MCKITHEN V. BROWN: DUE PROCESS AND POST-CONVICTION DNA TESTING

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ABSTRACT

When the Second Circuit decided McKithen v. Brown, *it joined an ever-growing list of courts faced with a difficult and pressing issue of both constitutional and criminal law: is there a federal constitutional right of post-conviction access to evidence for DNA testing? This issue, which sits at the intersection of new forensic technologies and fundamental principles of constitutional due process, has divided the courts. The Second Circuit, wary of reaching a hasty conclusion, remanded McKithen's case to the district court for consideration. The district court for the Eastern District of New York was asked to decide whether a constitutional right of access to evidence for DNA testing exists both broadly as well as under the defendant's circumstances. This iBrief concludes that although a due process post-conviction right of access to evidence for DNA testing may exist under some circumstances, it does not exist under current constitutional jurisprudence in McKithen's case.*

INTRODUCTION

¶1 Any interpretation of the protections afforded by constitutional due process must evolve with the circumstances underlying modern criminal convictions.[2] Scientific progress requires that constitutional values be reexamined in light of new technological developments, especially when science delivers technology that can conclusively exonerate the wrongly convicted.[3] This iBrief addresses a question which has been described as

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[2] *See* McCulloch v. Maryland, 17 U.S. 316, 415 (1819) ("[The] constitution [was] intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs.").

[3] *See* Harvey v. Horan (*Harvey II*), 285 F.3d 298, 305 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing en banc); The Innocence Project, About Us: Mission Statement, http://www.innocenceproject.org/about/Mission-Statement.php (last visited Aug. 18, 2008).

"one of the most important criminal law issues of our day."[4] One judge grappling with this question framed it as follows: does "there exist[] under the Constitution of the United States a right, post-conviction, to access previously-produced forensic evidence for purposes of . . . DNA testing in order to establish—before the executive, if not also before the courts—one's complete innocence of the crime for which [one] has been convicted and sentenced."[5] Such a right, if it exists, would arise under the Due Process Clause of the Fifth and Fourteenth Amendments, which act to protect individuals' liberty and to guard them against arbitrary and improper governmental action.[6]

¶2 Post-conviction DNA testing has the capacity to provide reliable and concrete demonstrations of factual innocence.[7] As of August 2008, 216 individuals have been conclusively exonerated through post-conviction DNA testing in the United States.[8] Sixteen of these individuals had served time on death row.[9] Wrongful convictions, though not abundant, are by no means isolated or unusual events.[10]

¶3 Current forensic DNA technology is categorically different from all other technologies preceding it.[11] There is a consensus among the scientific community that DNA technology has the power to distinguish between any two individuals on the planet (saving, of course, identical twins).[12] DNA testing is most commonly performed on samples from skin, blood, saliva, hair and semen.[13] Established techniques of analysis can yield reliable

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[4] *Harvey II*, 285 F.3d at 304 (Luttig, J., respecting the denial of rehearing en banc).

[5] *Id.* Others, in an attempt to disparage such a right, have defined it as a "general constitutional right for every inmate to continually challenge a valid conviction based on whatever technological advances may have occurred since his conviction became final." Harvey v. Horan (*Harvey I*), 278 F.3d 370, 375 (4th Cir. 2002). This, however, is not the appropriate level of inquiry. *See Harvey II*, 285 F.3d at 310 (Luttig, J., respecting the denial of rehearing en banc).

[6] U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1; *see also* McKithen v. Brown, 481 F.3d 89, 92 (2d Cir. 2007).

[7] NAT'L INST. OF JUSTICE, U.S. DEPT. OF JUSTICE, POSTCONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS vi (1999); The Innocence Project, About Us, http://www.innocenceproject.org/about/ (last visited Aug. 18, 2008).

[8] The Innocence Project, About Us: Mission Statement, *supra* note 3.

[9] *Id.*

[10] *See* The Innocence Project, About Us, *supra* note 7.

[11] *Harvey II*, 285 F.3d 298, 305 n.1 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing en banc).

[12] *Id.*

[13] *See* NAT'L INST. OF JUSTICE, *supra* note 7, at xiii.

results from as little as a single cell.[14] More commonly, between 50 and 100 cells are needed to provide conclusive information.[15] Though DNA technology in the U.S. is only used regularly in rape and homicide cases, where it has the most probative value, it can also be used to make identifications based on cells left behind on items touched by a perpetrator.[16] Due to the statistical improbability of a DNA match between any two individuals, in certain cases, an adequately powered testing procedure is capable of conclusively exonerating an individual to a practical certainty.[17]

¶4 Advances in forensic DNA technology have not gone unnoticed by both federal and state legislatures. In 2004, Congress passed the Innocence Protection Act (IPA), which is contained in the Justice for All Act of 2004.[18] The Act provides for post-conviction DNA testing in certain federal cases, requires the preservation of biological evidence, and allocates funds to help states finance the testing.[19] A majority of states have taken similar measures. Forty-three states have enacted statutes providing for some level of post-conviction DNA testing.[20] However, because not all states have acted to provide post-conviction access to testing, and because testing under both federal and state law is only reserved for statutorily-defined categories of cases, prisoners continue to seek post-conviction access to DNA testing as a federal constitutional matter.[21]

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[14] *See* I. Findlay et al., *DNA Fingerprinting from Single Cells*, 389 NATURE 555, 555 (1997).
[15] *See* NAT'L INST. OF JUSTICE, *supra* note 7, at xv.
[16] *Id.* at 1; Roland van Oorschor & Maxwell Jones, *DNA Fingerprints from Fingerprints*, 387 NATURE 767, 767 (1997).
[17] *Harvey II*, 285 F.3d 298, 305 n.1 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing en banc).
[18] Justice For All Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260 (codified in scattered sections of 18, 28 and 42 U.S.C.); Matthew J. Mueller, *Handling Claims of Actual Innocence: Rejecting Federal Habeas Corpus as the Best Avenue for Addressing Claims of Innocence Based on DNA Evidence*, 56 CATH. U. L. REV. 227, 254–55 (2006). The Innocence Protection Act can be found at Title IV of the Justice for All Act.
[19] Mueller, *supra* note 18, at 255.
[20] The Innocence Project, News and Information: Fact Sheets, http://www.innocenceproject.org/Content/304.php (last visited Aug. 18, 2008).
[21] *See, e.g*, McKithen v. Brown, 481 F.3d 89, 94 (2d Cir. 2007) (noting that petitioner, McKithen, had sought and was denied access to DNA testing through state avenues). For example, New York's post-conviction DNA testing statute provides that "[w]here the defendant's motion requests the performance of a forensic DNA test on specified evidence, and upon the court's determination that any evidence containing deoxyribonucleic acid ("DNA") was secured in connection with the trial resulting in the judgment, the court shall grant the application for forensic DNA testing of such evidence upon its determination

¶5 In March of 2007, the Second Circuit found itself "at this intersection of scientific advance and enduring constitutional values."[22] In *McKithen v. Brown*,[23] the Second Circuit was invited to determine whether the Due Process Clauses of the Fifth and Fourteenth Amendments guarantee a right to post-conviction DNA testing.[24] The Second Circuit temporarily declined to answer the question, remanding the case to the district court for its consideration. This iBrief considers the question with which the district court was charged and concludes that even if one accepts all of the arguments posited for the existence of such a constitutional right, McKithen is nevertheless precluded from relief under a theory of a due process right of post-conviction DNA testing.

I. *MCKITHEN V. BROWN*

¶6 In 1993, McKithen was convicted of attempted murder and related charges.[25] The prosecution's theory was that McKithen appeared at the apartment he once shared with his estranged wife, ran to the kitchen and grabbed a knife, stabbed his wife in the lower back as she was fleeing out of a window, and fled the apartment.[26] A distinctive knife, which McKithen's wife identified as the weapon used on her, was admitted into evidence at

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that if a DNA test had been conducted on such evidence, and if the results had been admitted in the trial resulting in the judgment, there exists a reasonable probability that the verdict would have been more favorable to the defendant." N.Y. CRIM. PROC. LAW. § 440.30(1-a)(a) (McKinney 2004). As was the situation in McKithen's case, the court made a determination that "there is no reasonable probability that the results of such testing would have resulted in a verdict more favorable to [McKithen]." *McKithen*, 481 F.3d at 94. McKithen disagreed and asserted a right to DNA testing under separate, constitutional, grounds. *See id.*

[22] *McKithen*, 481 F.3d at 92. For a list of selected appellate courts to have considered this issue, see *infra* note 24.

[23] McKithen v. Brown, 481 F.3d 89, 92 (2d Cir. 2007), *cert. denied*, 128 S. Ct. 1218 (2008), *remanded to*, NO. 02-CV-1670 JG LB, 2008 WL 2791852 (E.D.N.Y. Jul. 21, 2008).

[24] *Id.* Other courts have addressed this issue, but have failed to achieve consensus. *Compare Harvey II*, 285 F.3d 298, 312–15 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing en banc) ("I believe, and would hold, that there does exist such a post-conviction right of access to evidence."), *with Harvey I*, 278 F.3d 370, 388 (4th Cir. 2002) (King, J., concurring in part and concurring in the judgment) (concluding that the defendant had "no post-conviction legal right to access or discover the [biological] evidence relating to his . . . conviction"). The Eleventh Circuit declined to weigh in on "the thorny threshold issue." Grayson v. King, 460 F.3d 1328, 1340–41 (11th Cir. 2006).

[25] *McKithen*, 481 F.3d at 93.

[26] *Id.* at 93–94.

trial, yet this knife was never subjected to DNA or fingerprint testing.[27] Seven years after his conviction, McKithen moved to compel DNA testing of the weapon.[28] In 2002, while still incarcerated, he brought suit under 42 U.S.C. § 1983,[29] which provides a cause of action for persons deprived "of any rights, privileges, or immunities secured by the Constitution."[30] He claimed that the district attorney had "violated his constitutional right of post-conviction access to evidence for DNA testing" by denying him access to the knife he sought to have tested.[31] The district court referred the case to a magistrate judge who noted that courts have disagreed as to the existence of any substantive or procedural right to post-conviction DNA testing.[32] The magistrate judge ultimately concluded that McKithen's suit could be dismissed for lack of subject matter jurisdiction and therefore declined to reach the underlying constitutional issue.[33] The district court adopted the recommendation of the magistrate judge, and McKithen subsequently appealed to the Second Circuit Court of Appeals.[34]

¶7 The Second Circuit was ultimately faced with the constitutional question at hand. After analyzing applicable Supreme Court precedent and decisions in other circuits, the Second Circuit concluded that the claim should not have been dismissed for lack of subject matter jurisdiction.[35] The Second Circuit then agreed with the Seventh, Ninth, and Eleventh Circuits, and district courts in the First and Third Circuits that a claim seeking post-conviction access to evidence for DNA testing may properly be brought as a § 1983 suit.[36] The Fourth, Fifth, and Sixth Circuits had previously reached the opposite conclusion.[37] The Second Circuit then found that McKithen's claim was not estopped by either claim or issue

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[27] *Id.*
[28] *Id.*
[29] 42 U.S.C. § 1983 (2006).
[30] *McKithen*, 481 F.3d at 99**.**
[31] *Id.* at 94.
[32] *Id.* at 94–95 (quoting the magistrate judge's report and recommendation); *see also supra* note 24.
[33] *McKithen*, 481 F.3d at 95.
[34] *Id.*
[35] *Id.* at 99.
[36] *Id.* For other cases holding that a claim for post-conviction access to evidence for DNA testing may be brought as a § 1983 suit, see *Savory v. Lyons*, 469 F.3d 667, 669 (7th Cir. 2006), *Osborne v. Dist. Attorney's Office*, 423 F.3d 1050, 1054 (9th Cir. 2005), *Bradley v. Pryor*, 305 F.3d 1287, 1290-91 (11th Cir. 2002), and *Wade v. Brady*, 460 F.Supp.2d 226, 237 (D. Mass. 2006).
[37] *McKithen*, 481 F.3d at 100–01. For cases holding that such a claim is may not be brought as a § 1983 suit, see *Boyle v. Mayer*, 46 Fed. Appx. 340, 340 (6th Cir. 2002) (unpublished decision), *Kutzner v. Montgomery County*, 303 F.3d 339, 340–41 (5th Cir. 2002) (per curiam), and *Harvey I*, 278 F.3d 370, 375 (4th Cir. 2002).

preclusion.[38] Therefore, the court was required to determine first, whether a federal constitutional right to post-conviction DNA testing exists and second, what its contours are.[39] Because of the "fact-intensive nature of the inquiry" and "in light of the need to approach the issue cautiously," the Second Circuit remanded the case to the district court.[40]

¶8 However, the Second Circuit did not leave the district court to blindly struggle with this "extraordinarily important, and delicate, constitutional issue."[41] It provided guidance in its opinion for how to proceed. First, the district court must consider whether the liberty interest remaining after conviction already recognized in Supreme Court jurisprudence "encompasses an interest in accessing or possessing potentially exonerative biological evidence."[42] Then, the Second Circuit explained that if the district court concludes that this specific post-conviction liberty interest exists, procedural due process applies to its deprivation in the instant case.[43] The proper inquiry for analyzing procedural due process claims begins with the framework set out by the Supreme Court in *Mathews v. Eldridge*.[44] Using the *Mathews* factors, the district court should determine whether McKithen's procedural due process rights were violated in this instance.[45] Furthermore, the Second Circuit noted that a constitutional right of access may derive directly from substantive due process.[46] Because the Due Process Clause has been construed as granting substantive rights as well as the right that appropriate procedures be used in cases of deprivation of life, liberty, or property, the district court must also evaluate the existence of a constitutional right of access from a substantive due process framework.[47]

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[38] *McKithen*, 481 F.3d at 104–06.
[39] *Id.* at 106–07.
[40] *Id.* at 106.
[41] *Id.*
[42] *Id.* at 106–07.
[43] *Id.* at 107.
[44] *Id*; *see also* Mathews v. Eldridge, 424 U.S. 319 (1976).
[45] *McKithen*, 481 F.3d at 107.
[46] *Id*. at 107 n.17.
[47] *Id.* Judge Luttig of the Fourth Circuit has suggested that "there might well be a straightforward *substantive* due process right to [access to post-conviction DNA testing]." *Harvey II*, 285 F.3d 298, 318 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing en banc.). Several district courts have embraced former Judge Luttig's view. *See, e.g.*, Wade v. Brady, 460 F.Supp.2d 226, 249 (D. Mass. 2006) (finding that "the Due Process Clause provides a substantive right to post-conviction DNA testing in cases where testing could raise serious doubts about the original verdict").

II. PROCEDURAL DUE PROCESS AND POST-CONVICTION ACCESS TO DNA EVIDENCE

¶9 Prisoners have two paths available to them in order to remedy violations of their federal constitutional rights.[48] First, a prisoner may elect to file a habeas petition under 28 U.S.C. § 2254.[49] To qualify for habeas relief, a prisoner must file a petition in district court alleging that "he is in custody in violation of the Constitution or laws . . . of the United States."[50] A prisoner may alternatively seek relief by filing a suit under 42 U.S.C. § 1983,[51] which provides a civil cause of action for persons who have been "depriv[ed] of any rights, privileges, or immunities secured by the Constitution and laws."[52]

¶10 Under each of these statutes, the petitioner must allege a violation of a constitutional right.[53] Therefore, a prisoner who can successfully assert a constitutional right of post-conviction access to DNA evidence would be afforded the opportunity for relief through either of these two avenues, provided that all other procedural requirements are met. However, the law is unsettled as to whether such a right exists and if so, as to the extent of its reach.

¶11 The Supreme Court has never explicitly recognized the existence of a procedural due process right of access to post-conviction DNA testing.[54] It is difficult to categorize a right of post-conviction access to DNA evidence as a constitutional one because the concept does not fit cleanly into any preexisting categories of recognized procedural or substantive due process rights.[55] Yet, despite these hurdles, procedural due process grounds for a post-conviction right of access to DNA evidence for retesting may exist. The following arguments have been made to support a procedural due process right of post-conviction access to DNA evidence.

A. Claims of actual innocence

¶12 A post-conviction right of access to DNA evidence is difficult to categorize as "a right of 'factual innocence.'"[56] The Supreme Court has declared that though claims of actual innocence are not constitutional

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[48] Heck v. Humphrey, 512 U.S. 477, 480 (1994).
[49] *See* 28 U.S.C. § 2254 (2006).
[50] *Id.*
[51] 42 U.S.C. § 1983 (2006).
[52] *Id.*
[53] *See Heck*, 512 U.S. at 480.
[54] *See Harvey II*, 285 F.3d 298, 311 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing en banc).
[55] *Id.*
[56] *See id.* at 310.

themselves, they do operate as an entry for habeas petitioners seeking to challenge state custody over their person.[57] In *Herrera v. Collins*,[58] the Supreme Court reiterated that claims of actual innocence are not themselves constitutional; they are merely a "gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits."[59] The Supreme Court reaffirmed this holding in the 2006 case of *House v. Bell*,[60] where the court explicitly refrained from resolving the controversy as to whether freestanding innocence claims are actual constitutional claims.[61]

¶13 The Supreme Court has remarked that a petitioner may, in rare circumstances, have his federal constitutional claim considered on the merits, through the writ of habeas corpus, if he produces a sufficient showing of actual innocence.[62] This rule is referred to as the "fundamental miscarriage of justice" exception and is available "only where the prisoner *supplements* his constitutional claim with a colorable showing of factual innocence."[63] The Supreme Court has not yet defined what showing would be necessary to support a claim of actual innocence, yet it has noted that the "threshold showing" for such a claim "would necessarily be extraordinarily high."[64] Concurring in the judgment in *Herrera*, Justice White posited that "to be entitled to relief" a petitioner claiming actual innocence "would at the very least be required to show that based on proffered newly discovered evidence and the entire record before the jury that convicted him, 'no rational trier or fact could [find] proof of guilt beyond a reasonable doubt.'"[65]

¶14 An individual claiming actual innocence and seeking access to DNA evidence does not have a constitutional claim: "[t]he existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a

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[57] Herrera v. Collins, 506 U.S. 390, 404 (1993). The position that claims of actual innocence are not constitutional in themselves is the position taken by the majority in *Herrera*. *See id.* However, one can deduce from the four other opinions written in this case that five of the justices may have been willing to find that claims of actual innocence are themselves constitutional. *See id.* at 427 (O'Connor & Kennedy, JJ., concurring); *id.* at 430 (Blackmun, Stevens, & Souter, JJ., dissenting).
[58] *Herrera*, 506 U.S. 390.
[59] *Id.* at 404.
[60] House v. Bell, 126 S. Ct. 2064 (2006).
[61] *Id.* at 2086–87.
[62] *Herrera*, 506 U.S. at 404.
[63] *Id.* (quoting Kulhmann v. Wilson, 477 U.S. 436, 454) (emphasis added by the Court in *Herrera*).
[64] *Id.* at 417.
[65] *Id.* at 429 (White, J. concurring) (quoting Jackson v. Virginia, 443 U.S. 307, 324 (1979)).

ground for relief on federal habeas corpus."[66] However, it has been proposed that the writ of habeas corpus is deprived of its effectiveness if a petitioner lacks the means to make a claim of actual innocence.[67] A prisoner who needs access to DNA evidence in order to make a constitutionally sufficient showing of actual innocence would lose the benefit of habeas corpus protection if he could not access such evidence. Therefore, a right of access to DNA evidence may be procedure that is necessary for a petitioner to establish a well-supported claim of actual innocence, which he must do to litigate the constitutionality of his detention through habeas.[68] Such a right grounded in actual innocence would consequently *only* exist if the State deprived an individual of the means necessary to make a sufficient showing of actual innocence.

B. An extension of Brady *access to exculpatory evidence*

¶15 The Supreme Court first recognized a defendant's right of access to material, exculpatory evidence held by the prosecution in order to ensure a fair trial in *Brady v. Maryland*.[69] This requirement was deemed necessary as a matter of procedural due process, or more simply, is required by basic fairness.[70] This constitutional right explicitly concerns only pre-trial production by the prosecution of all evidence favorable to the accused, not post-conviction access to evidence.[71] Moreover, the holding in *Brady* only reaches evidence whose meaning is known to the prosecutor and can be directly evaluated, not untested evidence whose significance is unknown.[72]

¶16 The Supreme Court, in *Pennsylvania v. Ritchie*,[73] extended the reach of *Brady* by holding that that due process required the prosecution, at trial, to produce certain evidence whose import was unknown so that it could be reviewed by the court to properly determine its evidentiary

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[66] *Id.* at 398 (majority opinion) (quoting Townsend v. Sain, 372 U.S. 293, 317 (1963)).
[67] *See, e.g.*, Cherrix v. Braxton, 131 F. Supp. 2d 756, 760 (E.D. Va. 2001) (holding that discovery of the DNA evidence in question "is reasonably necessary [to support] the habeas petitioner's claims of actual innocence."); Benjamin Vetter, *Habeas, Section 1983 and Post-Conviction Access to DNA Evidence*, 71 U. CHI. L. REV. 587, 590–91.
[68] *See Cherrix*, 131 F. Supp. 2d at 760.
[69] Brady v. Maryland, 373 U.S. 83, 87 (1963).
[70] *Harvey II*, 285 F.3d 298, 316 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing en banc).
[71] *See Brady*, 373 U.S. at 87.
[72] Seth F. Kreimer & David Rudovsky, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, 151 U. PENN. L. REV. 547, 583 (2002).
[73] Pennsylvania v. Ritchie, 480 U.S. 39 (1987).

value.[74] The reach of *Brady* has also been extended by lower courts to various contexts not specifically addressed by the Supreme Court's initial holding.[75] For example, the Ninth Circuit has held that under *Brady*, the state was required to produce any exculpatory semen evidence in its possession during a post-conviction habeas proceeding.[76] Arguments have been made for a further extension of the holding in *Brady* to encompass post-conviction access to DNA evidence.[77] Such an extension would derive from the idea that "the very same principle of elemental fairness that dictates pre-trial production of all potentially exculpatory evidence dictates post-trial production of this infinitely narrower category of evidence."[78] Similarly, it has been observed that despite the fact that the Court has not specifically addressed the existence of a post-conviction *Brady* right, the existing cases support the notion that core due process interests, including the interests underlying the holding in *Brady,* do indeed survive conviction.[79]

¶17 However, the Supreme Court has further explained that evidence is material for *Brady* purposes "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."[80] Therefore, a right of post-conviction access to DNA evidence based on *Brady* access to evidence could only exist in circumstances where the DNA evidence sought would have a reasonable probability of undermining confidence in the outcome of the case.[81]

C. Access to the courts

¶18 A post-conviction right of access to DNA evidence could also be construed in terms of a due process right of meaningful access to the courts. The Constitution guarantees the fundamental right of meaningful access to the courts.[82] A post-conviction right of access to evidence may derive

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[74] *Id.* at 58–59.
[75] Wade v. Brady, 460 F. Supp. 2d 226, 243 (D. Mass. 2006).
[76] Thomas v. Goldsmith, 979 F.2d 746, 749–50 (9th Cir. 2002).
[77] *See, e.g.*, *Harvey II*, 285 F.3d 298, 316 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing en banc); Kreimer & Rudovsky, *supra* note 73 at 583–87.
[78] *Harvey II*, 285 F.3d at 317 (Luttig, J., respecting the denial of rehearing en banc).
[79] *Wade*, 460 F. Supp. 2d. at 248 (providing an extensive discussion of this argument).
[80] United States v. Bagley, 473 U.S. 667, 682 (1985).
[81] For an illustration of a court implementing this analysis, see *Arthur v. King*, No. 3:07-cv-319-WKW, slip op. at 6–7 (M.D. Ala. Aug. 17, 2007).
[82] Bounds v. Smith, 430 U.S. 817, 821 (1977).

directly from the fundamental right of access to the courts, because when an individual is denied access to evidence needed to challenge his conviction, he is ultimately barred from access to the courts on the merits of his case.[83] Such a substantial burden on access to the courts can be seen as constituting a violation of constitutional due process.[84] However, Supreme Court precedent exposes a flaw in this argument. Currently, one must present an underlying claim on which a right of access to the courts has been denied; one must allege actual injury.[85] The right of access to courts doctrine is secondary in nature to an underlying claim.[86] Therefore, a right to post-conviction access of DNA evidence would already need to exist for one to assert its deprivation as an actual injury, and consequently, denial of access to the courts.

D. Protection of a prisoner's residual post-conviction liberty interest

¶19 A constitutional right to post-conviction DNA access may derive from a prisoner's residual liberty interest, an interest defined as the liberty interest that remains after conviction. Post-conviction access to DNA evidence may be the procedure required to adequately protect this liberty interest. As the Second Circuit noted in *McKithen*, the Supreme Court has "made clear that prisoners lawfully deprived of their freedom retain substantive liberty interests under the Fourteenth Amendment."[87] Though the exact contours of this residual liberty interest are unclear, it is probable that under current Supreme Court precedent, some portion of a prisoner's liberty interest both in pursuing his freedom and in being free from confinement persist after conviction.[88]

¶20 Post-conviction access to DNA evidence would arguably be needed to adequately protect this interest. Even if further resort to the judicial process is, under law, not available because of procedural hurdles, an individual may still pursue his freedom through clemency. The Supreme Court has indeed remarked that "[c]lemency 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."[89]

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[83] Kreimer & Rudovsky, *supra* note 72, at 565–76.
[84] *Id.* at 570.
[85] Lewis v. Casey, 518 U.S. 343, 349 (1996).
[86] *Arthur*, slip op. at 9.
[87] McKithen v. Brown, 481 F.3d 89, 106 (2d Cir. 2007). *See Youngberg v. Romeo*, 457 U.S. 307, 315 (1982) ("The mere fact that [an individual] has been committed under proper procedures does not deprive him of all substantive liberty interests under the Fourteenth Amendment.").
[88] *See Harvey II*, 285 F.3d 298, 314 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing en banc).
[89] Herrera v. Collins, 506 U.S. 390, 411–12 (1993).

However, in order to pursue freedom from confinement through clemency, one must access the evidence needed to present to the executive in order to seek clemency. Therefore, procedural due process would require post-conviction access to DNA evidence in order to adequately protect one's residual liberty interest in being free from confinement and pursuing one's freedom, if not from the judiciary, then from the executive.[90]

¶21 Yet, even supporters of a constitutional right of post-conviction access concede that such a right should only exist in "certain, very limited circumstances."[91] Proponents of such a right have argued for its existence under circumstances where DNA testing of evidence would be probative of the individual's innocence.[92] Only then would a prisoner's interests arguably outweigh any legitimate interests the government may have in withholding such evidence. For example, in arguing for a procedural due process protection of post-conviction access to DNA evidence, former Judge Luttig of the Fourth Circuit stated he would define such a right as "a right of access to evidence for tests which, given the particular crime for which the individual was convicted and the evidence that was offered by the government at trial in support of the defendant's guilt, could prove beyond any doubt that the individual in fact did not commit the crime."[93] Judge Gertner, judge for the District Court for the State of Massachusetts, was more liberal in his definition of this right, but still limited the right to special circumstances, concluding that the "Due Process Clause provides a substantive right to post-conviction DNA testing in cases where testing could raise serious doubts about the original verdict."[94]

E. McKithen's procedural due process claim

¶22 The Second Circuit remanded McKithen's case to the district court so that it could consider whether a post-conviction right of access to DNA testing exists under McKithen's circumstances and if so, whether it has been violated. This iBrief contends that even if one accepts every argument advanced for a procedural due process right of post-conviction access to

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[90] *Harvey II*, 285 F.3d at 314 (Luttig, J., respecting the denial of rehearing en banc).
[91] *See, e.g.*, *id*. at 318.
[92] *Id.*; Kreimer & Rudovsky, *supra* note 72, at 570; *see also, e.g.*, Arthur v. King, No. 2:07-cv-319-WKW, slip op. at 8 (M D. Ala. Aug. 17, 2007) (declining to find a violation of procedural due process where DNA evidence would not have enough probative weight exculpate the individual seeking access).
[93] *Harvey II*, 285 F.3d at 315 (Luttig, J., respecting the denial of rehearing en banc). No other circuits have attempted to define such a right.
[94] Wade v. Brady, 460 F.Supp.2d 226, 249 (D. Mass. 2006).

DNA evidence, this right does not exist, nor has it been infringed in McKithen's case.

¶23 In McKithen's case, it is logically impossible that any DNA evidence produced could be conclusively exculpatory. In fact it has little, if no, probative value. At trial, the knife used against McKithen's estranged wife was never fingerprinted, nor was it subjected to DNA testing.[95] However, since DNA remains stable over time, it still may be possible to locate DNA on the knife and subject such DNA to testing.[96] The prosecution argued at trial that McKithen appeared at the home of his estranged wife, grabbed a knife from the kitchen, stabbed her as she was fleeing, and fled the apartment.[97] Therefore, at least two types of DNA could possibly be found on the knife—DNA from the victim and DNA from cells left on fingerprints by the attacker.

¶24 No result that is obtainable from a DNA test could logically exculpate McKithen from his crime. First, the presence of McKithen's DNA on the knife will logically inculpate him. Second, a lack of McKithen's DNA on the knife is also perfectly consistent with the prosecution's theory of the case. This is not a case in which the evidence in question consists of blood traces left by an assailant, or semen, both of which, if found, can be tested and potentially used conclusively to tie an individual to a crime.[98] Here, the prosecution argued that the assailant only touched the knife. One does not necessarily leave enough DNA for testing wherever one touches.[99] McKithen could have grabbed the knife and used it on his estranged wife without leaving a sufficient amount of his own DNA behind. Although DNA can be recovered and successfully tested a substantial amount of time after it was deposited, it also is possible that any DNA evidence that could have originally been present on the knife may not have survived in a condition suitable for testing.[100] Thus, there are a number of reasons why it is possible that DNA testing may not reveal a DNA match for McKithen. Third, if the DNA of another, unidentified individual is found on the knife, there are non-exculpatory explanations for this: someone other than the wife had previously visited the apartment and used the knife. In addition, a rogue skin cell or two could have contaminated the knife during the time it has been held in evidence.[101] In

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[95] *McKithen*, 481 F.3d at 94.
[96] NAT'L INST. FOR JUSTICE, *supra* note 7, at 21.
[97] *McKithen*, 481 F.3d at 93–94.
[98] *See* NAT'L INST. FOR JUSTICE, *supra* note 7, at 21–22.
[99] Rebecca Kanable, *DNA from Fingerprints?*, L. ENFORCEMENT TECH., July 2005, at 66, *available at* http://www.officer.com/print/Law-Enforcement-Technology/DNA-from-Fingerprints/1$25197.
[100] *Id.*
[101] *See* Van Oorschor & Jones, *supra* note 16, at 768.

sum, there is no way that any finding made based on the DNA on the knife could conclusively exculpate McKithen.

¶25 Based on the nature of any potential DNA evidence in McKithen's case, McKithen is incapable of asserting a constitutional right to post-conviction access to DNA evidence under the actual innocence argument, the *Brady* argument, or the access to the courts argument. All three of these theories require that the DNA evidence requested have the potential to actually be probatively exculpatory.[102] Since any DNA evidence produced from the knife would not have any exculpatory value, a right of access to the knife for testing does not exist in McKithen's case.

¶26 Under the fourth theory posited, a post-conviction right of access to DNA could derive from a prisoner's residual liberty interest.[103] Assuming, *arguendo*, that the district court concludes a liberty interest which should be protected through a post-conviction right of access to DNA evidence *does* exist in McKithen's case, this iBrief argues that he has already received adequate procedure to protect this interest and therefore, such a right has not been infringed.

¶27 If such a post-conviction liberty interest is constitutionally cognizable in McKithen's case, procedural due process applies to its deprivation.[104] The Second Circuit instructed the district court to use the framework established by the Supreme Court in *Mathews v. Eldridge*[105] for analyzing procedural due process claims. *Mathews* applies where an individual has a liberty or property interest that the government seeks to eliminate.[106] The test set forth in *Mathews* is used to determine the administrative and judicial procedures constitutionally required.[107]

¶28 The Second Circuit notes that the *Mathews* test is the appropriate one to use given that McKithen is seeking post-conviction access to evidence.[108] The court remarks that a higher standard would apply if McKithen were bringing a challenge to his underlying conviction or to "the process afforded during criminal proceedings themselves."[109] However, here, McKithen is not directly bringing a challenge to his conviction because evidence of innocence provided by tests performed on the theoretically exculpatory DNA evidence he seeks would be a prerequisite

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[102] *See supra* Part II.A–C.
[103] *See supra* Part II.D.
[104] McKithen v. Brown, 481 F.3d 89, 107 (2d Cir. 2007).
[105] Mathews v. Eldridge, 424 U.S. 319 (1976).
[106] Grayson v. King, 460 F.3d 1328, 1340 (11th Cir. 2006).
[107] *Id.*
[108] *McKithen*, 481 F.3d at 107.
[109] *Id.* (quoting Krimstock v. Kelly, 464 F.3d 246, 254 (2d Cir. 2006)).

for a direct challenge. In addition, he is not challenging the rules of criminal procedure used to determine his guilt or innocence.[110]

¶29 The *Mathews* framework is the following:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[111]

¶30 Due process "is flexible and calls for such procedural protections as the particular situation demands"[112] and "is not a technical conception with a fixed content unrelated to time, place and circumstance."[113] Recognizing the non-rigid nature of due process, the Second Circuit advises that "[u]nder *Mathews* the cases inevitably turn on their particular facts – which in the instant case include the availability or statutory avenues of relief, such as state or federal legislation providing for DNA testing, and the seriousness of the crime and sentence involved."[114] The court also draws attention to the potential cost to the state as a factor to be considered.[115]

1. The private interest that will be affected by the official action

¶31 McKithen's alleged private interest in obtaining access to the evidence at issue is arguably a substantial one. Such an interest would probably be classified as a liberty interest remaining after conviction (a "residual liberty interest") in freedom from restraint and to pursue freedom from confinement.[116] As noted, there is much debate as to whether such an interest is constitutionally cognizable.[117] It is sufficient for the purposes of this analysis to assume that some such interest exists and that it holds some constitutional weight.

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[110] *See id.*
[111] *Mathews*, 424 U.S. at 335.
[112] *McKithen*, 481 F.3d at 107–08 (quoting Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 12 (1979)).
[113] *Id.* at 108 (quoting *Mathews*, 424 U.S. at 334).
[114] *Id.* at 107–08.
[115] *Id.* at 108.
[116] *Harvey II*, 285 F.3d 298, 313 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing en banc).
[117] *See* Grayson v. King, 460 F.3d 1328, 1340–41 (11th Cir. 2006) (noting the disagreement on whether or not a liberty interest under the due process clause residually survives final conviction and sentencing).

2. The risk of an erroneous deprivation and other procedural safeguards

¶32 The risk of an erroneous deprivation of whatever continued liberty interest McKithen has is low. In addition, McKithen has received the benefit of other procedural safeguards.[118] Therefore, this factor weighs against McKithen. First, McKithen was found guilty by a jury at a fair trial in which no prosecutorial misconduct was alleged.[119] He received an appeal in which his conviction was affirmed; it was determined that his conviction was not against the weight of the evidence.[120] Seven years after his conviction, McKithen moved to compel DNA testing of the knife admitted into evidence in accordance with a New York provision providing for post-conviction DNA testing under certain circumstances.[121] The New York provision required that testing shall only be granted upon a determination that "if a DNA test had been conducted on such evidence, and if the results had been admitted in the trial resulting in the judgment, there exists a reasonable probability that the verdict would have been more favorable to the defendant."[122] The Queens County Court denied his motion, concluding that "there is no reasonable probability that the results of such testing would have resulted in a verdict more favorable to [McKithen]."[123]

¶33 The Second Circuit notes that the *Mathews* analysis depends in part on "adequate statutory avenues for relief."[124] The New York legislature, cognizant of the reality of wrongful convictions, enacted a statute providing for post-conviction testing of potentially exculpatory DNA testing.[125] In fact, New York was the first such state to so do.[126] The New York legislature has provided an opportunity for prisoners for whom DNA evidence has the potential to exculpate to be granted access to this evidence.[127] Here, it was determined that there is no "reasonable

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[118] *See McKithen*, 481 F.3d at 94. McKithen received an appeal, on which his conviction was affirmed. *Id.* He also received the opportunity to request access to DNA evidence under the relevant New York statute, of which he availed himself. *Id.*

[119] *Id.*

[120] People v. McKithen, 634 N.Y.S.2d 128, 129 (1995).

[121] *McKithen*, 481 F.3d at 94.

[122] *Id.* (citing N.Y. CRIM. PROC. LAW § 440.30(1-a)(a) (McKinney 2004)).

[123] *Id.*

[124] *Id.*

[125] N.Y. CRIM. PROC. LAW § 440.30(1-a)(a) (McKinney 2004).

[126] The Innocence Project, http://www.innocenceproject.org/Content/395.php (last visited Aug. 18, 2008).

[127] The New York statute requires that the court grant access to forensic DNA testing "if a DNA test had been conducted on such evidence [at trial], and if the results had been admitted in the trial resulting in the judgment, there exists a

probability that the verdict would have been more favorable to [McKithen]" even if any results of the DNA testing had originally been admitted at trial.[128] The court arguably made such a determination about the probative value of any DNA evidence for the same reasons articulated above as to why any DNA evidence could not be conclusively exculpatory. Here, McKithen received, by way of the New York post-conviction DNA testing statute, an additional procedural safeguard under which he could have obtained access to the evidence if it could have helped him to overturn his verdict. Consequently, any risk of an erroneous deprivation of McKithen's liberty interest in seeking freedom from confinement is low. If any DNA evidence produced would have assisted him in his endeavor, he would have been granted access to the DNA evidence under this statute.[129]

3. The Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail

¶34 The third factor of the *Mathews* analysis favors the denial of access to DNA evidence in McKithen's case, although it appears that such a conclusion is best supported only when any DNA evidence produced would lack the potential to exculpate the prisoner. The government has a compelling interest in the finality of duly adjudicated criminal judgments.[130] The government also has strong interests in "guarding against a flood of requests . . . and ensuring closure for victims and survivors."[131]

¶35 In McKithen's case, the government will bear no fiscal burden in permitting access to evidence for DNA testing since McKithen volunteered to cover the costs of testing himself.[132] McKithen does not challenge the state's procedures for the collection and storage of biological evidence.[133] Such a challenge would naturally trigger a valid concern as to cost.[134] Here, McKithen simply seeks access to evidence already available.[135] In addition,

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reasonable probability that the verdict would have been more favorable to the defendant." N.Y. CRIM. PROC. LAW § 440.30(1-a)(a) (McKinney 2004).

[128] *McKithen*, 481 F.3d at 94.

[129] *See supra* text accompanying note 127.

[130] Calderon v. Thompson, 523 U.S. 538, 555 (1998).

[131] Grayson v. King, 460 F.3d 1328, 1342 (11th Cir. 2006).

[132] *McKithen*, 481 F.3d at 108. DNA testing can cost as much as $5,000. Gwendolyn Carroll, Comment, *Proven Guilty: An Examination of the Penalty-Free World of Post-Conviction DNA Testing*, 97 J. CRIM. L. & CRIMINOLOGY 665, 666 (2007). Almost every state that provides for post-conviction testing funds the testing for indigent petitioners and requires solvent petitioners to advance the funding for the test. *Id.* at 669.

[133] *McKithen*, 481 F.3d at 109.

[134] *Id.*

[135] *Id.*

the government has likely incurred a greater cost in opposing McKithen's request for access to DNA evidence than it would if the request had been granted.

¶36 If the results of the DNA test were to confirm McKithen's guilt, then the state's interest in the finality of judgments would no doubt be served. If the results prove inconclusive, the state has still incurred no cost. If the results of the test could provide material evidence of factual innocence, the government's interest in the finality of judgments is no longer at issue, because the government cannot have a finality interest in imprisoning an innocent person.[136] In addition, the interests of the victim in this case, McKithen's estranged wife, would arguably have to cede to McKithen's interest in pursuing release, exculpatory evidence in hand.[137]

¶37 However, as previously noted, even if McKithen were to receive a favorable result from the DNA evidence, it would lack the power to shine real doubt upon his conviction. Any potential result obtained through DNA analysis is consistent with the prosecution's theory of the case at trial. Therefore, the state's interest in the finality of judgments and the interests of the victim arguably weigh against reopening a case in which there is no possibility of calling the verdict into question.

4. Weighing the Mathews *factors*

¶38 In McKithen's case, the *Mathews* factors call for a finding that McKithen's due process rights have not been violated by the procedure he was afforded. Due to the factual nature of any DNA evidence in his case, he lacks the possibility of being exculpated. Though the cost and burden to the state in affording access to the DNA evidence are arguably negligible, the lack of probative value of any evidence produced weighs against a grant of access.

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[136] *See* United States v. Agurs, 427 U.S. 97, 110–11 (reaffirming that the government's "overriding interest [is] that 'justice shall be done'"); *see also In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) ("[The] fundamental value determination of our society is that it is far worse to convict an innocent man than to let a guilty man go free.").

[137] *See* Wade v. Brady, 460 F. Supp. 2d 226, 249 (D. Mass. 2006) ("Victims may have an interest in moving on but they do not have an interest in imprisoning the wrong person.").

III. SUBSTANTIVE DUE PROCESS AND POST-CONVICTION ACCESS TO DNA EVIDENCE

¶39 A post-conviction right of access to DNA evidence does not fall within the realm of previously recognized substantive due process rights.[138] Substantive due process, though controversial, is firmly enshrined in constitutional jurisprudence.[139] Rights protected through substantive due process are those which are "fundamental," found in the history and traditions of England and America, and "implicit in the concept of ordered liberty."[140] The Supreme Court teaches that the "Due Process Clause "bar[s] certain government actions regardless of the fairness of the procedures used to implement them."[141] Post-conviction access to DNA evidence has never been explicitly held to constitute such a fundamental right.[142] However, the view has been advanced that under established Supreme Court precedent there may be a substantive due process right to access evidence for the purposes of post-conviction DNA testing.[143] The following arguments have been submitted for the proposition that a substantive due process right of post-conviction access to DNA evidence may exist.

A. Right of access to evidence

¶40 A substantive due process right to post-conviction DNA testing may fall within a substantive due process right of access to evidence. Under this view,

> the right of access to evidence is sufficiently supported by the history and traditions that our criminal justice system be fair and that the innocent not be wrongfully deprived of their liberty, and by our now-settled practice, adopted in pursuit of the same interests, that all potentially exculpatory evidence be provided to the accused in advance of trial (and even to the convicted post-trial, if previously known to the government).[144]

Such an argument contends that a right of access to evidence is rooted in Anglo-American jurisprudence. However, DNA testing has fundamentally

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[138] *Harvey II*, 285 F.3d 298, 311 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing en banc).
[139] *McKithen*, 481 F.3d at 107 n.17 (citing County of Sacramento v. Lewis, 523 U.S. 833, 856–57 (1998)).
[140] Palko v. Connecticut, 302 U.S. 319, 325 (1937).
[141] *Harvey II*, 285 F.3d at 318 (Luttig, J., respecting the denial of rehearing en banc) (citing Daniels v. Williams 474 U.S. 327, 331 (1986)).
[142] *See id.* at 311 (Luttig, J., respecting the denial of rehearing en banc).
[143] *Id.* at 318.
[144] *Id.* at 319.

changed the very nature of evidence and has opened up a new possibility for the production of conclusive, potentially exculpatory evidence after an individual has already been convicted.[145] Therefore, this right of access to evidence should reflect the new realities of technology and encompass access to this new type of evidence.[146]

B. Right to be free from arbitrary governmental action

¶41 Proponents of a substantive due process right to post-conviction DNA testing have advanced the notion that such a right could be grounded in an individual's right to be free from arbitrary governmental action.[147] It is a constitutional principle that the due process clause was "intended to secure the individual from the arbitrary exercise of the powers of government."[148] The Supreme Court has defined arbitrary governmental action as including "the exercise of power without any reasonable justification in the service of a legitimate governmental objective."[149] However, the Supreme Court has ruled that the abuse of power needs to rise to the level of that which "shocks the conscience" for a due process violation to be found – thus providing a doctrinal failsafe for emergency situations.[150] In certain post conviction access to evidence cases, where the evidence withheld has the capability to conclusively exculpate a prisoner, the refusal to turn it over might arguably rise to this shocking level. One could indeed claim that it is

> shockingly arbitrary that the government would literally dispose of the evidence used to deny one of his liberty (if not his right to life) before it would turn that evidence over to the individual, when he steadfastly maintains his factual innocence and ask only that he be allowed to subject that evidence to tests which, it is conceded, given the evidence

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[145] *See* Kreimer & Rudovsky, *supra* note 72, at 595.
[146] *Harvey II*, 285 F.3d at 315 n.6 (Luttig, J., respecting the denial of rehearing en banc) (citing City of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy & O'Connor, JJ., concurring) ("It must be added that history and tradition are the starting point, but not in all cases the ending point of the substantive due process inquiry.")).
[147] *See, e.g.*, *Harvey II*, 285 F.3d at 319 (Luttig, J., respecting the denial of rehearing en banc) (proposing that denial of access to DNA evidence may sometimes be "shockingly arbitrary"); *see also* Kreimer & Rudovsky, *supra* note 72, at 601.
[148] *Harvey II*, 285 F.3d at 319 (citing Daniels v. Williams 474 U.S. 327, 331 (1986)).
[149] *Id.*
[150] *See id.*

> introduced at trial in support of conviction, could prove him absolutely innocent of the crime.[151]

But if the evidence sought would provide no conclusive information about the prisoner's guilt or innocence, an argument that denial of access "shocks the conscience" appears substantially less convincing.

C. Substantive due process in McKithen's case

¶42 Even if a right of access for post-conviction DNA testing can sometimes be found through the doctrine of substantive due process, this right does not exist in McKithen's case. As discussed above with respect to procedural due process, even a favorable result from the DNA testing would not conclusively exculpate McKithen, nor shine serious doubt on his conviction in light of the overwhelming evidence against him. Having so concluded, the government in not acting arbitrarily in denying McKithen access to the DNA evidence. It is in no way shocking to the conscience that the government could have concluded that there are no circumstances under which the evidence would be exculpatory and therefore the interests of finality and conservation of resources favor denial of access. Furthermore, no right of access can be recognized when the evidence is not potentially exculpatory. No general substantive due process right of access to all evidence in the state's possession has ever been recognized. Therefore, even if one accepts the arguments advanced for a limited substantive due process right to post-conviction access, the right does not exist in this factual circumstance.

CONCLUSION

¶43 The Second Circuit charged the district court with a weighty task when it asked the court to consider the existence and boundaries of a constitutional post-conviction right of access to DNA evidence grounded in due process jurisprudence. The revolutionary technology of DNA testing, which has the potential to conclusively exculpate, may merit the recognition of an interest in accessing evidence for potentially exonerative DNA testing. However, where it is impossible that the evidence sought could ever prove exculpatory, the recognition of a right of access to evidence for DNA testing is not supported by current constitutional doctrine or reasonable extensions thereof. There is no logical possibility that the potential DNA evidence sought by McKithen could exculpate him from his crime. Therefore, the district should conclude that even if it accepts the arguments proposing that a post-conviction right of access to evidence for DNA testing may sometimes exist, such a right does not exist under the circumstances of McKithen's case.

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[151] *Id.* at 319–20.

POSTSCRIPT

¶44 Since the time that the body of this iBrief was written, Brown petitioned the Supreme Court for a writ of certiorari, which was denied on February 19, 2008.[152] In July of 2008, the district court for the Eastern District of New York decided *McKithen v. Brown* on remand.[153] Judge Gleeson, in a thorough, forty-eight page opinion, held that prisoners do indeed retain a constitutionally-protected post-conviction liberty interest in meaningful access to existing executive mechanisms of clemency.[154] He then determined that McKithen was entitled to access to the knife for the purposes of DNA testing as a matter of procedural due process.[155] In dicta, he further announced that under some circumstances, a substantive due process right of access to evidence for DNA testing exists.[156]

¶45 Judge Gleeson considered the arguments highlighted by this iBrief and ultimately found the argument advocating a residual liberty interest in meaningful access to clemency mechanisms to be persuasive.[157] He framed the origin of the right in terms of a "prosecutor's duty to seek justice," noting that such a duty continues after a conviction becomes final.[158] After conviction, that duty requires a prosecutor to "disclose only such evidence which, if the defendant had access to it but was erroneously prevented from using it, would deprive the defendant of either of his remaining rights relating to guilt or innocence"—one of those rights being that of access to the courts and the other, that of meaningful access to clemency proceedings.[159]

¶46 Drawing an analogy to transcripts of habeas corpus proceedings, to which a prisoner's access is constitutionally required, Judge Gleeson concluded that "the fact that evidence of innocence is neither sufficient nor strictly necessary for a favorable outcome does not indicate that it can never be required by the right of meaningful access to existing clemency mechanisms."[160] Instead, "like such a transcript, the evidence of innocence must be forceful enough to be practically necessary in a plea for clemency based on innocence."[161] Addressing the requisite reliability of such evidence he determined that "evidence of innocence that is of

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[152] Brown v. McKithen, 128 S. Ct. 1218 (2008).
[153] McKithen v. Brown, NO. 02-CV-1670 JG LB, 2008 WL 2791852 (E.D.N.Y. Jul. 21, 2008).
[154] *Id.* at *36.
[155] *Id.* at *44.
[156] *Id.* at *41.
[157] *See id.* at *36.
[158] *Id.* at *19.
[159] *Id.*
[160] *Id.* at *28.
[161] *Id.*

unimpeachable reliability is practically necessary if it undermines confidence in the outcome of the trial."[162]

¶47 After conducting the appropriate *Mathews* balancing, Judge Gleeson held as follows:

> After balancing this interest against the government's interests in light of the risk of erroneous deprivation and the probable value of additional safeguards, I conclude that in states possessing some clemency mechanism (including a parole system) which can reduce or undo a prisoner's sentence based on the ground that the prisoner is actually innocent, and at least where, as here, the tests can be performed effectively without imposing non-negligible fiscal or other burdens on the government or subjecting an individual to nonconsensual DNA testing not otherwise authorized by law, a prisoner has a right to access physical evidence for the purpose of DNA testing if: the physical evidence is in the possession of the government; the testing is nonduplicative; and assuming exculpatory results, the results of the testing would undermine confidence in the outcome of trial.[163]

¶48 As the Second Circuit explicitly instructed the district court to consider a substantive due process foundation for a post-conviction right of access to DNA evidence, Judge Gleeson discussed the circumstances under which he would find that denial of access to physical evidence for DNA testing shocks the conscience and therefore constitutes arbitrary governmental action barred by the dictates of constitutional substantive due process.[164] Judge Gleeson

> would conclude that if a prosecutor refuses a prisoner's specific request for access to physical evidence for DNA testing, in circumstances where the testing could be performed at negligible cost to the state and the results of the testing, if exculpatory, would prove beyond a reasonable doubt that the prisoner did not commit the crime for which she is incarcerated, the prosecutor exhibits deliberate indifference to the possibility that the prisoner is actually innocent.[165]

This deliberate indifference in circumstances when the results could be *conclusively* exculpatory "shocks the conscience" and therefore, a prisoner has a substantive due process right to be free from such arbitrary governmental conduct.[166] However, because the probative value of the evidence in McKithen's case is so low, Judge Gleeson rightly did not find

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[162] *Id.* at *29 (internal quotations omitted).
[163] *Id.* at *36 (footnotes omitted).
[164] *Id.* at *37–*41.
[165] *Id.* at *39.
[166] *Id.*

that the governmental action in McKithen's case to rose to this demanding standard.

¶49 Judge Gleeson turned then to McKithen's procedural due process claim. Under his previous analysis, the potential DNA evidence would, if exculpatory, need to undermine confidence in the outcome of the trial to require the government to release the knife to McKithen.[167] He feels it is necessary to assume that the results would be exculpatory, which in this case, means assuming that DNA belonging to a criminal in a DNA database collected for law enforcement purposes is found on the knife.[168] Even in the highly unlikely event that such DNA were found, McKithen would not be conclusively exculpated, as multiple eyewitness accounts as well as his own statements provided strong evidence against him. Indeed Judge Gleeson correctly noted that even the presence of such DNA would not change the result of McKithen's trial, given all the other evidence the government possessed against him.[169] However, he did conclude that such a finding would undermine confidence in McKithen's trial, and as a result, access to the DNA evidence was constitutionally required.[170]

Judge Gleeson's analysis correctly weights the importance of post-conviction DNA testing and appropriately concludes that there are circumstances under which it is constitutionally required. However, his formulation of the procedural due process right, which requires the assumption of exculpatory results and demands testing when the results would undermine confidence in the trial is too weak of a hurdle to overcome and invites frivolous demands for testing. If one must assume that skin cells from a criminal in a law enforcement database are on any objects associated with a crime, no matter how unlikely that scenario is, virtually any request for access to any object in evidence will present a situation in which DNA testing must be ordered. If the Constitution demands such testing, then prisoners should indeed receive it. However, it is unclear whether the dictates of procedural due process truly extend that far, and courts should be wary of reading them in such an expansive manner.

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[167] *Id.* at *44.
[168] *Id.*
[169] *Id.* at *43.
[170] *Id.* at *44.