
Eric Despotes

Follow this and additional works at: http://digitalcommons.law.scu.edu/lawreview

Part of the Law Commons

Recommended Citation


Available at: http://digitalcommons.law.scu.edu/lawreview/vol49/iss3/5

Eric Despotes*

“Our procedure has always been haunted by the ghost of the innocent man convicted. It is an unreal dream.”
—Judge Learned Hand

“Today, with the advance of forensic DNA technology, our desire to join Learned Hand’s optimism has given way to the reality of wrongful convictions—a reality which challenges us to reaffirm our commitment to the principle that the innocent should be freed.”
—Judge Guido Calabresi

I. INTRODUCTION

A. Bruce Godschalk’s Story

In 1987, Bruce Godschalk received a sentence of ten to twenty years imprisonment for the rape of two women that had occurred the previous year. A rape test kit examination

* Comments Editor, Santa Clara Law Review, Volume 49; J.D. Candidate, 2009, Santa Clara University School of Law; B.A., Political Science, California State University, Long Beach. I would like to thank my family for their unconditional love and support. I would also like to thank the editors of Santa Clara Law Review for all their hard work and helpful insight. Finally, thanks to Linda Starr and the Northern California Innocence Project for inspiring me to write about this topic.

of both victims revealed that the assailant had left residual traces of semen. After Godschalk's sister called police and informed them that she had seen a police sketch that resembled her brother, the police questioned Godschalk regarding the crimes. According to police, Godschalk confessed to the crimes in noncustodial interrogation, under no pressure or coercion. Additionally, when the police presented a photo lineup to the victims, one of them identified Godschalk as her assailant.

Forensic techniques available at the time of trial could not exclude Godschalk as the assailant. The prosecutor secured a conviction by relying on the one victim's identification testimony and Godschalk's confession, which was later proven to be false. Almost eight years after his conviction, Godschalk filed a petition in state court for access to DNA testing and was denied. Then, in 1995, the Innocence Project sought testing on Godschalk's behalf, and was denied. It was not until November of 2000 that a federal district court finally granted Godschalk access to the DNA evidence. Due to further legal and procedural hurdles, the evidence was not tested until January of 2002. The test results excluded Godschalk as the donor of the semen, and he was released from prison, but not before he had spent seven of his fifteen years in prison fighting to gain access to the evidence that would prove to exonerate him.

B. The Inadequacy of Traditional Post-Conviction Remedies and the Emergence of a New Cause of Action

Prisoners seeking access to evidence in the hands of the government for the purpose of DNA testing usually have

5. Kreimer & Rudovsky, supra note 3, at 547.
6. Id.
7. Id.
10. See Kreimer & Rudovsky, supra note 3, at 549.
11. See The Innocence Project, supra note 8.
12. Id.
13. Id.
14. Id.
15. “The government” for the purpose of this comment, means any federal,
several options. First, they can request to have the evidence turned over. If the government is uncooperative, they can potentially seek relief through state courts. Forty-four states now have “DNA access” statutes that allow convicted prisoners to access evidence for DNA testing under appropriate circumstances. If that route fails, prisoners can petition for a writ of habeas corpus or file similar claims for relief in state courts. If state habeas claims are unsuccessful, prisoners may then be able to file their habeas claims in federal court if they meet the requisite procedural requirements.

Unfortunately, sometimes even those with the most compelling claims are denied access to potentially exculpatory evidence under these traditional avenues of relief. Some state DNA access statutes are unduly burdensome or only allow access for certain types of crimes or sentences, and some states do not have DNA access statutes on their books. On the other hand, habeas corpus petitions—especially federal habeas petitions—are subject to stringent time limitations, and the petitioner must make a very convincing showing of “actual innocence” for the courts to give his claim any merit. This places the prisoner in a peculiar Catch-22: the very purpose for which he is seeking access to evidence is to show that he is “actually innocent,” but he may be barred from accessing the evidence in the first instance because he cannot make the requisite showing that he is “actually

state, or local entity that retains possession of physical evidence gathered from the scene of the crime for which the prisoner was convicted. Usually, police departments, district attorneys’ offices, or crime labs retain such evidence. See, e.g., Kreimer & Rudovsky, supra note 3, at 554.

16. See The Innocence Project, supra note 8. Six states do not have DNA access statutes: Alabama, Alaska, Massachusetts, Mississippi, Oklahoma, and South Dakota. Id.

17. See infra notes 42, 48 and accompanying text.

18. See infra notes 42, 48, 51 and accompanying text.

19. See Kreimer & Rudovsky, supra note 3, at 565.


21. See supra note 16 and accompanying text.

22. See infra note 51 and accompanying text.

innocent."  

For these reasons, prisoners have pursued an alternative remedy: a suit under the Civil Rights Act of 1871 (§ 1983), alleging that the government has violated their constitutional rights by withholding potentially exculpatory evidence. Filing a suit under § 1983 is advantageous over other post-conviction remedies in several ways. A § 1983 plaintiff can bypass the state courts and proceed directly to federal court; he is not required, as in habeas proceedings, to exhaust other state remedies before a federal court can hear his § 1983 action. Further, he is asserting a constitutional right, which, if recognized, supersedes conflicting statutory and common law. Thus, if a federal court recognizes a constitutional right to access evidence post-conviction for DNA testing, a uniform federal standard will overarch relevant state statutory and common law within that court’s jurisdiction. The existence of such a right would provide prisoners who seek to prove their innocence through DNA testing an important new avenue in the post-conviction litigation process.

This comment explores the issue of whether there is a constitutional right to access evidence post-conviction for the limited purpose of DNA testing, and if so, the scope of that right. Specifically, this comment focuses on the implications of recognizing such a right for the purpose of filing a claim under § 1983. This comment will begin with a discussion of

24. See Brief for Appellee at 24, Dist. Att’y’s Office for the Third Jud. Dist. v. Osborne, 521 F.3d 1118 (9th Cir. 2008) (No. 06 Civ. 35875).
26. See generally infra Parts II-IV.
29. U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803) (“[T]he particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void . . . .”).
31. See infra Parts II.C–VI.
32. The recognition of a post-conviction right to access evidence in the habeas context is outside the scope of this comment. The scope of such a right,
the interplay between habeas corpus, § 1983, and what can be termed the "Preiser-Heck" exception, which mandates that certain actions, while technically within the scope of § 1983's broad remedial power, nevertheless can be brought only as habeas petitions. Next, this comment will analyze judicial treatment of whether § 1983 suits to access DNA evidence fall within the Preiser-Heck exception. This will lead into the underlying constitutional issue of whether there is a post-conviction right to access DNA evidence. Next will follow consideration of whether it is prudential to "constitutionalize" a post-conviction right to access DNA evidence. This comment will then discuss the different ways to characterize such a constitutional right, and the constitutional "test" for determining when such a right is actionable. Finally, this comment proposes a solution to the legal problem, by articulating the best constitutional argument for recognizing a post-conviction right to access DNA evidence, and the applicable test that should govern when the right is actionable.

II. THE PROCEDURAL THRESHOLD

A. Habeas Corpus, § 1983, and the Preiser-Heck Doctrine as a Restriction upon Certain § 1983 Suits

The two primary avenues of relief to prisoners seeking redress for constitutional injury are a civil rights claim under § 1983 and a petition for a writ of habeas corpus. Both

if one exists, may be similar, if not identical in certain circumstances, to the right with respect to filing an actionable claim under § 1983. But this comment highlights the use of § 1983 as a means to compel the government to provide access to evidence within its possession for DNA testing. This is significant because, if such evidence turns out to be exculpatory, the prisoner may then use it as a foundation to file a habeas petition in the future, quite possibly alleging a different constitutional violation altogether.

34. See discussion infra Part II.A.
35. See discussion infra Part II.B.
36. See discussion infra Parts II.C, III.
37. See discussion infra Part IV.A.
38. See discussion infra Parts IV.B–C.
39. See infra Part V.
provide access to federal court to litigate constitutional claims against state officials, but they differ in scope and operation. Section 1983 provides civil redress for violations of constitutional or other federal rights in the form of damages or other injunctive relief. Habeas corpus, on the other hand, is the exclusive remedy where the petitioner challenges the fact or duration of his confinement and seeks immediate or speedier release. From a practical standpoint, bringing a § 1983 action in federal court is easier than bringing a federal habeas petition in several respects. First, a state prisoner normally is required to exhaust state remedies before filing a habeas petition in federal court. Under § 1983, prisoners generally are not required to exhaust state remedies. Second, under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), federal habeas petitions are subject to much stricter time limitations and rules against successive filings than are § 1983 actions.

42. Prisoners must first file petitions of habeas corpus in state court and exhaust their remedies in state court before filing a petition of habeas corpus in federal court. 28 U.S.C. § 2254(a)-(b)(1)(A) (2006). Federal courts have jurisdiction to consider petitions of habeas corpus, under appropriate circumstances, pursuant to § 2254. § 2254(a)-(b). Discussion of substantive and procedural standards underlying habeas corpus proceedings is largely outside the scope of this comment.

43. Heck, 512 U.S. at 480.

44. Section 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ...."

45. See, e.g., McKithen v. Brown (McKithen I), 481 F.3d 89, 99 (2d Cir. 2007); Osborne v. Dist. Att'y's Office for the Third Jud. Dist. (Osborne I), 423 F.3d 1050, 1052–53 (9th Cir. 2005).

46. Heck, 512 U.S. at 481.

47. See McKithen I, 481 F.3d at 100.

48. 28 U.S.C. § 2254(b)(1)(A) (2006); O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999) ("[S]tate prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process.").


51. 28 U.S.C. § 2244(d)(1). AEDPA provides a one-year limitation period in which to file a habeas petition in federal court after state remedies have been exhausted. Id. AEDPA also generally prohibits successive habeas claims in federal courts. See 28 U.S.C. § 2244(b)(1)–(2).
Therefore, suits which may be procedurally barred by the more stringent federal habeas requirements still may be brought as § 1983 actions. Ultimately then, "prisoners suing under § 1983 'generally face a substantially lower gate' than those prisoners petitioning for habeas." So it follows that prisoners seeking access to DNA evidence will generally prefer to do so by way of a § 1983 suit rather than a habeas petition.

The line between § 1983 suits and habeas petitions is not always clearly drawn, however, and the two remedies are not necessarily mutually exclusive. As a result, the United States Supreme Court has "attempted to harmonize the broad language of § 1983, a general statute, with the specific federal habeas corpus statute." Under a line of cases that began with Preiser v. Rodriguez, the Supreme Court has held that prisoners must bring certain claims as habeas petitions, and cannot bring them as § 1983 claims, even though they would otherwise come within the scope of § 1983.

In Preiser, several state prisoners brought civil rights actions under § 1983, challenging the constitutionality of prison disciplinary proceedings that had deprived them of their good-conduct time credits. The prisoners sought injunctive relief that would restore their time credits and result in their immediate release from prison. The prisoners argued that, although they could have brought their claims as habeas petitions, they could also properly proceed under § 1983, since their complaints "plainly came within the terms of that statute." The Court stated that the issue was not whether the prisoners' claims came within the literal

52. See, e.g., McKithen I, 481 F.3d at 100. In § 1983 actions, federal courts apply the statute of limitations of the state in which they sit. See id.
53. Id. (quoting Muhammad v. Close, 540 U.S. 749, 751 (2004) (per curiam)).
54. See discussion infra Part II.B (analyzing the split in authority regarding whether claims of access to DNA evidence can be brought as § 1983 suits).
55. See Docken v. Chase, 393 F.3d 1024, 1030–31 (9th Cir. 2004).
58. See Heck, 512 U.S. at 481; see also McKithen I, 481 F.3d at 99.
59. Preiser, 411 U.S. at 476.
60. Id. at 476–77.
61. Id. at 488.
language of § 1983, but whether § 1983 was an appropriate alternative to habeas corpus where a favorable outcome would result in the prisoners' release from confinement. It held that in situations where there is a potential overlap between § 1983 and the habeas statute, "when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole remedy is a writ of habeas corpus." More than twenty years later, in Heck v. Humphrey, the Supreme Court articulated what has become known as the "favorable termination requirement." The Court held that where a prisoner's § 1983 action, if successful, would necessarily imply the invalidity of his conviction or sentence, it must be dismissed unless he can demonstrate that the conviction or sentence has been invalidated already. Conversely, if a successful § 1983 suit would not necessarily imply the invalidity of the underlying conviction or sentence, then it may proceed, absent some independent bar to the suit.

Writing for the Court, Justice Scalia included two footnotes to help clarify when a successful § 1983 suit would necessarily invalidate the underlying conviction and when it would not. In the former category, he described a situation in which a defendant is convicted and sentenced for resisting arrest (i.e., intentionally preventing a peace officer from effecting a lawful arrest) and he subsequently brings a § 1983 action, alleging a violation of his Fourth Amendment right to be free from unreasonable seizure. Since success in the § 1983 action would require negating an element of the criminal offense and would therefore invalidate the underlying conviction, a § 1983 action would not be

62. See id. at 489, 500.
63. Id. at 489.
64. Heck v. Humphrey, 512 U.S. 477, 487 (1994); see also Osborne v. Dist. Att'y's Office for the Third Jud. Dist. (Osborne I), 423 F.3d 1050, 1053 (9th Cir. 2005).
66. Id.
67. See id. at 487 nn.6–7.
68. Id. at 487 n.6.
appropriate. On the other hand, a § 1983 suit would be appropriate where the suit is for damages attributable to an allegedly unreasonable search, even if the search produced evidence that was introduced in a criminal trial. Because of doctrines such as harmless error, inevitable discovery, and independent source, “a § 1983 action, even if successful, would not necessarily imply that the plaintiff’s conviction was unlawful.” Thus, “defendants are not prohibited from bringing § 1983 actions that increase their likelihood of gaining release, as long as they do not ‘necessarily’ vitiate the legality of their current confinement.”

Most recently, in Wilkinson v. Dotson, the Supreme Court reaffirmed that the proper inquiry under the Preiser-Heck line of cases was whether a victorious § 1983 claim would necessarily equate to immediate release from prison or a shorter prison term. The Court noted that it was irrelevant whether a successful § 1983 plaintiff would subsequently find himself in a better position to launch future attacks on his underlying conviction or sentence. Thus, Heck only applies to situations in which the prisoner’s § 1983 claims go to the “core” of habeas relief. Heck is not implicated when a plaintiff simply uses the fruits of his § 1983 success in subsequent litigation—this situation is outside the “core” of habeas relief that Heck sought to protect from a collateral § 1983 attack.

The Supreme Court’s articulation of the Preiser-Heck analysis can be summarized as follows: “the Court has focused on the need to ensure that state prisoners use only habeas corpus (or similar state) remedies when they seek to invalidate the duration of their confinement—either directly through an injunction compelling speedier release or indirectly through a judicial determination that necessarily

implies the unlawfulness of the State's custody." Within this framework, the question is whether or not a § 1983 claim for post-conviction access to DNA evidence is within the "core" of habeas relief.

B. The Threshold Inquiry: The Appropriateness of Seeking Access to DNA Evidence under § 1983

When a § 1983 plaintiff is seeking an injunction against the government compelling access to DNA evidence, a court must determine whether § 1983 is an appropriate alternative to habeas corpus relief before it can reach the merits of the plaintiff's underlying constitutional claim. In other words, the threshold procedural question is whether a successful § 1983 suit asserting a post-conviction right to evidence for the purpose of DNA testing "necessarily implies" the invalidity of the underlying conviction. The courts that have definitively ruled on this issue are split, but the weight of authority tips in favor for allowing such § 1983 actions to proceed.

1. The Argument for Prohibiting Suits Claiming a Post-Conviction Right to DNA Evidence under § 1983

In Harvey v. Horan (Harvey I), James Harvey, a Virginia state prisoner, sought a constitutional right of access to DNA

---

78. Id. at 81.
80. There are other procedural barriers that may prevent a court from addressing a § 1983 plaintiff's underlying claim. Federal abstention, see Osborne v. District Attorney's Office for the Third Judicial District (Osborne II), 521 F.3d 1118, 1126 (9th Cir. 2008), cert. granted, 129 S. Ct. 488 (2008), the "Rooker-Feldman doctrine," see Thames v. L.A. Police Department, No. CV 08-1044-RGK(MLG), 2008 WL 2641361 (C.D. Cal. June 30, 2008), and collateral estoppel, see Osborne II, 521 F.3d at 1134–35, are a few examples. Discussion of these and other doctrines is outside the scope of this comment.
81. See, e.g., Kutzner v. Montgomery County, 303 F.3d 339, 340–41 (5th Cir. 2002); Harvey II, 285 F.3d at 307.
82. Among the federal circuit courts, the Second, Seventh, Ninth, and Eleventh Circuits have answered this inquiry in the affirmative. See McKithen v. Brown (McKitthen I), 481 F.3d 89, 99 (2d Cir. 2007); Savory v. Lyons, 469 F.3d 667, 672 (7th Cir. 2008); Osborne v. Dist. Att'y's Office for the Third Jud. Dist. (Osborne II), 423 F.3d 1050, 1054 (9th Cir. 2005); Bradley v. Pryor, 305 F.3d 1287, 1291 (11th Cir. 2002). The Fourth, Fifth, and Sixth Circuits have answered in the negative. See Harvey v. Horan (Harvey I), 278 F.3d 370, 374 (4th Cir. 2002); Kutzner, 303 F.3d at 340–41; Boyle v. Mayer, 46 F. App'x 340, 340 (6th Cir. 2002).
evidence under § 1983. The district court granted summary judgment in Harvey’s favor, concluding that Harvey’s claim was not, in effect, a petition for writ of habeas corpus because he was not seeking immediate release from prison or challenging his conviction. The district court also concluded that Harvey had a due process right of access to the DNA evidence he sought. The Fourth Circuit reversed, holding that Harvey had failed to state a claim under § 1983 because by seeking access to biological evidence he was “challeng[ing] the fact or duration of his confinement.” Citing Heck, the court reasoned that “Harvey is seeking access to DNA evidence for one reason and one reason only—as a first step in undermining his conviction.” Hence, since Harvey believed that the DNA results would have been favorable, and would have allowed him to bring subsequent litigation to invalidate his conviction, “an action under 42 U.S.C. § 1983 [could not] lie.” Harvey filed a petition for rehearing and rehearing en banc. The Fourth Circuit denied the petition in Harvey v. Horan (Harvey II). Judge Luttig wrote a concurring opinion in Harvey II vociferously criticizing Judge Wilkinson’s majority opinion in Harvey I. Importantly, Judge Luttig pointed out that Judge Wilkinson seemed to conflate the procedural question under Heck with Harvey’s underlying constitutional claim. Judge Wilkinson stated “[t]he implications of circumventing Heck are no small matter. Harvey would have this court fashion a substantive right to post-conviction DNA testing out of whole cloth or the vague

83. Harvey I, 278 F.3d at 372.
85. See Harvey, 2001 WL 419142, at *5. Parts II.B–VI of this comment are devoted to the substantive constitutional question of post-conviction access to DNA evidence.
86. Harvey I, 278 F.3d at 374–75.
88. Harvey I, 278 F.3d at 375.
89. Id.
90. Harvey v. Horan (Harvey II), 285 F.3d 298 (4th Cir. 2002).
91. Id.
92. Id. at 304–26.
93. Id. at 322.
contours of the Due Process Clause." Judge Luttig argued that the court in Harvey I never should have discussed the merits of Harvey's constitutional claim, because it concluded that he failed to state a cause of action under § 1983. He pointed out that:

[T]he majority appear[ed] to believe that to resolve the issue under Heck [was] to resolve the ultimate question of whether there is or is not a right under the Constitution to access evidence post-conviction for purposes of DNA testing. Of course, such would be to mistake Heck's holding with respect to cognizance as, instead, a holding with respect to ultimate constitutional right.

However, despite Judge Wilkinson’s potentially flawed analysis, the law in the Fourth Circuit holds that a claim of post-conviction access to DNA evidence is not cognizable under § 1983.

The Fifth and Sixth Circuits have joined the Fourth Circuit in holding that a post-conviction claim to access DNA evidence cannot be brought under § 1983. While neither court did much to expand upon the reasoning in Harvey I, each court briefly touched upon the interplay between § 1983 relief and habeas relief. In Kutzner v. Montgomery County, the Fifth Circuit held that claims which are "so intertwined" with attacks on confinement are effectively transformed from § 1983 claims to habeas corpus petitions, while in Boyle v. Mayer, the Sixth Circuit stated that even though the plaintiff had no other available remedy other than § 1983, "Heck is not made inapplicable . . . by the unavailability of habeas relief.

94. Harvey I, 278 F.3d at 375. Indeed, the court in Harvey I devoted a large portion of its opinion to addressing the underlying constitutional question. See id. at 375–79. In Harvey II, Judge Luttig noted that while the Harvey I majority's entire discussion of the underlying constitutional claim is dicta, he would not "in the face of the majority's clear, repeated, and unequivocal statements" hold in the future that there is a post-conviction right of access to evidence for purposes of DNA testing. Harvey II, 285 F.3d at 312 n.3.

95. See Harvey II, 285 F.3d at 323.
96. Id. at 322 n.9.
97. See Harvey I, 278 F.3d at 372–73.
99. See Kutzner, 303 F.3d at 341; Boyle, 46 F. App'x at 340.
100. Kutzner, 303 F.3d at 341. According to the court, such claims "require habeas corpus treatment," meaning that they are subject to general habeas procedural and substantive standards. See id.
relief."\(^{101}\) Furthermore, the Sixth Circuit hinted that it would be unwilling to recognize an underlying constitutional violation under § 1983 when it stated, "Boyle has not raised a cognizable issue under § 1983 insofar as his claims do not implicate the validity of his convictions, as such claims would not rise to the level of a constitutional violation."\(^{102}\)

In sum, the courts that have not recognized post-conviction access to DNA evidence as a cognizable claim under § 1983 have relied upon Judge Wilkinson's interpretation of Heck in Harvey I. On the other hand, courts that have been willing to recognize post-conviction access to DNA evidence as a cognizable claim under § 1983 have relied upon Judge Luttig's concurrence in Harvey II.

2. The Argument for Allowing Suits Claiming Post-Conviction Right to DNA Evidence under § 1983

In Harvey II, Judge Luttig filed a concurring opinion respecting the denial of rehearing en banc even though he strongly disagreed with the majority's rationale in Harvey I.\(^{103}\) The case was moot by that point because Harvey had already obtained access to the DNA evidence through Virginia state court.\(^{104}\) Judge Luttig's concurrence in Harvey II echoed Judge King's concurrence in Harvey I,\(^{105}\) insofar as both disagreed with the majority's Heck analysis as to whether a post-conviction right of access to DNA evidence is cognizable under § 1983.\(^{106}\)

Judge Luttig emphasized that Heck is "actually a quite narrow decision," and does not apply in situations where the plaintiff might use a successful § 1983 suit as a basis for future litigation.\(^{107}\) If the plaintiff wins his § 1983 suit and

---

101. Boyle, 46 F. App'x at 340 (alteration in original) (citation omitted).
102. Id. The Sixth Circuit made its unwillingness to find a constitutional right to post-conviction access to DNA evidence explicit in Alley v. Key. Alley v. Key, No. 06-5552, 2006 WL 1313364, at *1–2 (6th Cir. May 14, 2006).
104. Id. at 298 (majority opinion).
105. See Harvey v. Horan (Harvey I), 278 F.3d 370, 381–82 (4th Cir. 2002) (King, J., concurring) (arguing that Harvey had stated a cognizable claim under § 1983).
106. See Harvey II, 285 F.3d at 304–11 (Luttig, J., respecting denial of rehearing en banc); Harvey I, 278 F.3d at 370.
107. See Harvey II, 285 F.3d at 308 (Luttig, J., respecting denial of rehearing en banc).
gets access to the evidence, it does not "necessarily imply" the invalidity of his underlying conviction. The results of any DNA tests that are performed may be exculpatory, inconclusive, or even inculpatory. Furthermore, even if the results are exculpatory, "the petitioner would have to initiate an entirely separate action at some future date, in which he would have to argue for his release upon the basis of a separate constitutional violation altogether." For these reasons, Judge Luttig concluded "it [is not] even arguable that a post-conviction action merely to permit access to evidence" for the purpose of DNA testing is cognizable under § 1983.

Since Harvey II, the Second, Seventh, Ninth, and Eleventh Circuits have adopted Judge Luttig's position, holding that a post-conviction claim to access DNA evidence may proceed under § 1983. Furthermore, several federal district courts have since recognized such a cause of action under § 1983.

It may not be a coincidence that most of these cases were handed down after the Supreme Court's decision in Wilkinson v. Dotson. In Wilkinson, Justice Breyer implicitly agreed with Judge Luttig's analysis—without explicitly saying it—by emphasizing that the plaintiff's motives in bringing a § 1983 suit are irrelevant, as is the possibility that he will use a § 1983 suit as a basis for attacking his confinement in the future. Thus, the fact that "in all likelihood the prisoners hope these actions will help bring about earlier release" does not mean that habeas is their sole avenue for relief. Still,
the factual context in *Wilkinson* was slightly different; the Supreme Court will soon address the issue of whether a prisoner’s claim seeking access to DNA evidence is cognizable under § 1983.117

A majority of federal circuit courts now hold that a § 1983 plaintiff may bring a constitutional claim seeking post-conviction access to DNA evidence.118 In light of the Supreme Court’s decision in *Wilkinson v. Dotson*, those courts that have not ruled definitively on the issue will likely join the Second, Seventh, Ninth, and Eleventh Circuits in holding that such a cause of action may proceed under § 1983.119 Therefore, as Judge Luttig predicted in *Harvey II*, more courts will begin to grapple with the underlying constitutional question that is the focus of the remainder of this comment: whether there is a constitutional post-conviction right to access evidence for the purpose of DNA testing, and if so, when that right may be asserted.120

C. Past the Procedural Threshold: Addressing the Merits of a Constitutional Claim to Access DNA Evidence Post-Conviction

Once a jurisdiction has determined that a claimant seeking post-conviction access to evidence may proceed under § 1983, it then must address the underlying substantive claim: the plaintiff’s assertion that, by denying him access to the evidence that he seeks to perform DNA testing, the government has violated his constitutional rights.121 The Ninth Circuit,122 and some lower courts, to varying extents, have recognized the right.123 On the other side, the Sixth

---

117. After the Second Circuit recognized such a cause of action in *McKithen I*, they remanded to the district court to consider the plaintiff’s substantive constitutional claims. *McKithen v. Brown* (*McKithen I*), 481 F.3d 89, 108 (2d Cir. 2007). However, before the district court could consider the substantive claims, the appellees filed a petition for certiorari with the Supreme Court, which was denied. *Brown v. McKithen*, 128 S. Ct. 1218 (2008).

118. See *supra* note 82 and accompanying text.

119. See *supra* text accompanying notes 114–117.

120. See *Harvey v. Horan* (*Harvey II*), 285 F.3d 298, 306–07 (4th Cir. 2002) (Luttig, J., respecting denial of rehearing en banc) (“[T]hese questions cannot long be avoided, now that the science is available.”).

121. See, e.g., id. at 306–07.


Circuit, in an unpublished opinion, affirmed a district court determination that no general constitutional right to "post-judgment DNA testing" exists.\textsuperscript{124} The Fourth Circuit seemingly came to the same conclusion, but its discussion of the precise constitutional issue was arguably dicta and thus may not foreclose the possibility of a different result in the future.\textsuperscript{125} Still, other courts have touched upon the issue, but, given the respective postures of the cases as presented, would not or could not definitively rule one way or the other.\textsuperscript{126} Finally, the Eleventh Circuit, although appearing hesitant to recognize a general constitutional right to access evidence post-conviction, "[did] not foreclose the possibility that a § 1983 plaintiff could, under some extraordinary circumstances, be entitled to post-conviction access to biological evidence for the purpose of performing DNA testing."\textsuperscript{127}

Courts are not only split as to whether there is a general constitutional right to post-conviction access to evidence for DNA testing; their views also differ as to where in the Constitution the right is derived and the scope and limitations of such a right. Most courts that have recognized the right have begun their analysis by analogizing to the due process requirements of \textit{Brady v. Maryland},\textsuperscript{128} which requires the government to produce all potentially exculpatory evidence to ensure that the defendant's trial is fair.\textsuperscript{129} Although the \textit{Brady} requirements have traditionally been

\begin{footnotesize}
\textsuperscript{124} Alley v. Key, No. 06-5552, 2006 WL 1313364, at *2 (6th Cir. May 14, 2006).
\textsuperscript{125} See supra note 94 and accompanying text.
\textsuperscript{126} E.g., Bryson v. Gonzales, 534 F.3d 1282, 1287 (10th Cir. 2008) (dismissing petitioner's complaint on other grounds); McKithen v. Brown (\textit{McKithen I}), 481 F.3d 89, 106 (2d Cir. 2007) (remanding to the district court to consider the "extraordinarily important, and delicate" constitutional issue in the first instance); Savory v. Lyons, 469 F.3d 667, 675 (7th Cir. 2006) (finding no need to decide constitutional issue because appellant's claims were not timely); Osborne v. Dist. Att'y's Office for the Third Jud. Dist. (\textit{Osborne I}), 423 F.3d 1050, 1056 (9th Cir. 2005) (remanding constitutional question to district court to address in the first instance); Moore v. Lockyer, No. C 04-1952 MHP, 2005 WL 2334350, at *10 (N.D. Cal. Sept. 23, 2005) (discussing constitutional issue but case decided on other grounds).
\textsuperscript{127} Grayson v. King, 460 F.3d 1328, 1339 (11th Cir. 2006).
\textsuperscript{128} Brady v. Maryland, 373 U.S. 83 (1963).
\end{footnotesize}
interpreted as trial rights, the "same motivations undergirding Brady, the desire to avoid wrongful convictions by providing access to evidence in the prosecutor's possession," arguably apply in the post-conviction context as well.\textsuperscript{130} Along a similar line of reasoning, courts have analyzed the § 1983 plaintiff's procedural due process rights under the framework established in \textit{Mathews v. Eldridge}.\textsuperscript{131} Under \textit{Mathews}, "identification of the specific dictates of due process" generally requires balancing three factors: the private interests that will be affected by state action; the risk of an erroneous deprivation of such interests through the procedures used, including the probative value of additional or substitute procedural safeguards; and the government's interest, taking into account the additional fiscal and administrative burdens that additional procedural safeguards would entail.\textsuperscript{132} The \textit{Mathews} factors are used to analyze whether government procedures are sufficiently adequate to protect the plaintiff's substantive rights.\textsuperscript{133}

Next, courts have discussed a § 1983 plaintiff's claim in terms of substantive due process, one of the most subjective and controversial areas of constitutional law.\textsuperscript{134} Substantive due process bars certain arbitrary government actions, regardless of the fairness of the procedures used to implement them.\textsuperscript{135} A § 1983 plaintiff may argue that by denying access to evidence when the plaintiff only seeks to perform DNA testing, the government is acting in a wholly arbitrary manner, and thus in violation of due process.\textsuperscript{136} Finally, as a corollary to procedural and substantive due process rights, some courts have given credence to the argument that by

\begin{itemize}
\item \textsuperscript{132} McKithen v. Brown (McKithen I), 481 F.3d 89, 107 (2d Cir. 2007) (citing Mathews, 424 U.S. at 335).
\item \textsuperscript{133} See Wade, 460 F. Supp. 2d at 246.
\item \textsuperscript{134} See, e.g., McKithen I, 481 F.3d at 107 n.17; Harvey II, 285 F.3d at 318–19.
\item \textsuperscript{135} Harvey II, 285 F.3d at 318 (citing Daniels v. Williams, 474 U.S. 327, 331 (1986)).
\end{itemize}
denying access to evidence, the government is unconstitutionally denying meaningful access to the courts. 137

Courts squarely addressing the issue may find the constitutional right in some or all of the above mentioned sources, or they may be unconvinced that any constitutional right to access evidence post-conviction exists at all. 138 Undeniably though, if a constitutional right exists to access evidence post-conviction, it must be conscribed to eliminate frivolous claims and to reflect the reality that the criminal justice system has an interest in preserving the finality of its judgments. 139 Therefore, courts must address not only whether there is a constitutional right in the first instance, they must also balance the interests of the prisoner against the interests of the government to determine when such a right becomes actionable.

III. IDENTIFICATION OF THE PROBLEM

Due process jurisprudence is vast and amorphous. With the relative novelty of DNA evidence, § 1983 claimants must articulate novel arguments that emphasize the pervasive and fundamental nature of due process in the American legal system. The remainder of this comment specifically focuses on whether a § 1983 plaintiff can fit his claim of post-conviction access to DNA evidence into one or more recognized due process concepts. This requires engaging in essentially a three step inquiry.

First, is it prudential for courts to engage in the "conversation-stopping process" of constitutionalizing a right to access evidence post conviction, or are state legislatures and Congress better equipped to determine the circumstances under which prisoners may access such evidence? 140 Answering this question requires an assessment of the role courts should play vis-à-vis lawmakers. On one hand, federal-state comity may dictate that state legislatures should be able to preserve the legitimacy of their criminal judgments and define the circumstances under which they may be collaterally attacked. 141 Furthermore, legislatures

137. See, e.g., Wade, 460 F. Supp. 2d. at 249–51.
138. See generally infra Parts III–IV.
139. See generally infra Parts III–IV.
140. See generally infra Part IV.
141. See discussion infra Part IV.A.
may be better able to wrestle out the thorny questions that may arise when a prisoner seeks access to evidence after conviction. On the other hand, prisoners throughout the country do not have uniform ability to access potentially exculpatory evidence, and some prisoners with truly meritorious claims may have no other means of recourse. In considering whether to constitutionalize a right to access evidence post-conviction, courts must balance concerns of federalism with interests in vindicating individual rights.

Next, what is the most apt constitutional argument for recognizing a post-conviction right to access evidence? Most commonly, § 1983 plaintiffs seek to extend the rule in Brady v. Maryland to the post-conviction context. Also, a § 1983 plaintiff may seek to establish a procedural due process right under Mathews v. Eldridge, concurrently arguing that he has a substantive due process right—a "fundamental" right—to access evidence post-conviction for DNA testing.

Finally, what might be the constitutional scope of such a right—what is the "test" for determining when a prisoner's constitutional rights have been violated? In this context, prisoners again have relied upon Brady v. Maryland and its "materiality" standard, which requires the prosecutor to turn over "material" exculpatory evidence to the defendant. At least one court has hinted that the materiality test may be the outer limit of a constitutional right to access evidence post-conviction, while others have intimated that the right should be "very narrowly confined," or should be limited only to "extraordinary circumstances."

Given the now vital role that DNA technology plays in the criminal justice system, courts will continue to grapple with these questions. As with the development of other subjective areas of constitutional law, different courts will

142. See discussion infra Part IV.A.
143. See discussion infra Part IV.A.
144. See discussion infra Part IV.A.
145. See supra Part II.C; infra Part IV.B.2.
146. See supra Part II.C; infra Parts IV.B.3-4.
147. See discussion infra Parts IV.B.2, IV.C.
150. Grayson v. King, 460 F.3d 1328, 1339 (11th Cir. 2006).
reach different conclusions. The implications of recognizing a constitutional right to access evidence post-conviction for DNA testing undoubtedly will have a large impact on the criminal justice system. It will provide a significant new avenue for prisoners to attack their convictions, especially in cases where convictions were based primarily upon older and ostensibly less reliable science. It may also place considerable burden on state and local governments, who would have to, at minimum, bear the administrative costs of preserving and turning over evidence. Moreover, in some cases, state and local governments would likely have to pay for the DNA testing itself.

For these reasons, the legal community will be affected substantially by the development of this "extraordinarily important, and delicate, constitutional issue."

The remainder of this comment will focus on analyzing a § 1983 plaintiff's claim of a constitutional right to access evidence post-conviction for the purpose of DNA testing.

IV. ANALYSIS

A. Constitutionalizing the Right to Access Evidence Post-Conviction for Purposes of DNA Testing

As courts begin to address squarely the issue of whether a constitutional right exists to access evidence post-conviction for the purpose of DNA testing, a primary issue will be whether courts should undertake the subjective process of "constitutionalization" at all, or whether they should leave the task to state legislatures to create laws that allow for post-conviction DNA testing. Indeed, no matter what one's

---

151. See discussion supra Parts I.B, II.A.
152. Surely, recognizing a constitutional right to access evidence post-conviction would raise these types of collateral issues. See Harvey II, 285 F.3d at 300–01. Although resolving these types of concerns is largely outside the scope of this comment, they are important factors to consider in evaluating the scope of the right. See id.; see also Osborne v. Dist. Att'y's Office for the Third Jud. Dist., 445 F. Supp. 2d 1079, 1081–82 (D. Alaska 2006) (recognizing a "very limited constitutional right to the testing sought," the court considered it significant that the testing could be easily performed without cost or prejudice to the government).
153. McKithen v. Brown (McKithen I), 481 F.3d 89, 106 (2d Cir. 2007).
154. See infra Parts IV–VI.
155. See Harvey II, 285 F.3d at 300 (discussing how attempting to fashion a novel due process right in the courts will create intractable problems that are
views are about the proper role of courts in American society, "fashion[ing] a substantive right to post-conviction DNA testing out of whole cloth or the vague contours of the Due Process Clause" is no easy task.\textsuperscript{156} It would mean federal judges would have to superimpose their own value judgments upon those of Congress and state legislatures. Nevertheless, as Justice Marshall famously said, "[i]t is emphatically the province and duty of the judicial department to say what the law is[,]" and if both the law and the Constitution apply to a particular case, the Constitution must govern.\textsuperscript{157}

1. The Argument for Judicial Restraint

Those against constitutionalizing a right of access to evidence post-conviction argue that "[e]stablishing a constitutional due process right under § 1983 to retest evidence with each forward step in forensic science would leave perfectly valid judgments in a perpetually unsettled state."\textsuperscript{158} In \textit{McCleskey v. Zant},\textsuperscript{159} the Supreme Court stated that "[o]ne of the law's very objects is the finality of its judgments."\textsuperscript{160} The Court noted that the criminal law is deprived of much of its deterrent and retributive effect without finality.\textsuperscript{161} Moreover, states traditionally have wide latitude to articulate societal norms through criminal law; federal courts should be hesitant to fashion new rules that may undermine the legitimacy of valid state criminal convictions.\textsuperscript{162} Thus, the argument goes, "[w]hile finality is not the sole value in the criminal justice system, neither is it subject to the kind of blunt abrogation that would occur with the recognition of a due process entitlement to post-conviction access to DNA evidence."\textsuperscript{163}

Those against constitutionalizing a right of access to
DNA evidence post-conviction argue that if states wish to create mechanisms by which state prisoners can gain access to evidence for DNA testing, then state legislatures are free to do so.\textsuperscript{164} Indeed, legislatures have been quite active in this area: forty-four states and the federal government have statutes that allow for prisoners to access DNA evidence under appropriate circumstances.\textsuperscript{165} To constitutionalize this area would be to override these legislative efforts, treating Congress, state legislatures, and state court systems as subordinate in "determining the entitlements of individuals to the fruits of scientific advances."\textsuperscript{166} In rather dramatic fashion, Judge Wilkinson argued in \textit{Harvey II} that this would signify nothing less than "a loss of faith in democracy . . . [c]aus[ing] legislatures across our nation to simply surrender the impulse to innovate based on the assumption that the federal courts are prepared to step in at any time."\textsuperscript{167}

It is questionable whether Judge Wilkinson's ominous forecast will come true in the event more courts recognize a constitutional right to access DNA evidence post-conviction, but there is something to be said for all the legislation addressing the subject. The constitutional dimensions of the post-conviction right to access evidence will develop in state and federal courts for years.\textsuperscript{168} The Supreme Court will likely address the issue in the near future. In jurisdictions that refuse to constitutionalize a post-conviction right to access DNA evidence, or jurisdictions that have not yet addressed the issue, the state and federal statutes can serve as "gap fillers" for prisoners who wish to access evidence in the hands of the government. In other words, prisoners may still have an alternative remedy if the Supreme Court declines to afford this right constitutional protection. Perhaps constitutionalizing a post-conviction right to access DNA

\textsuperscript{164} See id. ("[W]e do not declare that criminal defendants should not be allowed to avail themselves of advances in technology. Rather, our decision reflects the core democratic ideal that if this entitlement is to be conferred, it should be accomplished by legislative action rather than by a federal court as a matter of constitutional right.").


\textsuperscript{166} Harvey v. Horan (\textit{Harvey II}), 285 F.3d 298, 304 (4th Cir. 2002).

\textsuperscript{167} Id. at 303.

\textsuperscript{168} Only a few federal circuit courts and a handful of lower courts have definitively ruled on the issue. See supra notes 122–27 and accompanying text.
evidence, rather than signifying a "loss of faith" in legislatures, simply adds another dimension—a constitutional "floor"—below which legislation will not pass muster, but above which lawmakers are free to create alternative standards. 169

2. The Argument in Favor of Constitutionalizing a Post-Conviction Right to Access DNA Evidence

Those who argue that the right to access evidence post-conviction for DNA testing does have a constitutional dimension emphasize that the advances of DNA technology are no ordinary scientific developments. 170 DNA evidence can, in certain cases, exonerate criminal defendants—or those wrongfully convicted—to a practical certainty. 171 Thus, DNA testing is categorically different from other types of evidence. 172 Its unique qualities "justify a completely different balance than the courts usually strike in addressing [other] post-conviction challenges." 173

Furthermore, proponents of recognizing a constitutional right to post-conviction access to DNA evidence argue that while the government has a legitimate interest in the finality of its convictions, this interest cannot override those rare circumstances where DNA evidence can conclusively prove guilt or innocence. 174 After all, the criminal justice system

169. If the constitutional standard is as limited as some judges have intimated it might be, see infra Part IV.C, then pursuing redress through a state DNA access statute might be preferable. For example, California Penal Code § 1405(c)(1)(B) provides that a motion requesting access to DNA evidence will be granted upon a showing of, among other things, "how the requested DNA testing would raise a reasonable probability that the convicted person's verdict or sentence would be more favorable if the results of DNA testing had been available at the time of conviction." CAL. PENAL CODE § 1405(c)(1)(B) (Deering 2008). If the constitutional right to access DNA evidence post conviction only applies to "extraordinary circumstances," see Grayson v. King, 460 F.3d 1328, 1339 (11th Cir. 2006), then the prisoner's probability of success will probably be greater under the California statute.


171. Harvey II, 285 F.3d at 305 n.1 (citing David J. Balding & Peter Donnelly, Inferring Identity from DNA Profile Evidence, 92 PROC. NAT'L ACAD. SCI. 11741 (1995)).

172. See Wade, 460 F. Supp. 2d at 231.

173. Id. ("When the evidence is a new witness, or a recanted confession, . . . it is [more] difficult to justify the cost of a further proceeding—the financial cost to the government and the emotional cost to the victims.").

174. See Harvey II, 285 F.3d at 306.
requires a very high degree of proof to convict, but it does not require proof beyond all doubt.\textsuperscript{175} It would not be an indictment upon the system to recognize that jury verdicts can be fallible; to the contrary, it would be a "high credit" to the system to recognize this reality and provide a constitutional safety valve for those instances where DNA science can potentially exonerate the innocent.\textsuperscript{176} The government has an interest in finality, but it does not have an interest in imprisoning the wrong person.\textsuperscript{177}

The aforementioned arguments, both for and against recognizing a constitutional right to access DNA evidence post-conviction, are essentially policy arguments. They reflect judges' differing views on the proper role of courts. Those against recognizing the right are apprehensive about aggressive federal judges engaging in prescriptive lawmaking and usurping the proper role of legislatures.\textsuperscript{178} Proponents for recognizing the right argue that DNA evidence is unique—the evidentiary equivalent of a "watershed" rule of constitutional law.\textsuperscript{179} Therefore, allowing prisoners access to DNA evidence that may be crucial in challenging their imprisonment in the future must have constitutional implications.\textsuperscript{180} More and more judges are acknowledging that there must be some constitutional right: at some point along the continuum where a prisoner is seeking access to evidence and the government is steadfastly refusing to turn it over, there must be constitutional implications.\textsuperscript{181} The inquiry then focuses upon how to best characterize the right, and at what point along the continuum the constitutional

\textsuperscript{175.} Id.
\textsuperscript{176.} Id.
\textsuperscript{177.} See Wade, 460 F. Supp. 2d at 248–49.
\textsuperscript{178.} See Harvey II, 285 F.3d at 301.
\textsuperscript{179.} Id. at 306 (Luttig, J., respecting denial of rehearing en banc) (citing Teague v. Lane, 489 U.S. 288 (1989)).
\textsuperscript{180.} See id. at 306.
claim becomes actionable.  

B. How to Characterize the Right to Access DNA Evidence Post-Conviction

1. The Due Process Backdrop

The Supreme Court has often remarked that due process, unlike some legal rules, is not technical, but rather is a fluid concept "adaptable to the exigencies of a particular factual context." Along this line of reasoning, the Court has developed "what might loosely be called the area of constitutionally guaranteed access to evidence." Although the Court has never expressly ruled that a post-conviction constitutional right to access DNA evidence exists, it has not foreclosed the possibility either. The Court has, however, repeatedly stated the maxim that the central purpose of the criminal justice system is to convict the guilty and free the innocent. Therefore, if, as Justice Harlan famously posited, "it is far worse to convict an innocent man than to let a guilty man go free," then the reality of wrongful convictions must "challenge[] us to reaffirm our commitment to the principle that the innocent should be freed."

2. Due Process and the Brady v. Maryland Analogy

In Brady v. Maryland, the Supreme Court held that suppression of evidence by the prosecution favorable to the defendant is a violation of due process if the evidence is material to guilt or punishment, regardless of the good faith

---

182. See Wade, 460 F. Supp. 2d at 231 n.6.
186. See Wade, 460 F. Supp. 2d at 248.
189. McKithen v. Brown (McKithen I), 481 F.3d 89, 92 (2d Cir. 2007).
or bad faith of the prosecution.\textsuperscript{190} Evidence is considered "material" if there is a "reasonable probability that, had the evidence been disclosed to the defense, the result in the proceeding would have been different."\textsuperscript{191} A "reasonable probability" is a "probability sufficient to undermine confidence in the outcome."\textsuperscript{192} The underlying principle behind \textit{Brady} and its progeny is that the chief aim of the criminal justice system is not only to convict the guilty but to ensure that the innocent are not wrongfully convicted.\textsuperscript{193}

Section 1983 plaintiffs seeking post-conviction access to DNA evidence have argued that \textit{Brady}, which has traditionally applied to discovery before and during trial,\textsuperscript{194} extends to the post-conviction context as well. They argue that \textit{Brady} did not foreclose the possibility that the prosecutor has a similar duty to disclose evidence in the post-conviction context,\textsuperscript{195} and that the Court has expanded the \textit{Brady} doctrine in other contexts.\textsuperscript{196} However, the Court has been quite reluctant to revisit factual determinations of guilt or innocence after conviction in the habeas corpus context.\textsuperscript{197} The Court has observed that the determination of guilt is a "decisive and portentous event,"\textsuperscript{198} and reexamining a jury's factual determination after the passage of time "only diminishes the reliability of criminal adjudications."\textsuperscript{199}

In \textit{Harvey I}, Judge Wilkinson rejected the extension of \textit{Brady} to the post-conviction context, instead considering Harvey's § 1983 claim "as one brought in habeas corpus."\textsuperscript{200}

\begin{itemize}
\item \textsuperscript{190} Brady v. Maryland, 373 U.S. 83, 87 (1963).
\item \textsuperscript{191} United States v. Bagley, 473 U.S. 667, 682 (1985).
\item \textsuperscript{193} Harvey v. Horan (\textit{Harvey I}), 285 F.3d 298, 316 (4th Cir. 2002) (Luttig, J., respecting denial of rehearing en banc) (citing \textit{Brady}, 373 U.S. at 87; United States v. Agurs, 427 U.S. 97, 110–11 (1976)).
\item \textsuperscript{195} See \textit{Harvey II}, 285 F.3d at 315.
\item \textsuperscript{196} See \textit{Wade}, 460 F. Supp. 2d at 245. These other contexts include: "where the evidence is of obvious value to the defense," \textit{Agurs}, 427 U.S. at 110; revealing the contents of a plea agreement with major government witnesses, Giglio v. United States, 405 U.S. 150, 154 (1972); disclosure of impeachment evidence, \textit{Bagley}, 473 U.S. at 676; and information held by police but unknown to prosecutors, Kyles v. Whitley, 514 U.S. 419 (1995).
\item \textsuperscript{197} See Herrera v. Collins, 506 U.S. 390, 400–01 (1993).
\item \textsuperscript{198} Id. at 401 (quoting Wainwright v. Sykes, 433 U.S. 72, 90 (1977)).
\item \textsuperscript{199} \textit{Herrera}, 506 U.S. at 403.
\item \textsuperscript{200} Harvey v. Horan (\textit{Harvey I}), 278 F.3d 370, 379 (4th Cir. 2002).
\end{itemize}
The Fourth Circuit concluded that since Harvey had received a fair trial and had an opportunity to test the evidence using the best technology available at the time of trial, he had not stated a valid *Brady* claim.\(^{201}\) Then, somewhat paradoxically, the court pronounced "even were we to accept Harvey's analogy to *Brady*, it would only reinforce the conclusion that Harvey is bringing a habeas action rather than a § 1983 claim because *Brady* claims are typically raised in habeas petitions."\(^{202}\) Therefore, since the court was unwilling to accept Harvey's extension of *Brady* principles to the post-conviction context, it took the initiative to transform his § 1983 claim into a writ of habeas corpus.\(^{203}\)

Similarly, in *Grayson v. King*, the Eleventh Circuit rejected the *Brady* analogy.\(^{204}\) The court agreed with the Fourth Circuit's reasoning in *Harvey I*, stating that *Brady* only applies to the suppression of evidence prior to and during trial.\(^{205}\) The court again emphasized that the petitioner received a fair trial at which the evidence was available and presented.\(^{206}\) Thus, the court analyzed the petitioner's § 1983 claim within the specific procedural confines of *Brady*. Finding that it did not fit, the court rejected the petitioner's *Brady* analogy.\(^{207}\)

In *Wade v. Brady*, an influential case from the District Court of Massachusetts, Judge Gertner criticized the narrow view of *Brady* by characterizing it as an approach that "subordinate[s] the pursuit of justice to an arid obsession with procedure."\(^{208}\) In accepting the post-conviction *Brady* analogue, Judge Gertner argued that, under a more fluid concept of due process, "the same interest that motivated *Brady*—avoiding the wrongful conviction of the innocent—still applies in the post-conviction setting . . . ."\(^{209}\) She conceded that restricting *Brady* to pre-trial discovery may

\(^{201}\) Id. at 378–79.
\(^{202}\) Id. at 379.
\(^{203}\) Id.
\(^{204}\) Grayson v. King, 460 F.3d 1328, 1338 (11th Cir. 2006); accord Alley v. Key, No. 06-5552, 2006 WL 1313364, at *2 (6th Cir. May 14, 2006).
\(^{205}\) Grayson, 460 F.3d at 1337.
\(^{206}\) Id. at 1338.
\(^{207}\) Id. at 1339–40.
\(^{209}\) Id. at 247–48.
have made sense before the advent of DNA. But, unlike the “perceived unreliability of most new evidence,” such as new witness testimony or a recanted confession, DNA evidence “fundamentally alters the traditional Due Process calculus.” No longer, as the Supreme Court earlier stated in Herrera v. Collins, is the determination of guilt or innocence solely “within the limits of human fallibility.”

Other courts have since agreed with Judge Gertner’s analysis of Brady in the post-conviction context. In Osborne v. District Attorney’s Office for the Third Judicial District (Osborne II), the Ninth Circuit became the first federal court of appeals to recognize a post-conviction right to access DNA evidence. In doing so, the Ninth Circuit applied the Brady rationale to the post-conviction context. The court juxtaposed cases that have recognized a post-conviction right to access DNA evidence with those that have not. Finding the latter line of cases more persuasive, and relying on a previous habeas case within the circuit, the

---

210. Id. at 248.
211. Id.
215. Osborne II, 521 F.3d at 1132.
216. Id. at 1128–32.
217. Id. at 1131–32. The court noted that cases which do not recognize the right share two basic commonalities: they conflate the right of access to evidence with the ultimate right to habeas relief, and they read Brady and its progeny as applicable only in the trial context. Id. at 1131 (citing Osborne v. State, 110 P.3d 986, 992 (Alaska Ct. App. 2005); Harvey v. Horan (Harvey I), 278 F.3d 370, 375–76 (4th Cir. 2002); Grayson v. King, 460 F.3d 1328, 1137, 1342 (11th Cir. 2006)). The court then observed that cases which do recognize the right distinguish between the right to access evidence and habeas relief, and extend Brady due process principles to the post-conviction context. Id. at 1131–32 (citing Harvey v. Horan (Harvey II),) 285 F.3d 298, 322–24 (4th Cir. 2002); Wade v. Brady, 460 F. Supp. 2d 226, 246 (D. Mass. 2006); Moore v. Lockyer, No. C 04-1952 MHP, 2005 WL 2334350, at *8 (N.D. Cal. Sep. 23, 2005)).
218. See Thomas v. Goldsmith, 979 F.2d 746 (9th Cir. 1992). In Thomas v. Goldsmith, the Ninth Circuit ordered disclosure of potentially exculpatory biological evidence in a habeas proceeding where the defendant sought to use the evidence to make a “gateway” showing of actual innocence. Id. at 749–50. The court expressly applied Brady to find a post-conviction right in the habeas context. Id. In Osborne II, the court rejected the government’s efforts to distinguish Thomas and extended the reasoning in Thomas to the § 1983
Ninth Circuit vindicated Judge Gertner's *Brady* analysis, emphasizing that *Brady* stands for "fundamental fairness, the prosecutor's obligation to do justice rather than simply obtain convictions, and the constitutional imperatives of protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system."²¹⁹ Thus, in rejecting a narrow reading of *Brady*, the Ninth Circuit held that petitioner Osborne was entitled to assert a post-conviction due process right under § 1983 to access potentially exculpatory DNA evidence.²²⁰

*Osborne II* and *Wade* will be pivotal decisions for proponents of recognizing a right to post-conviction access to DNA evidence. Judge Gertner provides the most thorough and convincing articulation of the rationale behind extending *Brady* due process requirements to the post-conviction context.²²¹ Nonetheless, courts are still fairly split on the issue.²²² But, given that the *Brady* analogy is probably the most apt constitutional argument for recognizing a post-conviction right to DNA evidence,²²³ the issue will continue to be litigated. Judge Gertner's analysis may give other courts the ammunition they need to tilt the balance in favor of analogizing the *Brady* due process right to the post-conviction context.

3. **Mathews v. Eldridge and Procedural Due Process**

Section 1983 plaintiffs may also frame their constitutional claim in terms of *procedural* due process. Due process requires such procedural safeguards as the particular situation demands.²²⁴ Procedural adequacy is required only to protect *substantive* rights; one does not possess an interest in mere process without any underlying substantive interest.²²⁵ In the context of post-conviction access to DNA evidence, procedural due process entails the "right to have

---

²¹⁹. *Osborne II*, 521 F.3d at 1131–32 (internal quotations omitted).
²²⁰. *Id.* at 1132.
²²². See supra notes 122–27 and accompanying text.
²²³. Brief for Appellee at 18–19, Dist. Att'y's Office for the Third Jud. Dist. v. Osborne, 521 F.3d 1118 (9th Cir. 2008) (No. 06 Civ. 35875).
²²⁵. See *Harvey v. Horan (Harvey II)*, 285 F.3d 298, 315 (4th Cir. 2002) (Luttig, J., respecting denial of rehearing en banc).
previously-produced forensic evidence either released to the convicted individual for . . . DNA testing at his or her own expense, or submitted by the government for such testing, with the test results to be provided thereafter to the convicted individual. In effect, then, the government would be required to take certain actions in order to protect the prisoner's substantive interest in testing potentially exculpatory DNA evidence.

In Mathews v. Eldridge, the Supreme Court indicated three factors to consider in analyzing a procedural due process claim. Before consideration of these factors, however, one must prove that government action or policy has deprived him of an interest in life, liberty, or property. Once an interest has been identified, a court must consider three distinct factors to determine what procedure is "due": first, the private interest that will be affected by government action; second, the risk of an erroneous deprivation of such interest through the procedures used, including the probative value, if any, of additional or substitute procedures; and third, the government's interest, including fiscal and administrative burden that the procedural requirement would entail.

The prisoner arguably has a liberty interest in pursuing freedom by gaining access to evidence that could prove beyond all doubt that he did not commit the crime for which he was convicted. The risk of erroneous deprivation of such interest—if the prisoner has such a substantive liberty interest—is apparently high. If the government does not turn over the evidence, then the prisoner will likely be deprived of his interest in pursuing DNA testing and possibly future exoneration. However, the second prong of the Mathews framework takes into account the probative value of substitute procedural safeguards, which, in this case, may

---

226. Id.
depend upon the availability of statutory relief. If statutory relief is available, the risk of erroneous deprivation of liberty may be mitigated. As to the third prong, the government's interest is essentially twofold: it has an interest in maintaining the finality of criminal convictions, and it will incur fiscal costs in turning over the evidence to the prisoner and perhaps also the cost of performing the DNA testing itself. Balancing these factors is inevitably a fact-intensive inquiry, which may include considering the seriousness of the crime for which the prisoner was convicted, whether the prisoner has been sentenced to death or is only seeking earlier release from prison, and the potential availability of other means of relief.

McKithen v. Brown (McKithen II) provides a thorough analysis of the post-conviction "liberty" interest and application of the Mathews framework. The court considered "whether this residual post-conviction liberty interest encompasses an interest in accessing or possessing potentially exonerative biological evidence." Writing for the Eastern District of New York, Judge Gleeson emphasized that "liberty" in the context of procedural due process is a technical term, synonymous with a "conditional entitlement." With that in mind, the court entertained several potential grounds for finding that prisoners might retain a liberty interest in acquiring DNA evidence after conviction.

The court concluded first that, at least in noncapital

231. McKithen I, 481 F.3d at 108 n.18.
232. See id.
233. See Wade, 460 F. Supp. 2d at 248–49 (citing Calderon v. Thompson, 523 U.S. 538, 555–56 (1998)) ("[T]he interest in finality is, in reality, an amalgam of several interests, namely: retribution, deterrence, the quality of judging, and the interest of victims in finality.").
234. See McKithen I, 481 F.3d at 107–08.
236. Id. at 453 (citing McKithen I, 481 F.3d at 106–07). The appellate court in McKithen I directed the district court on remand to consider the contours of a post-conviction right to access DNA evidence. Id.
237. Id. at 452. The court explained, "[a] conditional entitlement is called an 'interest' for the purposes of procedural due process analysis, so that a 'liberty interest' in taking some action is a legal entitlement to take that action under certain conditions." Id. at 451. Procedural due process rights, then, "are the rights to appropriate procedures to determine if the individual possessing an interest satisfies the conditions for the entitlement." Id.
238. Id. at 453.
cases, a duly convicted prisoner does not have a liberty interest—or a "conditional entitlement"—in pursuing release from custody before his sentence expires. Judge Gleeson reasoned the conviction itself, with all its procedural safeguards, extinguishes a prisoner's entitlement to pursue freedom. However, the court ultimately did conclude that where the government chooses to provide executive clemency, statutory relief, or other relief that may provide post-conviction access to the courts, a convicted prisoner retains a liberty interest entitling him to meaningful access to these mechanisms. The court used the Mathews factors to determine the scope of "meaningful access." The Mathews analysis led the court to conclude that "meaningful access" means where a state has a clemency mechanism in place, including a parole system, the government must provide access to DNA evidence if "the testing is nonduplicative[,] and assuming exculpatory results, the results of the test would undermine confidence in the outcome of the trial." Thus, the court defined the applicable procedural due process standard where the prisoner is found to have a recognized

239. Id. at 457. The court acknowledged, “an innocent prisoner has a tremendous and justifiable interest, in any nontechnical sense of the term, in release from prison.” Id. at 457 n.19 (citing Schlup v. Delo, 513 U.S. 298, 321 (1995)) (emphasis added). Nonetheless, the court held that a prisoner—even an innocent prisoner—does not have a conditional entitlement to be released from prison before the end of his sentence, only a "unilateral hope." Id. at 457 n.19 (citing Conn. Bd. of Pardons v. Dumschat, 452 U.S. 458, 465 (1981)).


241. Id. at 485. It is worth noting here that the court refused to extend Brady due process to the post-conviction context, even though it did not entirely discount the significance of Brady. See id. at 462–64. The court’s Brady determination, coupled with its refusal to find a residual liberty interest to pursue freedom from confinement, can be read to mean that the court is hesitant to find an independent due process right of post-conviction access to DNA evidence. See id. at 495 (“Our legal system continues to grapple with the questions of which avenues of relief remain open to those advancing claims that they are wrongfully convicted . . . it is unclear whether there is a constitutional right [under § 1983].”). In other words, from the court’s perspective, due process principles are only implicated where the government denies the prisoner meaningful access to pursue government-created rights. See id. An exception, however, is that a prisoner may be able to assert a freestanding substantive due process claim when the government acts in a way that “shocks the conscience.” See generally id. at 485–92.

242. See id. at 480–85.

243. Id. at 485.
liberty interest.

4. *Substantive Due Process and a “Residual Liberty Interest”*

The procedural due process inquiry ensures that adequate procedures are in place to protect a litigant’s substantive rights.\(^{244}\) The *Mathews* test applies only where the prisoner has a recognized liberty interest that the government seeks to eliminate.\(^{245}\) Therefore, the prisoner may seek to establish a freestanding substantive due process right and then argue the government’s procedures in protecting that right are inadequate. If he has no cognizable substantive right, then it follows that he has no cognizable procedural right either.\(^{246}\) But in *Harvey II*, Judge Luttig explained that a constitutional right to access DNA evidence post-conviction does not fit squarely into either substantive or procedural due process as those concepts are “classically understood.”\(^{247}\) Rather, “it is a right that *legitimately* draws upon the principles that underlay [both]—a conceptual and constitutional fact that [is] understandably elu[slive].”\(^{248}\) Therefore, procedural and substantive due process arguments in this context are not neatly separable.

Nonetheless, one can think of a prisoner’s substantive due process interest in accessing evidence as a residual liberty interest that the prisoner retains even after he has been properly convicted and sentenced.\(^{249}\) The Supreme Court has held that “the mere fact that [one] has been committed under proper procedures does not deprive him of all substantive liberty interests under the Fourteenth Amendment.”\(^{250}\) The extent of that liberty may be “indeterminate,” but it arguably includes “many of the core

\(^{244}\) See discussion supra Part IV.B.2.

\(^{245}\) See *supra* notes 225, 227–29 and accompanying text.


\(^{247}\) *Harvey II*, 285 F.3d at 310–11.

\(^{248}\) *Id.* at 311.

\(^{249}\) *Id.* at 312.

values of unqualified liberty."\(^\text{251}\) While liberty certainly includes freedom from arbitrary bodily restraint,\(^\text{252}\) the issue is whether it includes the freedom to pursue freedom from confinement, albeit a "freedom" in an obviously reduced form.\(^\text{253}\) As noted above, Judge Gleeson in \textit{McKitthen II} rejected this extension of a liberty interest to pursue freedom from confinement.\(^\text{254}\) But other courts disagree, finding such an interest may exist under limited circumstances.\(^\text{255}\)

The Supreme Court's position regarding whether there is any interest in pursuing freedom from confinement is not clear.\(^\text{256}\) It may be the case that "one's liberty interest 'in being free from confinement' is 'extinguished' once he has been lawfully convicted and sentenced."\(^\text{257}\) However, due process still protects the individual from completely arbitrary government actions, regardless of whether he has been lawfully convicted.\(^\text{258}\) The government's steadfast denial of mere access to evidence can be deemed patently arbitrary in the absence of any governmental interest whatsoever in withholding such evidence.\(^\text{259}\) Indeed, this argument may be particularly strong where the prisoner can pay for the DNA testing; the government simply has to turn over the evidence with only nominal administrative costs.\(^\text{260}\) However, substantive due process is a murky area of constitutional law, and the issue of whether a convicted prisoner has a "residual

\(^{251}\) \textit{Harvey II}, 285 F.3d at 312 (citing Morrissey v. Brewer, 408 U.S. 471, 482 (1972)).


\(^{253}\) See \textit{Harvey II}, 285 F.3d at 313.

\(^{254}\) See supra notes 239–41 and accompanying text.


\(^{256}\) See \textit{Harvey II}, 285 F.3d at 313–14.

\(^{257}\) \textit{Id.} at 313 (quoting Ohio Adult Parole Auth. Bd. v. Woodard, 523 U.S. 272, 288–89 (1998)).

\(^{258}\) Daniels v. Williams, 474 U.S. 327, 331 (1986).

\(^{259}\) \textit{Harvey II}, 285 F.3d at 319 (citing County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998) (describing arbitrary governmental action as including "the exercise of power without any reasonable justification in the service of a legitimate governmental objective"); accord Moore v. Lockyer, No. C 04-1952 MHP, 2005 WL 2334350, at *8 (N.D. Cal. Sep. 23, 2005) ("To permit the state to deny a convicted defendant access to evidence that could prove his or her innocence for no reason whatsoever, under any and all circumstances, would undoubtedly be contrary to this [due process] principle.").

\(^{260}\) See Brief for Appellee at 27–29, Dist. Atty's Office for the Third Jud. Dist. v. Osborne, 521 F.3d 1118 (9th Cir. 2008) (No. 06 Civ. 35875).
liberty interest” may be foreclosed by precedent. But arguably, the right to access DNA evidence post-conviction, pursuant to society’s interest that the innocent are not wrongfully convicted, is rooted sufficiently in the history and traditions of the criminal justice system to be deemed “fundamental” for due process purposes. If this is the case, then a prisoner may have a substantive due process right in accessing DNA evidence.

5. Meaningful Access to the Courts

Finally, a § 1983 plaintiff may argue that by denying him access to potentially exculpatory DNA evidence, the government is denying him meaningful access to the courts. The Supreme Court has repeatedly affirmed that meaningful access to the courts is a fundamental right protected by the Constitution. This means whether an access [to the courts] claim turns on a litigating opportunity yet to be gained or an opportunity already lost, the very point of recognizing any access [to the courts] claim is to provide some effective vindication for a separate and distinct right to seek judicial relief for some wrong.

Therefore, if a prisoner has an independent and colorable claim to access DNA evidence, then the courts must provide him sufficient access. Here, the prisoner can argue that by denying him access to evidence, the state is denying him access to the tools “need[ed] in order to attack [his] sentence[]], directly or collaterally,” which the state is constitutionally required to do. Therefore, denying access to DNA evidence that may potentially prove the prisoner’s innocence essentially imposes an absolute bar to the prisoner’s future intention to challenge his sentence or

261. See, e.g., Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 7 (1979) (“There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence.”).
263. See, e.g., id.
266. This is the rationale the court followed in McKithen II. See supra notes 241–43 and accompanying text.
In sum, a § 1983 plaintiff may characterize a constitutional entitlement to access DNA evidence in multiple ways: as a Brady claim or as a freestanding substantive due process claim, both of which may provide the basis to assert a procedural due process violation. He may also characterize the right as a claim that meaningful access to the courts has been denied. No matter how the prisoner characterizes his constitutional right, the right cannot be absolute and can be trumped by competing government interests. Therefore, the prisoner must make the requisite showing that his interest is sufficiently high to gain access to the DNA evidence he seeks.

C. The Constitutional Standard

Those courts that have recognized a constitutional right to access evidence post-conviction for DNA testing have not provided extensive guidance as to what the standard should be for asserting such a right. Certainly, there are many cases where DNA evidence is only tangential to the finding of guilt, and even a favorable test result would probably have no impact on the verdict. If every prisoner could assert a constitutional right to re-test every piece of evidence that may be only slightly relevant, then courts would be overwhelmed and criminal adjudications would be in a perpetual state of uncertainty. It is necessary, then, to develop a test that requires some threshold showing that the evidence sought to be tested is sufficiently probative of guilt or innocence. The inquiry becomes, "at what point . . . does the due process interest become actionable?"

Judicial responses to this question have been quite ethereal thus far. In Harvey II, Judge Luttig provided a detailed analysis of the constitutional right at issue, but then

268. Wade, 460 F. Supp. 2d at 250.
269. See discussion supra Part IV.B.2.
270. See discussion supra Part IV.B.4.
271. See discussion supra Part IV.B.3.
272. See discussion supra Part IV.B.4.
273. See Wade, 460 F. Supp. 2d at 244.
274. See discussion infra Part IV.C.
275. Wade, 460 F. Supp. 2d at 231 n.6.
276. See Harvey v. Horan (Harvey I), 278 F.3d 370, 376 (4th Cir. 2002).
277. Wade, 460 F. Supp. 2d at 231 n.6.
went on to conclude simply that he "would very narrowly confine the right," without providing any more guidance. Judge Beistline, writing for the District Court of Alaska, seemed to agree with this result, holding that "under the unique and specific facts presented [there exists] a very limited constitutional right to the testing sought." Judge Hull, writing for the Eleventh Circuit, seemed unwilling to recognize a constitutional right to access DNA evidence post-conviction, but then stated rather cryptically that there may be such a right under "extraordinary circumstances."

A few courts have been a little more specific, seeming to embrace the Brady "materiality" standard. In Osborne II, the Ninth Circuit had a direct opportunity to define the contours of the post-conviction Brady standard, but declined to do so. However, the court did hold that the materiality standard in the post-conviction context is no higher than a reasonable probability that, if the exculpatory DNA evidence were disclosed, Osborne could prevail in an action for post-conviction relief. This standard, the court explained, did not require Osborne to show by a preponderance of evidence that disclosure of the evidence would enable him to prove his

278. Harvey v. Horan (Harvey II), 285 F.3d 298, 321 (4th Cir. 2002) (Luttig, J., respecting denial of rehearing en banc). To Judge Luttig's credit, the issue certainly was not ripe for decision; he felt it to be prudential not to define the contours of the right at that juncture. Id. at 320–21.


280. Grayson v. King, 460 F.3d 1328, 1339 (11th Cir. 2006).

281. See Breest v. N.H. Att'y Gen., 472 F. Supp. 2d 116, 121 (D.N.H. 2007) ("To the extent there is a reasonable probability that the results of the DNA testing requested . . . would have affected the outcome . . . I conclude that he has alleged a cognizable due process claim."); Moore v. Lockyer, No. C 04-1952 MHP, 2005 WL 2334350, at *9 (N.D. Cal. Sept. 23, 2005) ("[T]he court may safely assume that the 'reasonable probability' standard set forth in Bagley establishes the outer limits of a state prisoner's right to obtain post-conviction access to DNA evidence."); Godschalk v. Montgomery County Dist. Att'y's Office, 177 F. Supp. 2d 366, 369 (E.D. Pa. 2001) ("[I]n considering whether plaintiff is entitled to biological evidence under the Due Process Clause of the Fourteenth Amendment, we must employ the standard set by the Supreme Court in Brady . . .").

282. Osborne v. Dist. Att'y's Office for the Third Jud. Dist. (Osborne II), 521 F.3d 1118, 1134 (9th Cir. 2008), cert. granted, 129 S. Ct. 488 (2008) ("The precise height at which the materiality bar should be set is largely an academic question, which we may leave to another day and another case that truly presses the issue.").

283. Id.
innocence. It is not clear whether the Ninth Circuit would accept a standard lower than the "reasonable probability" standard; the court concluded, "wherever the bar is, [Osborne] crosses it." Judge Gertner, writing for the District Court of Massachusetts, did appear to embrace a lower standard. She stated, "[b]ecause DNA testing can exonerate the defendant, the government may only legitimately deny access to testing if it has a compelling reason to do so." However, she went on to say that "the question of what the appropriate standard may be . . . is not properly before the Court."

As the foregoing discussion demonstrates, courts have not articulated definitively what constitutional "test" a prisoner seeking post-conviction access to DNA evidence must satisfy. Given the importance of the issue, there needs to be a workable standard specific enough so that prisoners seeking access to evidence will have guidance in preparing to litigate their claims.

V. A PROPOSED SOLUTION: POST-CONVICTION ACCESS TO DNA EVIDENCE AND A MODIFIED BRADY STANDARD

The most straightforward and logical way to harmonize the various due process arguments that prisoners may assert in seeking access to DNA evidence is to recognize that the government has a duty, be it pre-trial, during trial, or post-conviction, to disclose material, potentially exculpatory evidence to the defendant. The standard articulated in Brady and its progeny should extend to the post-conviction context. Courts recognizing as much are correct in their analysis. However, courts must take into account that the prisoner has been duly convicted and sentenced and thus, has lost many of the due process rights that are attendant to unqualified liberty. Courts must also take into account the

284. Id.
285. Id.
287. Id.
288. Id. at 249.
289. See discussion supra Part IV.B.2.
290. See discussion supra Part IV.B.2.
291. See generally discussion supra Part IV.B.4.
fact that the government's burden in allowing access to DNA evidence is usually modest. Thus, a "modified Brady approach" is the best solution.

I propose a modified post-conviction Brady standard that incorporates a burden-shifting approach. First, the petitioner would have the burden of showing that the DNA test results, if favorable, would indicate a reasonable possibility that, had the results been presented at trial, the outcome would have been different. This burden is less onerous than a "reasonable probability" standard; it would only require the petitioner to show that the biological evidence, if presented at trial, would be an "important" factor. The petitioner would be able to meet this burden by, for example, showing that identity was an issue at trial and that the biological evidence, if presented, would have been a considerable factor in creating reasonable doubt. At this initial stage, the court should deny the petitioner's claim only if, in light of all the remaining evidence, there is a strong indication of guilt. If the petitioner meets his initial burden, then the burden would shift to the government, which would be required to articulate an "important" reason for withholding the evidence. The government may be able to make this showing by, for example, demonstrating that the petitioner already made successive and potentially frivolous requests for testing, that the particular method of testing was available at trial, or that producing the evidence would be significantly cost-prohibitive or administratively impracticable. If the government satisfies its burden, then the burden would shift back to the petitioner, who would have the ultimate burden of proving that the biological evidence was a predominant factor in the government's case. This would require showing by a preponderance of evidence that the test results, if favorable, would have led to an acquittal.

It must be emphasized that these § 1983 cases inevitably will involve a certain amount of judicial discretion. Judges

---

292. If, for example, the defendant was tried for rape and he asserted a consent defense, then identity was not "at issue;" DNA testing would not show whether or not the victim consented. On the other hand, if the defendant alleged that he never had sexual contact with the victim, then identity would be at issue: DNA testing may conclusively prove the defendant's innocence.

293. If the testing was available, but the evidence was not tested, then the plaintiff may have to allege another constitutional violation, such as ineffective assistance of counsel, rather than using § 1983 as a backdoor.
should have considerable leeway in weighing the particular facts and circumstances of each case to determine whether post-trial DNA testing is warranted. It is not possible, nor desirable, to formulate a mechanical test applicable to each and every factual scenario without consideration of basic fairness and justice. Nevertheless, a modified post-conviction *Brady* approach provides a workable framework to adjudicate § 1983 cases in a manner that is just for the prisoner and the government.

VI. CONCLUSION

I argue there is a post-conviction due process analogue to the *Brady v. Maryland* "materiality" standard. In reaching this conclusion, I first outlined the "*Preiser-Heck*" procedural bar and concluded that the doctrine is most likely inapplicable to § 1983 suits to access DNA evidence. I next considered the pros and cons of "constitutionalizing" a right to access DNA evidence. Judicial philosophy as to what role the courts should play in interpreting the Constitution will significantly guide judicial decisionmaking in this area. Courts that have considered the issue have characterized the right in different ways. The best way to analyze a post-conviction claim to access DNA evidence is to utilize a modified *Brady* standard.

The issue of whether there is a constitutional right to access DNA evidence post-conviction will continue to be litigated in the future. The recognition of such a right undoubtedly would have large implications for prisoners seeking to prove their innocence. In the meantime, many states have mechanisms in place for prisoners to access evidence under appropriate circumstances. Many of these mechanisms, however, impose a much more stringent standard than the modified *Brady* standard proposed in this comment. A federal due process standard would rightly

294. See supra Part V.
295. See supra Part II.
296. See supra Parts III–IV.A.
297. See supra Parts III–IV.A.
298. See supra Part IV.B.
299. See supra Part V.
300. See The Innocence Project, supra note 8; see also McKithen v. Brown (*McKithen II*), 565 F. Supp. 2d 440, 495 (E.D.N.Y. 2008).
acknowledge the true uniqueness of DNA evidence and would create a level of equality for prisoners across the United States.