

No. 08-6

IN THE
Supreme Court of the United States

DISTRICT ATTORNEY'S OFFICE FOR THE
THIRD JUDICIAL DISTRICT AND ADRIENNE BACHMAN,
DISTRICT ATTORNEY,
Petitioners,

v.

WILLIAM G. OSBORNE,
Respondent.

**On Writ of Certiorari to
the United States Court of Appeals
for the Ninth Circuit**

**BRIEF OF THE COUNCIL OF STATE
GOVERNMENTS, NATIONAL ASSOCIATION
OF COUNTIES, AND INTERNATIONAL
MUNICIPAL LAWYERS ASSOCIATION AS
AMICI CURIAE SUPPORTING PETITIONERS**

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QUESTION PRESENTED

Whether the Due Process clause creates a right of post-conviction access to DNA evidence.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States.¹ For over two centuries, the States have been responsible for regulation of the criminal law. This area of state sovereignty encompasses the process for exonerating the innocent in post-conviction proceedings.

As respondent acknowledges, the question of post-conviction procedure presented in this case “is almost exclusively addressed by state statute, rather than federal constitutional law.” Opp. 1. Consequently, creation of a new constitutional right has the potential to supersede many state laws that articulate clear standards for inmates to procure DNA evidence, the concomitant responsibilities of the States to preserve such evidence, and the appropriate remedies for violations thereof. Because fundamental principles of federalism counsel against federal interference in this traditional area of state responsibility, *amici* submit this brief to assist the Court in its resolution of this case.

STATEMENT OF THE CASE

Nearly 15 years ago, William Osborne and Dexter Jackson brutally attacked a prostitute, K.G., by forcing her to perform oral sex at gunpoint, raping her, and beating her. Pet. App. 64-65. When they were finished, they shot her and left her for dead.

¹ The parties have consented to the filing of this *amicus* brief and their consent letters have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici* and their members, has made a monetary contribution to the preparation or submission of this brief.

Id. at 66. Following an error-free jury trial in which Osborne and Jackson were tried jointly, both men were convicted of kidnapping, assault, and sexual assault. *Id.* at 116. Osborne was sentenced to 26 years in prison with 5 years suspended. *Id.* at 117.

1. *The evidence against Osborne.* As state and federal courts have recounted, biological, victim-eyewitness, and circumstantial evidence inculpated Osborne. *See id.* at 7. The following account summarizes this evidence.

A day after the attack, K.G. described her assailants and their car in a police interview. *Id.* at 66-67. When Jackson was pulled over by military police several days later for a traffic infraction, he and his car matched composite sketches that had been circulated after the interview. *Id.* During the stop, police observed a gun case in the glove compartment, which provided cause for a subsequent search of the car. *Id.* at 67. Jackson was arrested. *Id.* at 4. He later confessed his involvement in the attack and implicated Osborne as his accomplice.² *Id.* at 4, 98; Pet. 3.

A search of Jackson's car yielded a .380-caliber semiautomatic pistol, which ballistics tests later tied to a spent shell casing found at the crime scene, ammunition for the pistol, and K.G.'s perfume and Swiss Army knife. *Id.* at 4, 67-68. Forensic testing determined that blood in Jackson's car matched K.G.'s blood, and fibers from the carpeting of the car matched fibers found on K.G.'s sweater. *Id.* at 67.

² At the time of the traffic stop, another man, James Hunter, was riding in the passenger seat. Pet. App. 5, 94. Because Jackson and Osborne were tried jointly, Jackson's implication of Osborne was not admitted at trial. *See* Pet. 3.

Several other items of evidence specifically linked Osborne to the crime. First, K.G. identified Osborne, as well as Jackson, in separate photographic lineups. *Id.* at 68. Immediately following the attack, K.G. recalled that “two black guys with military . . . haircuts” had attacked her, a description consistent with Osborne’s physical appearance.³ *Id.* at 76. A blue condom recovered at the crime scene contained a pubic hair that was consistent with characteristics of Osborne’s pubic hair, but not Jackson’s; the passenger, but not the driver, wore a blue condom during the rape. *Id.* at 3, 6, 68. A pubic hair recovered from K.G.’s sweater was likewise consistent with Osborne’s pubic hair and not Jackson’s. *Id.*

In Jackson’s car, police found paper tickets from the arcade where Osborne had been prior to the crime. *Id.* at 7. Prior to the crime, Osborne had twice telephoned Jackson from the arcade where Jackson picked him up. *Id.* at 76. Near the crime scene, police found an axe handle which may have been used to beat K.G. and which was similar to the axe handles that Osborne used in his work. *Id.* at 65, 96. And several witnesses saw Osborne enter Jackson’s car before the crime, while others saw Osborne, with blood on his clothing, accompanying Jackson after the crime. *Id.* at 7, 66.

³ At trial, Osborne argued that K.G. mistakenly identified him. Pet. App. 7. He cited the fact that K.G. was not wearing her glasses on the night of the attack, that her identification was cross-racial (she was white and he was black), and her description of the passenger who attacked her as being 25 to 30 years old, 6 feet tall, clean shaven, and weighing 180 to 190 pounds; in fact Osborne was 20 years old, weighed 155 pounds, and had a mustache. *Id.*

Finally, DNA from seminal fluid found in the blue condom matched Osborne's DNA. *Id.* at 5. The State tested the DNA using polymerase chain reaction (PCR), *see id.* at 69, and compared the DNA at the DQ Alpha locus, which, "similar to ABO blood typing, reveals the alleles present at a single genetic locus." *Id.* According to the results, Osborne shares the same DQ Alpha type with 14.7 to 16 percent (roughly one-seventh to one-sixth) of African Americans. *Id.* At the same time, because Jackson does not share that DQ Alpha type, the results excluded him as the source. *Id.* Osborne's lawyer decided not to submit the DNA to a more discriminating method of testing that was available at the time. *Id.* at 6.

2. *The defense's decision not to test the DNA.* After the Alaska Court of Appeals affirmed the verdict, *see id.* at 112, Osborne filed for post-conviction relief, alleging that his trial counsel provided him ineffective assistance by failing to subject the DNA in the condom to a more discriminating test. *Id.* at 97; *see* Pet. 4. At the time of Osborne's trial, a highly discriminating method of "reverse fragment length polymorphism" (RFLP) testing was available. Pet. App. 5-6. Like the techniques that Osborne now seeks to utilize, RFLP testing had the potential to exclude him as the source of the sperm.

Before the trial court, Osborne's trial counsel explained that "[g]iven [Jackson's] confession which included Osborne as a perpetrator, and the absence of an air-tight alibi, I believed . . . that insisting on a more advanced . . . DNA test would have served to prove that Osborne committed the alleged crimes." *Id.* at 98. Accordingly, given that the odds based on the State's DNA test were approximately one-in-six that another person was the source of the sperm, Os-

borne's counsel concluded that "Osborne was in a strategically better position without [more specific] DNA testing." *Id.* Moreover, she stated that she had no "present memory" that Osborne desired to have more discriminatory testing performed at the time of his trial. *Id.* at 98-99.

The Alaska Superior Court credited this testimony, ruling that because Osborne's counsel made a "tactical decision" within the "wide range of professionally competent assistance," *id.* at 99-100, Osborne failed to establish a *prima facie* case of ineffective assistance of counsel. *Id.* Osborne sought reconsideration of the order, which the Superior Court denied along with his request to access the DNA evidence for testing. *Id.*

After the Superior Court rejected his application for post-conviction relief, Osborne appealed, filed a §1983 action in federal district court, and applied for discretionary parole. *Id.* at 8, 71. As for his state appeal, in 2005 the Alaska Court of Appeals affirmed the ruling that Osborne had not shown his counsel to be incompetent. *Id.* at 99.

4. *Osborne's due process right under the Alaska Constitution.* At the same time, the Alaska Court of Appeals remanded Osborne's case to the Superior Court in order to determine whether Osborne had a due process right to access the State's DNA evidence for testing. *Id.* at 109-11. Though the Court of Appeals concluded that under federal law, "a defendant who has received a fair trial apparently has no due process right to present new post-conviction evidence," *id.* at 105, the court declined "to hold that Alaska law offers no remedy to defendants who could prove their factual innocence." *Id.* at 110.

The Court of Appeals noted that several state courts had recognized a due process right to obtain post-conviction DNA testing under their state constitutions, and had articulated a three-part test in which a defendant must show (1) that his conviction rested primarily on eyewitness identification evidence, (2) there was demonstrable doubt concerning his identification as the perpetrator, and (3) testing would likely be conclusive as to his innocence. *Id.* at 109-10. The Court of Appeals adopted the same test and remanded to the Superior Court to determine whether Osborne met these criteria. *Id.* at 111.

5. *Osborne's confession to the parole board.* Before the Alaska Court of Appeals remanded his case, Osborne confessed his guilt, orally and in writing, in a 2004 application for parole. *Id.* at 71, 74. In his written confession, he described how his codefendant Jackson picked him up from the arcade and they encountered K.G. soliciting sex. *Id.* at 71 & n.11. Instead of paying her, they forced her to have sex with them at gunpoint, and after they were done, Osborne “ordered [her] to get out of the car.” *Id.* When she refused, “he “attempted to physically remove her from the car, and eventually got her out.” *Id.* Jackson became enraged that K.G. had defecated in his car and “began to assault her with a stick” while Osborne also kicked and punched her. *Id.* According to Osborne’s confession, “[a]fter a few seconds[,]” they stopped, kicked snow on her, and left the scene. *Id.* Osborne did not describe shooting K.G. *See id.* Osborne was denied parole. *Id.* at 8.

On remand, the Superior Court considered Osborne’s post-trial confessions along with the evidence from his trial. *Id.* at 72-73. The court found that Osborne did not meet any prong of the three-part

test: his conviction did not rest primarily on K.G.'s identification of him and there was no demonstrable doubt concerning this identification because "extensive other evidence" inculpated Osborne and supported K.G.'s identification. *Id.* at 72-73.

Moreover, DNA testing could not conclusively resolve his innocence. That is, even if a DNA test excluded Osborne as the source of the semen in the condom, the condom could have been coincidentally left at the scene by other people before the police arrived. *Id.* The court observed that the weight of the other evidence, including Osborne's confession, undermined his claim that he was factually innocent. *See id.* at 73. These findings were upheld by the Alaska Court of Appeals. *Id.* at 73-82. Osborne's petition to the Alaska Supreme Court was denied. *Id.* at 10.

6. *Osborne's §1983 claim.* In June 2003, before Osborne had exhausted his state post-conviction remedies, he filed a §1983 action in federal district court. *Id.* at 8. This action, like his state action, was pending at the time he confessed his guilt to the parole board. *Id.* at 8, 10.

Specifically, Osborne sought "release of the biological evidence—the semen and pubic hair from the blue condom and the pubic hair from K.G.'s sweater—and the transfer of such evidence for DNA testing." *Id.* at 11 (quotation marks omitted). Osborne explained that he intended to retest the evidence using short tandem repeat (STR) and mitochondrial DNA (mtDNA) analyses. *Id.* If the tests excluded him as the source of the DNA, he would subsequently use the results to support a freestanding innocence claim in state or federal court. *Id.* at 58.

The federal district court ruled that the proper avenue for Osborne’s claim was through a petition for habeas corpus, and dismissed the complaint. *Id.* at 54. The court of appeals reversed, holding that Osborne’s claim was not procedurally barred. *Id.* at 52. It remanded to the district court to determine, in the first instance, whether Osborne had a federally protected right to access the DNA evidence. *Id.* at 62. On remand, the district court ruled in favor of Osborne, finding that “*under the unique and specific facts presented*, a very limited constitutional right” afforded Osborne access to the evidence he sought. *Id.* at 49 (emphasis in original).

The court of appeals affirmed. *Id.* at 2. Following the law of the Circuit, which had recognized an extension of due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963) to the post-conviction context, *id.* at 15-16, the court held that Osborne was entitled to access the DNA evidence. Doing so, it assumed, would allow him to file a subsequent “freestanding” petition for post-conviction relief on actual innocence grounds. *Id.* at 19, 21.

The court of appeals noted that in Osborne’s state proceedings, the Alaska courts had allowed Osborne to pursue the DNA evidence under the Alaska Constitution by using a three-part test that Osborne ultimately failed to meet. *Id.* at 28; *see also id.* at 64. But the court declined to give any weight to the Alaska Court of Appeals’ rulings. *Id.* at 28-32. It held that “only the state court’s third finding—which is essentially its ‘materiality’ finding under Alaska law—is in play But that finding is also not entitled to preclusive effect in this case because it was made in conformity with a materiality standard under state law that is more stringent than any stan-

dard this court would apply under federal law.” *Id.* at 30.

SUMMARY OF ARGUMENT

1. There is “no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and the vindication of its victims.” *United States v. Morrison*, 529 U.S. 598, 618 (2000). Rules of procedure governing all aspects of the criminal process, including post-conviction proceedings, are a core component of every State’s criminal justice system. Statutes specifically governing post-conviction access to DNA evidence for retesting exist in 44 States. Respondent approvingly cites this body of state law, acknowledging that the States have enacted, “in little more than a decade, a broad array of legislation to afford DNA testing to convicted persons.” Opp. 8. Two States, Alaska and South Dakota, currently rely on judge-made rules for analyzing inmate DNA petitions.

This Court has frequently said that fundamental concerns of federalism counsel against federal interference with state criminal law and process. It has emphasized that such intrusions undermine both the States’ sovereignty and “their good-faith attempts to honor constitutional rights.” *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993). Like this Court, the States are well aware that punishing innocent persons is a gross injustice, and that state courts must take assertions of innocence by convicted persons very seriously. But given their huge inmate populations, state courts cannot grant every petition for post-conviction access for DNA evidence. Doing so would not only undermine the principle of finality of judgments, but would impose substantial other costs.

Weighing these competing concerns is squarely within the competence of state legislatures.

By contrast, the Due Process clause, as applied by the federal courts on a case-by-case basis, does not provide a workable means of accommodating such competing policy considerations. Published federal court opinions, including the opinions below in this case, have found a Due Process right to DNA evidence in a heavily-qualified, fact-specific way. While opening the door to future inmate petitions throughout the Ninth Circuit, the court below provided scant guidance for evaluating those petitions. Such case specificity is unsurprising; what constitutes federal due process is a fact-intensive inquiry that depends upon the demands of the particular situation. Concluding that the States, rather than federal courts, should set the rules for post-conviction access to DNA evidence is thus grounded in recognition of their respective competencies.

2. Inmates such as respondent do not benefit from the presumption of innocence or the requirement that their guilt be proven beyond a reasonable doubt when they seek post-conviction relief. As this Court has repeatedly observed, “[t]he guilt or innocence determination in state criminal trials is ‘a decisive and portentous event.’” *Herrera v. Collins*, 506 U.S. 390, 401 (1993). Given such precepts, it is clear that respondent received ample process from the Alaska courts when they carefully considered his petition for DNA evidence.

The Alaska Court of Appeals adopted a three-part test for post-conviction DNA access that had been endorsed by other state courts. On remand, the Superior Court carefully analyzed each part of the test and ruled against respondent. On appeal, the

Alaska Court of Appeals conducted a *de novo* review of the record and affirmed the trial court's judgment denying respondent's petition. Having fully litigated his petition in the Alaska courts, respondent should not be permitted to do so again in the federal courts.

ARGUMENT

THE DUE PROCESS CLAUSE DOES NOT CREATE A RIGHT OF POST-CONVICTION ACCESS TO DNA EVIDENCE.

The court of appeals erred when it ruled that respondent "has a limited due process right of access to [biological] evidence for purposes of post-conviction DNA testing." Pet. App. 2. Moreover, by making clear that it did not "purport to set the standards by which all future cases must be judged," *id.* at 44, the court below provided scant guidance to future petitioners.

This ruling was inadvisable as well as erroneous: Not only did the Alaska courts give respondent ample opportunity to demonstrate his entitlement to the evidence under a clearly-articulated three-part test, *see id.* at 64, but almost every other State has laws governing post-conviction access to DNA evidence. These state laws, not federal courts construing the Due Process clause, should set the parameters for post-conviction access to DNA evidence. The judgment of the court of appeals should accordingly be reversed.

A. Post-Conviction Remedies Are an Integral Part of State Criminal Procedure That Should Be Determined by States, Not by Federal Courts.

Respondent was convicted of committing brutal crimes against a woman in “a secluded area of Anchorage.” Pet. App. 3. “The regulation and punishment of [such] intrastate violence . . . has always been the province of the States.” *United States v. Morrison*, 529 U.S. 598, 618 (2000) (citing *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 426 (1821)). “Indeed,” the Court added in *Morrison*, “we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.” *Id.*; see also *id.* at 618 n.8 (the Constitution’s reservation of “a generalized police power to the States is deeply ingrained in our constitutional history”) (citations omitted).

Rules of criminal procedure governing all aspects of the criminal process, including post-conviction proceedings, are a core component of every State’s criminal justice system. See, e.g., National Conference of Commissioners on Uniform State Laws, Uniform Post-Conviction Procedure Act (1980).⁴ The

⁴ The Uniform Post-Conviction Procedure Act (which is available on Westlaw) has been adopted by Idaho, Iowa, Maryland, Minnesota, Montana, North Dakota, Oklahoma, Oregon, Rhode Island, and South Dakota. See Nat’l Conference of Comm’rs on Uniform State Laws, Uniform Post-Conviction Procedure Act (1980) (References & Annotations). The other States have adopted their own post-conviction procedures. For example, respondent filed his state-court petition seeking access to DNA evidence pursuant to Alaska Stat. §12.72.020 *et seq.*, Alaska’s general post-conviction relief statute. See Opp. 5.

purpose of the Uniform Post-Conviction Procedure Act, for example, “is to provide a [state-law] method to develop a complete record to challenge a criminal conviction.” *Berlin v. North Dakota*, 698 N.W.2d 266, 269 (N.D. 2005) (citing N.D. Cent. Code Ann. §29-32.1).

Procedures governing post-conviction access to DNA evidence are a component of the post-conviction procedural rules of almost every State. As respondent emphasizes, the rules governing post-conviction access to DNA evidence in state criminal proceedings are “in 2008 . . . almost exclusively addressed by state statute, rather than federal constitutional law.” Opp. 1. There is, he argues, a “broad national consensus about the probative value of DNA evidence that has led the states (and Congress) to address the issue—enacting, in little more than a decade, a broad array of legislation to afford DNA testing to convicted persons, and largely obviating the need for the federal courts to hear such claims.” *Id.* at 8. At the time respondent’s brief in opposition was filed, “forty-three states and the District of Columbia [had] such laws.” *Id.* & n.4 (collecting statutory citations from 43 States).⁵ Moreover, in several States that

⁵ Since the brief in opposition was filed, South Carolina has adopted a DNA-access statute, raising the current total to 44 states. *See* Access to Justice Post-Conviction DNA Testing Act, S.C. Code §17-28-10 *et seq.* The Alaska Innocence Project is currently lobbying the Alaska legislature to adopt DNA-access laws. *See* Bill Oberly, *Evidence Preservation Should Be Priority*, Anchorage Daily News, April 8, 2008.

Respondent also notes that in 2004 “Congress passed (by overwhelming bipartisan vote) and President Bush signed similar legislation into law,” thereby “giv[ing] the nation’s more than 200,000 federal prisoners a statutory right to petition for post-conviction DNA testing.” Opp. 8-9.

did not have DNA statutes, courts crafted rules for determining the circumstances under which an inmate may obtain access to DNA evidence for retesting. *See* Pet. App. 109-111 & n.27 (collecting cases).⁶

In line with its long-held view that “the States possess primary authority for defining and enforcing the criminal law,” *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) (quoting *Engle v. Isaac*, 456 U.S. 107, 128 (1982)), this Court has frequently noted that fundamental federalism concerns counsel against federal interference with state criminal law and process. *See, e.g., Morrison*, 529 U.S. at 618 (citing *Lopez*, 514 U.S. at 568); *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993); *Herrera v. Collins*, 506 U.S. 390, 401 (1993); *Coleman v. Thompson*, 501 U.S. 722, 726, 748 (1991). As the Court reiterated in *Brecht*, “[f]ederal intrusions into state criminal trials frustrate both the States’ sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.” 507 U.S. at 635 (quoting *Engle*, 456 U.S. at 128).

Following this Court’s lead, state courts are well aware that “[p]unishment of the innocent may be the worst of all injustices,” and that to “avoid such a grievous outcome courts should solemnly consider reopening a case if a ‘truly persuasive’ showing of actually innocence lies close at hand.” *Jenner v. Dooley*, 590 S.W.2d 463, 471 (S.D. 1999) (quoting *Herrera*, 506 U.S. at 517 and citing *Schlup v. Delo*, 513

⁶ Four States—Massachusetts, Oklahoma, Mississippi, and Alabama—do not have either statutory or judicially-created DNA-access rules. South Dakota, like Alaska, currently relies on case law to provide standards for post-conviction DNA petitions. *See Jenner v. Dooley*, 590 N.W.2d 463, 471-72 (S.D. 1999).

U.S. 298 (1995)). However, it is neither possible nor appropriate that such evidence be made available in response to every request. Setting the parameters for when and how DNA evidence is to be made available requires the weighing of competing interests and is, as respondent recognizes, squarely within the competence of state legislatures. *See* Opp. 1 (DNA access “is almost exclusively addressed by state statute, rather than federal constitutional law”); *id.* at 8-10 & nn.3-8 (collecting state statutes).

Numerous determinations are required to devise standards for post-conviction access to DNA evidence. *See* Ron C. Michaelis et al., *A Litigator’s Guide to DNA* 383-86 (2008). For example, variables include whether inmates seeking only sentence reduction rather than exoneration should be permitted to petition, *id.* at 383, whether petitioners must show that identity was a disputed issue at trial, *id.*, and whether the petitioner must offer new, noncumulative evidence. *Id.* at 384. If there is a “new evidence” requirement, must the evidence not have been available to the defendant at trial? *Id.* If, as in this case, the “new evidence” consists of retesting DNA with a new, more sophisticated technology, how much different must the new testing method be from those available to the defendant at trial? *Id.*

Besides these questions, there are certain safeguards necessary to ensure the integrity of post-conviction DNA testing. These include proof of an unbroken chain of custody of the DNA evidence, time limits for filing a petition, the impact on other remedies available to the petitioner, and the availability of stays. *Id.* at 384-86. These questions in turn raise the issues of whether counsel should be appointed to represent petitioners in some or all cases, and what

the standards should be for determining whether the assistance of counsel has been effective. *Id.* at 386 & nn.52-53 (collecting cases). Finally, retesting DNA evidence necessarily implicates cost questions. See Press Release, Office of the Governor of South Carolina, *Governor, NAACP Call for Reconsideration of DNA Bill* (Oct. 28, 2008), available at <http://www.scgovernor.com/news/releases/10-28-08.htm> (DNA testing statute enacted by South Carolina legislature would “require the state to spend \$4 million yearly on collecting, analyzing and storing DNA samples”).

Unlike state DNA statutes, the Due Process clause has not provided a workable basis for developing such legal standards. Published federal-court opinions that find a Due Process right to DNA do so in a heavily-qualified, fact-specific way. In this case, for example, the Ninth Circuit held that “under the unique and specific facts of this case and assuming the availability of the evidence in question, Osborne has a limited due process right of access to the evidence.” Pet. App. 2. While opening the door to future Due Process petitions by convicted defendants, this ruling provides scant guidance for evaluating such petitions. And respondent, represented by a commendable civil rights project dedicated to this issue, candidly acknowledges as much. See Opp. 34 (“[I]t bears noting that the decision below was narrowly tailored to limit the scope of its due process ruling only to cases that are at least as compelling on their facts as Osborne’s.”).⁷

⁷ See also Pet. App. 49 (dist. ct. op.) (“there *does* exist, *under the unique and specific facts presented*, a very limited constitutional right to the testing sought”) (emphasis in original); *Harvey v. Horan*, 2001 U.S. Dist. LEXIS 9587 (E.D. Va. 2001) (“Due

The fact-specific nature of these Due Process cases is no surprise. “Due process” in a given case is dictated by “such procedural protections as the particular situation demands.” *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. ‘Due process,’ unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place, and circumstances.

Cafeteria & Restaurant Workers Union, Local 473 v. McElroy, 367 U.S. 886, 895 (1961) (citations and internal quotation marks omitted). “Neither the term ‘due process,’ nor the concept of fundamental fairness itself, is susceptible of precise and categorical definition, and no single test can guarantee that a judge will grant or deny habeas relief when faced with a similar set of facts.” *Brecht*, 507 U.S. at 639-40 (Stevens, J., concurring).

process is not a technical conception with a fixed content unrelated to time, place, and circumstances. It is flexible and calls for such procedural protections as the particular situation demands.”) (internal citations and quotation marks omitted), *rev’d*, *Harvey v. Horan*, 278 F.3d 370 (4th Cir. 2002); *Harvey v. Horan*, 285 F.3d 298, 306 (4th Cir. 2002) (opinion of Luttig, J., on denial of rehearing) (“As I allude to, this is not at all to say that post-conviction access to evidence for further testing in light of scientific advance is (or ought to be) constitutionally required or permitted as a matter of course or even frequently. It should not be, not only because of the presumption of correctness rightly enjoyed by final judgments of conviction and the separate, indisputable interest in the finality of such judgments, but also because of the reality that only rarely will further testing hold out the possibility that the convicted actually can be proven innocent of the crime.”).

Yet given the vast number of potential post-conviction DNA petitions by state inmates,⁸ state law, rather than the Due Process clause, is the appropriate source of legal standards. And state legal standards are better equipped to address legal problems such as limits on liability for negligently disposed DNA evidence. *See, e.g.*, S.C. Code §§17-28-110(C); 17-28-360.

Relying on state-law standards is not only the most practical solution to a problem that is far more multi-faceted than initially appears, but also respects the States' sovereign power to devise the rules of criminal procedure that govern their administration of criminal justice and protection of the interests of victims. The judgment of the court of appeals should therefore be reversed.

B. The Alaska Courts Gave Respondent Ample State-Law Process for Obtaining the DNA Evidence He Seeks.

Amici fully respect the desire of convicted persons such as respondent to obtain access to DNA evidence for retesting. For the reasons noted above, however, it is neither possible nor appropriate that such evidence be made available in response to every request. "Punishment of the innocent may be the worst of all injustices. To avoid such a grievous outcome courts should solemnly consider reopening a case if a 'truly persuasive' showing of actual innocence lies close at hand." *Jenner*, 590 N.W.2d at 471 (quoting *Herrera v. Collins*, 506 U.S. 390, 417

⁸ According to the Bureau of Justice Statistics, in 2005 an estimated 687,700 state prisoners were incarcerated for violent offenses. U.S. Dep't of Justice, Bureau of Justice Statistics, Summary Findings (2007), <http://www.ojp.usdoj.gov/bjs/prisons.htm#findings>.

(1993)). But not every inmate who asserts innocence “will be able to reopen a case to analyze old evidence. Our system of justice will hold little respect if its judgments are never final.” *Id.* at 472.

While a criminal defendant is presumed innocent until proven guilty and their guilt must be proven beyond a reasonable doubt, *see Herrera*, 506 U.S. at 398-99, a post-conviction petitioner “does not come before the Court as one who is ‘innocent,’ but . . . as one who has been convicted by due process of law” of a violent felony. *Id.* at 399-400. “The guilt or innocence determination in state criminal trials is ‘a decisive and portentous event.’” *Id.* at 401 (quoting *Wainright v. Sykes*, 433 U.S. 72, 90 (1977)).⁹

Given these precepts of criminal jurisprudence, it is clear that respondent received ample process in the Alaska courts during his post-conviction proceedings. On his direct appeal, the Alaska Court of Appeals reversed the denial of his petition for DNA evidence. It held that “a defendant who seeks post-conviction DNA testing must, at a minimum meet the three-part test endorsed by [other] state courts.” Pet. App. 109-111 & n.27 (collecting cases). “That is, the defendant must show (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.” *Id.* at 110-111.

⁹ Because of the fundamental differences between trials and post-conviction proceedings, *Brady v. Maryland*, 373 U.S. 83 (1963), heavily relied upon by the court below, is not applicable to this case. See Pet. Br. 36.

On remand, the Superior Court reviewed the trial record, as well as the two confessions Osborne made to the Parole Board in 2004. *See id.* at 71 & n.11. It ruled that respondent had failed to satisfy this three-part test. *Id.* at 72-73. Respondent appealed and the Court of Appeals conducted a *de novo* review of the record. *See id.* at 77. The court meticulously examined the third prong of the Alaska test—whether further DNA testing would conclusively establish Osborne’s guilt or innocence—and found that it would not. *See id.* at 78-82 (citing and quoting *Riofta v. State*, 142 P.3d 193 (Wash. App. 2006) (applying similar inquiry to post-conviction DNA petition)).

Respondent asserts that “the Ninth Circuit appropriately applied the basic protections of the Due Process Clause” to provide him the relief he requested from the State, Opp. 27, notwithstanding the fact that this question was fully litigated in state court. This case thus raises questions not only about whether the Due Process clause requires post-conviction access to DNA evidence, but also about the amount of process to which respondent is entitled.

A recent full faith and credit clause case, *San Remo Hotel v. City & County of San Francisco*, 545 U.S. 323 (2005), is useful in answering that question. In *San Remo*, the plaintiffs asserted that they had a right to relitigate in federal court constitutional claims that had been fully litigated in state court. This Court held that the *San Remo* plaintiffs were not entitled to two bites at the apple. “We have,” the Court ruled, “repeatedly held . . . that issues actually decided in valid state-court judgments may well deprive plaintiffs of the ‘right’ to have their federal

claims relitigated in federal court. . . . The relevant question in such cases is . . . whether the state court actually decided an issue of fact or law that was necessary to its judgment.” *Id.* at 342.

Respondent ought to have faced a similar bar in his effort to get the federal courts to give him a more favorable ruling than the Alaska courts. The state trial and appeals courts devoted much time and effort to determining his DNA entitlement, ultimately deciding that he had failed to make the requisite evidentiary showing. Having litigated his DNA claim up and down the Alaska court system and then back up, respondent should not be permitted to do so again in federal court.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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