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

BRIEF OF ELEVEN INDIVIDUALS WHO HAVE RECEIVED CLEMENCY THROUGH DNA TESTING AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

The question presented in this case touches human lives in a particularly profound way. *Amici* are uniquely positioned to describe that human element and to emphasize the importance of access to evidence that allows one to seek clemency on grounds of actual innocence. Each was wrongfully convicted of a serious crime. And each is one of the 232 people over the past two decades who obtained biological material for DNA testing and, based on the exculpatory results of that testing, received clemency. If these individuals had been convicted in Alaska by petitioners, they could still be in prison today. The *amici* are:

1. Kenneth Adams was exonerated by DNA testing in 1996, eighteen years after being wrongfully convicted in Illinois of rape and murder in what is now known as the Ford Heights Four case. The key evidence in the case consisted of eyewitness testimony placing Adams and the three others near the scene of the crime.

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission. Both parties have filed letters with the Clerk consenting to all *amicus* filings.

Eventually, Adams and the three others gained access to biological material for DNA testing. They also discovered that the police had received information pointing to the identity of the actual perpetrators, but had chosen not pursue the lead. DNA testing exonerated all four men and implicated three others, two of whom confessed and pled guilty to the crime in 1997. Governor Jim Edgar granted pardons to all four men.

2. Marvin Anderson was exonerated by DNA testing in 2001, nineteen years after being wrongfully convicted and imprisoned in Virginia for robbery, forcible sodomy, abduction, and two counts of rape. The victim had told a police officer that her assailant said he "had a white girl," and Anderson was the only black man the officer knew who lived with a white woman. Because Anderson had no criminal record, the officer went to Anderson's employer and obtained a color photo-identification card to show the victim. She identified Anderson as her assailant. The Virginia Bureau of Forensic Science performed serology tests on biological evidence taken from the victim, but the tests proved inconclusive.

At trial in 1982, Anderson pleaded his innocence and suggested that the actual perpetrator of the crime was likely a man named James Otis Lincoln, who had been identified as stealing a bicycle just a half hour before it was used in the rape. The jury nonetheless found Anderson guilty as charged.

In 1988, Lincoln confessed to the crime under oath and in open court, but the judge called Lincoln a liar and refused to vacate Anderson's conviction. A coalition of civil rights groups, church leaders, and state legislators petitioned then-Governor L. Douglas

Wilder for clemency in 1993, but he denied the request. The Commonwealth then told Anderson that all of the biological evidence in his file had been destroyed, pursuant to Virginia's normal procedures for post-conviction cases.

In 2001, however, Anderson learned that some of the evidence had been accidentally preserved in a laboratory notebook. He requested that this evidence be subjected to newly available DNA testing. State authorities initially resisted on the grounds that allowing testing without a prisoner's showing cause would be an undue burden. Later that year the Commonwealth adopted a new statute, Va. Code Ann. 19.2-327.1, which made it easier for prisoners to petition the state's courts for DNA testing. Anderson obtained DNA testing under the new statute that proved his innocence beyond a doubt. Anderson was pardoned by Governor Mark Warner in 2002.

3. A.B. Butler was exonerated by DNA evidence in 2000, after being wrongfully convicted and spending almost seventeen years in a Texas prison for aggravated kidnapping and rape. The victim identified Butler from a book of mug shots and a police lineup. Despite alibi evidence, a jury convicted Butler in 1983 and sentenced him to ninety-nine years in prison. Butler repeatedly appealed and requested that physical evidence from the rape be tested. Finally, in 1999, his lawyer obtained the testing and it excluded him as the source of the semen and hairs found at the scene. He obtained a pardon from then-Governor George W. Bush in May of 2000.

4. Kevin Byrd was exonerated by DNA evidence in 1997, twelve years after being wrongfully

convicted and imprisoned in Texas for rape. The victim initially described her attacker as white, but four months after her rape she saw Byrd, a black man, in a grocery store and told her husband that he was the rapist. Despite shaky evidence and complaints from the trial judge about the poor quality of the investigation, Byrd was convicted of the rape in 1985 and sentenced to life in prison. In 1994, the physical evidence from the rape was supposed to be destroyed to alleviate overcrowding in the evidence warehouse. For unknown reasons, however, the prosecutor's office decided to preserve the evidence.

In 1997, Byrd obtained testing of the biological material, which proved that he did not commit the rape. The judge, district attorney, and sheriff involved in the case all joined in requesting that then-Governor George W. Bush pardon Byrd. The Governor first asked that the DNA test be validated by a court hearing, but granted Byrd a pardon in October 1997.

5. Michael Evans served twenty-six years in prison in Illinois for a rape and murder he did not commit before being exonerated by DNA testing. The State convicted him and his co-defendant, both of whom were black, of raping a white nine-year-old girl based on the mistaken testimony of a witness who came forward in response to a $5000 reward offer.

Although the perpetrator of the crime had left semen in the body of the victim, DNA testing was unavailable at the time of Evans's conviction. After the development of the new technology, Illinois enacted a statute mandating post-conviction DNA testing in cases where the result would likely provide new evidence that might support a claim of actual

innocence. The State Attorney's Office opposed the testing, but Evans ultimately persuaded a court to order it. Testing exonerated Evans, who was released on his own recognizance in 2003 until prosecutors finally agreed to drop the charges against him. He was pardoned in 2005 by Governor Rod Blagojevich.

6. Paula Gray was another defendant in the Ford Heights Four case who was pardoned for innocence in 2002 after serving nine years in prison. She was only seventeen and borderline mentally retarded, but the police interrogated her for two days in a hotel room until she confessed to the crime. The confession was used to secure her conviction, as well as the convictions of the other defendants. Gray's conviction was thrown out in 2001, and she was pardoned by Governor George H. Ryan based on innocence a year later.

7. Dana Holland was exonerated by DNA testing in 2003 after serving ten years of a 118-year sentence for two separate wrongful convictions for rape, armed robbery, and attempted murder. Since he was a suspect in the armed robbery and attempted murder only because of his arrest for the rape, his exoneration by DNA evidence for the rape proved his innocence in both crimes. The rape victim initially denied that Holland was her attacker, but changed her mind. Evidence from the armed robbery was found in the car of the rapist, and the armed robbery victim then identified Holland. An initial forensic report stated that there was not enough semen at the scene of the crime for DNA testing. That report, however, was incorrect, and the crime analyst who provided the false report was later discovered to have

provided false forensic testimony in several cases. In 2002, the semen was finally tested and proved that Holland did not commit the rape. Additional testing revealed that Holland's uncle, Gordon Bolden, was the real perpetrator. Holland received a pardon from Governor Rod Blagojevich in 2005.

8. Edward Honaker was exonerated by DNA testing in 1994, over nine years after being wrongfully convicted in Virginia of seven counts of sexual assault and rape. The crime involved a man's attacking a couple while they were sleeping in their car in a rural area. The perpetrator forced one of the victims to go into the surrounding woods and drove away with the other victim in his truck, and raped her repeatedly after arriving at a different location. With help from the victim, the police were able to make a sketch of the assailant. When presented with Honaker at trial, the victims identified Honaker as the perpetrator.

When the Innocence Project pressed to conduct DNA testing on the biological evidence collected in Honaker's case, the prosecution agreed to release the evidence. Three rounds of testing excluded Honaker as the sperm donor to any of the victims. Based on this DNA exclusion, Honaker filed for clemency, and his petition was joined by the Commonwealth. Honaker received a pardon after being incarcerated for nearly ten years.

9. Steven Linscott was exonerated by DNA testing in 1992, after he had served three years in prison and been out on bond for seven years for a wrongful murder conviction in Illinois. The prosecution's case centered on statements Linscott made to police during the investigation in which he

recounted a dream he had the night of the incident that paralleled the crime in several ways. After a new trial was granted, prosecutors agreed to DNA testing, which excluded Linscott. Based on these results, the prosecution chose not to try Linscott again. In December 2002, Linscott was pardoned by Governor George Ryan.

10. Ben Salazar was exonerated by DNA testing in 1997, five years after being wrongfully convicted of aggravated sexual assault of a pregnant woman. The victim identified Salazar as the perpetrator from one of several albums of photographs at the Austin Police Department, and matched a tattoo on the perpetrator to one of Salazar's tattoos. Salazar was convicted in 1992 and sentenced to thirty years in prison.

Seminal fluid was found on items in the rape kit taken from the victim. The fluid initially eliminated the victim's husband as a source, but did not exclude Salazar. After conviction, Salazar's attorneys secured a court order to preserve the evidence, and in 1997, obtained an order to retest the evidence. After three rounds of more sophisticated DNA testing, Salazar was shown conclusively innocent. Then-Governor George W. Bush pardoned Salazar, following the recommendation of the Texas Board of Pardons and Paroles.

11. Earl Washington was exonerated by DNA testing in 2000, sixteen years after being wrongfully convicted and sentenced to death in Virginia. At trial, police officers testified that Washington confessed to a rape and murder about a year after the crime occurred, while in police custody on unrelated charges. In fact, Washington, who has an I.Q. of

approximately sixty-nine, had confessed to five different crimes over two days of police questioning. Four of these confessions were dismissed due to inconsistencies in the testimony and the inability of the victims to identify Washington. His confession to the rape and murder also suffered numerous inconsistencies and misreported basic details about the crime. Nonetheless, the State prosecuted and convicted Washington for the rape and murder, with the confession proving to be the prosecution's sole piece of evidence connecting him to the crime.

On direct appeal, the Virginia Supreme Court affirmed the conviction and death sentence. In August 1985, shortly before he was scheduled to be executed, Washington filed a state habeas corpus petition and was granted a stay of execution. Washington then filed a petition for a writ of habeas corpus in federal district court, asserting that his trial counsel was constitutionally ineffective for failure to "present to the jury the results of certain allegedly exculpatory forensic evidence;" specifically, "the results of exculpatory laboratory tests on semen stains found on a blanket recovered from the bed where the rape of Mrs. Williams occurred." *Washington v. Murray*, 952 F.2d 1472, 1476 (4th Cir. 1991). The district court ruled that trial counsel's conduct did not fall outside the range of accepted professional conduct and, in any event, that Washington was not prejudiced by the challenged conduct. *See id.* The Fourth Circuit eventually affirmed, holding that, in light of Washington's voluntary confessions, the failure to present the inconclusive laboratory results did not prejudice him.

See Washington v. Murray, 4 F.3d 1285, 1292 (4th Cir. 1993).

After his habeas proceedings had concluded, the Commonwealth in 1993 agreed to analyze the evidence again using more sophisticated DNA testing. The test excluded Washington as the source of the semen found at the crime scene and, on December 20, 1993, Washington filed a petition for clemency with the Virginia governor. The governor commuted Washington's sentence from death to life imprisonment. In 2000, shortly after the advent of Short Tandem Repeat DNA-testing methodology, Washington's lawyers obtained the consent of a new Virginia governor to perform further tests. Not only did the new tests conclusively exculpate Washington, but they were also used to identify the actual perpetrator of the crime. On October 2, 2000, Governor James Gilmore granted Washington a full pardon.

SUMMARY OF ARGUMENT

The historical and current presence of clemency as a source of relief for prisoners who conclusively demonstrate their actual innocence supports a constitutional right to access biological material in a state's control when performing DNA testing on that material could conclusively establish a prisoner's innocence.

I. Throughout American history, executive clemency has provided a "fail-safe" for our criminal justice system, *Herrera v. Collins*, 506 U.S. 390, 415 (1993) – namely, a mechanism for granting relief to prisoners who demonstrate their actual innocence.

Essential to this mechanism has always been the ability of an applicant to present – and the ability of the executive decisionmaker to consider – any newly available evidence of innocence. Crime-scene DNA provides a paradigmatic example of such evidence. DNA testing's unmatched precision gives certain prisoners the ability to demonstrate their innocence beyond dispute. It also gives executives who make clemency determinations the certainty and political cover they sometimes need to confer relief upon applicants.

II. The history and tradition of affording clemency to actually innocent prisoners provides respondent with a liberty interest in this case. *Amici* agree with respondent's argument that he has a liberty interest in meaningful access to the clemency process (along with any other available mechanisms for post-conviction relief). But even if he lacked a liberty interest in access to the clemency process alone, he would nonetheless have a liberty interest in affirmatively obtaining clemency insofar as he has the ability to demonstrate his innocence beyond dispute. In contrast to prisoners who seek clemency on the grounds of mercy or disputable claims of innocence, prisoners who can demonstrate their innocence *beyond dispute* have a legitimate expectation that they actually will receive clemency. Not only have numerous individuals throughout history received pardons on innocence grounds, but since 1989, 232 inmates in thirty-three states have received clemency on the basis of DNA evidence. *Amici* are among these individuals. No American executive of whom we are aware has ever denied

clemency to a prisoner whose innocence he has acknowledged.

III. Denying a prisoner access to biological material that could decisively demonstrate his innocence deprives him of his liberty interest in obtaining clemency without due process of law. Lest there be any doubt on this score, the longstanding tradition of looking to new evidence in clemency proceedings and the widespread practice among the states and federal government allowing DNA testing confirm that petitioners' refusal to grant the access respondent seeks is patently arbitrary. Indeed, petitioners' refusal to allow respondent to conduct a DNA test is worse than arbitrary because they may test the biological material at issue anytime they wish but, under their view of the law, they need not divulge any test results confirming respondent's innocence. This type of one-way ratchet – unsupported by any perceptible governmental interest – reaches beyond arbitrariness into the realm of perversity.

ARGUMENT

I. Clemency Is The "Fail-Safe" For Our Nation's Criminal Justice System.

A. Executive Clemency Historically Has Provided Relief To Innocent Individuals Who Have Been Wrongfully Convicted.

The power of executive clemency developed alongside codified systems of punishment since at least four millennia ago, at the time of Hammurabi's

Code. KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY AND THE PUBLIC INTEREST 15-16 (1989). Prior to the founding of the United States, clemency was an essential part of the English criminal justice system, and the power to grant it was delegated from the King to the heads of the American colonies. CHRISTEN JENSEN, THE PARDONING POWER IN THE AMERICAN STATES 8 (1922). Subsequently, both the American President and the governors of the states were given the power to pardon, although in many states the power is shared with an advisory board. *Id.* at 9-11. Whatever the precise mechanism for granting such relief, the clemency power is now a settled "part of the Constitutional scheme." *Biddle v. Perovich*, 274 U.S. 480, 486 (1927).

Throughout this history, there have been two major reasons for an executive to grant clemency: mercy and actual innocence. With respect to the first ground, executives sometimes confer leniency on those who are guilty under the letter of the law but undeserving of their punishment. In the words of Hamilton: "The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel." THE FEDERALIST NO. 74, at 275 (Alexander Hamilton) (Clinton Rossiter ed., 2006); *see also Biddle*, 274 U.S. at 486 ("When [a pardon is] granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed.").

At the same time, early leaders of our Nation believed that it was equally, if not more, important

that clemency be available to provide justice to prisoners who had been wrongfully convicted and not granted relief by the judicial system. "The power is given to the executive to relieve against the possible contingency, under all systems of laws, of a wrongful conviction. . . . Under the old common law pardons in case of improper conviction in the absence of provision for new trial . . . were considered as 'grantable of right,' or practically so." James D. Barnett, *The Grounds of Pardon in the Courts*, 20 YALE L.J. 131, 133-34 (1910) (quotation marks omitted); *see also* Richard C. Donnelly, *Unconvicting the Innocent*, 6 VAND. L. REV. 20, 30-31 (1952) (explaining that a pardon is the only option "[w]hen claims of unjust conviction do not fit within existing judicial remedies.").

Though invoked less often than the mercy rationale, this Court, leading treatises, and historical accounts of both the clemency power and wrongful convictions in America have recognized the tradition of executive pardons for the innocent. In *Herrera v. Collins*, this Court explained that clemency is "deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." 506 U.S. 390, 411-12 (1993). Clemency, in other words, is "the 'fail safe' in our criminal justice system." *Id.* at 415. This Court also recognized that "history is replete with examples of wrongfully convicted persons who have been pardoned in the wake of after-discovered evidence establishing their innocence." *Id.*

For instance, W. H. Humbert's examination of the President's clemency power, cited in *Herrera*, 506

U.S. at 412, includes a survey of the reasons that the pardon attorney assigned and the Attorney General and the President approved for granting clemency. W. H. HUMBERT, THE PARDONING POWER OF THE PRESIDENT 124 (1941). Between 1885 and 1931, three of the "[p]rincipal reasons" for granting clemency were "[g]rave doubt as to justice of conviction," "[d]oubt as to guilt" and "[d]isclosure of new evidence." *Id.* at 124 tbl. V. Less frequently assigned reasons included "[i]nsufficient evidence," "[d]ying confession of real murderer" and "[m]istaken identity." *Id.* at 124 tbl. VI.

Similarly, Edwin Borchard's study of wrongful convictions (conducted at the request of Justice Frankfurter) frequently acknowledges the use of clemency to free innocent prisoners. Among seventy-eight documented cases of wrongful convictions between 1851 and 1931, fifty-five people were freed through either presidential or gubernatorial clemency. *See generally* EDWIN M. BORCHARD, CONVICTING THE INNOCENT (1932).

Clemency likewise has been invoked to free wrongfully convicted individuals throughout the twentieth century. Between 1911 and 1991 (about the time that DNA testing became available) at least sixty-three prisoners who had been convicted of death-eligible crimes were freed through executive pardons after proving their innocence. MICHAEL L. RADELET ET AL., IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES 283-356 (1992).

B. The Clemency Process Allows The Consideration Of New Evidence Of Innocence, Regardless Of When It Is Discovered.

A critical characteristic of executive clemency that enables it to protect the wrongfully convicted is that, unlike judicial post-conviction proceedings that are litigated solely through the baseline of the trial record, the executive traditionally has the power to consider any factor that is relevant. This power allows prisoners to present new evidence of their innocence at clemency hearings even when such evidence is irrelevant to whether the applicant received a "fair trial" or whether it would be barred from consideration in the courts.

1. Both this Court and legal scholars have recognized the breadth of a clemency determination. Clemency "allow[s] the executive to consider a wide range of factors not comprehended by earlier judicial proceedings and sentencing determinations." *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 280-81 (1998) (plurality opinion). "In the great majority of states there is no limitation as to the scope of the inquiry" in a clemency proceeding, and a clemency hearing "offers opportunity for the presentation of any kind of evidence, unhampered by legal technicalities as to its admissibility." JENSEN, *supra*, at 46, 49.

This wide scope allows wrongfully convicted prisoners to present new evidence of their innocence when they cannot present it to the courts. Accordingly, "[h]istory shows that the traditional remedy for claims of innocence based on new evidence, *discovered too late in the day to file a new trial motion*, has been executive clemency." *Herrera*,

506 U.S. at 417 (emphasis added). Even when certain states over the years have limited the ability of a clemency authority to second-guess the outcome of judicial proceedings, the states have made exceptions for newly discovered evidence. Maine was one such restrictive state. There, governors have always been allowed to grant clemency, notwithstanding restrictions in the past on their ability to look behind judicial proceedings finding that the applicant committed a crime, if "the evidence raises a doubt as to the guilt of the accused." JENSEN, *supra*, at 47. The same has been true in other states that have restricted the grounds on which an executive could grant clemency. In Maryland, even when such authority was constricted, governors retained the ability to grant clemency if "new evidence has been discovered." *Id.* In Nebraska and New Mexico, clemency remained available despite restrictions if facts "have been learned since conviction." *Id.* at 48. And in Wisconsin, clemency was granted in a restrictive climate when "new and convincing evidence [of innocence] that could not be produced at the trial was presented." *Id.*

2. While new evidence can be considered in clemency proceedings, the burden, as a practical matter, falls on the applicant to produce that evidence. It thus is critical that the applicant have access to any evidence necessary to make out his case.

Although specific state policies vary, the clemency process generally begins when a prisoner fills out an application containing information about himself and his conviction, the reasons for his clemency request, and any supporting documents or

evidence. *See* David R. Dow et al., *Is It Constitutional To Execute Someone Who Is Innocent (And If It Isn't, How Can It Be Stopped Following* House v. Bell*)?*, 42 TULSA L. REV. 277 app. B at 322-399 (2006); Elkan Abramowitz & David Paget, *Executive Clemency in Capital Cases*, 39 N. Y. U. L. REV. 136, 146-47 (1964). At that point, the clemency authorities begin some form of investigation into the prisoner's request. *Id.* at 148.

Theoretically, state clemency authorities can conduct as thorough an investigation as they see fit, and some are explicitly granted subpoena powers. *See* Dow, *supra*, app. B at 322-399. In practice, however, any "investigation" that occurs is usually limited to gathering evidence potentially relevant to granting mercy – for example, a compilation of the prisoner's biographical information, the records of his conviction and prison behavior, and occasionally interviews and psychiatric reports. *See* Abramowitz & Paget, *supra*, at 148-50. "[T]he prevailing attitude" of the clemency authorities is that "the investigative agency is not an independent fact-gathering body whose orientation is directed toward the development of new evidence bearing on the guilt or innocence of the defendant." *Id.* at 151.

Nor does any state allow an applicant to invoke the power of the state to undertake any kind of formalized discovery in clemency proceedings. Some state statutes, in fact, specifically note that it is up to the applicant to present evidence of his innocence. In Alabama, for example, a pardon for innocence can only be granted "following receipt and filing of clear proof of [the prisoner's] innocence," as well as "written approval" from the judge or district attorney

associated with the case. Ala. Code § 15-22-36(c). In Georgia, a pardon may be granted "to a person who proves his innocence of the crime for which he was convicted." Ga. Comp. R. & Regs. 475-3-.10(3)(a).

In light of an applicant's burden of proof as well as production, it is imperative that states avoid *standing in the way* of prisoners' procuring post-conviction evidence of their innocence. If states were to obstruct prisoners' access to new, potentially exculpatory evidence, it would be impossible for the prisoners to bring that evidence to the attention of clemency authorities.

C. The Exculpatory Power Of DNA Evidence Makes It Especially Important To Clemency Proceedings.

DNA testing offers a distinctive potential for showing a prisoner's complete innocence. This possibility makes it especially important that prisoners be able to procure and to present DNA-based evidence in clemency proceedings.

1. The "historical scientific developments" in DNA testing "have rendered it literally possible to confirm guilt or innocence beyond any question whatsoever." *Harvey v. Horan*, 285 F.3d 298, 305 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing en banc). This has resulted in a string of DNA-based exonerations "in numbers never imagined before the development of DNA tests." *Kansas v. Marsh*, 548 U.S. 163, 180 (2006) (Souter, J., dissenting).

In the past twenty years, 232 convicted prisoners have been exonerated by DNA evidence in thirty-three states. Seventeen of these DNA exonerees had

been sentenced to death, and several died while in prison. The average sentence served has been twelve years, for a total of 2894 years wrongfully served. Approximately seventy percent of exonerees have belonged to minority groups, including 138 African Americans, twenty Latinos, and one Asian American. In roughly forty percent of exonerations, DNA testing has successfully identified the actual perpetrator of the crime. And as familiarity with DNA testing's role in exonerations has increased, the number of exonerations has grown, with more than twice as many exonerations in the past decade (167) as in the prior one. *See* The Innocence Project, *Facts on Post-Conviction DNA Exonerations*, http://www.innocenceproject.org/Content/351.php (last visited January 31, 2009).

An empirical analysis of our nation's first 200 DNA exonerations shows that, of the 133 prisoners whose cases produced written decisions, seventy percent received no relief of any kind during their appeals or post-conviction court proceedings before DNA testing was done. Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 106 (2008). Of the 200 total exonerees, fully twenty-one percent of them were unable for one reason or another to obtain judicial relief even after their exculpatory DNA evidence was discovered. Thus, they were released only after receiving an executive pardon. *Id.* at 129-30. For these prisoners, the historical "fail safe" of clemency was the only way to restore the liberty of which their states had wrongfully deprived them.

2. As a tool for securing clemency by conclusively exonerating wrongfully convicted prisoners, the latest DNA-testing technology has several advantages over

other forms of biological identification techniques, including traditional ABO blood-typing, human-leukocyte-antigen (HLA) typing, and typing of red-cell enzymes and serum proteins through protein-gel electrophoresis. Physical DNA itself "is much more stable and robust than the antigens, enzymes, and proteins examined by the traditional tests, and may be tested from aged and weathered samples which previously could not be typed. DNA tests can also be performed on much smaller tissue samples than traditional tests." 84 A.L.R. 313, § 2(e) (4th ed. 1991) (footnote omitted).

Further, DNA tests "are based directly on the genetic makeup of the individual, the DNA itself. In contrast, serological and protein tests identify a gene product and therefore may be only an indirect reflection of the DNA composition." DEP'T OF JUSTICE, FUTURE OF FORENSIC DNA TESTING 15 (2000). "Most important, from a forensic standpoint, individual variability in the DNA is much greater than can be revealed by serological and enzymatic markers, so that the probability of two unrelated individuals having the same DNA profile is very small." *Id.* With its unique combination of durability and amenability to precise testing, DNA holds the unmatched potential "to supply strong support for identity between, for example, a crime scene sample and DNA from a suspect." *Id.*

3. The unique capacity of DNA testing to conclusively prove innocence even after significant passage of time renders it perfectly suited – if not nowadays essential – to provide the certainty and confidence typically required to secure a pardon on grounds of actual innocence. Executives do not

generally proactively seek opportunities to pardon people convicted of heinous crimes. To the contrary, in order to avoid the perception of being soft on crime, most state governors face political pressure to be tight-fisted with pardons. *See* Evelyn Nieves, *Granting Clemency; Being in the Wrong Place at the Right Time*, N.Y. TIMES, May 9, 1999, § 4, at 5. And even putting such political considerations aside, governors have a duty to protect public safety by ensuring that individuals with violent propensities are not improperly released from custody.

Post-conviction DNA testing is able to solve both of these problems. It provides executives with an unrivaled degree of certainty on which to base their clemency decisions. And it provides unparalleled political cover for freeing innocent prisoners.

This past week brought a typical example of the power of DNA evidence in these respects: the pardon of five people in Nebraska imprisoned for the 1985 rape and murder of a sixty-eight-year-old woman. All had confessed to the brutal crime under the State's threat to seek death sentences. State courts initially denied the prisoners access to crime-scene material for testing on the basis of their belief that the evidence introduced in earlier court proceedings overwhelmingly demonstrated the prisoners' guilt. But after the Nebraska Supreme Court overturned those decisions and allowed the prisoners (pursuant to a state statute) to test the State's evidence, the state attorney general conceded that the testing showed "beyond all doubt" that the five people were innocent. Anna Jo Bratton, *5 Pardoned After Wrongful Conviction in Neb. Crime,* ASSOCIATED

PRESS, Jan. 27, 2009. In absence of any avenue by which the wrongly convicted individuals could seek state post-conviction relief, the governor granted them clemency.

II. A Prisoner Possesses A Liberty Interest In Meaningful Access To The Clemency Process And, In The Rare Case In Which He Can Demonstrate His Innocence, In Obtaining Clemency.

Petitioners assert that a person who has been convicted of a crime lacks any liberty interest in pursuing clemency, even when the person has the ability to show beyond dispute that he is innocent. In petitioners' view, if an innocent person is convicted of a crime through a fair trial that included sufficient evidence for a jury to return a guilty verdict, that person must simply accept his fate – whether it be death, life in prison, or a term of years behind bars.

Petitioners misconceive the nature of clemency. Clemency's traditional role in affording relief to wrongly convicted prisoners gives individuals such as respondent a liberty interest in meaningful access to that process and, indeed, in obtaining clemency insofar as they can demonstrate their innocence beyond dispute.

A. A Prisoner Possesses A Liberty Interest In Meaningful Access To The Clemency Process.

We agree with respondent that there is a liberty interest in meaningful access to clemency. *See* Resp. Br. 27-31. A liberty interest "may arise from an expectation or interest created by state laws or

policies." *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005). Having granted its prisoners the right to seek clemency, Alaska has given them a constitutionally protected expectation that this right is a meaningful one and not merely an empty formality in which the State may arbitrarily preclude them from demonstrating their innocence.

B. A Prisoner Possesses A Liberty Interest In Obtaining Clemency When He Can Conclusively Prove Actual Innocence.

Even if prisoners in general lack an enforceable liberty interest in access to the clemency process, individuals like the respondent in this case would still have such an interest: when clemency is the only possible source of relief, a prisoner has a protectable liberty interest when he can prove his innocence beyond dispute. Such a prisoner, unlike one who seeks clemency on the basis of a plea for mercy or disputed claim of innocence, has a substantive expectation, confirmed by history and tradition, that clemency will be granted.

Liberty or property interests "are created . . . by existing rules or understandings that stem from an independent source such as state law." *Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005) (quotation omitted). Accordingly, an actual liberty interest in obtaining clemency can arise only if an individual has not only a right to apply for it, but also "a legitimate claim of entitlement to [receiving] it." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *accord Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 465 (1981).

Applying this test, this Court has held in cases involving requests for clemency on grounds of mercy that prisoners lack any liberty interest in obtaining clemency. *See Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272 (1998) (involving mandatory clemency review of death sentence); *Dumschat*, 452 U.S. 458 (involving petition for commutation of life sentence). Both by law and tradition, the decision to grant leniency or act on a disputed claim of innocence rests within the complete discretion of the executive. In the mercy context, therefore, prisoners have "no substantive expectation of clemency"; they have only a "unilateral hope" that the executive will show mercy. *Woodard*, 523 U.S. at 280, 283 (Rehnquist, C.J., plurality opinion); *accord Dumschat*, 452 U.S. at 465.

By contrast, cases like *Woodard* and *Dumschat* do not apply when prisoners can indisputably prove that they are innocent. In this small category of cases, history and tradition give rise to prisoners' having a legitimate claim of entitlement to clemency. Unlike a prisoner who merely seeks the exercise of executive mercy, a wrongfully convicted individual "retains a powerful and legitimate interest in obtaining his release." *Kuhlmann v. Wilson*, 477 U.S 436, 452 (1986) (Powell, J., plurality opinion). If he can prove his innocence beyond dispute, in other words, he retains a substantive expectation that he will obtain clemency – even if he received a fair trial that included sufficient evidence to convict.

To be sure, no state law expressly guarantees clemency to anyone – not even to individuals who show themselves to be innocent. Yet an expectation in freedom from restraint need not be guaranteed in

positive state law to give rise to a liberty interest. As Justice Frankfurter observed, "[d]eeply embedded traditional ways of carrying out state policy – or not carrying it out – are often tougher and truer law than the dead words of the written text." *See, e.g.*, *Poe v. Ullman*, 367 U.S. 497, 502 (1961) (plurality opinion) (quotation omitted). Accordingly, "existing rules *or understandings*" that derive from well-settled state practice give rise to liberty interests. *Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005) (emphasis added).

The settled understanding, undergirded by centuries of experience as well as by hundreds of modern exonerations, is that an applicant who has no available judicial remedies and presents clemency authorities with evidence that conclusively exonerates himself will in fact receive clemency. A pardon under these rare circumstances is not bestowed "as a matter of grace." *Woodard*, 523 U.S. at 282 (emphasis omitted). The executive's motivation is not mercy. Instead, the governor acts according to a social imperative – universally felt and always carried out – of righting a grievous wrong. Indeed, *amici* know of no examples in American history of an executive denying clemency to a prisoner whom he has acknowledged to be innocent.[2] And members of this Court have acknowledged the

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[2] Governors have denied pardons in a few cases in which the exonerated individual was no longer alive or was no longer in prison. *See* EDWIN M. BORCHARD, CONVICTING THE INNOCENT 168-69, 342-44 (1932); Adam Liptak, *Pardon Unlikely for Civil Rights Advocate*, N.Y. TIMES, May 4, 2006, at A16. These scenarios, of course, do not implicate any interest in freedom from confinement.

"improbab[ility]" of such situation ever "fail[ing] to produce an executive pardon." *Herrera*, 506 U.S. at 428 (Scalia, J., concurring). If this Court's notion of clemency as the "fail-safe" of our criminal justice system, *id.* at 415 (majority opinion), is to have any meaning, it must be that an executive will grant clemency in such cases.

It would be no answer for petitioners to respond that respondent nonetheless lacks a liberty interest because he has not actually shown – through DNA testing or otherwise – that he is indisputably innocent. Liberty interests arise from "*claims* of entitlements to th[e] benefits" at issue. *Board of Regents v. Roth,* 408 U.S. 564, 577 (1972) (emphasis added).

> Thus, the welfare recipients in *Goldberg v. Kelly*, [397 U.S. 254 (1970)], had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. *The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility.* But we held that they had a right to a hearing at which they might attempt to do so.

Id. (emphasis added). The same is true here: although respondent has not yet proven that he is actually innocent, he has a liberty interest in obtaining clemency because he is incarcerated and *could* demonstrate beyond doubt that he is, in fact, innocent.

This Court's jurisprudence concerning physical confinement for criminal conduct bears out this reality. In *In re Winship*, for example, the Court held

that a due process liberty interest existed in freedom from restraint when a state fails to establish guilt beyond a reasonable doubt, even though state law did not create such an entitlement and even though the defendant had not yet shown whether the state's proof fell short of that mark. 397 U.S. 358 (1970). The Court noted that the requirement of proof beyond a reasonable doubt "dates at least from our early years as a Nation" and "plays a vital role in the American scheme of criminal procedure." *Id.* at 361, 363. Such commitment to an unwritten principle, the Court reasoned, "reflect[ed] a profound judgment about the way in which law should be enforced and justice administered." *Id.* at 361-62 (quotation omitted); *see also id.* at 372 (Harlan, J., concurring) (noting "the nearly complete and long-standing acceptance of the reasonable-doubt standard by the States in criminal trials"); *Jackson v. Virginia*, 443 U.S. 307, 315 (1979) (noting that proof beyond reasonable doubt had "traditionally been regarded as the decisive difference between criminal culpability and civil liability."). That being so, this Court concluded that individuals have a liberty interest in remaining free from criminal punishment absent a state's satisfying the reasonable-doubt standard. *In re Winship*, 397 U.S. at 364.

The Court undertook a similar analytical approach when it concluded that the Due Process Clause also mandates a presumption of innocence instruction in criminal trials. *See Taylor v. Kentucky*, 436 U.S. 478 (1978). Looking to history and tradition, the Court remarked that the presumption is "axiomatic and elementary, and its enforcement lies at the foundation of the

administration of our criminal law." *Id.* at 483 (quotation omitted); *see also Coffin v. United States*, 156 U.S. 432 (1895) (tracing the history of the presumption).

Like the liberty interest in remaining free from confinement absent proof of criminal conduct beyond a reasonable doubt, the expectation of being released from confinement (through clemency if necessary) upon a showing of actual innocence is "deeply rooted" in our history and plays a critical role in our criminal justice system. *See Herrera,* 506 U.S. at 411-12. A state may no more arbitrarily deny an individual the ability to *avoid* physical confinement through the presumption of his innocence than it may arbitrarily deny him the ability to *end* his confinement through clemency by showing his actual innocence.

III. In Order To Protect The Liberty Interest In Clemency For Conclusively Innocent Prisoners, The State Must Grant Respondent DNA Testing.

Because prisoners have a liberty interest in receiving clemency when they are actually innocent and can prove so conclusively, due process demands that they be able to access potentially exculpatory DNA evidence to protect that interest. We agree with respondent that the balancing test of *Mathews v. Eldridge*, 424 U.S. 319 (1976), weighs decidedly in favor of allowing prisoners in respondent's position access to DNA evidence. We further agree that the "narrower," tradition-related inquiry of *Medina v. California*, 505 U.S. 437, 445 (1992), is inapplicable here and that even if the *Medina* test were to be applied, the respondent satisfies it. *See Harvey*, 285

F.3d at 315 n.6 (Luttig, J., respecting the denial of rehearing en banc).

We add here two points. First, holding that prisoners in respondent's position are entitled to perform DNA testing on biological material in the state's control would accord with longstanding tradition concerning the ability of applicants to present new evidence in clemency proceedings. Second, the petitioners' refusal to give respondent the process he seeks is not just arbitrary but worse than arbitrary: they are exercising unilateral authority over the biological material at issue so that they could use it to their advantage but respondent cannot.

A. Longstanding Tradition Supports The Modest Process Respondent Seeks.

1. Requiring Alaska to grant respondent access to biological material in its possession would comport with the longstanding tradition of allowing prisoners to seek clemency based on new evidence of actual innocence. As described *supra* in Part I.B, the ability to introduce new evidence of innocence has historically been a salient feature of clemency. Every state permits applicants to seek clemency based on new evidence of actual innocence. This tradition is buttressed today by the specific statutory and administrative procedures adopted in many states that permit prisoners to introduce new evidence while seeking clemency. *See supra* Part I.B. Indeed, if prisoners were blocked from procuring and presenting new evidence to clemency authorities, it would be virtually impossible for them to obtain clemency on grounds of innocence.

2. That the overwhelming majority of states already allow prisoners to access state-held biological material for DNA testing reinforces the importance of such testing for prisoners seeking to prove their innocence and the unique injustice of arbitrarily withholding this evidence from prisoners. Forty-four states, the District of Columbia, and the federal government have enacted statutes that give prisoners the ability to access DNA evidence held by the state after their conviction.[3] Five other states have granted such access as a matter of practice. *See* Resp. Br. 6-7.

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[3] 18 U.S.C. § 3600; Ariz. Rev. Stat. § 13-4240; Ark. Code Ann. § 16-112-202; Cal. Penal Code § 1405; Colo. Rev. Stat. § 18-1-413; Conn. Gen. Stat. Ann. § 52-582; Del. Code. tit. 11, § 4504; D.C. Code Ann. §§ 22-4133, -4135; Fla. Stat. Ann. § 925.11; Ga. Code Ann. § 5-5-41; Haw. Rev. Stat. § 844D-123; Idaho Code § 19-4902; 725 Ill. Comp. Stat. Ann. 5/116-3; Ind. Code Ann. § 35-38-7; Iowa Code § 81.10; Kan. Stat. Ann. § 21-2512; Ky. Rev. Stat. § 422.285; La. Code Crim. Proc. Ann. art. 926.1; Me. Rev. Stat. Ann. tit. 15, § 2137; Md. Code Ann., Crim. Proc. § 8-201; Mich. Comp. Laws § 770.16; Minn. Stat. § 590.01; Mo. Rev. Stat. § 547.035; Mont. Code Ann. § 46-21-110; Neb. Rev. Stat. § 29-4120; Nev. Rev. Stat. § 176.0918; N.H. Rev. Stat. Ann. § 651-D:2; N.J. Stat. Ann. § 2A:84A-32a; N.M. Stat. Ann. § 31-1a-2; N.Y. Crim. Proc. Law § 440.30(1-a); N.C. Gen. Stat. § 15A-269; N. D. Cent. Code Ann. § 29-32.1-15; Ohio Rev. Code Ann. § 2953.72; Or. Rev. Stat. § 138.690; Pa. Stat. Ann. 42 § 9543.1; R.I. Gen. Laws § 10-9.1-11; S.C. Code Ann. § 17-28-30; Tenn. Code Ann. § 40-30-304; Tex. Code Crim. Proc. Ann. art. 64.01 *et seq*; Utah Code Ann. § 78B-9-300 *et seq*; Vt. Stat. Ann. tit. 13, § 5561; Va. Code Ann. § 19.2-327.1; Wash. Rev. Code § 10.73.170; W. Va. Code Ann. § 15-2B-14; Wi. Stat. Ann. § 974.07; Wyo. Stat. Ann. § 7-12-303.

These statutes and practices are integral to facilitating the process of clemency. While every state except Alaska regularly or at least sometimes grants prisoners access to potentially exculpatory DNA evidence, many do not provide a mechanism for seeking post-conviction relief upon a showing of innocence, thus leaving clemency as the sole avenue of relief. *See* Kathy Swedlow, *Don't Believe Everything You Read: A Review of Modern "Post-Conviction" DNA Testing Statutes*, 38 CAL. W. L. REV. 355, 356 (2002). Accordingly, a substantial number of prisoners who obtain exculpatory DNA evidence turn to clemency as their only avenue of relief. Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 120 (2008).

Ruling for the respondent, in short, would simply require Alaska to abide by the widespread practice in the vast majority of states. And that current practice reflects nothing more than the time-honored principle that prisoners should be able to procure and present new evidence of innocence in clemency proceedings.

B. Alaska's Refusal To Permit Access To DNA Evidence Is Worse Than Arbitrary.

Alaska's refusal to grant respondent access to the biological material he seeks is "shockingly arbitrary." *Harvey*, 285 F.3d at 319 (Luttig, J., respecting the denial of rehearing en banc). The material is in the state's control, and it is easily reachable. If a DNA test of the material excludes respondent as a source, then respondent is undeniably innocent of the crime for which he is imprisoned. What is more, the material's relevance with respect to respondent's ability to seek clemency is unique: the DNA it

contains is the *only* evidence in existence that can conclusively demonstrate whether he is guilty or innocent of the crimes for which he is incarcerated. *See supra* Part I.C. That petitioners assert a right to withhold material – the only material – that could exculpate an innocent and incarcerated man is, to say the least, unsettling.

Even more disturbing are the implications of the State's unilateral exertion of control over the biological material. Because the State has the material, petitioners could perform a DNA test at any time, whether to combat a clemency application or for any other reason. Yet under the petitioners' view of the law, under which the disclosure obligations of *Brady v. Maryland,* 373 U.S. 83 (1963), no longer apply after the State has obtained a conviction, they would not have any obligation to disclose an exculpatory result. *See* Petr. Br. 36-38; U.S. Br. 12-13. This type of one-way ratchet – allowing the state to use DNA testing to beat back challenges to convictions but declining to require it to accept the consequences of the occasional flip side of such testing – flouts any possible sense of fair play. Indeed, it is perverse. Accordingly, "if not satisfactorily supported by these longstanding legal traditions and established practices, then the right of access might very well be grounded in the patent arbitrariness of denying access to such evidence in the absence of any governmental interest whatsoever in the withholding of such." *Harvey*, 285 F.3d at 319 (Luttig, J., respecting the denial of rehearing en banc).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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