 *See, e.g.*, *Lloyd*, 144 So. 3d at 517.

123 *See, e.g.*, *id.*

124 ALA. R. CRIM. P. 32.2(c).

125 *Id.*

126 *Id.*; *see also Lloyd*, 144 So. 3d at 517.

127 854 So. 2d 1195 (Ala. Crim. App. 2004).

128 *Id.* at 1197–98.

129 903 So. 2d 858 (Ala. Crim. App. 2004).

130 *Id.* at 866–67.

131 Cunningham Order, *supra* note 75, at 14–15.

132 *Id.* at 5. Short Tandem Repeat (STR) DNA testing analyzes DNA along specific variable sequences and is now the most common type of DNA testing. Terry Taylor, *Extending the Time to Collect DNA in Sexual Assault Cases*, 267 NIJ J. 22, 24 (2011) (analyzing STR-DNA in a sidebar), https://nij.ojp.gov/topics/articles/what-str-analysis [https://perma.cc/NQT5-FANJ].

133 Cunningham Order at 6–7, *supra* note 75. Mt-DNA, or mitochondrial DNA, is the genetic material held in the mitochondria, rather than the chromosomes of human cells, and is helpful in forensics when regular DNA testing is unavailable. *See* David H. Kaye & George F. Sensabaugh, Jr., *Reference Guide on DNA Evidence*, *in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, FED. JUD. CTR. 495 (2nd ed. 2000), https://www.fjc.gov/sites/default/files/2012/sciman00.pdf [https://perma.cc/6WPX-LKCE].

STR in 2006;[134] and touch DNA in 2008.[135] The court used these dates to determine that all but the touch DNA technologies were available and known prior to six months before Cunningham brought his Rule 32 petition.[136] As with the bar on successive petitions, if the DNA technology was available during any prior proceedings, the court will dismiss the case as time-barred and rule that it is not newly discovered evidence.[137] Without new developments in DNA technology, it would be impossible to argue that DNA is "newly discovered" under Rule 32.2(c).[138]

4. An Unlikely Solution: Equitable Tolling

Although Rule 32.2(c) renders most claims of newly discovered DNA evidence time-barred, the Alabama courts have allowed exceptions to statutes of limitations in extraordinary circumstances under the doctrine of equitable tolling.[139] In *Ward v. Alabama*,[140] the Alabama Supreme Court recognized the need to allow equitable tolling when extraordinary and unavoidable circumstances exist that are beyond the petitioner's control even when exercising due diligence.[141] Courts have clarified that due diligence does not require a petitioner to exhaust all his options or undertake futile or repeated efforts, but they must make reasonable efforts.[142] Additionally, courts have acknowledged that due diligence must be considered in light of the circumstances, conditions, and realities of living inside of a prison, with the limited resources and opportunities that accompany the prison

134 Cunningham Order at 13, *supra* note 75. Y-STR DNA testing analyzes DNA along the Y chromosome and can only identify the DNA of males. Taylor, *supra* note 132, at 23.

135 Cunningham Order at 15, *supra* note 75. While the State offered these dates, Cunningham asserted much later dates of acceptability, arguing instead that STR testing was not the preferred method until 1999, mt-DNA was not available until 2002, and Y-STR was not widely used until 2006. *Id.* at 5–7. The court accepted the State's dates. *Id.* at 12–18. Touch DNA refers to the small amounts of microscopic DNA that is transferred from person to person or from person to object in casual contact. *See* David Spraggs, *Just a Touch: Using Touch DNA Evidence*, POLICE MAG. (Dec. 1, 2008), http://www.policemag.com/channel/technology/articles/2008/12/just-a-touch.aspx [http://perma.cc/6P55-VRYQ].

136 Cunningham Order, *supra* note 75, at 15.

137 *Id.* at 5, 13.

138 *Compare* Barbour v. State, 903 So. 2d 858, 867 n.6 (Ala. Crim. App. 2004), *with* Dowdell v. State, 854 So. 2d 1195, 1197–98 (Ala. Crim. App. 2002).

139 *See, e.g.*, *Ex parte* Ward, 46 So. 3d 888 (Ala. 2007).

140 *Id.*

141 *Id.* at 897.

142 Aron v. United States, 291 F.3d 708, 712 (11th Cir. 2002).

system.[143] In *Ward*, the Alabama Court of Criminal Appeals found that the petitioner—a prisoner on death row—did not fail to exercise due diligence when his attorney expressly ignored his wishes, filing a habeas petition rather than a Rule 32 petition.[144] Nevertheless, equitable tolling is only granted in extreme circumstances, and the threshold for meeting that standard is extremely high.[145] Courts have declined to find extreme circumstances sufficient to apply equitable tolling in cases of a prisoner's pro se status, late notice of decisions, inadequate resources in the prison library, and normal attorney errors.[146]

In *Cunningham II*, the petitioner conceded that his Rule 32 petition was time-barred but argued that the court should apply the doctrine of equitable tolling.[147] Cunningham argued that DNA technology was unavailable at the time of trial, and even once the technology became available, Alabama refused to turn over the evidence for testing, thus presenting extraordinary circumstances beyond his control.[148] In its opinion, the court conflated its discussion of equitable tolling with the requirements of Rule 32.1(e)(1), finding that Cunningham did not exercise due diligence and was not entitled to equitable tolling because he could have sought DNA testing much earlier and the circumstances were therefore not extraordinary.[149] This application of the doctrine of equitable tolling by the Escambia County Circuit Court reveals that while equitable tolling has the potential to overcome the six-month statute of limitations for newly discovered evidence, it will not be granted if the DNA technology was available during any prior proceeding.[150]

II. ANALYSIS: RULE 32 IS CONSTITUTIONALLY INADEQUATE AS-APPLIED

Alabama courts have been generally unwilling to grant Rule 32 petitions requesting DNA testing on grounds of newly discovered evidence, though they have declined to explicitly find that such relief is impossible.[151] Even the former Attorney General of Alabama, William

143 *Id.*

144 Ward v. State, 228 So. 3d 490, 504 (Ala. Crim. App. 2017).

145 United States v. Marcello, 212 F.3d 1005, 1010 (7th Cir. 2000); *accord* Davis v. Johnson, 158 F.3d 806, 810–12 (5th Cir. 1998).

146 *Ward*, 228 So. 3d at 498.

147 Cunningham Petition, *supra* note 39, at 10.

148 *Id.* at 11.

149 Cunningham Order, *supra* note 75, at 15.

150 *See id.* at 12–15.

151 *See* discussion *infra* Sections II.A–B.

Pryor, has acknowledged that most non-capital Rule 32 petitions are summarily dismissed without even a hearing.[152] While it is difficult to determine exactly how many Rule 32 petitions are granted and denied at the trial level, the appellate record reflects that very few petitions for post-conviction testing of evidence are granted.[153] Even fewer petitions, if any exist at all, are granted relief based on the results of that testing.[154]

DNA evidence was first used and accepted in Alabama courts in 1991.[155] Because of this, and because the public is widely aware of the potential for DNA evidence in criminal cases, the Alabama courts have been reluctant to consider DNA technology as *newly* discovered evidence—that is, it cannot be new if it has been accepted for 29 years.[156] While DNA testing in general is not considered *newly* discovered for purposes of Rule 32.1(e), Alabama courts have indicated a willingness to consider new *advances* in DNA technology as potentially newly discovered evidence, provided that the new advancements were unavailable at the time of trial, or during any subsequent appeals or collateral attacks.[157] In *Barbour v. State*,[158] the court recognized that it had previously not considered DNA to be newly discovered evidence but distinguished the case by acknowledging that the claim was based on the development of new technology that could exonerate Barbour rather than the claim that DNA testing was not done at trial.[159] While the courts have acknowledged this potential avenue, however, they have not granted such a petition, and continue to deny petitions alleging new DNA technology, despite their insistence that it is possible to bring such a claim.[160]

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152 *Protecting the Innocent: Ensuring Competent Counsel in Death Penalty Cases: Hearing Before the Comm. on the Judiciary*, 107th Cong. 1 (2001) ("[T]he trend in Alabama is for Rule 32 petitions in non-capital cases to be dismissed or denied without an evidentiary hearing.") (statement of William H. Pryor, Jr., Ala. State Att'y Gen.).

153 *See generally* discussion *infra* Sections II.A–B.

154 *See generally* discussion *infra* Sections II.A–B.

155 *See Ex parte* Perry, 586 So. 2d 242, 256 (Ala. 1991).

156 *See* Dowdell v. State, 854 So. 2d 1195, 1197–98 (Ala. Crim. App. 2004) (reasoning that the claim that a petitioner recently "learned of the existence of DNA testing as a method to prove his innocence" was not credible).

157 *See* Barbour v. State, 903 So. 2d 858, 867 n.6 (Ala. Crim. App. 2004).

158 *Id.*

159 *Id.* ("Barbour's claim is predicated not on the absence of DNA testing at trial . . . but that significant, recent technological developments would exonerate him.").

160 *Id.* at 865–67 (acknowledging the potential for new DNA advancements but dismissing the petition on other grounds); Cunningham Order, *supra* note 75 (acknowledging that touch DNA is newly discovered but finding that this evidence alone was not dispositive).

A. *Rule 32 was Inadequate when* Cunningham I *was Decided*

Two Alabama cases prior to the Eleventh Circuit's decision in *Cunningham I* formed much of the foundational case law interpreting Rule 32 petitions for post-conviction DNA testing:[161] *Dowdell v. State*[162] and *Barbour v. State*.[163] Dowdell was convicted in 1986 of rape and sentenced to eighteen years in prison.[164] In 2001, Dowdell filed a Rule 32 petition alleging newly discovered evidence in the form of DNA technology that could establish his innocence.[165] He did not have the exculpatory DNA results at the time he filed his petition but was seeking to obtain DNA testing to prove that he was innocent.[166] The Alabama Court of Criminal Appeals found that because DNA technology had been widely available since 1991, it was not newly discovered and was time-barred under Rule 32.2(c).[167] Although Dowdell claimed that he only learned of the DNA technology recently, thus falling within the six-month requirement of 32.2(c), the *Dowdell* Court did not find this claim credible.[168] Both the concurring and dissenting opinions in *Dowdell* emphasized the need for post-conviction DNA testing, recognized the due process concerns that existed in denying certain procedures for postconviction DNA testing, and identified the procedural barriers to successfully bringing a Rule 32 petition.[169]

Christopher Barbour was convicted in 1993 of three counts of murder committed alongside two other men.[170] In 2001, Barbour brought a Rule 32 petition alleging newly discovered evidence in the form of DNA technology unavailable at the time of trial that had the power to exonerate him.[171] The Alabama Court of Criminal Appeals found that, unlike Dowdell, his petition was not time-barred under 32.2(c) because he was arguing that *recent* technological developments

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[161] Cunningham Order *supra* note 75, at 7.

[162] *See Dowdell*, 854 So. 2d 1195.

[163] *See Barbour*, 903 So. 2d 858.

[164] *Dowdell*, 854 So. 2d at 1195.

[165] *Id.* at 1196.

[166] *Id.*

[167] *Id.* at 1197–98.

[168] *Id.*

[169] *Id.* at 1199, 1202 (Shaw, J., concurring) ("I believe that the failure to implement such procedures may raise serious due-process issues . . . .In short, there is no mechanism available for Dowdell to challenge his conviction based upon allegedly exculpatory DNA test results."); *id.* at 1203 (Baschab, J., dissenting) ("[T]his court . . . should recognize the need for, and the importance of, post-conviction DNA testing . . . . ").

[170] Barbour v. State, 903 So. 2d 858, 860, 867 (Ala. Crim. App. 2004).

[171] *Id.* at 861.

would exonerate him, rather than DNA testing in general.[172] The Barbour Court nevertheless dismissed his petition because he was convicted as an accomplice, and therefore the court found that had exculpatory DNA results been known at trial, the result would not have been different—that is, had another man's DNA been found on the victim, it would not prove that Barbour was not an accomplice to her murder.[173] The majority expressed that procedures should be put in place to allow for post-conviction testing but acknowledged that the legislature or the Alabama Supreme Court were the proper bodies for determining such a procedure.[174] The dissent agreed that procedures needed to be put in place but argued that petitioners should not be deprived of a remedy merely because the legislature had not created a mechanism to obtain testing.[175] While the Alabama Legislature passed section 15-18-200 five years later, providing such a procedure for capital cases, neither the legislature nor the Alabama Supreme Court have taken up the issue for non-capital cases.[176]

B. *Rule 32 Continues to Be Inadequate*

Recent cases have moved in the direction of allowing discovery but have not gone so far as to grant relief.[177] Thomas Arthur successfully sought Rule 32 discovery to subject evidence from his case to DNA testing to substantiate a claim that another man, who confessed, committed the crime.[178] There, the newly discovered evidence was not the DNA, but rather the confession of the other man. The post-conviction court ordered an evidentiary hearing on that new evidence and ordered DNA testing to determine the legitimacy of the claim.[179] When the DNA results excluded the other man, the *Arthur* Court denied the Rule 32 petition, finding that the non-DNA evidence used to

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172 *Id.* at 867 n.6.

173 *Id.* at 867.

174 *Id.* at 868–69.

175 *Id.* at 873 (Baschab, J., dissenting) ("[P]etitioners should not be left without a remedy simply because the Legislature and/or the Alabama Supreme Court have not yet addressed this situation.").

176 *See* ALA. CODE § 15-18-200; Lloyd v. State, 144 So. 3d 510, 515 (Ala. Crim. App. 2013); Cunningham v. Dist. Att'y's Off. for Escambia Cnty. (*Cunningham I*), 592 F.3d 1237, 1267 (11th Cir. 2010).

177 *See, e.g.*, Stallworth Order, *supra* note 100, at 10.

178 Arthur v. State, 71 So. 3d 733, 738–39 (Ala. Crim. App. 2010).

179 *Id.* at 738.

convict Arthur at trial revealed that the confession was false and did constitute newly discovered evidence.[180]

While this case could be seen not as a failure of Rule 32 but rather as a deficiency in the petitioner's case, this conclusion is wrong. Arthur sought DNA testing to support a *separate* claim of newly discovered evidence.[181] He was not alleging that the DNA technology *itself* was newly discovered.[182] Thus, his ability to obtain discovery must be considered separate from the question of whether a petitioner can get Rule 32 discovery of evidence on a claim of newly discovered DNA technology *alone*. As the *Cunningham I* Court itself pointed out, there has never been successful discovery of evidence based *solely* on a claim of DNA technology as newly discovered evidence.[183]

In *Stallworth*, the petitioner sought to test evidence in an attempt to prove his claim that counsel was ineffective for failing to conduct independent DNA testing at trial.[184] The *Stallworth* Court ordered discovery of the evidence but denied relief on the grounds that Stallworth abandoned his claims when he failed to adequately present evidence at the evidentiary hearing.[185] Again, as in Arthur's case, Stallworth sought DNA testing as part of a *separate* claim of ineffective assistance of counsel.[186] While it could be true that Stallworth was deficient at the evidentiary hearing, his apparent deficiency was not based on the inability of DNA evidence to prove his innocence but rather on his inability to adequately question his trial counsel at the hearing.[187]

Dewayne Cunningham, as discussed *supra*,[188] was convicted in 1996 of the rape of Alicia Brown, for which he maintained his innocence.[189] Following the Eleventh Circuit's dismissal of his § 1983

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180 *Id.* at 748–49. It is interesting to note that Thomas Arthur requested the death penalty at trial, rather than a life sentence, recognizing the legal hurdles that exist for non-capital offenders. Arthur v. Thomas, 739 F.3d 611, 614 (11th Cir. 2014).

181 *Arthur*, 71 So. 3d at 739.

182 *See generally id.*

183 Cunningham v. Dist. Att'y's Off. for Escambia Cnty. (*Cunningham I*), 592 F.3d 1237, 1266 (11th Cir. 2010).

184 Stallworth Petition, *supra* note 101, at 6–7.

185 Stallworth Order, *supra* note 100, at 10. Although somewhat unclear, it does not appear as if Stallworth was able to actually conduct testing of the evidence. The court ruled that he abandoned his claims by failing to question his trial attorney as part of his ineffective assistance of counsel claim. *Id.* at 6–7.

186 Stallworth Petition, *supra* note 101, at 6–7.

187 Stallworth Order, *supra* note 100, at 6–7.

188 *See* discussion *supra* Section I.C.

189 Cunningham v. Dist. Att'y's Off. for Escambia Cnty. (*Cunningham I*), 592 F.3d 1237, 1241 (11th Cir. 2010).

claim in *Cunningham v. District Attorney's Office*, Cunningham filed a Rule 32 petition in state court seeking discovery and testing of three specific items containing DNA evidence that he believed could prove his innocence: a condom wrapper, pubic hairs, and fingernail scrapings.[190] In his petition, Cunningham argued that Rule 32 provides a mechanism to acquire newly discovered evidence, including DNA testing.[191] He presented evidence that STR-DNA, Y-STR, mt-DNA, and touch DNA testing did not exist at the time of trial and could not have been discovered with due diligence.[192] Cunningham acknowledged that his Rule 32 petition was untimely but argued that he was entitled to equitable tolling because he had been attempting to obtain DNA testing since 2004, but Alabama refused to turn over the evidence.[193] Cunningham argued that the difficulty of obtaining exculpatory DNA results without first obtaining the DNA for testing presented extraordinary circumstances.[194]

In an eighteen-page order dismissing the Rule 32 petition, the Escambia County Circuit Court found that all forms of DNA testing except touch DNA were available during prior appeals and petitions, and thus could not constitute newly discovered evidence entitled to equitable tolling.[195] The court found that Cunningham was not entitled to equitable tolling on the fingernail and hair fragments because STR-DNA and mt-DNA testing were available prior to 2004 when he first sought testing.[196] The trial court acknowledged that Y-STR testing only became available in 2006 but found that these developments occurred while Cunningham's § 1983 case was pending in federal court.[197] There, he argued due process violations rather than newly discovered evidence and was thus, the court found, not entitled to equitable tolling because his choice of claims showed a lack of due diligence.[198] The court then cited the Eleventh Circuit's opinion that warned Cunningham of the difficulties in bringing a timely petition as its justification for denying the petition.[199]

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190 Cunningham Petition, *supra* note 39, at 1.

191 *Id.* at 5.

192 *Id.* at 6–7.

193 *Id.* at 10–11.

194 *Id.* at 12.

195 Cunningham Order, *supra* note 75, at 12–15.

196 *Id.* at 12–13.

197 *Id.*

198 *Id.* at 13.

199 *Id.* ("After the *Osborne* ruling, the Eleventh Circuit made its decision in January 2010, and actually warned Cunningham of the possibility that if he filed a Rule 32 petition, it might be barred as untimely because of 'his own omissions.'") (quoting Cunningham v. Dist. Att'y's Off. for Escambia Cnty. (*Cunningham I*), 592 F.3d 1237, 1272 (11th Cir. 2010)).

The Escambia County Circuit Court provided some hope in its acknowledgment that touch DNA only became widely known after 2008 and thus found that subjecting the condom wrapper to DNA testing met the standards for newly discovered evidence, discovery, and equitable tolling.[200] The court declined to order testing, however, as exculpatory results on the condom wrapper *alone* would not have been enough to exonerate Cunningham.[201] The court conceded that exculpatory results from testing all three items of evidence would have been enough to exonerate Cunningham, but ruled that some items could not be tested because the type of DNA testing sought on those items was not timely requested and the final piece of evidence—which could be tested using DNA technology that *did* fall within the time limitations—would not be enough by itself to exonerate Cunningham.[202]

Robert Lloyd was convicted of rape in 2006 and in 2012 brought a Rule 32 petition seeking post-conviction DNA testing of the rape kit.[203] The trial court denied his petition, finding that Lloyd could not satisfy the requirements for newly discovered evidence.[204] The State argued that because Lloyd was aware that he did not provide a DNA sample at the time of trial, and because Lloyd did not allege that he was unaware of the existence of the rape kit, he could not claim that the evidence was newly discovered.[205] The trial court agreed and dismissed Lloyd's petition as a successive petition.[206] On appeal, the Alabama Court of Criminal Appeals found that Lloyd satisfied the requirements of Rule 32.1(e)(2–5), but agreed with the State that he could not claim newly discovered evidence because he did not state in his petition that he was unaware of the existence of the rape kit at trial or that it could not have been subject to DNA testing.[207] Unlike the defendants in *Barbour* and *Cunningham*,[208] Lloyd failed to argue that technological *improvements* in DNA testing since his trial, posttrial motions, or previous Rule 32 petitions constituted newly discovered evidence.[209]

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200 *Id.* at 15.

201 *Id.* at 16.

202 *Id.* ("The fingernail scrapings, hair, and hair fragments . . . cannot be tested because Petitioner waited too long to request DNA testing of this evidence. This would leave only the condom wrapper to be tested. Test results from the wrapper alone, though, would not be sufficient [to exonerate Cunningham].").

203 Lloyd v. State, 144 So. 3d 510, 512–13 (Ala. Crim. App. 2013).

204 *Id.*

205 *Id.* at 517.

206 *Id.* at 512–13.

207 *Id.* at 516–17.

208 *See* discussion *supra* Section II.A.

209 Lloyd v. State, 144 So. 3d 510, 517 (Ala. Crim. App. 2013).

In 2015, Buddy Craft filed a Rule 32 petition alleging that new DNA technology was available that could prove his innocence of a rape for which he was convicted in 2006.[210] Although DNA testing of underwear prior to trial matched Craft, he alleged that the underwear was not that of the victim's, but rather that of Craft's wife.[211] He alleged that modern advancements in DNA technology could reveal the profile not just of Craft, but that of his wife, as well, proving his theory that the State tested the wrong piece of evidence.[212] Because these technologies—mini-STR testing and GlobalFiler[213]—were recently developed, they could not have been discovered at trial or in a prior petition.[214]

In a three-page order, the Jackson County Court dismissed his petition as successive and found that Craft did not allege good cause why this claim could not have been brought in a prior petition.[215] Without addressing Craft's allegation that the underwear belonged to his wife, the court relied on the finding that DNA matched to Craft at trial.[216] Ignoring Craft's clear and specific allegation that new technology exists that can reveal multiple profiles in degraded DNA samples,[217] the court further ruled that a DNA analyst testified at trial and provided no evidence that the results could be different with new technology.[218] The Alabama Court of Criminal Appeals affirmed without opinion and the Alabama Supreme Court denied certiorari.[219]

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210 Craft Petition, *supra* note 81, at 1–2.

211 *Id.* at 3.

212 *Id.* at 5–6.

213 Mini-STR is a type of DNA testing that can analyze small and degraded samples of DNA where some parts of the DNA required for STR testing are unavailable. *Mini-STR Testing*, FORENSIC DNA CTR., http://www.forensicdnacenter.com/dna-ministr.html [http://perma.cc/472R-HXE4]. GlobalFiler is a type of DNA testing that analyzes DNA along twenty-four loci and can identify profiles among degraded samples. Matthew J. Ludeman, Chang Zhong, Julio J. Mulero, Robert E. Lagacé, Lori K. Hennessy, Marc L. Short, & Dennis Y. Wang, *Developmental Validation of GlobalFiler™ PCR Amplification Kit: A 6-Dye Multiplex Assay Designed for Amplification of Casework Samples*, 132 INT'L J. LEGAL MED. 1555, 1557–58 (2018).

214 Craft Petition, *supra* note 81, at 5–6.

215 Order at 2, State v. Craft, No. CC-2004-326.62 (Ala. Cir. Ct. 2016) [hereinafter Craft Order].

216 *Id.* at 3.

217 *See* Craft Petition, *supra* note 81, at 5–6.

218 Craft Order, *supra* note 215, at 3.

219 Craft v. State, 231 So. 3d 1176 (Ala. Crim. App. 2016) (Table); *Ex parte* Craft, 245 So. 3d 578 (Ala. 2017) (Table).

C. *The Futility of Rule 32 in Practice Today*

The Alabama courts have interpreted Rule 32 in such a way that petitioners cannot successfully overcome its procedural barriers.[220] Currently, the only path to obtaining post-conviction DNA testing in non-capital cases is to bring a Rule 32 petition arguing that new technological advances in DNA testing are available that were unavailable at the time of trial or at the time of *any* subsequent appeals, motions, petitions, or collateral attacks, constituting newly discovered evidence under Rule 32.1(e).[221] The petition must provide a clear and specific statement of the grounds upon which relief is sought and the reason that remedy is due, providing specific facts as to each element of Rule 32.1(e).[222] One must simultaneously seek discovery of the DNA evidence, arguing that good cause exists for ordering discovery of the evidence.[223] In arguing good cause, the request must explicitly address the following: the issues presented in the petition; the scope of the requested discovery (that is, the specific items to be tested; the length of time between the conviction and the post-conviction proceeding; the burden of discovery; and the availability of the evidence through other means.[224]

Because petitions for post-conviction DNA testing are likely to fall outside of the six-month filing requirements of Rule 32.2(c), a successful petition will likely need to argue that extraordinary circumstances outside a petitioner's control entitle him to equitable tolling.[225] While a Rule 32 petition does not necessarily require alleging grounds for post-conviction relief other than newly discovered DNA evidence, the Alabama courts have indicated that obtaining DNA testing as a means to prove other grounds for wrongful conviction—

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220 *See* discussion *supra* Sections II.A–B.

221 *See, e.g.*, Barbour v. State, 903 So. 2d 858, 867 n.6 (Ala. Crim. App. 2004); *see also* Cunningham Order, *supra* note 75, at 13–14.

222 ALA. R. CRIM. P. 32.6(b). Merely alleging that a petitioner is claiming innocence will likely not meet the pleading requirements, but a specific statement of the grounds upon which DNA evidence will prove his innocence (such as in a rape kit in a single-perpetrator case) is more likely to be successful. The item to be tested *must* provide conclusive proof of innocence, and if the petition is suggesting a redundant profile among multiple items of evidence, all items to be tested *must* be tested by a means unavailable at the time of trial or any prior proceeding. *See generally* Cunningham Order, *supra* note 75.

223 *See generally Ex parte* Land, 775 So. 2d 847, 852–53 (Ala. 2000).

224 *See Ex parte* Perkins, 920 So. 2d 599, 602 (Ala. Crim. App. 2005).

225 *Ex parte* Ward, 46 So. 3d 888, 897–98 (Ala. 2007); *see also* Cunningham Petition, *supra* note 39, at 10.

e.g., ineffective assistance of counsel—may be more likely to succeed.[226] Rule 32 petitions may not be brought as successive petitions and while newly discovered evidence is generally not considered successive, if the newly discovered evidence was available during a prior petition, a subsequent petition will be dismissed.[227] Alabama does not recognize a right to counsel in post-conviction litigation, so many prisoners file petitions for post-conviction relief *pro se*.[228] It is unlikely that many of these *pro se* petitioners are well-versed enough in the intricacies of DNA technology to request testing in their petitions.[229] Thus, many potentially strong candidates for post-conviction DNA testing are likely already barred by the procedural barriers inherent in Rule 32.[230]

One can easily imagine a case, like that of Christopher Tapp, where there is a compelling case for innocence, where the potential for DNA testing could affirmatively prove his innocence, but where Alabama's procedural barriers make it impossible to obtain such testing. One need not imagine, however, as there are potentially dozens of cases in Alabama with stories just like Mr. Tapp's. Practitioners on the ground can file Rule 32 petitions, appropriately meeting all the pleading requirements and overcoming the procedural barriers, but the Alabama courts will likely deny those petitions.[231] When they do, however, the Eleventh Circuit will have the opportunity to revisit its decision in *Cunningham I*.

The Court did revisit the topic in November 2019, when it used the reasoning from *Cunningham I* to find Georgia's DNA statute constitutional.[232] In that case, *Cromartie v. Shealy*, the Eleventh Circuit analyzed the constitutionality of Georgia's statute by conflating its own

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226 *See* Cunningham v. Dist. Att'y's Off. for Escambia Cnty. (*Cunningham I*), 592 F.3d 1237, 1265–66 (11th Cir. 2010).

227 ALA. R. CRIM. P. 32.2(b). *See, e.g.*, Lloyd v. State, 144 So. 3d 510, 517 (Ala. Crim. App. 2013).

228 *See Alabama Post-Conviction Relief Project, Inc.*, FEDERAL DEFENDERS FOR THE MIDDLE DISTRICT OF ALABAMA, http://www.almfd.org/pdfs/History.web.pdf [https://perma.cc/QB6J-9Y73] ("Alabama does not guarantee appointment of counsel in post-conviction proceedings.").

229 *See* Ira P. Robbins, *Ghostwriting: Filling in the Gaps of Pro Se Prisoners' Access to the Courts*, 23 GEO. J. LEGAL ETHICS 271, 277–80 (2010); Sue Russell, *The Right and Privilege of Post-Conviction DNA Testing*, PAC. STANDARD (May 3, 2017), https://psmag.com/news/the-right-and-privilege-of-post-conviction-dna-testing-47781 [https://perma.cc/FP29-ZS28] (quoting a criminal justice reform expert, Lindsay Herf, who explained "[t]here is a misconception that every inmate in prison would know to file for DNA testing the moment the statute was passed"); *see also Alabama's Death Penalty*, EQUAL JUST. INITIATIVE, https://eji.org/issues/alabama-death-penalty [https://perma.cc/V2A6-ZBVF] (discussing the difficulties of researching one's case while in prison).

230 *See* discussion *supra* Section I.D.3.

231 *See* discussion *supra* Sections II.A–B.

232 Cromartie v. Shealy, 941 F.3d 1244, 1258–59 (11th Cir. 2019).

decision in *Cunningham I* and the Supreme Court's decision in *Osborne*.[233] By continuing to find post-conviction DNA procedures consistent with fundamental fairness, the Eleventh Circuit continues to arbitrarily deny an otherwise qualified petitioner access to post-conviction DNA testing to prove his innocence.[234] Ray Cromartie was executed on November 13, 2019, after the Supreme Court denied certiorari, for a crime that DNA testing could have proved he did not commit.[235] Similar to the case of Christopher Tapp, discussed in the Introduction, even the victim's family supported DNA testing in Cromartie's case, but the Court nevertheless denied the request.[236] Ray Cromartie's case is tragic, but it is just one example of the harmful impact *Cunningham I* has had on prisoners alleging innocence in Alabama and throughout the Eleventh Circuit's jurisdiction.[237]

The Eleventh Circuit must revisit its decision in *Cunningham I* by considering the factual basis upon which the decision rested: whether Alabama's DNA procedures are *adequate*.[238] Faced with a decade of failed petitions, it is difficult to see how the Eleventh Circuit or the United States Supreme Court will justify maintaining a finding that Alabama's procedures under Rule 32 are adequate, given that they have been inadequate for every petitioner who has sought to use them.[239] There could be any number of potentially compelling cases in Alabama where a petitioner seeking post-conviction DNA testing to prove his innocence will be procedurally barred by Rule 32.[240] It is those cases that have the power to illuminate not only why Rule 32 is inadequate, but why *Cunningham I* was based on a set of assumptions that continue to be wrong.[241] Practitioners on the ground should continue to bring those cases and force the Eleventh Circuit to confront its decision. Until the Eleventh Circuit does revisit its decision in *Cunningham I*, there is much that the Alabama legislature can do to make its procedures constitutional.

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233 *Id.* at 1252–53.

234 *See id.* at 1253.

235 *Georgia Man Executed for 1994 Killing of a Store Clerk Hours After Supreme Court Rejects 11th-Hour Appeal*, CBS NEWS (Nov. 13, 2019, 11:59 PM), https://www.cbsnews.com/news/georgia-execution-ray-jefferson-cromartie-executed-today-for-1994-killing-supreme-court-rejects-appeal-2019-11-13 [http://perma.cc/YW5Q-VBZC].

236 *Id.*

237 *See, e.g.*, *Cromartie*, 941 F.3d at 1253 (applying *Cunningham I* to Florida's and Georgia's DNA statutes).

238 Cunningham v. Dist. Att'y's Off. for Escambia Cnty. (*Cunningham I*), 592 F.3d 1237, 1266 (11th Cir. 2010).

239 *See* discussion *supra* Sections II.A–B.

240 *See* discussion *supra* Sections II.A–B.

241 *See* discussion *supra* Sections II.A–B.

III. PROPOSAL: AMEND RULE 32 AND SECTION 15-18-200

This Part outlines two primary proposals that would make Alabama's DNA procedures more constitutionally adequate. Section A provides an overview of just what is required to successfully access DNA testing under Rule 32, as it is currently written. Section B proposes an amendment to section 15-18-200 to expand the category of individuals who can access DNA testing. Section C proposes amending Rule 32, alongside section 15-18-200 to do away with time limitations, following the model of other states who have similarly amended their statutes.

A. *Amending Section 15-18-200 to Include Non-Capital Offenders*

Prior to *Cunningham I*, several members of the Alabama Court of Criminal Appeals recognized the need to establish a statute allowing post-conviction DNA testing.[242] As discussed *supra* Section I.B, the Alabama legislature created such a mechanism in 2009 under section 15-18-200 of the Code of Alabama, but included only capital offenders, leaving non-capital offenders with Rule 32 as their only means of obtaining DNA testing.[243] The rationale behind the need for post-conviction DNA testing should not stop at capital cases. One proposal would be to urge the Alabama legislature to amend section 15-18-200 to include both capital and non-capital offenders. This, alone, however, is likely to be futile, as section 15-18-200 provides its own procedural hurdles that ultimately kick most petitioners, capital or otherwise, back to Rule 32.[244] Thus, amending section 15-18-200 to include non-capital offenders must be done alongside an amendment to Rule 32. If section 15-18-200 is amended alongside amending Rule 32 to do away with time limitations, it could create a statutory right to DNA testing for *all* petitioners in Alabama absent any time limitations.

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242 Dowdell v. State, 854 So. 2d 1195, 1199, 1202 (Ala. Crim. App. 2002) (Shaw, J., concurring) ("I believe that the failure to implement such procedures may raise serious due-process issues . . . . In short there is no mechanism available for Dowdell to challenge his conviction based upon allegedly exculpatory DNA test results."); *id.* at 1203 (Baschab, J., dissenting) ("[T]his court . . . should recognize the need for, and the importance of, post-conviction DNA testing . . . ."); *see also* Barbour v. State, 903 So. 2d 858, 873 (Ala. Crim. App. 2004) (Baschab, J., dissenting) (reaffirming his position in his dissent in *Dowdell*).

243 ALA. CODE § 15-18-200; Lloyd v. State, 144 So. 3d 510, 515 (Ala. Crim. App. 2013); ALA. R. CRIM. P. 32.1(e).

244 *See* § 15-18-200(f)(1)(c) (requiring that a petition be brought within the time limitations set forth in Rule 32.2(c) or within one year of August 1, 2009).

B. *Amending Rule 32 or Section 15-18-200's Time Limitations*

All forms of DNA testing currently available have been accepted in the Alabama courts for more than six months, the threshold imposed by Rule 32,[245] and, as time goes on, petitioners will likely become more and more unlikely to persuade a judge that even new technological advancements in DNA are newly discovered—that is, as time passes, even new technology will no longer be considered new.[246] One proposal to avoid summary dismissal of petitions as time-barred would be to amend Rule 32.2(c) to extend the time for filing petitions for newly discovered evidence or create an exception for DNA testing petitions. One of the reasons the Supreme Court found Alaska's DNA procedures to be adequate in *Osborne* was the absence of such time limitations.[247] Rule 32 petitions alleging newly discovered evidence have no time limitations in relation to the time of trial—a factor the Eleventh Circuit considered when it found the Rule adequate.[248] Those petitions must, however, be brought within six months of discovering the new evidence—an impossible feat for petitions seeking DNA testing where the technology has been in existence for longer than six months.[249]

Two other states—Florida and Pennsylvania—provide models for the way that Alabama could amend its statute. Florida had similar time limitations in its post-conviction DNA testing statute but has since amended its statute to do away with those time limitations.[250] Pennsylvania, similar to Alabama, has time limitations in its post-conviction relief statute but, unlike Alabama, excludes petitions for DNA testing from those time limitations.[251] Alabama should adopt one of these alternatives in order to provide adequate procedures to access DNA testing.

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[245] ALA. R. CRIM. P. 32.2(c).

[246] *Compare* Craft Petition, *supra* note 81, at 5–6, *with* Craft Order, *supra* note 215, at 3; *see also* Cunningham Order, *supra* note 75, at 12–13.

[247] Dist. Att'y's Off. v. Osborne, 557 U.S. 52, 70 (2009).

[248] Cunningham v. Dist. Att'y's Off. for Escambia Cnty. (*Cunningham I*), 592 F.3d 1237, 1263 (11th Cir. 2010).

[249] *See, e.g.*, Dowdell v. State, 854 So. 2d 1195, 1197–98 (Ala. Crim. App. 2002) ("Dowdell should have become aware of the existence of DNA testing before more than 10 years had passed since the Alabama Supreme Court recognized the existence of DNA forensic testing. Had Dowdell filed his petition within a reasonable time . . . his claim that he had only recently learned about DNA testing would have been credible and we would have considered the merits of his petition alleging newly discovered evidence.").

[250] *See In re* Amendments to Fla. Rule of Crim. Proc. 3.853(d), 938 So. 2d 977, 977–78 (Fla. 2006) (mem.).

[251] Commonwealth v. Gacobano, 65 A.3d 416, 419 (Pa. Super. Ct. 2013).

Florida's DNA statute—Rule 3.853 of Florida's Rules of Criminal Procedure—was enacted in 2001 and created a deadline for filing petitions.[252] Shortly after the Rule was created, the Criminal Procedure Rules Committee of the Florida Bar challenged that deadline—originally within two years of conviction or by October 1, 2003.[253] In 2004, Governor Jeb Bush signed legislation that extended the deadline to 2005 or within four years of conviction and Rule 3.853 was amended accordingly.[254] In 2006, the Florida legislature once more amended Rule 3.853 to do away entirely with all time-based limitations.[255] Amending Alabama's Rule 32 to similarly do away with its six-month time limitation for newly discovered evidence would allow capital and non-capital offenders alike to present claims of newly discovered evidence in the form of DNA technology capable of proving a petitioner's innocence.

This simple, but essential, amendment would at the very least make Rule 32 adequate on its face and could open the door for those who would otherwise be barred by the Rule as written. While critics of this proposal might argue that this would open the floodgates to litigation, this criticism is flawed in several ways. First, the timeliness requirements of Rule 32 do not stop individuals from bringing Rule 32 petitions, as demonstrated *supra* Section II.[256] As the rule currently stands, individuals bring Rule 32 petitions, knowing they are otherwise time-barred, but argue that they are nonetheless entitled to DNA testing.[257] Amending the Rule to do away with timeliness requirements would merely allow those cases, already being brought, to be heard on the merits.[258] To the extent that petitions *would* increase, it is very likely that it would be the result of a recognition by those reluctant to bring a petition in the past because of the futile nature of the procedure that while today Rule 32 petitions are impossible,[259] under this proposed amendment, they become possible. Furthermore, this proposed amendment would not require a post-conviction court to order DNA

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252 *In re* Amendment to Fla. Rules of Crim. Proc. Creating Rule 3.853 (DNA Testing), 807 So. 2d 633, 639–40 (Fla. 2001) (mem.).

253 *Id.*

254 *In re* Amendments to Fla. Rule of Crim. Procedure 3.853(d)(1)(A) (Postconviction DNA Testing), 884 So. 2d 934, 935 (Fla. 2004) (mem.).

255 *Amendments to 3.853(d)*, 938 So. 2d at 977. Now, Rule 3.853 allows a petition to be brought at any time after conviction. FLA. R. CRIM. P. 3.853(d).

256 *See, e.g.*, Cunningham Petition, *supra* note 39, at 11.

257 *Id.*

258 Rather than summarily dismissing a case as time-barred, a court would instead need to consider whether a petition for DNA meets the pleading requirements of Rule 32. *See* ALA. R. CRIM. P. 32.1(e).

259 *See* discussion *supra* Sections II.A–B.

testing in all cases, as the other limitations of Rule 32—e.g., pleading requirements and the ban on successive petitions[260]—as discussed *supra* Section I.B–C, would limit DNA testing to those who can actually show that testing would establish their innocence.[261]

Pennsylvania offers an alternative that would ensure Alabama's procedures are adequate while at the same time limiting those who may bring a motion for DNA testing. Pennsylvania has a similar statutory mechanism to Alabama, with a specific DNA statute, section 9543.1,[262] and a separate post-conviction relief statute, section 9541.[263] Its post-conviction relief statute, like Rule 32, provides a specific time limitation for bringing claims of newly discovered evidence.[264] Pennsylvania, however, in contrast to Alabama, excludes petitions for post-conviction DNA testing from the time limitations in its post-conviction relief statute, so long as the DNA results are brought before the court within one year of testing.[265] While, generally, Pennsylvania's post-conviction relief statute requires petitions for relief to be brought within either one year of conviction or within one year of when the claim could have been presented,[266] the Pennsylvania courts have excluded requests for DNA testing from this time bar.[267] Unlike Alabama, Pennsylvania does not preclude requests for post-conviction DNA testing based on the timeliness requirements of the post-conviction relief statute.[268] In other words, a petition for DNA testing may be brought *at any time* post-conviction and it is the *results* of that testing that must fall within the

260 *See* discussion *supra* Section I.D.

261 *See* discussion *supra* Sections I.B–C.

262 42 PA. CONS. STAT. § 9543.1 (2019).

263 42 PA. CONS. STAT. § 9541 (2019).

264 42 PA. CONS. STAT. § 9545(b) (2018).

265 Commonwealth v. Gacobano, 65 A.3d 416, 419 (Pa. Super. Ct. 2013) ("Post conviction DNA testing does not directly create an exception to § 9545's one-year time bar. . . . Rather it allows for a convicted individual to first obtain DNA testing which could then be used within a PCRA petition to establish new facts in order to satisfy the requirements of an exception under 42 Pa.C.S.A. § 9545(b)(2).").

266 42 PA. CONS. STAT. § 9545(b) (2018). To compare, Rule 32 has similar language and requires that petitions be brought within one year of conviction or within six months of discovering the evidence. ALA. R. CRIM. P. 32.2(c). Alabama has interpreted this, however, to mean that petitions seeking DNA testing under Rule 32 must be brought within six months of discovering the DNA technology. *See* Lloyd v. State, 144 So. 3d 510, 517 (Ala. Crim. App. 2013).

267 *In re* Payne, 129 A.3d 546, 555 n.11 (Pa. Super. Ct. 2015) ("This Court has consistently held the one-year jurisdictional time bar of the PCRA does not apply to motions for DNA testing under Section 9543.1.").

268 Commonwealth v. Williams, 35 A.3d 44, 50 (Pa. Super. Ct. 2011); *Payne*, 129 A.3d at 553 n.11 ("Jurisdictional time-bar [of the Pennsylvania Post Conviction Relief Act, 42 Pa.C.S. § 9541 et seq.,] does not preclude a request for DNA testing made pursuant to Section 9543.1.").

time limitations of the post-conviction relief statute, i.e. within one year of receiving the results.[269]

If Alabama were to follow the example set by Pennsylvania, it could amend section 15-18-200 to include all offenders, and do away with its time limitations for bringing a DNA motion.[270] With these amendments, Alabama could still require, under the timeliness requirements of Rule 32.2(c), a petitioner to bring the results before a court within six months of receiving the testing.[271] There are certainly other bars to a successful Rule 32 petition for post-conviction relief, as discussed *supra* Section I.D. Under this proposal, however, a petitioner would be able to obtain DNA testing pursuant to section 15-18-200 without any timeliness requirements—in relation to his conviction or the discovery of the DNA technology—then bring the *results* as newly discovered evidence under Rule 32 within six months of receiving them. This would allow far more potentially innocent individuals to be able to not only access the DNA testing that can prove their innocence but present those exculpatory results to the court in order to gain relief.[272] Because section 15-18-200 requires a petitioner to plead that DNA results on their face would show actual innocence, it is unlikely that this proposed amendment would lead to an unreasonable influx of post-conviction DNA testing, as very few individuals are able to meet that high standard.[273] While still less than perfect, this small but significant change to the DNA procedures in Alabama would at the very least be *adequate* viewed in light of procedural due process requirements. Only then could *Cunningham I*'s reasoning that Alabama's procedures to access DNA testing are adequate stand as true.[274]

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269 *Gacobano*, 65 A.3d at 419.

270 *Cf.* 42 PA. CONS. STAT. § 9543.1 (2018); *Williams*, 35 A.3d at 50.

271 *Cf.* 42 PA. CONS. STAT. § 9545(b)(2) (2018); *Gacobano*, 65 A.3d at 419.

272 *Compare* NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/browse.aspx?View={B8342AE7-6520-4A32-8A06-4B326208BAF8}&FilterField1=State&FilterValue1=Pennsylvania&FilterField2=DNA&FilterValue2=8%5FDNA [https://perma.cc/ME9H-46R2] (showing Pennsylvania's eighteen DNA exonerations), *with All Cases, Alabama*, *supra* note 16 (showing Alabama's three DNA exonerations).

273 *See, e.g.*, *Ex parte* Hammond, 93 So. 3d 172, 177 (Ala. Crim. App. 2012) ("[I]t is the judgment and opinion of the Court that there is no reasonable possibility that the testing requested by defendant will produce exculpatory evidence that would exonerate the defendant. The testing requested by defendant is therefore denied.") (citation omitted); Wilson v. Marshall, No. 2:14-cv-01106-MHT-SRW, 2018 U.S. Dist. LEXIS 158715, at *14 (M.D. Ala. 2018) ("Under Ala. Code § 15-18-200(a), the [DNA] results . . . on its face, would not demonstrate the petitioner's factual innocence . . . . Even if other DNA specimens are present on the evidence requested for forensic DNA testing, this would not, on its face, exonerate [Petitioner] . . . .").

274 Cunningham v. Dist. Att'y's Off. for Escambia Cnty. (*Cunningham I*), 592 F.3d 1237, 1274 (11th Cir. 2010).

CONCLUSION

There is, in effect, no path for non-capital offenders in Alabama to gain post-conviction DNA testing and relief, contrary to the Eleventh Circuit's reasoning in *Cunningham I*. In a mere handful of cases, petitioners have gained access to DNA evidence through Rule 32 discovery.[275] Of those, none have been granted relief.[276] Most petitions are summarily dismissed as either successive, time barred, or failing to meet the pleading requirements.[277] Alabama courts have made clear, however, that bringing a successful Rule 32 petition seeking post-conviction DNA testing is not impossible and they continue to maintain that this is the *only* path for a non-capital offender to obtain post-conviction DNA testing.[278] The Eleventh Circuit's opinion in *Cunningham I* made it easier for Alabama to continue to dismiss Rule 32 petitions on procedural grounds and insulated it from constitutional challenges.[279] Cunningham's subsequent Rule 32 petition and the Escambia Circuit Court's order dismissing the petition reveal that the factual basis upon which the Eleventh Circuit relied is inaccurate.[280]

Unless the Alabama legislature amends its Rule 32 and DNA statute, Alabama is likely going to continue denying access to post-conviction DNA testing to those alleging actual innocence, despite the fact that it assures us it is possible.[281] In the meantime, a successful Rule 32 petition should adopt the language of Cunningham's petition, but specifically allege that each piece of evidence sought to be tested would be probative evidence of innocence and that every item sought to be tested will utilize newly discovered DNA technology, unavailable during any prior proceeding, and must argue for equitable tolling. If, and when, the Alabama courts deny this petition, the Eleventh Circuit may reconsider its decision in *Cunningham I*.

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275 *See* discussion *supra* Section I.D.2.

276 *See* discussion *supra* Section I.D.2. It is nearly impossible to know the outcome of all Rule 32 petitions, but of the dozens of cases examined, no successful cases have been uncovered or referred to in the appellate records. *Id.*

277 *See, e.g.*, Lloyd v. State, 144 So. 3d 510, 517–18 (Ala. Crim. App. 2013).

278 *See, e.g.*, *id.* at 515 (holding that Rule 32 is the proper mechanism for non-capital offenders to seek post-conviction DNA testing).

279 *See Cunningham I*, 592 F.3d at 1274.

280 *See generally* Cunningham Petition, *supra* note 39; Cunningham Order, *supra* note 75.

281 *See* discussion *supra* Section II.C.