No. 08-6

In the Supreme Court of the United States

DISTRICT ATTORNEY'S OFFICE FOR THE THIRD JUDICIAL DISTRICT, ET AL., PETITIONERS

v.

WILLIAM G. OSBORNE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

The United States will address the following question: Whether respondent has a right under the Fourteenth Amendment's Due Process Clause to obtain post-conviction access to the State's physical evidence.

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INTEREST OF THE UNITED STATES

Respondent asserts a right under the Due Process Clause of the Fourteenth Amendment to obtain postconviction access to physical evidence used to convict him at trial for a brutal sexual assault. Because the Due Process Clause of the Fifth Amendment applies to defendants tried in federal courts, the United States has a significant interest in the disposition of this case. In addition, Congress has articulated the circumstances under which federal prisoners may secure postconviction DNA testing of evidence in the federal government's possession. See 18 U.S.C. 3600. This Court's decision could affect the validity of that statute.

STATEMENT

1. One evening in March 1993, respondent twice called his friend Dexter Jackson from the Space Station arcade. Pet. App. 65a; J.A. 215. Jackson drove to the Space Station, and respondent entered his vehicle. *Ibid.*

That same evening, a woman on foot, K.G., was approached by a car driven by Jackson. Pet. App. 113a; J.A. 64. After Jackson and his male passenger offered K.G. $100 to perform fellatio, J.A. 66, the men drove her to a secluded site, taking her Swiss Army knife from her on the way. Pet. App. 113a-114a. The passenger pointed a gun at K.G. and ordered her to disrobe. *Id.* at 114a. K.G. was forced to perform fellatio on Jackson, and the passenger, wearing a blue condom, raped her. *Id.* at 3a, 114a; J.A. 68-69. When K.G. refused the passenger's command to get out of the car and lie face down in the snow, Jackson struck her with the gun and the passenger choked her. Pet. App. 114a; J.A. 71-72.

When K.G. finally exited the car, both men brutally beat her with a wooden object. Pet. App. 114a-115a; J.A. 73-74. The passenger then fired a shot at K.G. Pet. App. 115a. The bullet grazed her skull, and she pretended to be dead. *Ibid.* The men buried her with snow and left her for dead. *Ibid.* After her assailants departed, K.G. flagged down a passing car and told its occupants she had been attacked by two black men with military haircuts. *Ibid.*; J.A. 216. Later that evening, respondent and Jackson (both African-Americans in the military) were seen together by multiple witnesses, some of whom noticed blood on respondent's clothing. *Ibid.*

Six days later, military police stopped Jackson's car. Pet. App. 116a; J.A. 97. A search of the car produced a .380-caliber semiautomatic pistol, a bottle of K.G.'s per-

fume, and tickets from the Space Station arcade. Pet. App. 67a, 116a; J.A. 215-216. K.G.'s Swiss Army knife was in Jackson's pocket. Pet. App. 116a. DQ-alpha (DQA) DNA testing of blood spots in Jackson's car matched K.G.'s DQA type, which is found in approximately 4.4 to 4.8% of white females. *Ibid*. Jackson confessed that he and respondent had attacked K.G. *Id*. at 4a. K.G. identified both Jackson and respondent. *Id*. at 116a-117a; J.A. 80-81, 214.

At the crime scene, investigators had discovered several sets of tire tracks, one of which matched the tires on Jackson's car, and an area of disturbed and blood-stained snow. Pet. App. 117a. In the snow, they located K.G.'s bloody pants, an axe handle similar to ones respondent used in his work and kept in his home, a .380-caliber shell-casing that ballistics testing matched to the pistol taken from Jackson's car, and a used blue condom. *Id*. at 4a-5a, 68a, 117a. Sperm in the condom did not match Jackson's DQA type, but did match respondent's, which is shared by about 14.7 to 16% of African-American males. *Id*. at 5a, 117a; J.A. 117-119, 217. Pubic hairs found on the condom and on K.G.'s sweater had the same microscopic characteristics as respondent's (but not Jackson's) pubic hair. J.A. 104-105, 108, 216-217.

2. Respondent and Jackson were tried jointly in Alaska Superior Court. Pet. App. 117a. Respondent presented a defense of mistaken identity, arguing in part that one-sixth of the African-American male population shared the DQA type found in the condom and could have been K.G.'s attacker. *Id*. at 70a. The jury rejected that defense and convicted respondent of kidnapping, assault, and two counts of sexual assault. *Id*. at 117a. He was given a composite sentence of 26 years of imprisonment, with five years suspended. *Id*. at 118a.

In 1996, the Alaska Court of Appeals affirmed respondent's convictions and sentence. *Id.* at 113a-130a.

3. a. Respondent filed a state postconviction petition, arguing, *inter alia*, that his trial counsel had been ineffective in failing to test the contents of the condom and the pubic hair found on K.G.'s sweater using the restriction-fragment-length-polymorphism (RFLP) method, a significantly more discriminating method of DNA testing than the DQA method.[1] Pet. App. 97a; J.A. 14. Respondent's lawyer submitted an affidavit explaining that she made a conscious decision not to seek RFLP testing before trial. Pet. App. 97a-99a. She believed the State's own test results failed to exclude a significant portion of the population and thus created a solid predicate for a mistaken-identity defense. *Id.* at 98a. Given the other evidence, including Jackson's confession (which could not be used against respondent at their joint trial under *Bruton* v. *United States*, 391 U.S. 123 (1968)), counsel believed a more sophisticated test would only have confirmed that respondent committed the crimes. Pet. App. 98a-99a; J.A. 18.

The state postconviction court found that counsel's strategic decision "to forego [*sic*] more precise genetic testing of physical evidence and to argue that the testing conducted by the State was inconclusive" was a reasonable one, and it therefore denied respondent's petition. J.A. 20. The court also denied respondent's motion to order retesting of the evidence using the short-tandem-repeat (STR) method (a newer, even-more-discriminating form of DNA analysis). J.A. 22, 38; Pet. App. 11a.

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[1] RFLP testing is generally several orders of magnitude more powerful than the DQA testing that was performed on the semen sample. See, *e.g.*, Eric S. Lander & Bruce Budowle, *DNA Fingerprinting Dispute Laid to Rest*, 371 Nature 735, 738 (1994).

b. The Alaska Court of Appeals affirmed in part. Pet. App. 91a-112a. The court upheld the lower court's finding that counsel's decision to forgo further DNA testing was a reasonable trial strategy. *Id.* at 100a-102a. The court also held that there is no federal due process right to retest evidence in order to attack a final judgment of conviction. *Id.* at 105a-109a. But the court suggested the Alaska Constitution might afford respondent an equivalent right if he could demonstrate "(1) that the conviction rested primarily on eyewitness identification evidence, (2) that there was a demonstrable doubt concerning [his] identification as the perpetrator, and (3) that scientific testing would likely be conclusive on this issue." *Id.* at 111a.

c. On remand, the trial court concluded that respondent could not meet that standard because abundant evidence linked him to the attack. J.A. 213-222. Moreover, in connection with an April 2004 parole application (while his postconviction appeal was pending), respondent confessed, both orally and in writing, that he *had* brutally attacked K.G. Pet. App. 71a; J.A. 221. Thus, the trial court determined that new DNA testing was not likely to establish respondent's innocence. J.A. 158-160.

d. The Alaska Court of Appeals affirmed. Pet. App. 63a-90a. The court was satisfied that further DNA testing would not establish respondent's innocence. *Id.* at 79a-82a. In a concurring opinion, Judge Mannheimer, joined by Chief Judge Coats, concluded that the Alaska Constitution might require a court to review claims by defendants who presented "clear genetic evidence of their innocence," *id.* at 89a, but that respondent could not meet that threshold even if the new DNA results he sought were favorable to him, *id.* at 90a. The Alaska

Supreme Court denied discretionary review. See *id.* at 10a.

4. In 2003, respondent filed a federal civil rights action under 42 U.S.C. 1983, seeking to compel petitioners to provide him with access to some of the evidence used to convict him. J.A. 23-40. Respondent alleged that he wanted to submit the evidence for further DNA testing, at his expense, using the short-tandem-repeat (STR) and mitochondrial-DNA (mtDNA) testing methods, which were not available at the time of his 1994 trial. J.A. 24-25, 31-32.

a. The district court dismissed respondent's complaint, concluding that he was required to pursue his claim in a habeas corpus action under 28 U.S.C. 2254, rather than a Section 1983 action. Pet. App. 54a. The court of appeals reversed, *id.* at 51a-62a, holding that Section 1983 was a proper vehicle for respondent's right-of-access claim because his success on that claim would not necessarily imply that his conviction was invalid, *id.* at 57a-61a. The court remanded for the district court to consider whether respondent had a constitutional right of access to the evidence. *Id.* at 62a.

b. On remand, the district court concluded that "there *does* exist, *under the unique and specific facts presented*, a very limited constitutional right to the testing sought," but the court did not determine the specific source of that right. Pet. App. 49a.

c. The court of appeals affirmed. Pet. App. 1a-45a. While acknowledging that "the Supreme Court's cases involving *Brady* rights[] involved only the right to *pretrial* disclosure," the court relied on Ninth Circuit precedent that "applied *Brady* as a post-conviction right." *Id.* at 15a, 16a. The court further noted that respondent's "access-to-evidence claim" is "specifically in-

tended to support an application for post-conviction relief." *Id.* at 19a. The court "assume[d] for the sake of argument" that a freestanding claim of actual innocence is "cognizable in federal habeas proceedings," and held that respondent was constitutionally entitled to access to evidence that might help him develop such a claim. *Id.* at 21a. The court also suggested that respondent had a federal right to access evidence that he might use to pursue a state constitutional claim of actual innocence, a claim that state law "might" recognize. *Id.* at 19a-20a.

After reviewing the usual standards for *Brady* claims, the court held that "the standard of materiality applicable to [respondent's] claim for post-conviction access to evidence is no higher than a reasonable probability that, if exculpatory DNA evidence were disclosed to [respondent], he could prevail in an action for post-conviction relief." Pet. App. 28a. Without "determin-[ing] the full breadth of post-conviction *Brady* rights," the court concluded that its standard does "not require a demonstration by a preponderance that disclosure of the DNA evidence will ultimately enable [respondent] to prove his innocence," but instead is satisfied by the "potential probative value" of the evidence in question. *Id.* at 27a, 28a. Applying that test, the court held that respondent was constitutionally entitled to test the evidence. *Id.* at 32a-44a.

SUMMARY OF ARGUMENT

The Ninth Circuit erred in discovering a new and broad-based constitutional right to obtain postconviction access to physical evidence for DNA testing. That right has never previously been recognized as to physical evidence, such as fingerprints, used to convict a defendant

during a criminal trial satisfying the numerous safeguards guaranteed by the Constitution. DNA testing is, to be sure, a valuable contribution to the criminal justice system. And recognizing that value, Congress and 44 state legislatures have recently enacted laws adopting differing approaches to ensuring access to physical evidence for DNA testing in certain circumstances. But both the novelty and the varying contours of those laws underscore the absence of any settled or fundamental tradition of granting postconviction access to physical evidence for DNA testing and the difficult line-drawing questions raised by the advent and evolution of DNA testing. This Court exercises the "utmost care" in deciding whether to recognize new constitutional rights, especially where the democratic process is already actively addressing the subject. *Washington* v. *Glucksberg*, 521 U.S. 702, 720 (1997) (internal quotation marks omitted). And particularly in the circumstances here, the Court should decline to recognize the broad-based right asserted by respondent.

A. The court of appeals erroneously concluded that the prosecution's obligation to disclose exculpatory evidence under *Brady* v. *Maryland*, 373 U.S. 83 (1963), continues after a defendant has been convicted (and, as here, has exhausted appeals and state postconviction review). The *Brady* disclosure obligation has always been a preconviction right associated with the right to a fair trial, and its rationale does not apply when the presumption of innocence has been rebutted by a conviction and the government has acquired a strong interest in the finality of a presumptively valid conviction. It would also be impractical to apply *Brady* in the postconviction context, when there is no longer an "individual prosecutor" who could reasonably be expected "to learn of any

favorable evidence known to the others acting on the government's behalf in the case." *Kyles* v. *Whitley*, 514 U.S. 419, 437 (1995). Furthermore, *Brady* is particularly inapt here because the evidence at issue is, at best, potentially exculpatory and could have been destroyed as soon as respondent's conviction became final.

B. Nor has respondent demonstrated any other due process right of access to the evidence for postconviction DNA testing in the circumstances here. Respondent enjoyed the panoply of constitutional protections guaranteed to criminal defendants at trial and was convicted. Because the postconviction right he asserts relates to state criminal justice systems, due process would require the requested access only if its denial "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina* v. *California*, 505 U.S. 437, 445 (1992) (internal quotation marks omitted). There is no tradition in this country of granting convicted criminals postconviction access to the prosecution's evidence locker, whether for DNA testing, fingerprint analysis, or other purposes. And constitutional rights do not spring into existence simply because science has advanced.

Recent legislative activity across the Nation underscores that there is no settled tradition, much less a fundamental one, of requiring postconviction access to evidence for DNA testing in the circumstances here. Congress and 44 state legislatures have authorized such testing but in doing so have imposed varying limits on it. In particular, they have evinced concerns about prisoners (like respondent) who forwent available DNA testing at their original trial or who do not maintain that they are actually innocent. Some States also require a prisoner seeking postconviction DNA testing to provide a

reason to believe (as opposed to a mere possibility) that the new tests would be exculpatory.

This Court has always been especially reluctant to create new due process rights and thereby place a "matter outside the arena of public debate and legislative action." *Glucksberg*, 521 U.S. at 720. Given the vibrant democratic process already underway and the myriad of different approaches that have been taken and could be taken in response to this issue, there is particularly good cause for exercising such restraint here. Moreover, the recognition of any such right would be especially untenable in the circumstances of this case, which involves a defendant who forwent more sophisticated DNA testing at trial, who later confessed to the underlying crime, and who is inculpated by other evidence. Even if the Constitution conferred some protections in this context, they would not extend to the circumstances here.

C. Respondent's constitutional claim should be rejected for the independent reason that neither he nor the Ninth Circuit has identified a viable underlying substantive right that would support his due process claim in the circumstances here. There is no substantive due process right of postconviction access to the State's evidence for DNA testing because access to evidence is a procedural matter. Moreover, any procedural due process right would have to relate to the adjudication of an underlying substantive right, but neither the court of appeals nor respondent has identified a cognizable underlying substantive right. The court of appeals assumed that respondent could use new DNA test results in pursuing a freestanding claim of actual innocence in federal habeas corpus, but this Court has never recognized such a freestanding right and, instead, has long held that "the existence merely of newly discovered evi-

dence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus." *Townsend* v. *Sain*, 372 U.S. 293, 317 (1963). Nor does respondent have a cognizable liberty interest in pursuing executive clemency. See *Ohio Adult Parole Auth.* v. *Woodard*, 523 U.S. 272, 289 (1998) (O'Connor, J., concurring in part and concurring in the judgment). Finally, respondent has no federal procedural right to the government's assistance in establishing a claim of innocence in any state postconviction hearing.

States have wide discretion to ensure the availability and effectiveness of postconviction relief. Moreover, as noted, Congress and the legislatures of most States have passed laws authorizing postconviction DNA testing in varying circumstances. This is no doubt good policy, especially as science advances and DNA testing becomes more accurate and less costly, but the Ninth Circuit erred in concluding that the Constitution entitles respondent to postconviction access to the State's evidence for DNA testing in the circumstances here.

ARGUMENT

THE NINTH CIRCUIT ERRED IN HOLDING THAT THE CONSTITUTION ENTITLES RESPONDENT TO OBTAIN POSTCONVICTION ACCESS TO THE STATE'S EVIDENCE

The Ninth Circuit erred in holding that respondent enjoyed a constitutional right of postconviction access to physical evidence for DNA testing in the circumstances here. The court of appeals relied on *Brady* v. *Maryland*, 373 U.S. 83 (1963), as the source of that right, but *Brady* is limited to the pre-trial—not postconviction—setting. Moreover, while DNA testing undoubtedly can be valuable, the federal and state legislatures are actively addressing a myriad of questions related to DNA testing,

and there is no settled and fundamental tradition of requiring the government to make physical evidence available to convicted defendants in the circumstances of this case. This Court has admonished that the Judiciary should exercise great caution in deciding whether to recognize new constitutional rights where the matter is the subject of an active democratic process of experimenting with and adopting new protections. See *Washington* v. *Glucksberg*, 521 U.S. 702, 720 (1997). And the Ninth Circuit erred in concluding that the recognition of a new constitutional right was warranted in the circumstances here.

A. The *Brady* Right To Receive Exculpatory Evidence In The Government's Possession Does Not Apply After Conviction

The Ninth Circuit held that *Brady* confers "a post-conviction" or "post-trial right" of access to potentially exculpatory evidence. Pet. App. 16a, 23a. That was error. Under *Brady*, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. One of the "essential elements" of such a claim is that the evidence in question "'must have been suppressed by the State, either willfully or inadvertently.'" *Banks* v. *Dretke*, 540 U.S. 668, 691 (2004) (quoting *Strickler* v. *Greene*, 527 U.S. 263, 282 (1999)). No such suppression occurred here. Before his conviction, respondent had access to the same evidence as the State, and the same opportunity to test that evidence.

Thus, *Brady* could apply here only if the government bore an open-ended continuing duty to inform defen-

dants postconviction of new evidence—or, in this case, of the potential availability of new testing of old evidence. Moreover, respondent could prevail only if such a duty extended not only through trial, direct appeal, and collateral-review proceedings, but even at a time (like now) when no habeas proceedings remain pending. As the court of appeals recognized, this Court has never recognized such a constitutional right, and all of this Court's "cases involving *Brady* rights[] involved only the right to *pre-trial* disclosure." Pet. App. 15a. Indeed, this Court has suggested that while due process requires disclosure of significant exculpatory evidence "[a]t trial," any post-trial duty of disclosure arises only under ethics rules, not the Constitution. *Imbler* v. *Pachtman*, 424 U.S. 409, 427 n.25 (1976); cf. *Kyles* v. *Whitley*, 514 U.S. 419, 437 (1995) (explaining that "the Constitution" and *Brady* "require[] less of the prosecution than the ABA Standards for Criminal Justice").

There is no basis for extending *Brady* to the post-trial setting. Before conviction, a defendant is presumed innocent and the government bears the burden of proving guilt beyond a reasonable doubt. See, *e.g.*, *Taylor* v. *Kentucky*, 436 U.S. 478, 483 (1978); *In re Winship*, 397 U.S. 358 (1970). In the postconviction context, by contrast, the presumption of innocence has been rebutted, the conviction is presumed to be valid, and the government has a strong interest in finality. *Herrera* v. *Collins*, 506 U.S. 390, 399 (1993). Those differing burdens caution strongly against lifting *Brady* from its pre-conviction context and transposing it to the realm of collateral attacks (much less to stand-alone Section 1983 actions). Cf. *Sanchez-Llamas* v. *Oregon*, 548 U.S. 331, 359 (2006) (finding *Brady* inapplicable where government

and defendant knew the same facts, but defendant did not know their legal consequences).

Furthermore, the *Brady* obligation would be impractical in the postconviction setting. For purposes of *Brady*, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles*, 514 U.S. at 437; see *Strickler*, 527 U.S. at 275 n.12. That duty is appropriate before conviction because, in the course of preparing a case for trial, a prosecutor must marshal and sift through evidence in the government's possession. Thus, it is reasonable to charge the prosecutor with knowledge of the evidence, even if specific exculpatory evidence in the hands of other government agents working on that prosecution is in fact unknown to him or her. But in the context of a postconviction proceeding—which may occur long after the trial—the original prosecutors and investigating officers may well have left the government, and there can be no expectation that replacements will even have been assigned to long-dormant cases, let alone that they should be aware of new evidence or know whether such evidence would have been relevant or material to the trial. It would be even more extraordinary to impose such an obligation on the government when (as here) there is not even a pending proceeding in which the evidence in question could be used.

Moreover, this Court has contrasted "material exculpatory" evidence, to which *Brady* applies, with evidence that is merely "potentially useful." *Illinois* v. *Fisher*, 540 U.S. 544, 549 (2004) (per curiam) (quoting *Arizona* v. *Youngblood*, 488 U.S. 51, 57-58 (1988)). When only the latter sort of evidence is at stake, there is no automatic duty (even pre-trial) to preserve the evidence.

Ibid.; *Youngblood*, 488 U.S. at 58. Like the evidence in *Youngblood* and *Fisher*, the evidence here is at best "potentially exculpatory," and under those decisions, it could have been destroyed consistent with the Due Process Clause and *Brady* as soon as respondent's conviction became final. See *ibid*.

B. The Court Should Decline To Recognize A New Due Process Right To Postconviction Access To Evidence For DNA Testing In The Circumstances Of This Case

Respondent also argues that, even apart from *Brady*, the Due Process Clause entitles him to postconviction access to the State's evidence. This Court has never recognized the existence of such a right. And respondent has failed to satisfy the extremely heavy burden of demonstrating that the Court should create such a right in the circumstances here.

1. There is no tradition of granting convicted defendants access to the evidence used to convict them

In the field of criminal law and procedure, this Court has been especially hesitant to use the "open-ended rubric of the Due Process Clause" to impose demands on state criminal justice systems beyond the "specific guarantees enumerated in the Bill of Rights." *Medina* v. *California*, 505 U.S. 437, 443 (1992) (quoting *Dowling* v. *United States*, 493 U.S. 342, 352 (1990)). In this context, therefore, the balancing test of *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), does not apply. Instead, "a narrower inquiry [is] more appropriate": whether the challenged action "'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Medina*, 505 U.S. at 445 (quoting *Patterson* v. *New York*, 432 U.S. 197, 202 (1977)).

The Constitution establishes a panoply of rigorous safeguards when it comes to charging and trying defendants for crimes. See *Herrera*, 506 U.S. at 398-399. But the demands of due process are severely reduced once society has validly convicted an individual of a crime and thus established its right to punish. *Greenholtz* v. *Inmates of the Neb. Penal & Corr. Complex*, 442 U.S. 1, 7 (1979); *Ohio Adult Parole Auth.* v. *Woodard*, 523 U.S. 272, 288-289 (1998) (O'Connor, J., concurring in part and concurring in the judgment); see also *Pennsylvania* v. *Finley*, 481 U.S. 551, 557-559 (1987) (no right to counsel on collateral review).

There is "no settled tradition" (*Medina*, 505 U.S. at 446) of granting postconviction access to the prosecution's evidence locker—whether for DNA testing or anything else. Physical evidence such as fingerprints, strands of hair, or blood has long been used to connect individuals to crime scenes and convict them of serious offenses. Yet there is no tradition in this country of allowing convicted criminals to test—or retest—the prosecution's evidence years after a guilty verdict, or to attempt to come up with new ways of establishing that evidence used at trial was unreliable, inconclusive, or exculpatory. Neither respondent, the court of appeals, nor any other court addressing the question has identified any postconviction tradition of access to evidence. And such a tradition would fundamentally conflict with the principle that "the trial of a criminal case in state court" is "a decisive and portentous event" because the proceeding before the jury is the one in which "[t]o the greatest extent possible all issues which bear on th[e] criminal charge should be determined." *Wainwright* v. *Sykes*, 433 U.S. 72, 90 (1977).

2. The state and federal governments are currently experimenting with different approaches to postconviction DNA testing

"Contemporary practice" among the States and the federal government has only "limited relevance to the due process inquiry." *Medina*, 505 U.S. at 447. Instead, the due process inquiry looks to settled and fundamental traditions. *Id.* at 446. In this case as in *Medina*, however, it is significant that "there remains no settled view" (*id.* at 447) that someone in respondent's position should be entitled to relief. To the contrary, the federal and state governments have addressed the question only recently, and have adopted varying approaches. Those recent legislative efforts underscore both the absence of a settled and fundamental tradition, and the fact that the democratic process is working to make valuable policy gains in this area as science progresses. See *Glucksberg*, 521 U.S. at 735.

Moreover, the detailed nature of the statutes demonstrates that postconviction DNA testing presents a number of developing policy issues that are especially appropriate for the democratic process and require quintessentially legislative line drawing. See *Harvey* v. *Horan*, 285 F.3d 298, 300-301 (4th Cir. 2002) (Wilkinson, C.J., concurring in denial of rehearing and rehearing en banc) (discussing the "myriad of questions that would have to be answered in order to define the parameters of a constitutional right to post-conviction access to DNA evidence").

a. Scientific advances associated with DNA have recently had a significant impact on criminal justice systems at the federal and state levels. DNA can, in appropriate circumstances, powerfully match physical evidence with a specific individual. That power has made

DNA testing an important tool in investigating crimes, convicting the guilty, and clearing the innocent.

In 1994, New York became the first State to adopt a statute that specifically authorizes inmates to obtain postconviction DNA testing in certain circumstances. See N.Y. Crim. Proc. Law § 440.30(1-a) (McKinney 2005). Under that statute, if a defendant moves to vacate a judgment or set aside a sentence, a court may grant an application for DNA testing of evidence "secured in connection with the [underlying] trial" if the court determines "that if a DNA test had been conducted on such evidence, and if the results had been admitted in the trial * * *, there exists a reasonable probability that the verdict would have been more favorable to the defendant." *Id.* § 440.30(1-a)(a). That reasonable probability standard has been construed as requiring the court to determine—before the testing has been carried out—both the likelihood that the new test would be exculpatory and the likelihood that such exculpatory results would have caused a different outcome at trial. *McKithen* v. *Brown*, 565 F. Supp. 2d 440, 482 (E.D.N.Y. 2008).

In 1996, the National Institute of Justice (NIJ) issued a report that discussed 28 instances in which DNA technology had established the factual innocence of a person who had been convicted of a crime and sent to prison. See Edward Connors et al., *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial* (1996) (NCJ No. 161258). In response, the Attorney General requested the establishment of a commission "to identify ways to maximize the value of DNA in our criminal justice system," including ways to handle postconviction DNA testing. See National Comm'n on the Future of

DNA Evidence, *Postconviction DNA Testing: Recommendations for Handling Requests* at iii (1999) (NCJ No. 177626).

In 2004, Congress enacted 18 U.S.C. 3600, which allows a federal court to grant a written motion for DNA testing by an individual imprisoned or sentenced to death for a federal crime when each of 10 specific criteria is satisfied. Innocence Protection Act of 2004, Pub. L. No. 108-405, Tit. IV, 118 Stat. 2278. Some of those criteria help to ensure that the proposed testing could produce evidence that is sufficiently reliable and material to cast doubt on the conviction. For instance, the evidence in question must be in the government's possession and must have been "retained under conditions sufficient to ensure that [it] has not been substituted, contaminated, tampered with, replaced, or altered in any respect material to the proposed DNA testing." 18 U.S.C. 3600(a)(4). The proposed testing must be "reasonable in scope," use "scientifically sound methods," and be "consistent with accepted forensic practices." 18 U.S.C. 3600(a)(5). It must also be able to "produce new material evidence that would * * * raise a reasonable probability that the applicant did not commit the [underlying] offense." 18 U.S.C. 3600(a)(8).

Moreover, Section 3600 seeks to ensure that the proposed new test results would be meaningfully new. If the evidence in question was previously subjected to DNA testing, the applicant must be requesting "testing using a new method or technology that is substantially more probative than the prior DNA testing." 18 U.S.C. 3600(a)(3). If the evidence was not previously subjected to testing, the applicant must not have "knowingly and voluntarily waive[d] the right to request DNA testing of that evidence in a court proceeding after" the enactment

of Section 3600 in October 2004, or have "knowingly fail[ed] to request" testing in "a prior motion for post-conviction DNA testing." *Ibid*.

As the exclusion for those who failed to request or previously waived DNA testing shows, Congress sought to guard against strategic behavior. The applicant must "assert[], under penalty of perjury, that [he] is actually innocent" of the underlying crime. 18 U.S.C. 3600(a)(1). He must also identify a theory of defense that "is not inconsistent with an affirmative defense presented at trial," that "would establish" his "actual innocence" of the crime, and that would be "support[ed]" by the results of the proposed testing. 18 U.S.C. 3600(a)(6) and (8)(A). If the applicant was convicted at a trial, "the identity of the perpetrator" must have been "at issue in the trial." 18 U.S.C. 3600(a)(7). The applicant's motion must also be made in a "timely fashion," and Congress enacted a series of detailed rules governing timeliness. 18 U.S.C. 3600(a)(10).

Section 3600 addresses a variety of other policy decisions associated with postconviction DNA testing. When an applicant is indigent, the government will pay the costs of court-ordered testing, and the court may appoint counsel. 18 U.S.C. 3600(b)(3) and (c)(3). The applicant's own DNA profile must be submitted to the Federal Bureau of Investigation's national database of DNA profiles, which is linked with DNA profiles of convicted offenders from all 50 States (and of certain arrestees in some States). See 18 U.S.C. 3600(e)(2); 73 Fed. Reg. 74,932-74,933 (2008). The Attorney General must notify appropriate law enforcement agencies if the profile matches one associated with any other offense in the database. 18 U.S.C. 3600(e)(3). If the new testing inculpates the applicant in the underlying crime, the govern-

ment may move to have him held in contempt, have him pay the costs of testing, and have the Bureau of Prisons notified (so that it may deny the applicant good-conduct credit). 18 U.S.C. 3600(f)(2). If the applicant is convicted of perjury for making false assertions in proceedings under Section 3600, the court shall add at least three years to his term of imprisonment. 18 U.S.C. 3600(f)(3).

By contrast, if the new DNA test results "exclude the applicant as the source of the DNA evidence," he may file a motion for new trial, which can be granted "if the DNA test results, when considered with all other evidence in the case (regardless of whether such evidence was introduced at trial), establish by compelling evidence that a new trial would result in an acquittal." 18 U.S.C 3600(g)(1) and (2).

A total of 44 States have now joined Congress in enacting statutes providing access to postconviction DNA testing in certain circumstances.[2] In some of the States that currently lack such statutes—including Alaska—legislatures have considered similar legislation in recent years, see Br. in Opp. 12, and state courts have recognized (or left open the possibility of) a state-law entitlement to postconviction DNA testing in appropriate circumstances, see Pet. App. 111a; *Lambert* v. *State*, 777 So. 2d 45, 49 (Miss. 2001); *Jenner* v. *Dooley*, 590 N.W.2d 463, 471-472 (S.D. 1999).

b. While most legislatures have now decided to permit DNA testing in some circumstances, they dis-

[2] The brief in opposition to certiorari (at 8 n.4) identified statutes from 43 States and the District of Columbia. In October 2008, South Carolina adopted such a statute. See Access to Justice Post-Conviction DNA Testing Act, 2008 S.C. Acts No. 413, § 1 (to be codified at S.C. Code Ann. §§ 17-28-10 *et seq.* (Supp. 2008)) (effective January 1, 2009).

agree on the circumstances in which such testing is appropriate. Many of the limitations in the state statutes are similar to those in Section 3600, presumably because they were enacted after the federal statute, which included a grant program for States that provided postconviction DNA testing "in a manner comparable to" Section 3600. See Innocence Protection Act of 2004, § 413(2)(A), 118 Stat. 2285. Thus, many state statutes require a sworn statement that the applicant did not commit the underlying crime. See, *e.g.*, Cal. Penal Code § 1405 (c)(1) (West Supp. 2009); Fla. Stat. Ann. § 925.11(2)(a) (West Supp. 2009); N.H. Rev. Stat. Ann. § 651-D:2(I) (LexisNexis 2007); S.C. Code Ann. § 17-28-40(B) and (C) (Supp. 2008). Many require identity to have been at issue in the criminal trial (even to the point of excluding applicants who pleaded guilty). Brandon L. Garrett, *Claiming Innocence*, 92 Minn. L. Rev. 1629, 1680 n.238 (2008) (*Claiming Innocence*). "[A]ll state statutes share the requirement that the application be made to the trial court that presided over the conviction." *Id.* at 1682.

Many of the state statutes are more restrictive than the federal statute. Some permit only defendants who have been sentenced to death to request DNA testing. See Ky. Rev. Stat. Ann. § 422.285 (LexisNexis Supp. 2008); Nev. Rev. Stat. Ann. § 176.0918 (LexisNexis 2006). Several require the requested testing to "have been technologically impossible at the trial." *Claiming Innocence* 1681 & n.242 (identifying 12 States). Some preclude testing if the applicant's attorney failed to request it at trial. *Id.* at 1682 & n.245 (identifying three States). Some, like New York, see p. 18, *supra*, require the applicant to establish some likelihood (rather than just a possibility) that the new testing will actually be

exculpatory, as opposed to inculpatory. For example, if there was prior DNA testing in the case, New Hampshire requires "clear and convincing evidence" that "the requested DNA test would provide results that are significantly more discriminating and probative on a material issue of identity, and would have a reasonable probability of contradicting prior results." N.H. Rev. Stat. Ann. § 651-D:2(III)(g) (LexisNexis 2007); see also La. Code Crim. Proc. Ann. art. 926.1.C(1) (Supp. 2009) (requiring "an articulable doubt" about applicant's guilt and a "reasonable likelihood that the requested DNA testing will * * * establish * * * innocence").

In this case, the Alaska Court of Appeals drew on other state-court precedents in holding that, assuming *arguendo* that state due process requires DNA testing in some circumstances, this case does not present such a circumstance because respondent could not demonstrate "(1) that the conviction rested primarily on eyewitness identification evidence, (2) that there was a demonstrable doubt concerning the defendant's identification as the perpetrator, and (3) that scientific testing would likely be conclusive on this issue." Pet. App. 111a.

Other factors would bar respondent from obtaining relief in other States. He is not under a sentence of death. Respondent forwent more sophisticated DNA testing at trial. Far from maintaining his innocence, respondent later confessed to the crime. Nor has he shown any likelihood (as opposed to mere possibility) that new testing would exonerate him. To the contrary, security videotapes and telephone records show that respondent called Jackson the evening of the kidnapping and rape; witnesses then saw him get into Jackson's car; witnesses later saw him with blood on his clothes and in Jackson's company; the ax handle left at the scene of the

beating matched ones respondent had at work and home; the forensic evidence limited the range of suspects; pubic hairs on the condom and on K.G.'s sweater were similar to respondent's; Jackson identified respondent in his own post-arrest confession; and respondent himself admitted his guilt to the parole board. See pp. 2-3, 5, *supra*.

Accordingly, the recent legislative activity in this area only confirms that there is no settled tradition, much less a fundamental one, of requiring DNA testing in the circumstances of this case.

3. There is, in particular, no basis for recognizing any new constitutional right in the circumstances here

As this Court has admonished, "[b]y extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action." *Glucksberg*, 521 U.S. at 720. The active and ongoing legislative efforts at the federal and state level in this area call for great restraint in entertaining respondent's claim to a constitutional right to postconviction access to the State's evidence for DNA testing. See *Harvey*, 285 F.3d at 301 (Wilkinson, C.J., concurring in denial of rehearing and rehearing en banc) ("Only the most aggressive view of federal judicial power could lead us to preempt both a coordinate branch of the federal government and the state courts and legislatures with what would in essence be prescriptive law making of our own.").

Moreover, at least three circumstances make respondent's constitutional claim especially untenable. First, postconviction DNA testing should not be required in the absence of "a good reason for the defense's failure to

request DNA testing at the original trial (e.g., unavailability of new technology)." *ABA Standards for Criminal Justice: DNA Evidence* 117 (3d ed. 2007). Respondent has no such reason. In a strategic decision that the state courts determined to be reasonable on postconviction review, respondent's trial counsel deliberately chose to forgo RFLP testing—which could have been orders of magnitude more discriminating than the DQA testing that had already been done—precisely because it threatened to produce more powerfully inculpatory evidence.[3] The record certainly validates counsel's decision. The subsequent development of STR testing, which is now even better than RFLP, does not change the analysis, because it does not alter the fact that respondent chose not to seek far better testing that *was* available at the time of trial. Cf. Utah Code Ann. § 78B-9-301(4) (2008) (barring postconviction testing if defendant "did not request DNA testing" at the time of trial "for tactical reasons"); Wyo. Stat. Ann. § 7-12-303(d) (Supp. 2008) (similar prohibition for convictions since 2000).

Second, respondent's other conduct does not evoke the individual who "steadfastly maintains his factual innocence," *Harvey*, 285 F.3d at 319 (Luttig, J., opinion respecting denial of rehearing en banc), or, as required by many of the postconviction DNA statutes, one who has sworn under penalty of perjury that he is actually

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[3] At the petition stage, petitioners disavowed (Reply Br. 10) reliance on the pretrial decision to forgo RFLP testing. That may reflect their focus on the scope of *Heck* v. *Humphrey*, 512 U.S. 477 (1994), and the potential existence of a freestanding innocence claim. But a decision to forgo testing at trial is plainly relevant if the Court must evaluate the interest that the government has in denying postconviction testing to those who have engaged in strategic behavior that does not appear to be consistent with actual innocence.

innocent. Respondent did submit an affidavit in the state-court proceedings, see J.A. 225-226, but as petitioners point out (Br. 42, 53-54), it was oddly worded and not a ringing affirmation of his innocence.[4] Moreover, consistent with the overwhelming weight of the evidence, respondent confessed to the parole board. Pet. App. 71a; J.A. 221. And he later admitted that he would lie to obtain his release. J.A. 227.

Third, it appears quite likely that further DNA testing would only provide further evidence of respondent's guilt. While the federal DNA statute does not look to whether the results of requested testing would likely be favorable or unfavorable to the applicant, some of the state statutes do. See pp. 18, 19, 22-23, *supra*. And as discussed above, the evidence against respondent is extremely strong. For those reasons, even if the Constitution afforded some protections in this context, notwithstanding the absence of any settled or fundamental practice to that effect, the Ninth Circuit erred in recognizing a new, broad-based right of postconviction access to evidence for DNA testing in the circumstances of this case.[5]

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[4] Instead of directly asserting his innocence, respondent declared that he has "always maintained [his] innocence" (and then went on to disprove that statement by acknowledging that he confessed to the parole board). J.A. 226, 227. He also asserted: "I have no doubt whatsoever that re-testing of the condom will prove once and for all time either *my guilt* or innocence." J.A. 227 (emphasis added). An actually innocent man would presumably be confident that a test will not "prove" his "guilt."

[5] As discussed, this case is governed by *Medina*, not *Mathews*. Nevertheless, the same result would obtain in this case even if—notwithstanding the inextricable ties between the asserted right and the criminal justice system—the Court were to apply the *Mathews* balancing test. Here, where respondent chose not to seek more sophisti-

C. Neither Respondent Nor The Ninth Circuit Has Identified A Liberty Interest That Could Give Rise To A Postconviction Due Process Right To DNA Testing

The Court may reverse the judgment below based on the absence of any settled or fundamental practice of permitting convicted persons access to DNA testing in the circumstances of this case and the other considerations discussed above. As a result, the Court need not reach the independent question whether respondent has a protected liberty interest that could give rise to the due process right he asserts to postconviction DNA testing. In any event, neither respondent nor the court of appeals has identified such an interest in the circumstances here.

1. Substantive due process protects "fundamental rights" that are so "deeply rooted in our legal tradition" that the government generally may not infringe them regardless of the procedures used. *Glucksberg*, 521 U.S. at 719, 722. A right of access to evidence is not such a right. It relates not to substantive rights such as those "to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, [and] to

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cated DNA testing at the time of trial, where he later confessed to the crime, and where there is little reason (other than his continually changing story) to believe that new testing would result in evidence favorable to him, the risk of an erroneous deprivation and the value of additional procedural safeguards (*Mathews*, 424 U.S. at 335) are reduced and outweighed by the government's interests in avoiding indefinite re-litigation by prisoners who have already exhausted their appeals and other postconviction relief. Moreover, any balancing would still need to be predicated on the deprivation of a constitutionally protected liberty interest. See *Harvey* v. *Horan*, 278 F.3d 370, 388 (4th Cir. 2002) (King, J., concurring). As discussed next, respondent has not established the deprivation of any such interest.

use contraception," *id.* at 720 (citations omitted), but instead to the procedures by which guilt or innocence is determined. Indeed, the Due Process Clause protects life, liberty, and property (U.S. Const. Amend. XIV), and access to evidence is none of those things; instead, it relates to the procedures used to protect those interests. Thus, evidence is a traditional subject for the federal rules of criminal and civil *procedure*, see Fed. R. Crim. P. 15-16; Fed. R. Civ. P. 26-37, which are by definition non-substantive, see 28 U.S.C. 2072(b). Morever, there is no reason to doubt that the government may impose reasonable restrictions on access to such evidence, as Congress and nearly every state legislature have done.

2. Respondent has not identified any other substantive foundation for a procedural due process right to the postconviction access to evidence he seeks. As this Court has observed, "[p]rocess is not an end in itself." *Olim* v. *Wakinekona*, 461 U.S. 238, 250 (1983). Instead, "[i]ts constitutional purpose is to protect a substantive interest to which [an] individual has a legitimate claim of entitlement." *Ibid.* The court of appeals therefore erred by simply "assum[ing] for the sake of argument" that a freestanding claim of actual innocence would be "cognizable in federal habeas proceedings," Pet. App. 21a, and that state law "might" also give rise to such a claim, *id.* at 19a-20a. In the absence of an actual substantive right to protect, there can be no procedural due process right. *Olim*, 461 U.S. at 249-251. And neither the Ninth Circuit nor respondent has identified such a substantive right.

a. The Ninth Circuit erred in assuming that a standalone claim of actual innocence is cognizable in federal habeas. "[F]ederal habeas courts sit to ensure that indi-

viduals are not imprisoned in violation of the Constitution—not to correct errors of fact." *Herrera*, 506 U.S. at 400; accord, *e.g., McCleskey* v. *Zant*, 499 U.S. 467, 495 (1991). Thus, "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." *Herrera*, 506 U.S. at 400. To the contrary, "*the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus*." *Ibid*. (quoting *Townsend* v. *Sain*, 372 U.S. 293, 317 (1963)).

Indeed, because of the importance of the trial in determining factual guilt or innocence and the overriding state interests of comity and finality, "[f]ew rulings would be more disruptive of our federal system than to provide for federal habeas review of freestanding claims of actual innocence." *Herrera*, 506 U.S. at 401. To be sure, new evidence may cast doubt, even serious doubt, on criminal convictions. But for centuries, "[e]xecutive clemency," not habeas claims of actual innocence, "has provided the 'fail safe' in our criminal justice system." *Id*. at 415 (citation omitted); see *id*. at 412. See also U.S. Br. at 8, 12-24, *Herrera*, *supra* (No. 91-7328).

In *Herrera*, the Court "assume[d], for the sake of argument * * *, that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim." *Herrera*, 506 U.S. at 417; accord *House* v. *Bell*, 547 U.S. 518, 554-555 (2006). But this is not a capital case. And the Court has never assumed, much less recognized, any *liberty* interest for a convicted person not sentenced to death.

To the contrary, once "a person has been fairly convicted and sentenced, his liberty interest, in being free from such confinement, has been extinguished." *Woodard*, 523 U.S. at 289 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 280 (plurality opinion).

Respondent has argued (Br. in Opp. 31) that, rather than pursue a freestanding federal habeas claim, he might use new DNA evidence in "asserting a 'gateway' claim of actual innocence, to permit the consideration of otherwise-barred constitutional claims (such as ineffective assistance of trial counsel)." That argument is at best premature because respondent has not filed a federal habeas petition. And, in any event, respondent has not shown that he can assert any federal habeas claims that would be meritorious but for a procedural bar that would be overcome by proof of innocence. For instance, on postconviction review, the state courts rejected respondent's ineffective-assistance-of-counsel claim not because of a procedural bar, but because counsel made a reasonable strategic decision. See p. 4-5, *supra*. Moreover, to the extent that respondent wants discovery for a federal habeas claim, he may seek discovery, consistent with the rules that govern discovery in habeas, after filing a federal habeas petition and demonstrating that he has a claim that warrants discovery under those rules. See Fed. R. Governing Section 2254 Cases 6(a); cf. Fed. R. Governing Section 2255 Proceedings 6(a). But he has no general constitutional right of access to evidence for purposes of attempting to establish actual innocence in federal habeas.

b. Respondent has said he might ultimately attempt to bring a "clemency proceeding where he can make a showing of actual innocence." J.A. 38. He is free to do

so in accordance with Alaska law. There is, however, no general federal constitutional right to clemency. *Connecticut Bd. of Pardons* v. *Dumschat*, 452 U.S. 458, 463-464 (1981). And because clemency is a matter of grace, the Court has never placed procedural limitations on clemency proceedings. See *Woodard*, 523 U.S. at 285 (plurality opinion). Instead, in *Woodard*, the plurality, *id.* at 280, and the concurrence agreed that once "a person has been fairly convicted and sentenced, his liberty interest, in being free from such confinement, has been extinguished." *Id.* at 289 (O'Connor, J., concurring in part and concurring in the judgment). While Justice O'Connor suggested that a *life* interest might justify some "*minimal* procedural safeguards" against deprivations such as flipping a coin to decide whether to grant clemency, *ibid.*, this case involves neither a life interest nor a wholly arbitrary deprivation, in light of the careful consideration that the State has given to his claim.

c. Nor do this Court's cases confer on respondent any procedural right to government assistance in establishing a claim of innocence in his state postconviction hearing. As in the clemency context, this Court has exercised great caution to avoid federalizing procedural protections in that realm. See *Danforth* v. *Minnesota*, 128 S. Ct. 1029, 1046-1047 (2008) (expressing "uncertainty about the source of authority to impose a federal limit on the power of state judges to remedy wrongful state convictions"). Indeed, this Court has never held that defendants have a constitutional right to direct review, much less collateral review, of a state court conviction. See *Halbert* v. *Michigan*, 545 U.S. 605, 610 (2005); see also *Case* v. *Nebraska*, 381 U.S. 336, 337 (1965). And when States make collateral postconviction proceedings available, they retain "substantial discretion to develop

and implement programs to aid prisoners seeking to secure postconviction review." *Finley*, 481 U.S. at 559; accord *Murray* v. *Giarratano*, 492 U.S. 1, 14-15 (1989) (Kennedy, J., concurring in the judgment). Indeed, convicted persons do not even have a right to counsel in whatever postconviction proceedings a State chooses to provide. *Id.* at 11-12 (plurality opinion); *Finley*, 481 U.S. at 557-559.

In addition, because the States are not required to provide collateral postconviction remedies, the applicability of any federal due process right would depend on a State's decision to create such a remedy. As the court of appeals recognized, however, it is unclear whether a freestanding claim of actual innocence is viable under Alaska law. Pet. App. 19a-20a. The court of appeals erred in invoking potential state-law remedies as a basis for requiring access to evidence without first deciding whether those remedies actually exist.

Alaska permits a defendant to seek postconviction relief, without regard to otherwise applicable procedural bars, if the defendant has proceeded with due diligence and newly discovered evidence establishes his innocence clearly and convincingly. Alaska Stat. §§ 12.72.010(4), 12.72.020(b) (2006). But that statute requires the applicant to present the newly discovered evidence as a predicate for bringing the claim in the first place. *Id.* § 12.72.020(b)(2). It does not provide a right to discovery to applicants, such as respondent, lacking such evidence. State law therefore provides no apparent basis for recognizing the novel constitutional right asserted by respondent.

In any event, this Court need not reach the question whether (or in what circumstances) there is any liberty interest supporting the creation of a procedural due pro-

cess right because, as discussed above, there is no fundamental tradition of requiring postconviction access to the State's physical evidence for DNA testing, and, at a minimum, no basis for recognizing any constitutional right to such evidence in the circumstances here.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

18 U.S.C. 3600 provides:

DNA testing

(a) IN GENERAL.—Upon a written motion by an individual under a sentence of imprisonment or death pursuant to a conviction for a Federal offense (referred to in this section as the "applicant"), the court that entered the judgment of conviction shall order DNA testing of specific evidence if the court finds that all of the following apply:

(1) The applicant asserts, under penalty of perjury, that the applicant is actually innocent of—

(A) the Federal offense for which the applicant is under a sentence of imprisonment or death; or

(B) another Federal or State offense, if—

(i) evidence of such offense was admitted during a Federal death sentencing hearing and exoneration of such offense would entitle the applicant to a reduced sentence or new sentencing hearing; and

(ii) in the case of a State offense—

(I) the applicant demonstrates that there is no adequate remedy under State law to permit DNA testing of the specified evidence relating to the State offense; and

(II) to the extent available, the applicant has exhausted all remedies available under State law for requesting DNA testing of specified evidence relating to the State offense.

(2) The specific evidence to be tested was secured in relation to the investigation or prosecution of the Federal or State offense referenced in the applicant's assertion under paragraph (1).

(3) The specific evidence to be tested—

(A) was not previously subjected to DNA testing and the applicant did not—

(i) knowingly and voluntarily waive the right to request DNA testing of that evidence in a court proceeding after the date of enactment of the Innocence Protection Act of 2004; or

(ii) knowingly fail to request DNA testing of that evidence in a prior motion for postconviction DNA testing; or

(B) was previously subjected to DNA testing and the applicant is requesting DNA testing using a new method or technology that is substantially more probative than the prior DNA testing.

(4) The specific evidence to be tested is in the possession of the Government and has been subject to a chain of custody and retained under conditions sufficient to ensure that such evidence has not been substituted, contaminated, tampered with, replaced, or altered in any respect material to the proposed DNA testing.

(5) The proposed DNA testing is reasonable in scope, uses scientifically sound methods, and is consistent with accepted forensic practices.

(6) The applicant identifies a theory of defense that—

(A) is not inconsistent with an affirmative defense presented at trial; and

(B) would establish the actual innocence of the applicant of the Federal or State offense referenced in the applicant's assertion under paragraph (1).

(7) If the applicant was convicted following a trial, the identity of the perpetrator was at issue in the trial.

(8) The proposed DNA testing of the specific evidence may produce new material evidence that would—

(A) support the theory of defense referenced in paragraph (6); and

(B) raise a reasonable probability that the applicant did not commit the offense.

(9) The applicant certifies that the applicant will provide a DNA sample for purposes of comparison.

(10) The motion is made in a timely fashion, subject to the following conditions:

(A) There shall be a rebuttable presumption of timeliness if the motion is made within 60 months of enactment of the Justice For All Act of 2004 or within 36 months of conviction, whichever comes later. Such presumption may be rebutted upon a showing—

(i) that the applicant's motion for a DNA test is based solely upon information used in a previously denied motion; or

(ii) of clear and convincing evidence that the applicant's filing is done solely to cause delay or harass.

(B) There shall be a rebuttable presumption against timeliness for any motion not satisfying subparagraph (A) above. Such presumption may be rebutted upon the court's finding—

(i) that the applicant was or is incompetent and such incompetence substantially contributed to the delay in the applicant's motion for a DNA test;

(ii) the evidence to be tested is newly discovered DNA evidence;

(iii) that the applicant's motion is not based solely upon the applicant's own assertion of innocence and, after considering all relevant facts and circumstances surrounding the motion, a denial would result in a manifest injustice; or

(iv) upon good cause shown.

(C) For purposes of this paragraph—

(i) the term "incompetence" has the meaning as defined in section 4241 of title 18, United States Code;

(ii) the term "manifest" means that which is unmistakable, clear, plain, or indisputable and requires that the opposite conclusion be clearly evident.

(b) NOTICE TO THE GOVERNMENT; PRESERVATION ORDER; APPOINTMENT OF COUNSEL.—

(1) NOTICE.—Upon the receipt of a motion filed under subsection (a), the court shall—

(A) notify the Government; and

(B) allow the Government a reasonable time period to respond to the motion.

(2) PRESERVATION ORDER.—To the extent necessary to carry out proceedings under this section, the court shall direct the Government to preserve the specific evidence relating to a motion under subsection (a).

(3) APPOINTMENT OF COUNSEL.—The court may appoint counsel for an indigent applicant under this section in the same manner as in a proceeding under section 3006A(a)(2)(B).

(c) TESTING PROCEDURES.—

(1) IN GENERAL.—The court shall direct that any DNA testing ordered under this section be carried out by the Federal Bureau of Investigation.

(2) EXCEPTION.—Notwithstanding paragraph (1), the court may order DNA testing by another qualified laboratory if the court makes all necessary orders to ensure the integrity of the specific evidence and the reliability of the testing process and test results.

(3) COSTS.—The costs of any DNA testing ordered under this section shall be paid—

(A) by the applicant; or

(B) in the case of an applicant who is indigent, by the Government.

(d) TIME LIMITATION IN CAPITAL CASES.—In any case in which the applicant is sentenced to death—

(1) any DNA testing ordered under this section shall be completed not later than 60 days after the date on which the Government responds to the motion filed under subsection (a); and

(2) not later than 120 days after the date on which the DNA testing ordered under this section is completed, the court shall order any post-testing procedures under subsection (f) or (g), as appropriate.

(e) REPORTING OF TEST RESULTS.—

(1) IN GENERAL.—The results of any DNA testing ordered under this section shall be simultaneously disclosed to the court, the applicant, and the Government.

(2) NDIS.—The Government shall submit any test results relating to the DNA of the applicant to the National DNA Index System (referred to in this subsection as "NDIS").

(3) RETENTION OF DNA SAMPLE.—

(A) ENTRY INTO NDIS.—If the DNA test results obtained under this section are inconclusive or show that the applicant was the source of the DNA evidence, the DNA sample of the applicant may be retained in NDIS.

(B) MATCH WITH OTHER OFFENSE.—If the DNA test results obtained under this section exclude the applicant as the source of the DNA evidence, and a comparison of the DNA sample of the applicant results in a match between the DNA sample of the applicant and another offense, the Attorney General shall notify the appropriate agency and preserve the DNA sample of the applicant.

(C) NO MATCH.—If the DNA test results obtained under this section exclude the applicant as the source of the DNA evidence, and a comparison of the DNA sample of the applicant does not result in a match between the DNA sample of the applicant and another offense, the Attorney General shall destroy the DNA sample of the applicant and ensure that such information is not retained in NDIS if there is no other legal authority to retain the DNA sample of the applicant in NDIS.

(f) POST-TESTING PROCEDURES; INCONCLUSIVE AND INCULPATORY RESULTS.—

(1) INCONCLUSIVE RESULTS.—If DNA test results obtained under this section are inconclusive, the court may order further testing, if appropriate, or may deny the applicant relief.

(2) INCULPATORY RESULTS.—If DNA test results obtained under this section show that the applicant was the source of the DNA evidence, the court shall—

(A) deny the applicant relief; and

(B) on motion of the Government—

(i) make a determination whether the applicant's assertion of actual innocence was false, and, if the court makes such a finding, the court may hold the applicant in contempt;

(ii) assess against the applicant the cost of any DNA testing carried out under this section;

(iii) forward the finding to the Director of the Bureau of Prisons, who, upon receipt of such a finding, may deny, wholly or in part, the good conduct credit authorized under section 3632 on the basis of that finding;

(iv) if the applicant is subject to the jurisdiction of the United States Parole Commission, forward the finding to the Commission so that the Commission may deny parole on the basis of that finding; and

(v) if the DNA test results relate to a State offense, forward the finding to any appropriate State official.

(3) SENTENCE.—In any prosecution of an applicant under chapter 79 for false assertions or other conduct in proceedings under this section, the court, upon conviction of the applicant, shall sentence the applicant to a term of imprisonment of not less than 3 years, which shall run consecutively to any other term of imprisonment the applicant is serving.

(g) POST-TESTING PROCEDURES; MOTION FOR NEW TRIAL OR RESENTENCING.—

(1) IN GENERAL.—Notwithstanding any law that would bar a motion under this paragraph as untime-

ly, if DNA test results obtained under this section exclude the applicant as the source of the DNA evidence, the applicant may file a motion for a new trial or resentencing, as appropriate. The court shall establish a reasonable schedule for the applicant to file such a motion and for the Government to respond to the motion.

(2) STANDARD FOR GRANTING MOTION FOR NEW TRIAL OR RESENTENCING.—The court shall grant the motion of the applicant for a new trial or resentencing, as appropriate, if the DNA test results, when considered with all other evidence in the case (regardless of whether such evidence was introduced at trial), establish by compelling evidence that a new trial would result in an acquittal of—

(A) in the case of a motion for a new trial, the Federal offense for which the applicant is under a sentence of imprisonment or death; and

(B) in the case of a motion for resentencing, another Federal or State offense, if evidence of such offense was admitted during a Federal death sentencing hearing and exoneration of such offense would entitle the applicant to a reduced sentence or a new sentencing proceeding.

(h) OTHER LAWS UNAFFECTED.—

(1) POST-CONVICTION RELIEF.—Nothing in this section shall affect the circumstances under which a person may obtain DNA testing or post-conviction relief under any other law.

(2) HABEAS CORPUS.—Nothing in this section shall provide a basis for relief in any Federal habeas corpus proceeding.

(3) NOT A MOTION UNDER SECTION 2255.—A motion under this section shall not be considered to be a motion under section 2255 for purposes of determining whether the motion or any other motion is a second or successive motion under section 2255.