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Pleading Guilty to Innocence: How Faulty Field Tests Provide False Evidence of Guilt

Kaelyn Phelps*

In 2010, Houston Police pulled over Amy Albritton and her boyfriend, Anthony Wilson, for failing to use a turn signal when changing lanes.¹ After both parties were ordered out of the car, officers looked inside the vehicle where they reportedly saw a needle in the car's ceiling.² Though Wilson was driving, Albritton owned the car so officers asked for her permission to search the vehicle, telling her that if she did not give permission they would then call in a drug-sniffing dog.³ Nervously, she consented.⁴ During the search, the officers found a white crumb on the floor and immediately thought it was crack cocaine.⁵ Standing handcuffed on the side of a busy highway, Albritton and Wilson watched the officer pull from his trunk a small plastic pouch containing a vial of pink liquid: a field test.⁶ He dropped the white crumb into the liquid, and watched as the mixture turned from pink to blue, indicating the presence of cocaine.⁷ "You're

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1. Ryan Gabrielson & Topher Sanders, *How a \$2 Roadside Drug Test Sends Innocent People to Jail*, N.Y. TIMES MAG. (July 7, 2016), https://www.nytimes.com/2016/07/10/magazine/how-a-2-roadside-drug-test-sends-innocent-people-to-jail.html?_r=0 [https://perma.cc/4RK7-64CB].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

busted,” he told them.⁸

Nine hours later, Albritton was booked into the Harris County Jail.⁹ Just before her arraignment, Albritton’s appointed defense attorney met with her, and told her that she was going to be charged with possession of a controlled substance, a felony with a maximum penalty of two years in state prison.¹⁰ However, the prosecutor offered her a deal for forty-five days, most likely only half of which she would actually have to serve if she pled guilty.¹¹ Despite asserting her innocence, faced with no other options and two sons at home who needed her care, Albritton took the deal.¹²

Twenty-one days later, she left prison and returned to her family in Louisiana.¹³ Upon her return, she discovered she had been fired from her job and kicked out of her home, leaving her to find new employment and an apartment with a felony conviction on her record.¹⁴ In twenty-one days, Albritton went from a property manager with a stable home to working minimum wage while living with a friend, after repeatedly being denied work and living arrangements because of her criminal background.¹⁵ The crumb that was the root of her conviction remained in the state lab for six months before it was tested, long after Albritton had served her sentence; when it finally was tested, the results were negative for any kind of illegal substance.¹⁶ Six years later, that lab test served as the basis of her exoneration, a final testament to her actual innocence.¹⁷

Albritton’s story is a familiar one to thousands of innocent Americans who have pled guilty to a drug charge based solely on a positive field test.¹⁸ As field tests’ unreliability gains notoriety, states must begin to question field tests’ role in providing evidence in guilty pleas. While plea deals are quick and efficient ways to

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See *Ex parte* Albritton, No. WR-85,184-01, 2016 Tex. Crim. App. Unpub. LEXIS 599, at *1 (Tex. Crim. App. June 22, 2016).

¹⁸ Gabrielson & Sanders, *supra* note 1.

move defendants through a clogged justice system, using unreliable evidence to obtain these guilty pleas can have the opposite effect of efficiency, since after an involuntary guilty plea defendants are subsequently forced to challenge their wrongful convictions in court.¹⁹ Rather, it is more intuitive that justice should be served properly the first time by not allowing the prosecution to rely on faulty field tests as evidence of guilt. Drug field tests are unreliable evidence that should never be used to demonstrate guilt at trial or plea hearings.

Part I of this Comment explains field and laboratory tests, and each test's role in the prosecution of a defendant. This Part also discusses the unreliability of field tests as evidence of guilt. Part II of this Comment discusses how, even though a disproportionate percentage of defendants enter a guilty plea as opposed to going to trial, both procedures result in the same long-term impact on the defendant. This Part further argues that the same standard for what provides evidence of guilt for a conviction should also be applied to guilty pleas because of this same long-term impact. Part III first addresses concerns that requiring laboratory test results prior to guilty pleas is not feasible due to the high number of cases in backlog and low laboratory funding and staffing. However, this Part concludes that these concerns can easily be addressed, by providing examples of two counties that have implemented this practice; it also concludes that the need for these results to be available prior to pleas outweighs these concerns. Part IV concludes that, because field tests are not sufficient evidence of guilt and there are practical alternatives to accepting field tests to show guilt for guilty pleas, these tests

19. See Lindsey Devers, U.S. DEPT OF JUST. BUREAU OF JUST. ASSISTANCE, PLEA AND CHARGE BARGAINING RESEARCH SUMMARY (Jan. 24, 2011), <https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf> [<https://perma.cc/G6S8-MJ76>]. In cases where unreliable evidence serves as the basis of a guilty plea, defendants are forced to appeal their conviction. See *Ex parte* Palmberg, 491 S.W.3d 804, 806–07 (Tex. Crim. App. 2016) (finding that the defendant pled guilty involuntarily and had no knowledge that the substance found on his person was not analyzed in a laboratory because the field test used the entirety of the substance found on his person); see also *Ex parte* Cortez, No. AP-75,419, 2006 WL 1410846, at *1 (Tex. Crim. App. 2006). After the defendant served three months in jail, a lab test of the substance found on the defendant's person determined that the substance was not in fact cocaine, and that the defendant had been wrongfully convicted of possession. *Cortez*, 2006 WL 1410846, at *1.

should not form the sole basis of such pleas.

I. CONTROLLED SUBSTANCE FIELD TESTS AS PRESUMPTIVE PROOF

A. *Field Tests Offer Presumptive Proof While Lab Tests Offer Near-Conclusive Proof of Guilt*

Field tests are a simple, portable, and convenient way for officers to quickly obtain presumptive proof of the presence of an illegal substance, including cocaine, heroin, marijuana, and methamphetamine.²⁰ These field tests consist of chemical mixtures that react with illegal substances by changing to different colors depending on the drug present, which then indicates the presence of an illegal substance.²¹ Formally branded as the NIK NarcoPouch 908 or the Duquenois-Levine Reagent, these color-changing reagent field tests are used by nearly every federal, state, and local police agency in America.²² Included in each field test kit is a color chart so the color produced from the test can be compared to the range of colors on the chart, allowing law enforcement officers to form their conclusions as to whether the substance tested positive or negative for an illegal drug.²³

Field tests establish presumptive evidence of guilt, meaning that the test does not definitively prove the substance's identity but rather just creates a presumption of the identity of the substance.²⁴ This presumptive evidence is sufficient to establish

20. See R.A. Velapoldi & S.A. Wicks, *The Use of Chemical Spot Tests Kits for the Presumptive Identification of Narcotics and Drugs of Abuse*, 19 J. FORENSIC SCI. 636, 636, 655 (1974); see also Alan Harris, Comment, *A Test of a Different Color: The Limited Value of Presumptive Field Drug Tests and Why That Value Demands Their Exclusion From Trial*, 40 SW. L. REV. 531, 531–32 (2011).

21. Velapoldi & Wicks, *supra* note 20, at 636; see also NIK Public Safety, *Instructions for Use*, http://www.tigerofficer.com/files/a43afec4-036b-430c-99b0-4ac2ada243efNIK%20Test%20I_Instructions.pdf [https://perma.cc/FK7X-ZRH4] (last visited Mar. 2, 2018) (providing instructions on how to use the NIK NarcoPouch 908).

22. JOHN KELLY, FALSE POSITIVES EQUAL FALSE JUSTICE 2 (2008); Jack King, *'False Positives' Report Calls Drug Field Tests Useless; 'Untold Thousands of Wrongful Arrests'*, 33 CHAMPION 12, 13 (2009).

23. U.S. DEP'T OF JUST. NAT'L INST. OF JUST., COLOR TEST REAGENTS/KITS FOR PRELIMINARY IDENTIFICATION OF DRUGS OF ABUSE 1 (2000), <https://www.ncjrs.gov/pdffiles1/nij/183258.pdf> [https://perma.cc/P2L6-LUD7] [hereinafter COLOR TEST REAGENTS].

24. See *Presumptive Evidence*, BLACK'S LAW DICTIONARY (10th ed. 2014).

probable cause for an arrest and to charge the individual with a drug offense, but the field test alone is not sufficient proof of the substance's identity to prove guilt at trial.²⁵ Field tests were introduced for the purpose of obtaining a "preliminary identification" of the suspected substance, not to identify illegal substances with one hundred percent accuracy.²⁶ When created, field tests were intended solely to assist police in drug investigations to test suspected substances, and that is where their role should end.²⁷ While courts have acknowledged field tests' limited presumptive evidentiary value, they have held that field tests, without more, are not prima facie evidence of the substance's identity.²⁸

This consensus is due in large part to the fact that field tests do not pass the reliability standard established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*²⁹ In *Daubert*, the Supreme Court ruled that judges must act as gatekeepers to determine the reliability of the scientific evidence by considering five factors: (1) whether the scientific technique has been tested; (2) whether the method has been subjected to peer review and publication; (3) the known potential error rate; (4) the existence and maintenance of standards controlling the method's operation; and (5) whether the science is generally accepted within the scientific community.³⁰ Field tests primarily fail the final factor, as there is no general acceptance within the scientific community of the reliability of field tests beyond presumptive proof.³¹ Rather, scientists have stated that these tests should not be used as sole proof of a

²⁵ *See id.*

²⁶ *See* Velapoldi & Wicks, *supra* note 20, at 655 ("Most importantly . . . these kits are useful in obtaining preliminary and presumptive evidence only"); *see also* S.H. Johns et al., *Spot Tests: A Color Chart Reference for Forensic Chemists*, 24 J. FORENSIC SCI. 631, 631 (1979) ("[C]olor tests alone indicate nothing but the possible presence or absence of a particular molecular grouping.").

²⁷ KELLY, *supra* note 22, at 20 ("Field tests were never intended to be used as a positive method of drug identification.").

²⁸ *See* Higgs v. Bland, 888 F.2d 443 (6th Cir. 1989) (positive field tests constitute some evidence of guilt); *State v. Hancock*, No. 09-JE-30, 2010 Ohio App. LEXIS 4101, at *6 (Ohio Ct. App. Sept. 29, 2010).

²⁹ *See* 509 U.S. 579 (1993).

³⁰ *Id.* at 593–94.

³¹ *See* Johns et al., *supra* note 26, at 631; Velapoldi & Wicks, *supra* note 20, at 655.

substance's positive identification.³² According to forensic scientist S.H. Johns, "the color test must be considered inconclusive for purposes of positive identification."³³ Further, scientists R.A. Velapoldi and S.A. Wicks emphasize that field tests "should not be used as sole evidence for the identification of a narcotic or drug of abuse."³⁴ Due to further issues of unreliability, courts have also declined to allow field tests as proof of a substance's positive identification at trial.³⁵

Instead, in order for field tests to be admissible at trial to prove a defendant's guilt, there must be corroborating evidence; in most cases this corroboration is provided in a laboratory report.³⁶ Courts have ruled that a field test "is sufficient in the bringing of a charge, but more than the results of such a test . . . are necessary to sustain a conviction."³⁷ Further, field tests supported by testimony in which the officer could not remember the name of the test, the instructions, the color that indicated that the substance was illegal, or the color the test actually turned was insufficient to support a drug conviction.³⁸ The National Institute of Justice further advocates for the approach of obtaining a confirmatory laboratory report, stating on field test kits that "all substances tested should be subjected to more definitive examination by qualified scientists" in a laboratory.³⁹

Unlike field tests that provide presumptive evidence, laboratory tests provide conclusive evidence that is determinative of the substance's identity and can support a verdict.⁴⁰ A

32. See Johns et al., *supra* note 26, at 631; Velapoldi & Wicks, *supra* note 20, at 655.

33. Johns et al., *supra* note 26, at 631.

34. Velapoldi & Wicks, *supra* note 20, at 655.

35. State v. Hancock, No. 09-JE-30, 2010 Ohio App. LEXIS 4101, at *1 (Ohio Ct. App. Sept. 29, 2010); KELLY, *supra* note 22, at 23; see ANNE C. GOLDBACH, TRYING DRUG CASES IN MASSACHUSETTS § 7.2.10 (2d ed. 2010 & Supp. 2015); see *infra* section II.

36. Hancock, 2010 Ohio App. LEXIS 4101, at *1; State v. Colquitt, 137 P.3d 892, 898 (Wash. Ct. App. 2006); see GOLDBACH, *supra* note 35.

37. People v. Jason F., No. 99-398, 1999 N.Y. Misc. LEXIS 348, at *10 (Just. Ct. 1999).

38. See People v. Hagberg, 733 N.E.2d 1271, 1274 (Ill. 2000); see also State v. Lucas, No. 1503008254, 2015 Del. C.P. LEXIS 53, at *1, *7 (Del. C.P. 2015) (holding result of a field test inadmissible as scientific evidence without more corroborative evidence as to the reliability and accuracy of test).

39. COLOR TEST REAGENTS, *supra* note 23, at 7.

40. See *Presumptive Evidence*, *supra* note 24.

laboratory test is most often conducted using infrared and mass spectrometry, both of which establish strong evidence of the substance's identity.⁴¹ The reports produced as a result of this scientific testing are widely accepted by courts as proof of the identity of an illegal drug, thus providing conclusive proof unlike field tests.⁴² However, in most cases, drugs are only tested in a crime lab if the case is proceeding to trial.⁴³

Upwards of ninety percent of criminal defendants resolve their cases through plea deals rather than proceeding to trial.⁴⁴ Despite this overwhelming majority, there is no federal standard or case law governing what test results will or will not be accepted as the basis for guilty pleas.⁴⁵ In cases involving drug possession, major jurisdictions across the country, such as Boston, Philadelphia, and Dallas, accept guilty pleas based solely on the results of field tests taken at the time of the arrest.⁴⁶ In approximately twenty-four percent of forensic laboratories, the most common reason for not conducting a lab test is because the defendant pled guilty to the charge.⁴⁷ This means that laboratory tests are rarely ever done in routine drug cases because of the high number of guilty pleas for drug possession cases.⁴⁸

In the few jurisdictions that conduct a confirmatory lab test

41. Edward J. Imwinkelried, *Jackson v. Virginia: Reopening the Pandora's Box of the Legal Sufficiency of Drug Identification Evidence*, 73 KY. L. J. 1, 9 (1984).

42. See *United States v. Zeno*, 495 Fed. Appx. 464 (5th Cir. 2012); Janine Arvizu, *Feature: Shattering the Myth: Forensic Laboratories*, 24 CHAMPION 18 (2000).

43. See *Innocents Who Plead Guilty*, NAT'L REGISTRY OF EXONERATIONS 1, 2 (2015), <http://www.law.umich.edu/special/exoneration/Documents/NRE.Guilty.Plea.Article1.pdf> [<https://perma.cc/N5C4-QUPT>] ("Drug testing after guilty pleas is highly unusual").

44. *Id.* at 1; Devers, *supra* note 19, at 1.

45. See *Drug Cases*, NAT'L REGISTRY OF EXONERATIONS 1, 1 (2016), https://www.law.umich.edu/special/exoneration/Documents/Drug_Cases_2016.pdf [<https://perma.cc/P2QU-E89X>].

46. See Gabrielson & Sanders, *supra* note 1. Other jurisdictions include: Atlanta, Jacksonville, Las Vegas, Los Angeles, Newark, Phoenix, Salt Lake City, San Diego, Seattle, and Tampa. *Id.*

47. U.S. DEP'T OF JUST., DRUG ENF'T ADMIN., 2013 SURVEY OF CRIME LAB. DRUG CHEMISTRY SECTIONS (2013), https://www.nflis.deadiversion.usdoj.gov/desktopmodules/reportdownloads/reports/nflis_labsurvey_2013.pdf [<https://perma.cc/7SDR-ZLRA>] [hereinafter 2013 SURVEY].

48. Samuel R. Gross, *What We Think We Know and What We Think We Know About False Convictions*, 14 OHIO ST. J. CRIM. L. 753, 776 (2017).

after a defendant enters a guilty plea, the defendant must file a writ of habeas corpus to withdraw his guilty plea if the report is negative for the presence of illegal drugs.⁴⁹ In order to establish his innocence, a defendant must produce “clear and convincing evidence” that the substance was not an illegal drug. This burden is satisfied if the defendant produces a negative laboratory test contradicting the positive field test.⁵⁰ However, this adds an unnecessary step in the court process in forcing a defendant to file a petition to overturn a conviction that would not have been necessary if the field test was not allowed to serve as the basis of the guilty plea in the first place.

B. Field Tests Are Unreliable

Strengthening the premise that field tests should not form the basis of a defendant’s guilt for guilty pleas is the fact that field tests frequently produce false positives.⁵¹ In an experiment, the Duquenois-Levine Reagent test—used to identify marijuana—was used on forty-two different substances; approximately seventy percent of the tests produced a false positive result.⁵² The Duquenois-Levine Reagent has reportedly reacted positively to legal substances such as cocoa products, eucalyptus, patchouli, and cypress.⁵³ The NarcoPouch has reacted positively to substances like aromatic herbs, such as thyme and oregano; essential oils, such as anise extract, vanilla, peppermint, and ginseng; and even a strip of newspaper.⁵⁴ Overall, these tests are unreliable for a number of reasons, including a high risk of contamination, human error, and lack of officer training.⁵⁵

49. See generally *Ex parte* Palmberg, 491 S.W.3d 804, 804 (Tex. Crim. App. 2016); *Ex parte* Cortez, No. AP-75,419, 2006 WL 1410846, at *1 (Tex. Crim. App. 2006). But see *State v. Ward*, 14 P.3d 388 (Idaho Ct. App. 2000).

50. 28 U.S.C. § 2244(b)(B)(ii) (1996) (“[T]he facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.”); *Cortez*, 2006 WL 1410846, at *1.

51. See Harris, *supra* note 20, at 537–41.

52. *Id.* at 542.

53. King, *supra* note 22, at 12.

54. *Id.*

55. See Harris, *supra* note 20, at 540–43.

1. *High Risk of Contamination*

One of the reported reasons that a field test yields a false positive result is because of the high risk of contamination.⁵⁶ Due to the wide range of common legal substances—in addition to the relatively small number of illegal ones—that create the necessary chemical reaction to produce a positive result, the presence of any one of these legal substances, however minute, can trigger a false positive.⁵⁷ As the name implies, law enforcement officers are conducting these tests in the field, in their offices, in their cars, outside in the elements, or in a host of other locations.⁵⁸ Notably, these field tests are not conducted in sterile laboratories, where the risk of contamination is close to zero.⁵⁹ The nature of where these tests are conducted leads to the reasonable inference that common substances, specifically the ones known to yield false positive results, may contaminate the suspected substance to be tested. For example, the Duquenois-Levine Reagent is known to test positive for various brands of coffee, which is commonly found in nearly every location where law enforcement officers conduct field tests.⁶⁰ Should the officer touch coffee or otherwise mix even an unnoticeable amount of coffee in with a legal substance, the field test will produce the positive color and yield a false positive result.

2. *Human Error*

Another reason substance field tests are unreliable is because of the high risk of human misperception in reading the tests.⁶¹ As previously stated, field tests yield results according to a specified color so that when that specified color is observed, an officer concludes that the test is positive for the illegal substance in question.⁶² However, the colors produced may be assigned to a “broad ‘spectral’ range,” meaning that the actual color reaction may vary slightly each time the test is conducted.⁶³ This

56. Velapoldi & Wicks, *supra* note 20, at 640.

57. *See generally id.* at 636–55; Harris, *supra* note 20, at 541.

58. *See Harris, supra* note 20, at 542.

59. *See id.* at 542–43; *see also* Velapoldi & Wicks, *supra* note 20, at 649.

60. KELLY, *supra* note 22, at 9, 18.

61. Velapoldi & Wicks, *supra* note 20, at 640.

62. *See id.* at 636.

63. *Id.*

variation in color can easily result in an officer observing the wrong color. This is particularly likely when the color card is not available for comparison, which is often the case, and can ultimately lead to false positives.⁶⁴ For example, in 2014, Hillsborough County, Florida Sheriff's deputies produced fifteen false positives for methamphetamine during the first seven months of the year, solely because the officers had misunderstood which colors indicated a positive result.⁶⁵

The color is not only affected by human perception, but also by the time at which the test is read.⁶⁶ Officers are trained to read tests at approximately the sixty-second mark, as colors produced by the test kits are inaccurate after sixty seconds.⁶⁷ Due to inadequate training or instructions, officers might not follow this time guideline and, as such, may observe and base their conclusions off a color produced outside the sixty-second guideline.⁶⁸ Even where the color may or may not be exactly right, these comparisons are often done in conditions of poor visibility.⁶⁹ When conducting field tests, officers often view the color result under streetlights, by the lights of their cars, or in other less-than-ideal lighting situations depending on the weather.⁷⁰

3. *Lack of Officer Training*

Officers also receive limited training concerning how to properly conduct field tests.⁷¹ Even though in 2000 the U.S. Department of Justice issued guidelines that required test kit users to receive the proper and appropriate training, many officers are still not well versed in the workings of field test kits.⁷² Despite ascertaining a basic understanding of how to use the kits,

64. *Id.* at 640.

65. Carlita Salazar, *Positively Wrong: Unreliable Roadside Drug Tests Lead Innocent People to Plead Guilty*, INNOCENCE PROJECT (Aug. 11, 2016), <https://www.innocenceproject.org/bad-drug-test-leads-to-wrongful-convictions/> [<https://perma.cc/USM2-JVKN>].

66. *See* GOLDBACH, *supra* note 35.

67. *See id.*

68. *See id.*

69. Harris, *supra* note 20, at 542.

70. *See id.*

71. *Id.* at 543.

72. *See id.*; *see generally* COLOR TEST REAGENTS, *supra* note 23.

most officers do not understand the risks of reading the test kit results too early, or how various factors could affect the test results.⁷³ This lack of training leads to the high risk of human error in forming a conclusion based on the field test results.⁷⁴

Due to the high risk of contamination, human error, and lack of officer training, field tests are highly unreliable and generally not accepted at trial.⁷⁵ In addition to courts and attorneys, legislatures are also beginning to question the reliability of field tests. For example, the Texas Legislature is requiring the Texas Forensic Science Commission to conduct a study about the use of field tests by law enforcement agencies in Texas.⁷⁶ The Commission is required to: “(1) evaluate the quality, accuracy, and reliability of field test kits; (2) identify any common problems with drug field test kits; (3) evaluate the availability and adequacy of training for law enforcement officers regarding the use of drug field test kits and the interpretation of the test results”⁷⁷ Yet, field tests continue to provide the sole basis for millions of guilty pleas, resulting in millions of defendants with felony drug convictions because of unreliable evidence.

II. BECAUSE GUILTY PLEAS AND TRIAL VERDICTS HAVE THE SAME IMPACT ON DEFENDANTS AS GUILTY CONVICTIONS, THE EVIDENTIARY BASIS SHOULD BE THE SAME

In the United States, approximately 1.6 million people were arrested in 2016 for a drug offense.⁷⁸ Once arrested, an estimated ninety-five percent of those defendants entered a guilty plea for a felony conviction, mainly due to pressure from attorneys on both sides.⁷⁹ For prosecutors with overloaded dockets and limited time,

73. See Harris, *supra* note 20, at 543.

74. See *id.*

75. See *id.* at 539–43.

76. *Sixth Annual Report*, TEX. FORENSIC SCI. COMM’N 1, 7 (2017), <http://www.txcourts.gov/media/1440353/fsc-annual-report-fy2017.pdf> [<https://perma.cc/5B9N-C3CX>] [hereinafter *Sixth Annual Report*].

77. *Id.* at 7–8.

78. *2016 Crime in the United States*, FED. BUREAU OF INVESTIGATIONS: UNIFORM CRIME REPORTING (2016), <https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/tables/table-18> [<https://perma.cc/97GQ-KJLZ>] (last visited Oct. 11, 2018).

79. See *Innocents Who Plead Guilty*, *supra* note 43, at 1; Devers, *supra* note 19, at 1.

the appeal of quickly obtaining a guilty plea is all too enticing.⁸⁰ On the other side, guilty pleas offer a practical option for defendants facing criminal charges, even if they are innocent.⁸¹ Many defendants charged with a drug offense are faced with months in jail before trial and years more if convicted, especially if they have criminal records that result in higher bails and longer prison sentences.⁸² However, if a defendant enters a guilty plea, he will often receive a lighter sentence and an expedited trip through the justice system, which may be the only option for defendants with little of the resources that are necessary to go to trial.⁸³ Practical aspects aside, this high percentage of defendants entering guilty pleas, rather than pursuing trials, represents a problem for defendants arrested as a result of an unreliable positive field test. These extraordinary numbers exemplify why notoriously unreliable evidence, such as field tests, should not be allowed to form the basis of these guilty pleas.

A. Guilty Pleas Have the Same Post-Conviction Impact on Defendants but Require Less Evidence to Prove Guilt Than Trials

Despite the convenience of guilty pleas for both attorneys and defendants, guilty-plea defendants are subject to the same post-conviction consequences as if they had been convicted at trial, even though the basis of guilt at trial differs from that for a guilty plea.⁸⁴ A defendant going to trial for a drug offense cannot be convicted solely because of a positive field test, whereas a defendant entering a plea deal can.⁸⁵ The same evidentiary

80. See Devers, *supra* note 19, at 1.

81. See *id.* at 2.

82. *Innocents Who Plead Guilty*, *supra* note 43, at 2; *Drug Cases*, *supra* note 45, at 1.

83. *Innocents Who Plead Guilty*, *supra* note 43, at 1; see Devers *supra* note 19, at 1–2.

84. *People v. Popescue*, 177 N.E. 739, 743 (Ill. 1931).

[O]n a plea of guilty the remaining ‘duty of the court to examine witnesses as to the aggravation and mitigation of the offense’ is not a trial . . . the judge is only required to examine witnesses for the purpose of determining, not guilt or innocence but the degree of punishment which his judgment should express.

Id.

85. See 5B M.J. Criminal Procedure § 33 LEXIS (2017); *Drug Cases*, *supra* note 45, at 2; see also *supra* section II. In Harris County, ninety-four of

standards should apply to both guilty pleas and trials because the defendant is convicted in both procedures and thus suffers the same long-term impact. When a defendant enters a guilty plea, he admits to all the elements of the criminal charge and, for all intents and purposes, is just like the defendant found guilty at trial.⁸⁶ With this judgment of guilt comes a host of “collateral consequences” that apply to both convicted defendants and plea deal defendants after they serve their sentences.⁸⁷ These consequences can extend indefinitely and affect defendants’ employment, access to government benefits and programs, and housing opportunities.⁸⁸ For defendants convicted of a drug offense, they can be further subjected to mandatory drug testing and may have certain professional licenses revoked.⁸⁹

The main difference between the two processes is that the plea-deal defendant waives his right to pursue any further evidence to prove his innocence.⁹⁰ A voluntary guilty plea is a “self-supplied” conviction where the defendant waives his right to appeal the issue of whether there was sufficient evidence to prove his guilt beyond a reasonable doubt.⁹¹ To that extent, a trial court is not required to hear evidence to sustain the conviction, meaning that a guilty plea eliminates the necessity for proof.⁹² Rather, any evidence heard by the trial court after the plea has been entered only goes towards the defendant’s sentencing.⁹³ Should a similarly situated defendant pursue a trial, rather than enter a guilty plea, the prosecution would have a much higher evidentiary

the 140 drug crime exonerations where the defendant entered a guilty plea were based solely on a field test. *Drug Cases*, *supra* note 45, at 2.

86. *United States v. Broce*, 488 U.S. 563, 570 (1989) (“A plea of guilty and the ensuing conviction comprehend all of the factual and legal elements necessary to sustain a binding final judgment of guilt”); 5B M.J. Criminal Procedure § 33 LEXIS (2017); Scott Moore, Comment, *Re-Examining the Admissibility Effect of Guilty Pleas*, U. CHI. LEGAL F. 463, 467 (1998).

87. Sarah B. Berson, *Beyond the Sentence—Understanding Collateral Consequences*, 272 NAT’L INST. JUST. J. 1, 25 (2013), <https://www.ncjrs.gov/pdffiles1/nij/241924.pdf> [<https://perma.cc/DG6Y-6X6V>].

88. *Id.* at 26.

89. *See id.*

90. *See* 5B M.J. Criminal Procedure § 33 LEXIS (2017).

91. *See id.*

92. *See id.*

93. *People v. Popescue*, 177 N.E. 739, 743 (Ill. 1931).

burden.⁹⁴ Instead of sustaining a drug conviction on a field test alone, the prosecution may be required to obtain a laboratory test or other corroborating evidence.⁹⁵ Safeguards that are in place to protect defendants from the admission of unreliable evidence at trial are not similarly applied for guilty pleas, leading both to a higher risk of error and an unfair conviction process.⁹⁶ Plea deals based on such unreliable evidence demonstrate that plea deals are “the great American method of sweeping problems in criminal cases under the rug.”⁹⁷ In essence, a guilty plea is a conviction with a lower evidentiary bar, as a guilty plea is enough to sustain a conviction which might otherwise have an insufficient evidentiary basis at trial.⁹⁸ To the extent that both guilty pleas and verdicts result in the same impact, justice should require the same evidentiary standard for both types of convictions, meaning that the prosecution should be required to obtain a laboratory report confirming the field test prior to entering a guilty plea with the defendant.

III. THE STATE CAN REASONABLY WAIT FOR A LABORATORY CONFIRMATION BEFORE ACCEPTING A GUILTY PLEA

A. *Overcoming Potential Obstacles of Making States Obtain Laboratory Reports for Guilty Pleas*

Prosecutors often argue that it is not feasible to obtain laboratory results to confirm a field test before a plea deal is offered because of the large quantities of drug evidence that are collected and submitted to crime laboratories.⁹⁹ According to the National Forensic Laboratory Information System, there were a total of 163,806 cases in backlog in 2012 nationwide, with approximately 1,213 backlogged cases per laboratory, and with

94. See *People v. Hagberg*, 733 N.E.2d 1271, 1273 (Ill. 2000).

95. See, e.g., *State v. Jackson*, 468 N.W.2d 431, 431 (Wis. 1991); *People v. Brightman*, 565 N.Y.S.2d 989, 992–93 (N.Y. Dist. Ct. 1991).

96. See *Popescue*, 177 N.E. at 743; Moore, *supra* note 86, at 467.

97. Gross, *supra* note 48, at 777 (“The evidence of guilt is weak? Reduce the charges enough and he’ll probably go for it, and then we’ll never have to present what evidence we do have.”).

98. See *Popescue*, 177 N.E. at 743.

99. See, e.g., *Controlled Substances*, NAT’L INST. JUST., <https://www.nij.gov/topics/forensics/evidence/controlled-substances/pages/welcome.aspx> [<https://perma.cc/Q5R7-LTBR>] (last modified Nov. 17, 2015).

state labs having more cases in backlog than local labs.¹⁰⁰ Thirty-nine percent of state laboratories reported that this was an increase in backlogged cases from the prior year, mainly due to an influx of emerging drugs used on the streets that require the development of new testing technology, combined with a loss of staff.¹⁰¹ This increase in backlogged cases not only requires crime labs to prioritize the evidence they analyze, but also leads to an increased turnaround time for cases.¹⁰² Prosecutors argue that this increased wait for a laboratory report, which would delay plea deals, is unfair and not feasible for defendants seeking to avoid waiting in jail for months and for attorneys seeking to lighten their dockets as efficiently as possible.¹⁰³ Prosecutors further suggest that, although in the long-run requiring a laboratory report before a guilty plea would lessen the time spent in the justice system over a longer period of time, in the short-run requiring a laboratory report before a guilty plea would require more time on the part of both the defendant and the attorney.¹⁰⁴

Requiring state labs to conduct testing on a substance prior to entering a guilty plea is a tall order, because these labs are often underfunded and understaffed.¹⁰⁵ The limited funding means crime labs are unable to update and expand their infrastructure, which would increase their ability to handle the backlog of cases or hire more staff to tackle the increase in cases.¹⁰⁶ Further, labs must use a share of this limited funding to create new techniques necessary to test for new designer drugs that emerge at a rapid

100. 2013 SURVEY, *supra* note 47, at 3. Backlog is defined as “cases that went unanalyzed for 30 days or more after submission to the laboratory.” State laboratories had 92,003 while local labs had 71,803. *Id.*

101. *Id.*

102. *Id.* Turnaround is defined as “the time from submission of a case to the laboratory until the report is administratively approved.” *Id.*

103. See *Drug Cases*, *supra* note 45, at 1; *Innocents Who Plead Guilty*, *supra* note 43, at 2; Devers, *supra* note 19, at 1.

104. *Ex parte* Palmberg, 491 S.W.3d 804, 809–10 (Tex. Crim. App. 2016); see also *Ex parte* Cortez, No. AP-75,419, 2006 WL 1410846, at *1 (Tex. Crim. App., 2006) (reversing conviction where defendant was exonerated by laboratory test results three months after pleading guilty); see Devers, *supra* note 19, at 2.

105. Innocence Staff, *Strengthening Forensic Science Includes Supporting Forensic Laboratory Funding*, INNOCENCE PROJECT (Sept. 18, 2017), <https://www.innocenceproject.org/strengthening-forensic-science-includes-supporting-forensic-laboratory-funding/> [https://perma.cc/J4FJ-9QNS].

106. *Id.*

pace.¹⁰⁷ Increased funding is preferred to allow laboratories to comprehensively improve the above issues; however, there are reforms to the current process that can feasibly produce a laboratory report prior to a plea deal, as exemplified by Harris County, Texas, and Multnomah County, Oregon.¹⁰⁸

B. Practicality of Obtaining a Lab Report

Obtaining a laboratory report before a guilty plea is a timely, achievable alternative to either never testing the suspected substance or waiting until after the plea to test the substance. Acting as a pioneer, the Harris County District Attorney has historically required the Houston Forensic Science Center to test all evidence submitted to the lab, even if the defendant pled guilty before proceeding to trial.¹⁰⁹ As explained below, this unique practice enabled the District Attorney to take further steps that require these tests to be completed prior to any guilty plea and inspired Multnomah County to subsequently pursue similar steps to enact another practical alternative.

1. Harris County, Texas

In 2014, the Harris County Deputy District Attorney Inger Chandler observed a steady number of cases where the defendant pled guilty to a drug charge but then received a report from the crime lab months or years later indicating there was no controlled substance.¹¹⁰ Every innocent defendant had taken a guilty plea on the basis of a positive field test.¹¹¹ Upon further investigation of this problem, Chandler discovered that the laboratory detected no controlled substances in 212 of the 301 cases in which a positive field test led to an arrest.¹¹² According to Gerald Doyle, Chief of the Harris County District Attorney's Conviction Integrity Division, the County's ongoing practice of testing substances in a laboratory after a plea and receiving a "no controlled substance"

107. *Controlled Substances*, *supra* note 99.

108. *See id.*; *see also Drug Cases*, *supra* note 45, at 2; *see also* Innocence Staff, *supra* note 105.

109. Innocence Staff, *supra* note 105; *Innocents Who Plead Guilty*, *supra* note 43.

110. *Drug Cases*, *supra* note 45, at 1; Gross, *supra* note 48, at 776.

111. Innocence Staff, *supra* note 105.

112. *Id.*; *Drug Cases*, *supra* note 45, at 1.

report proved how unreliable field tests are and became the primary motivation for working towards a better policy.¹¹³

In response to these “no controlled substance” laboratory reports, in 2014 Chandler enacted a program that streamlined crime lab testing in an effort to address the case backlog from prior years and filter out wrongful convictions at a quicker pace.¹¹⁴ From February 2014 to February 2018, Harris County identified 484 cases where the laboratory had issued a report that negated a positive field test and subsequent wrongful drug charge.¹¹⁵ Of the 484 cases, the laboratory found no controlled substance in 331 cases.¹¹⁶ Albritton was one of these 331 defendants.¹¹⁷ Chandler’s efforts to restructure the crime labs culminated on February 1, 2015, when Harris County implemented a new policy, one that is currently in effect, which prohibits plea deals in felony drug cases until a laboratory test confirms the positive field test.¹¹⁸ Therefore, under this current policy, the Harris County District Attorney only allows prosecutors to enter into plea deals in felony drug conviction cases after there is a laboratory test.¹¹⁹

To successfully enact this program, the Houston and Harris County crime labs worked to decrease their backlogs of controlled substance cases using the streamlined process mentioned earlier, which they successfully accomplished in 2015, right when the Harris County District Attorney officially enacted the new policy.¹²⁰ Once this backlog was substantially lessened, the laboratories began re-prioritizing case submissions.¹²¹ Typically,

113. Telephone Interview with Gerald Doyle, Chief, Conviction Integrity Div., Harris Cty. Dist. Attorney’s Office (Mar. 20, 2018) (“The problem with field tests is that the tests are very sensitive and not specific.”).

114. *Drug Cases*, *supra* note 45, at 1.

115. Telephone Interview with Keith Satterwhite, Paralegal, Conviction Integrity Div., Harris Cty. Dist. Attorney’s Office (Mar. 20, 2018).

116. *Id.*

117. *Id.*; see *Ex parte* Albritton, No. WR-85, 2016 Tex. Crim. App. Unpub. LEXIS 599, at *1 (Tex. Crim. App. June 22, 2016).

118. Innocence Staff, *supra* note 105.

119. *Id.*

120. Lise Olsen & Anita Hassan, *298 Wrongful Drug Convictions Identified in Ongoing Audit*, HOUS. CHRON. (July 16, 2016), <https://www.houstonchronicle.com/news/houston-texas/houston/article/298-wrongful-drug-convictions-identified-in-8382474.php> [<https://perma.cc/2B97-BAYE>].

121. *Id.*

laboratories prioritize cases going to trial and test these substances first, but under the new program in Harris County the crime laboratories prioritizes all pending cases, which include potential guilty pleas.¹²² In combination with this new hierarchy and the decreased backlog of cases, the laboratories are currently able to produce a report within ten days after receiving a submission.¹²³ Under Harris County's program, a prosecutor can efficiently use the laboratory report either confirming or negating the field test in moving forward in the plea process without having to wait an extended amount of time.¹²⁴ This quick turnaround by the labs has facilitated the policy of not pleading without a lab report and has ultimately resulted in fewer wrongful drug convictions based on inadequate evidence and more case dismissals.¹²⁵

Part of the reason for the policy's widespread success was the laboratories' willingness and ability to work with the District Attorney to reduce case backlog and potential wrongful convictions.¹²⁶ The primary laboratories used by Harris County, the Houston Forensic Science Center and Harris County Laboratory, were already well-funded and well-staffed when the policy was introduced.¹²⁷ This enabled the labs to quickly decrease the pre-existing backlog by a substantial amount within a year from start to finish, while continuing to run smoothly and keep up with new submission requests.¹²⁸ While this increased funding and staffing were helpful to Harris County, neither is ultimately necessary for other state laboratories to achieve the same objective. As demonstrated below, it is possible for other

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Ryan Gabrielson, *Prosecutors in Portland Change Policy on Drug Convictions*, PROPUBLICA (Nov. 28, 2016, 1:06 PM), <https://www.propublica.org/article/prosecutors-in-portland-change-policy-on-drug-convictions> [<https://perma.cc/QA6B-2SQW>].

¹²⁵ Telephone Interview with Randi Capone, Assistant Dist. Attorney, Harris Cty. Dist. Attorney's Office (Mar. 20, 2018); Interview with Gerald Doyle, *supra* note 113; Interview with Keith Satterwhite, *supra* note 115.

¹²⁶ Interview with Randi Capone, *supra* note 125; Interview with Gerald Doyle, *supra* note 113; Interview with Keith Satterwhite, *supra* note 115.

¹²⁷ Interview with Randi Capone, *supra* note 125; Interview with Gerald Doyle, *supra* note 113; Interview with Keith Satterwhite, *supra* note 115.

¹²⁸ Interview with Randi Capone, *supra* note 125; Interview with Gerald Doyle, *supra* note 113; Interview with Keith Satterwhite, *supra* note 115.

counties to obtain laboratory reports prior to a plea deal without an increase in funding or staffing.¹²⁹ Further, according to Gerald Doyle, the driving force behind the policy's success in Harris County was the forensic labs' motivation to minimize the number of wrongful convictions.¹³⁰ When the District Attorney initially realized the high number of wrongful convictions in 2014, laboratory staff approached the District Attorney to work towards a solution.¹³¹ Together, staff from both the forensic labs and the District Attorney's office created the current, more efficient policy.¹³²

Gerald Doyle reports that there were no hiccups in enacting this policy.¹³³ Although the number of priority cases to be tested by the laboratory has increased as a consequence of the policy, the laboratory has not reported any additional backlog since 2015.¹³⁴ In fact, since 2015 the number of total cases in backlog at the Houston Forensic Science Center has dropped from approximately 7,000 cases to under 4,000 cases in 2018.¹³⁵ The laboratory has also not experienced an increase in turnaround time since the policy was enacted, reporting an average turnaround time for controlled substances in February 2018 of six days.¹³⁶ Aside from the obvious change in requiring a laboratory report, the policy has also not dramatically changed the way attorneys negotiate guilty pleas.¹³⁷ Once the policy was enacted, defense attorneys knew to wait the short time for the laboratory report before accepting a plea deal and prosecutors were not burdened by this wait because

129. See *infra* section III.B.2.

130. Interview with Randi Capone, *supra* note 125; Interview with Gerald Doyle, *supra* note 113; Interview with Keith Satterwhite, *supra* note 115.

131. Interview with Randi Capone, *supra* note 125; Interview with Gerald Doyle, *supra* note 113; Interview with Keith Satterwhite, *supra* note 115.

132. Interview with Randi Capone, *supra* note 125; Interview with Gerald Doyle, *supra* note 113; Interview with Keith Satterwhite, *supra* note 115.

133. Interview with Gerald Doyle, *supra* note 113.

134. Interview with Randi Capone, *supra* note 125; Interview with Gerald Doyle, *supra* note 113; Interview with Keith Satterwhite, *supra* note 115.

135. *HFSC at a Glance*, HOUS. FORENSIC SCI. CTR. 1, 1, 3 (Mar. 2018), https://gallery.mailchimp.com/c407835114cfb9251dbf54adf/files/045c9d83-7ae2-4a49-a41b-a001dd008fb2/March_2018_What_27s_New.pdf [<https://perma.cc/NNF7-5CZJ>].

136. *Id.*

137. Interview with Randi Capone, *supra* note 125; Interview with Gerald Doyle, *supra* note 113; Interview with Keith Satterwhite, *supra* note 115.

of the quick turnaround time by the lab.¹³⁸

2. *Multnomah County, Oregon*

In response to Harris County's efforts, and the publicity of field tests' unreliability, the Multnomah County, Oregon District Attorney's Conviction Integrity Unit checked all drug possession guilty pleas since 2010.¹³⁹ Their office exonerated five defendants who pled guilty from 2010 to 2016 but a subsequent laboratory test found no controlled substance.¹⁴⁰ In 2016, the District Attorney began requiring the laboratory to test all substances, regardless of whether or not the defendant pled guilty or was going to trial.¹⁴¹ Unlike Harris County, this policy only requires the state to obtain a laboratory report after a guilty plea, not necessarily before a guilty plea.¹⁴² For a defendant in Multnomah County who enters a guilty plea and a subsequent laboratory test negates the field test, the District Attorney notifies the defendant and revokes the plea.¹⁴³ In cases where the defendant maintains his innocence, he can request a confirmatory laboratory report before entering a plea.¹⁴⁴ If the defendant requests the laboratory report pre-plea, the prosecutor must provide it before proceeding with the plea deal.¹⁴⁵ While these requests are fairly rare due to many defendants knowing their guilt before the confirmatory laboratory test, they demonstrate the County's ability to obtain a laboratory report prior to a guilty plea.¹⁴⁶

The new policy of testing all substances for all cases has not had negative consequences in the County.¹⁴⁷ The laboratory is able to keep up with all requests by prioritizing all substance requests for guilty pleas and pending trial cases equally.¹⁴⁸ The new policy has also not increased laboratory costs or placed a

138. Interview with Randi Capone, *supra* note 125; Interview with Gerald Doyle, *supra* note 113; Interview with Keith Satterwhite, *supra* note 115.

139. *Drug Cases*, *supra* note 45, at 2; Gabrielson & Sanders, *supra* note 1.

140. *Drug Cases*, *supra* note 45, at 2.

141. Telephone Interview with JR Ujifusa, Senior Deputy Dist. Attorney, Multnomah Cty. Dist. Attorney (Mar. 6, 2018).

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

financial burden on the laboratories.¹⁴⁹ Since the County is already testing all substances under its current policy with no financial burden, it may be possible for the County to move towards requiring laboratory testing of all substances pre-plea without facing an impossible financial burden. Arguably, more resources may be necessary to make the jump from testing all substances to producing a laboratory report pre-plea. In order for the laboratory to produce a report in a reasonable amount of time so defendants and prosecutors are not forced to wait longer before proceeding with a plea deal, the laboratory must work to lower its turnaround time, like in Harris County.¹⁵⁰ In order to achieve a quicker turnaround time, the laboratory would need enough employees to keep up with the substance requests in addition to the funding necessary to efficiently test all the substances.¹⁵¹ Thus, in order to achieve the ultimate goal of testing all substances pre-plea, it may be necessary for the laboratory to have access to enough funding and staffing to both keep up with requests and produce reports quickly. Even if this is the case, and laboratories may be restricted from their ability to test all substances pre-plea due to staffing and funding, Multnomah County demonstrates that it is feasible for laboratories with limited resources to at least test all substances—a policy that very few counties currently practice.¹⁵²

Multnomah County's policy of testing all substances demonstrates a workable minimum alternative to Harris County's approach of obtaining a laboratory report prior to entering every plea. While Multnomah County's practice makes it easier to dismiss a drug charge post-plea by testing every case and revoking pleas if the laboratory test negates the field test, the County's method fails to take into account the increased time in the court system for innocent defendants who pled guilty.¹⁵³ In Multnomah County, the prosecutor must wait for the laboratory report to negate the field test before initiating court proceedings to overturn

¹⁴⁹ *Id.*

¹⁵⁰ Interview with Randi Capone, *supra* note 125; Interview with Gerald Doyle, *supra* note 113; Interview with Keith Satterwhite, *supra* note 115.

¹⁵¹ See Innocence Staff, *supra* note 105.

¹⁵² Gross, *supra* note 48, at 776; 2013 SURVEY, *supra* note 47; see Interview with Gerald Doyle, *supra* note 113.

¹⁵³ See Devers, *supra* note 19.

the innocent defendant's conviction; in Harris County this step is not needed as the defendant's innocence is proven with the laboratory report before the defendant is ever convicted.¹⁵⁴ Multnomah County's approach ultimately serves justice, but it does not prevent the defendant from spending time in jail, juggling various personal and family obligations, and suffering from negative financial and employment effects. Further, because the County is financially able to test all substances, it is likely reasonable for the County to go a step further and follow Harris County's lead of testing all the substances pre-plea as discussed above. Multnomah County's approach is not as efficient as a method that requires prosecutors to obtain a laboratory report prior to the guilty plea, where the defendant would never have to go back and undo a wrongful plea.

Though clearly novel practices, Harris County and Multnomah County demonstrate the feasibility of systematically testing for suspected drugs in a state crime lab.¹⁵⁵ The high number of exonerations in Harris County alone, after a lab test found no controlled substance while the field test did, shows the need for a more effective program of testing all suspected substances at every stage of the prosecution. As demonstrated by the two counties, requiring a lab result, however inconvenient it may at first appear, is clearly achievable for all states and counties so as to avoid these wrongful convictions based solely on an unreliable field test. The quick turnaround time diminishes defendants' fears of increased pretrial jail time and prosecutors' fears of spending more time working on an individual case. Further, these programs show that it is viable for crime laboratories to eliminate backlogged cases, making it easier moving forward to quickly produce laboratory reports prior to a guilty plea without paralyzing the plea process or placing a substantial burden on laboratory staff. While increased funding for forensic laboratories is certainly helpful, these additional resources are not necessary to enact a policy requiring laboratory reports prior to a guilty plea, or at a minimum, a policy requiring

154. See Interview with JR Ujifusa, *supra* note 141; Interview with Randi Capone, *supra* note 125; Interview with Gerald Doyle, *supra* note 113; Interview with Keith Satterwhite, *supra* note 115.

155. *Drug Cases*, *supra* note 45, at 2.

laboratory testing of all substances after the plea.¹⁵⁶ Rather, as shown by both Multnomah County and Harris County, all that is needed is the right motivation from both the District Attorney and the laboratory.

IV. CONCLUSION: FIELD TESTS SHOULD NOT FORM THE SOLE BASIS OF GUILTY PLEAS

A high number of innocent defendants are currently serving sentences or dealing with the collateral consequences of their convictions after pleading guilty to a drug offense on the basis of a positive field test. Courts, scientists, and government officials have demonstrated their disapproval of field tests as conclusive evidence of guilt.¹⁵⁷ Yet, by allowing state prosecutors to use field tests as the basis of a guilty plea, this seemingly insufficient evidence has been accepted as if it were conclusive evidence of a defendant's guilt before he reaches the safeguards of trial. Many of these defendants are none the wiser as to whether the suspected substance was actually an illegal substance due to the common practice of not testing substances in a laboratory after a guilty plea. However, as demonstrated by Harris County and Multnomah County, it is not only possible but practical for states to require lab reports before entering into plea deals with defendants. When there are viable alternatives available to ensure that defendants are not wrongfully convicted as a result of faulty field tests, it is the state's duty to follow these alternatives in the interest of preserving justice.

In light of the millions affected by guilty pleas and field tests, as well as the long-term impact suffered by defendants convicted on different evidentiary standards, an alternative to entering guilty pleas based on positive field tests should be implemented. Due to the practical available alternative of not entering a guilty plea until a laboratory report is obtained, there is no reason as to why field tests must continue to serve as the sole basis of guilt for defendants entering guilty pleas. Rather, in the interest of

156. See Interview with JR Ujifusa, *supra* note 141; Interview with Randi Capone, *supra* note 125; Interview with Gerald Doyle, *supra* note 113; Interview with Keith Satterwhite, *supra* note 115.

157. Johns et al., *supra* note 26, at 631; *Sixth Annual Report*, *supra* note 76; Velapoldi & Wicks, *supra* note 20, at 655.

judicial fairness, all guilty pleas should be substantiated with a confirmatory laboratory report indicating the presence of an illegal substance, not just a potentially faulty field test. Mandating confirmatory laboratory reports would eliminate the high number of defendants wrongfully convicted each year after pleading guilty to a drug charge based on a false positive field test. Defendants like Amy Albritton could avoid the needless wave of litigation to declare their innocence and the long-lasting impact of having a felony conviction if prosecutors were forced to obtain a confirmatory laboratory report before entering a guilty plea.