LETTING INNOCENCE SUFFER: THE NEED FOR DEFENSE ACCESS TO THE LAW ENFORCEMENT DNA DATABASE

Jason Kreag[†]

Law enforcement has gradually amassed a sizable DNA database that holds considerable promise for solving cold cases and identifying suspects. The Supreme Court has blessed this effort, allowing investigators to include profiles of arrestees as well as convicted persons in the database. At present, though, law enforcement has a near monopoly on use of the DNA database, leaving defendants at the whim of the law enforcement officials who control access to this tool. Legal scholars have alternatively praised and decried the database, but none has examined its prospects for proving defendants' innocence post-conviction. This Article fills that void by identifying a limited due process right to defense-initiated DNA database searches. The Article argues that the database is a powerful truth-promoting tool that should be available to law enforcement and defendants alike. Because legislators have failed to promote the search for actual offenders through statutory rights of access, this Article presents the constitutional authority for defense-initiated searches to vindicate the rights of innocent defendants.

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† Visiting Assistant Professor, The University of Arizona James E. Rogers College of Law. I thank Professors Jane Bambauer, Derek Bambauer, Jeffrey Fagan, Brandon Garrett, Bernard Harcourt, Cecilia Klingele, Dave Marcus, Toni Massaro, Daniel McConkie, Michael Rich, Stephen Rushin, Barry Scheck, Roy Spece, Colin Starger, Elina Alexandra Treyger, and Jordan Woods for their insightful comments. This Article also benefitted from discussions at the 2013 Rocky Mountain Junior Scholars Forum and the 2014 CrimFest Workshop.

INTRODUCTION

After spending over five decades, combined, in Texas prisons professing their innocence, Michael Morton and Rickey Wyatt faced the same problem.[1] Their convictions were for unrelated crimes, but the paths they followed in trying to establish their innocence were similar. In the end, on the cusp of joining the growing group of DNA exonerees, each man needed one additional item of evidence to gain his freedom. Morton and Wyatt had previously identified third-party DNA from probative crime scene evidence, and each had demonstrated that he was not the source of that DNA. However, neither of them had connected the foreign DNA profile in his case to a specific person. Absent identifying an alternate perpetrator in their respective cases, Morton and Wyatt faced lengthy battles to overturn their convictions. To take the last step, they needed access to law enforcement's DNA database to

[1] As a staff attorney at the Innocence Project, I represented Wyatt in his post-conviction proceedings and was part of Morton's legal team in his pursuit of post-conviction DNA testing.

compare the foreign crime scene DNA profiles to the DNA profiles in the database.[2] This search had the potential to yield a match to a convicted offender, simultaneously proving innocence and identifying the actual perpetrator.

At this point, their paths diverged. Morton, who was convicted of killing his wife, endured a multi-year battle to secure DNA testing, but once testing was conducted, he quickly obtained a DNA database search.[3] The search confirmed that the DNA on a bloody bandana found at the crime scene matched the DNA of another man, Mark Alan Norwood.[4] Within a matter of days, traditional investigation established that it was Norwood, not Morton, who committed the murder.[5] Without access to the database, Morton likely would still be professing his innocence, and Norwood would be a free man.[6]

Wyatt's case took a different path, largely because—unlike Morton—he was prohibited from accessing the DNA database.[7] Wyatt was a suspect in a string of sexual assaults, and despite the fact that non-DNA evidence pointed to his innocence at the time of the crime, he was ultimately tried, convicted, and sentenced to ninety-nine years in prison.[8] Once he finally secured DNA testing nearly three decades later, the DNA evidence from the sexual assault kit had degraded to a degree that prevented the lab from identifying a full profile. Nonetheless, the lab identified a partial DNA profile and excluded Wyatt as a source of it. Armed with the partial—but exclusionary—DNA profile, Wyatt sought a search of the DNA database, hoping to identify the actual perpetrator. However, Wyatt's request was blocked by the Texas DNA database

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2 This Article refers to the collection of law enforcement DNA databases as one singular database. That is, it lumps together the national network of DNA databases that are operated by the Federal Bureau of Investigation (FBI) with the local and state databases that operate outside of the FBI's regulations. It follows this convention except where it is helpful and necessary to distinguish between a DNA database that is part of the FBI's national network and one that is not. The Article proceeds in this manner because the limited constitutional right to a DNA database search that it develops applies to all DNA databases—those in the FBI's network and the non-FBI regulated databases.

3 For a comprehensive account of Morton's wrongful conviction; his multi-year battle for DNA testing; his exoneration; the fallout from his exoneration, including the criminal proceedings against the prosecutor who sent Morton to prison; and the ultimate conviction of Norwood for the crime, see *Michael Morton*, TEX. MONTHLY, http://www.texasmonthly.com/topics/michael-morton (last visited Oct. 12, 2014), and *Know the Cases: Michael Morton*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Michael_Morton.php (last visited Oct. 12, 2014). For Morton's first-hand account of his case, see MICHAEL MORTON, GETTING LIFE: AN INNOCENT MAN'S 25-YEAR JOURNEY FROM PRISON TO PEACE (2014).

4 *See Michael Morton*, *supra* note 3.

5 *Id.*

6 For an explanation as to why an exclusionary DNA result is not always sufficient to establish innocence, see *infra* Part II.A.

7 Wyatt v. State, No. 05-04-01345-CR, 2005 WL 729960, at *1 (Tex. Ct. App. Mar. 31, 2005).

8 *Id.*

administrator who concluded that the partial profile did not meet the requirements for a database search. Thus, the State was deprived of the opportunity to use the database to find the actual perpetrator, and Wyatt was denied the opportunity to remove all doubt about his innocence.[9]

These two cases demonstrate the crucial role that the DNA database can play in post-conviction proceedings involving innocence claims.[10] Access to the database can provide the key to the prison door for innocent individuals and the welcome mat for actual perpetrators who had previously escaped punishment. In this manner, the DNA database simultaneously serves the two goals of the law: "that guilt shall not escape or innocence suffer."[11] Despite this promise, the database's ability to serve the second goal of protecting innocence has been curtailed by procedures that block post-conviction defendants from accessing this powerful, truth-promoting tool.

To be sure, the criminal justice system has provided some support to the powerful truth-seeking nature of DNA to prove innocence in post-conviction cases. Over a short period of time, every state created procedures that provide post-conviction defendants a mechanism to obtain DNA testing.[12] Nevertheless, states have not responded with the same vigor to the need for certain post-conviction defendants to search the DNA database to prove innocence, as only nine states provide such access.[13] This Article examines the fickleness of a system that allows law enforcement to use the DNA database to ensure that "guilt shall not

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9 While Wyatt's case stalled because he was blocked from accessing the DNA database, his conviction was ultimately overturned. *See Ex parte* Wyatt, No. AP-76797, 2012 WL 1647004, (Tex. Crim. App. May 9, 2012) (vacating his conviction based on a combination of the exculpatory DNA results and a series of *Brady* violations). Ultimately, after a lengthy re-investigation that followed Wyatt's release in 2012, the District Attorney dismissed the original indictment, citing Wyatt's innocence. *See* Robert Wilonsky, *Dallas Man Who Served 31 Years in Prison for a Rape He Didn't Commit Finally Declared Innocent*, DALL. MORNING NEWS CRIME BLOG (Dec. 24, 2014, 1:12 PM), http://crimeblog.dallasnews.com/2014/12/dallas-man-who-served-31-years-in-prison-for-a-rape-he-didnt-commit-finally-declared-innocent.html.

10 This Article uses the term "post-conviction" to refer to state and federal proceedings following the direct appeal.

11 Berger v. United States, 295 U.S. 78, 88 (1935).

12 *See* Dist. Attorney's Office for the Third Judicial Dist. v. Osborne, 557 U.S. 52, 72–73 (2009) (characterizing the legislative response to the promise of DNA as "prompt and considered"). *But see* Brandon L. Garrett, *DNA and Due Process*, 79 FORDHAM L. REV. 2919, 2954 (2010) (disagreeing with the Court's assertion that states promptly responded to the power of DNA by providing for post-conviction DNA testing).

13 These states are Colorado, Georgia, Illinois, Maryland, Mississippi, New York, North Carolina, Ohio, and Texas. COLO. REV. STAT. ANN. § 18-1-412(9) (West 2013); GA. CODE ANN. § 5-5-41(9) (West 2003); 725 ILL. COMP. STAT. ANN. 5/116-5 (West 2008); MD. CODE ANN. CRIM. PROC. § 8-201(d)(2) (West 2013); MISS. CODE ANN. § 99-39-11(10) (2014); N.Y. CRIM. PROC. LAW § 440.30.1-a(c) (McKinney 2014); N.C. GEN. STAT. ANN. § 15A-269 (West 2009); OHIO REV. CODE ANN. § 2953.74(E) (West 2006); TEX. CODE. CRIM. PROC. ANN. art. 64.035 (West 2011).

escape," but only grants access to certain, lucky post-conviction litigants seeking to prove their innocence, leaving others, like Wyatt, to suffer without the one tool that could categorically solve their cases. It proposes a constitutional remedy to address this imbalance. Absent recognizing a constitutional right to post-conviction defense-initiated DNA database searches, innocent defendants will be left to the whim of law enforcement officials who currently control the DNA database, and some will remain incarcerated despite their innocence.[14]

Scholars have evaluated and criticized the database from many angles. They have (1) questioned its effectiveness as a crime fighting tool; (2) criticized the growth of the database, the racial make-up the database, and the potential for using the database to focus investigative resources on innocent individuals (through familial DNA searches); (3) analyzed the Fourth Amendment implications of collecting DNA from convicted offenders and arrestees; (4) evaluated whether there should be a time limit or other restrictions on how long an individual's profile remains in the database; and (5) called for greater access to the database for research purposes.[15] What this important work has not examined is whether post-conviction litigants should have a right to access law

14 This Article focuses exclusively on a constitutional right to DNA database searches in post-conviction proceedings. It does so because pretrial DNA database searches are routinely performed by law enforcement regardless of whether the defendant requests the search. To the extent law enforcement refuses to conduct a database search pretrial, the constitutional arguments outlined in this Article apply with greater force in the pretrial setting, where a defendant's due process liberty interest has not been weakened by a conviction. *See infra* Part III.C.

15 *See, e.g.*, Frederick R. Bieber, *Turning Base Hits into Earned Runs: Improving the Effectiveness of Forensic Data Bank Programs*, 34 J.L. MED. & ETHICS 222, 227 (2006) ("It has been assumed, but not demonstrated, that the DNA data banks are effective on a broad scale in the manner intended. In fact, we know very little about the outcomes of most 'hits' . . . ."); Matthew Gabriel et al., *Beyond the Cold Hit: Measuring the Impact of the National DNA Data Bank on Public Safety at the City and County Level*, 38 J.L. MED. & ETHICS 396 (2010); Elizabeth E. Joh, Maryland v. King*: Policing and Genetic Privacy*, 11 OHIO ST. J. CRIM. L. 281, 291 (2013) (predicting that police will be able to collect DNA samples during routine *Terry* stops and traffic stops); David H. Kaye, *DNA Database Trawls and the Definition of a Search in* Boroian v. Mueller, 97 VA. L. REV. IN BRIEF 41, 42 (2011) (exploring how courts have addressed the question of whether convicted offenders can seek to have their DNA profiles removed from the database after serving their sentences); David H. Kaye, *A Fourth Amendment Theory for Arrestee DNA and Other Biometric Databases*, 15 U. PA. J. CONST. L. 1095, 1099 (2013) [hereinafter *Fourth Amendment Theory*] ("[T]here are no statistics that show how much the database hits contributed to investigation or convictions . . . ."); David H. Kaye, *The Genealogy Detectives: A Constitutional Analysis of "Familial Searching,"* 50 AM. CRIM. L. REV. 109, 130–31 (2013) [hereinafter *Genealogy Detectives*] (documenting the failure of numerous constitutional challenges to the DNA database); Erin Murphy, *Relative Doubt: Familial Searches of DNA Databases*, 109 MICH. L. REV. 291 (2010) (evaluating constitutional and policy limitations for familial DNA searches, including a description of why such searches have a disproportionate racial and ethnic impact); Andrea Roth, *Safety in Numbers: Deciding When DNA Alone Is Enough to Convict*, 85 N.Y.U. L. REV. 1130, 1140 n.43 (2010) (documenting the scholars who have advocated for greater transparency and access to the database for research purposes). Additionally, defendants have challenged the constitutionality of the database, but these challenges have been unsuccessful.

enforcement's DNA database to prove innocence. This Article fills that void.

Rather than critique the DNA database, this Article contends that the database represents a significant repository of valuable information and a powerful truth-promoting tool—for the government and defendants alike. And, while there are important questions to be raised about how the government uses this tool,[16] the present focus is under what circumstances, and based on what authority, post-conviction defendants should have a right to access this data.[17]

This Article makes two novel contributions. First, it offers a history of the rise of the database. It begins with a brief description of how the DNA database functions, with a particular focus on its use for post-conviction defendants seeking to prove innocence. The Article explains how the DNA database has developed and grown, what types of searches are permitted, and who makes the rules for the administration of the database. Importantly, it outlines why a DNA database search is necessary to establish innocence in certain cases and details the steps of how a defense-initiated DNA database search should proceed. Then, it describes the barriers faced by post-conviction defendants seeking access to the database, which include (1) opposition to the post-conviction DNA testing that might develop a foreign DNA profile; (2) strict law enforcement regulations about which profiles can be searched in the database; and (3) failure to recognize that the interests of the state and convicted individuals, trying to prove innocence with a DNA database search, represent an area where the adversarial nature of criminal proceedings should be relaxed.[18]

Second, this Article advances the claim that there is a constitutional right to post-conviction defense-initiated DNA database searches, grounding this right in the Due Process Clause. It identifies a liberty interest in establishing one's innocence that is based on state-created procedures and in the Due Process Clause itself, which at its core contains a strong innocence-protecting force that reaches post-conviction defendants. The Article demonstrates that this force is most evident in the due process principles that give rise to an expansive right to present a defense of third-party guilt, the right to exculpatory

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16 I will explore many of these questions in a future paper entitled *Going Local: The Fragmentation of Genetic Surveillance*.

17 *See* Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1659–60 (2008) (recognizing that the question of whether a right to defense-initiated DNA database searches exists is unresolved).

18 *See* Dist. Attorney's Office for the Third Judicial Dist. v. Osborne, 557 U.S. 52, 99 (2009) (Stevens, J., dissenting) ("Crime victims, the law enforcement profession, and society at large share a strong interest in identifying and apprehending the actual perpetrators of vicious crimes . . . .").

information, and a still-solidifying right to present a freestanding or bare constitutional claim asserting one's innocence. Critically, the piece explains why this fundamental liberty interest is not extinguished by a procedurally fair trial and why the Supreme Court's opinion in *District Attorney's Office for the Third Judicial District v. Osborne*,[19] in which the Court signaled a desire to limit the application of due process to a defendant's request for post-conviction DNA testing,[20] does not preclude the recognition of a right to defense-initiated DNA database searches.

This Article next examines what process is due to protect this liberty interest. To do so, it applies the traditional due process balancing test, which the Court has used in criminal cases,[21] and the more restrictive test used in *Medina v. California*,[22] where the Court held that a due process violation occurs only if the state practice "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[23] The Article concludes that regardless of which test is used, the Due Process Clause's innocence-protecting core requires a limited procedural right for post-conviction defendants to access the law enforcement DNA database to prove their innocence. In reaching this conclusion, the Article addresses concerns that recognizing this right (1) upends the system's commitment to finality; (2) creates unnecessary institutional burdens; (3) undermines or limits law enforcement's ability to use the DNA database to solve crimes; and (4) erodes important privacy considerations.

The Article grounds its arguments in traditional modes of constitutional analysis, including arguments from precedent and values arguments.[24] Moreover, it appeals to fundamental principles of fairness at stake in the DNA debate[25] that may defy or transcend formalistic categorization.[26]

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19 557 U.S. 52 (2009).

20 *Id.* at 72–74.

21 *See* United States v. Ruiz, 536 U.S. 622, 631 (2002) (applying the traditional procedural due process balancing test); Ake v. Oklahoma, 470 U.S. 68, 77 (1985) (same).

22 505 U.S. 437 (1992).

23 *Id.* at 445 (internal quotation marks omitted).

24 Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1194–1209 (1987) (identifying and describing five traditional types of constitutional arguments, including: (1) textual arguments, (2) arguments about the framers' intent, (3) arguments of constitutional theory, (4) arguments based on precedent, and (5) value arguments).

25 Given the subject matter, some of the arguments will appeal to emotion and fundamental notions of justice. *See* Jamal Greene, *Pathetic Argument in Constitutional Law*, 113 COLUM. L. REV. 1389 (2013) (recognizing the role of pathos in constitutional discourse).

26 *See, e.g.*, E. THOMAS SULLIVAN & TONI M. MASSARO, THE ARC OF DUE PROCESS IN AMERICAN CONSTITUTIONAL LAW 25–26 (2013) ("[T]he nature and degree of procedural protection that due process requires hinge in part on the substantive rights at stake: procedure

The Article proceeds as follows: Part I describes the DNA database and its birth, growth, and evolution as a law enforcement tool. Part II explains why some post-conviction defendants require a DNA database search to prove their innocence, describes the process that should be in place to obtain such a search, and concludes with a description of the hurdles post-conviction litigants currently face in seeking access to the database. Part III identifies the due process liberty interest, which arises from state-created procedures and the Due Process Clause itself. Part IV demonstrates why this liberty interest requires a limited procedural right to defense-initiated DNA database searches to prove innocence. It concludes by outlining some of the issues ripe for additional research and study.

I. THE DNA DATABASE

A. *Law Enforcement Tool*

After scientists isolated and discovered DNA, law enforcement quickly recognized its promise as a crime-solving tool, and the FBI began creating a law enforcement DNA database almost immediately.[27] In 1994, Congress responded to the FBI's initial steps by passing the DNA Identification Act, which authorized the Director of the FBI to create a national DNA database containing DNA profiles of convicted offenders and DNA profiles obtained from crime scene samples.[28] Ultimately, this led to the FBI's creation of an integrated national DNA database, allowing law enforcement to exchange and search DNA profiles.[29] Today, in addition to the FBI's national DNA database, there

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and substance notions are inherently interdependent."); *id.* at 37 ("[P]rocedural rights are never defined independently of the substantive interests being burdened.").

27 *See* Erin Murphy, *Databases, Doctrine and Constitutional Criminal Procedure*, 37 FORDHAM URB. L.J. 803, 805–10 (2010) (describing the numerous law enforcement databases, including the national DNA database); Murphy, *supra* note 15, at 294–97 (describing the mechanics of the national DNA database). DNA was first used to aid a criminal conviction in England in 1986. *See* Maryland v. King, 133 S. Ct. 1958, 1966 (2013) (citation omitted). Having proven its potential as a crime-solving tool, it was not long before post-conviction criminal defendants sought to unleash its power to challenge their convictions and establish their innocence. In 1989, after serving nearly a decade in prison for a rape that he did not commit, Gary Dotson became the first man in the United States to be exonerated based on post-conviction DNA testing. *See* BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 84–89 (2011).

28 42 U.S.C. § 14132 (2012).

29 *See CODIS Brochure*, FBI, http://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis_brochure (last visited Jan. 13, 2015); *see also* FBI, NATIONAL DNA INDEX SYSTEM (NDIS) OPERATIONAL PROCEDURES MANUAL, 4 (Jan. 31, 2013) [hereinafter NDIS MANUAL], *available at* http://static.fbi.gov/docs/NDIS-Procedures-Manual-Final-1-31-2013-1.pdf. While the FBI's

are numerous state and local DNA databases that operate outside of the regulatory structure of the FBI's database.[30] Compared to the national DNA database, we know very little about the state and local databases that operate outside of the national network,[31] however, it is reasonable to presume that the basic structure of these databases is similar to the national DNA database.

It was clear from its inception that the national DNA database was created as a law enforcement tool to be used and controlled exclusively by law enforcement.[32] Tellingly, the authorizing statute itself is a subsection of the Violent Crime Control and Law Enforcement Act of 1994 and is entitled "Index to facilitate law enforcement exchange of DNA identification information."[33] In addition, the law states that a DNA profile is not eligible for inclusion in the database unless it is prepared "by or on behalf of a criminal justice agency (or the Secretary of Defense),"[34] which is defined as "an agency . . . of the Federal, State, or Local government, other than the office of the public defender, which performs . . . activities relating to the apprehension, investigation, prosecution, adjudication, incarceration, supervision or rehabilitation of criminal offenders."[35] To be clear, the law does recognize that in certain

national DNA database is often identified as the Combined DNA Index System (CODIS), CODIS is actually the software program that allows law enforcement to exchange and search DNA profiles.

30 *See* Jason Kreag, Going Local: The Fragmentation of Genetic Surveillance (unpublished manuscript) (on file with author). While this collection of databases does not function as a fully integrated whole, this Article refers to these DNA databases as a singular database. It does so for three reasons. First, the national database administered by the FBI is, by far, the largest DNA database. Second, we know more about the national DNA database than the others because the FBI made public its operational regulations for the database. *See supra* note 29. Third, the constitutional right to defense-initiated DNA database searches explained in Parts III and IV applies to each of the DNA databases in a similar fashion.

31 *See* Murphy, *supra* note 15, at 347 (characterizing these databases as "'rogue' informal databases"). I am exploring the implications of the expansion of local, non-CODIS DNA databases in a future project. *See* Kreag, *supra* note 30.

32 *See* Sandra J. Carnahan, *The Supreme Court's Primary Purpose Test: A Roadblock to the National Law Enforcement DNA Database*, 83 NEB. L. REV. 1, 28 (2004) ("The DNA Act's legislative history is replete with examples of Congress's intention to promote the goal of general crime control through a comprehensive national law enforcement DNA database."); *id.* at 37–38 ("The express language and legislative history of the Act overwhelmingly support crime-solving as its primary purpose. The immediate goals of the Act are to identify criminal suspects, match their DNA to crime scene evidence, and prosecute them—all ordinary law enforcement functions. CODIS was designed by the Federal Bureau of Investigation, for the use of local, state, and federal law enforcement officials."). *But see* United States v. Reynard, 220 F. Supp. 2d 1142, 1161 (2002) (noting that a review of the legislative history shows that a secondary goal of the database was to "increase the efficacy of the criminal justice system by 'eliminat[ing] the prospect that innocent individuals w[ill] be wrongly held for crimes that they did not commit'" (quoting 146 CONG. REC. H8572-01, at *H8575)).

33 42 U.S.C. § 14132.

34 *Id.* § 14132(b).

35 *See* NDIS MANUAL, *supra* note 29, at 80.

limited situations, e.g., when being prosecuted for a crime based on a DNA database match, criminal defendants should be provided information from the database particular to that match,[36] but no one has interpreted this provision to provide for defense-initiated searches of the database.[37]

Rather, the FBI continues to assert that the database is exclusively for the use of law enforcement in accordance with the FBI's regulatory framework.[38] The FBI's position is consistent with the structure of the law that gave rise to the database, as Congress left it to the FBI to fill in the regulatory and operational details for law enforcement's use of the database.[39] The understanding that the DNA database is a tool for law enforcement has been trumpeted and reinforced as the database has expanded.[40] And, given the backdrop of the Court's recent decision in *Maryland v. King*,[41] in which the Court held that law enforcement can collect DNA samples from arrestees,[42] it seems clear that the DNA database will continue to expand and to be championed as an important

36 42 U.S.C. § 14132(b)(3).

37 *See* NDIS MANUAL, *supra* note 29, at 26 ("This provision does not authorize a defendant to access all of the DNA records in the National DNA Index."); David H. Kaye, *Trawling DNA Databases for Partial Matches: What Is the FBI Afraid Of?*, 19 CORNELL J.L. & PUB. POL'Y 145, 167 n.126 (2009) ("Plainly, this subsection does not entitle the defendant to the millions of DNA samples and profiles that come from other investigations or convictions.").

38 *See CODIS Brochure*, *supra* note 29 ("The DNA Identification Act of 1994 established the FBI's authority to maintain a National DNA Index System (NDIS) for law enforcement purposes."). The FBI reveals its belief that the database is exclusively for law enforcement purposes when discussing future developments for the database. It asserts that "[w]ith the continued cooperation and collaboration of legislative bodies and all components of the criminal justice community—law enforcement, crime laboratories, victims, prosecutors and the judiciary—the future of DNA, CODIS, and NDIS holds even greater promise to solve crime and identify the missing and unidentified." *Id.*

39 *See* NDIS MANUAL, *supra* note 29, at 7 ("[T]he FBI is responsible for ensuring that the DNA records in the national index are 'generated in accordance with publicly available national standards that meet or exceed the FBI Director's *Quality Assurance Standards for Forensic DNA Testing and DNA Databasing Laboratories*.'"); *see also id.* at 5 (discussing the FBI's NDIS Procedures Board—composed of the chief of the FBI's DNA database unit, four additional representatives from the FBI Laboratory's DNA unit, and eight representatives from state and local public DNA labs—which was tasked with creating the procedures).

40 *See, e.g.*, NAT'L COMM'N ON THE FUTURE OF DNA EVIDENCE, POSTCONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS 1 (1999), *available at* https://www.ncjrs.gov/pdffiles1/nij/177626.pdf ("As these DNA databases grow in size, society will benefit even more from the technology's incredible power to link seemingly unrelated crimes and to identify with alacrity suspects who were until then completely unknown to investigators."); Garrett, *supra* note 17, at 1659 ("Since databanks continually grow in size, the likelihood that a cold hit will occur continues to grow."); *Fourth Amendment Theory*, *supra* note 15, at 1127 ("Realistically, the overwhelming legislative purpose of arrestee [DNA] sampling, given that fingerprinting is already in place, has been intelligence.").

41 133 S. Ct. 1 (2012).

42 *Id.* at 1–3.

law enforcement tool.[43]

B. *Database Searches*

This Part outlines the types of searches available through the national DNA database administered by the FBI.[44] In addition to giving context to why post-conviction defendants seek access to the DNA database, this description of the operational mechanics of the database is necessary in Part IV, where the Article argues that the due process balancing test weighs in favor of recognizing a right to post-conviction defense-initiated DNA database searches.[45]

The strength of the database comes from the ability to search and compare all of the DNA profiles in the database. For example, the national database system runs a weekly comparison of the DNA profiles of known individuals with the DNA profiles obtained from crime scenes.[46] It also compares all crime-scene DNA profiles to each other in an attempt to identify serial offenders.[47] The FBI reports that these searches have assisted in over 220,000 investigations[48] and have led to resolving several notable unsolved crimes.[49]

Two categories of DNA database searches are relevant to post-conviction defendants seeking to prove their innocence.[50] The first, the search of a known offender profile, continues to be the driving motivation behind the expansion of the database.[51] These searches

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43 *See* Joh, *supra* note 15, at 291 (predicting that police will be able to collect DNA samples during routine *Terry* stops and traffic stops). Despite the database's expansion, we know very little about its overall effectiveness as a crime-solving tool. *See* Bieber, *supra* note 15, at 227 ("It has been assumed, but not demonstrated, that the DNA data banks are effective on a broad scale in the manner intended. In fact, we know very little about the outcomes of most 'hits'. . . ."); *Fourth Amendment Theory*, *supra* note 15, at 1099 ("[T]here are no statistics that show how much the database hits contributed to investigation or convictions . . . .").

44 While the state and local DNA databases operate outside of the national network of databases administered by the FBI, these non-FBI databases utilize similar searches.

45 *See infra* Part IV.

46 *See* NDIS MANUAL, *supra* note 29, at 40–42.

47 *Id.*

48 *See CODIS—NDIS Statistics*, FBI, http://www.fbi.gov/about-us/lab/biometric-analysis/codis/ndis-statistics (last visited Jan. 13, 2015).

49 *See, e.g.*, Colin Moynihan, *Cold Case DNA Unit Links Riker's Inmate to '86 Murder*, N.Y. TIMES, July 6, 2011, at A19 (describing the arrest of Steven Carter based on a DNA database hit in a twenty-six-year-old murder case); *see also* Janon Fisher, *Man Sentenced to Max—26 Years After Harlem Slaying*, N.Y. DAILY NEWS (July 30, 2012, 5:57 PM), http://www.nydailynews.com/new-york/man-sentenced-max-26-years-harlem-slaying-article-1.1125142 (documenting Carter's conviction).

50 *See* NDIS MANUAL, *supra* note 29, at 40 (listing the requirements for searching).

51 *See* Joh, *supra* note 15, at 288–90 (describing the forces advocating for an increase in the number of known DNA profiles in the database from convicted felons and arrestees).

compare the DNA profile from a known individual to all of the crime-scene DNA profiles in the database, thus serving the quintessential goal of the DNA database—to help law enforcement solve cases by linking DNA profiles from known individuals to DNA profiles from unsolved crimes.

The second category of searches, a search of a crime-scene DNA profile, is the flipside of the first. In these searches, law enforcement seeks to link a crime-scene profile from an unknown individual to an offender DNA profile of a known individual or to another crime-scene profile in the database.[52] Here, again, law enforcement's goal is to find potential perpetrators in unsolved cases.[53]

In the national DNA database administered by the FBI, law enforcement has two options for searching a DNA profile from crime-scene evidence. First, if the crime-scene profile is sufficiently complete, the profile itself will be permanently added to the DNA database as part of the search.[54] Doing so ensures that the profile will be routinely compared to any new profiles added to the database during the weekly searches. However, if the crime-scene profile is only a partial profile, perhaps because the DNA degraded over time or because there was only a small amount of DNA in the initial sample, the FBI has created a second type of search short of permanently uploading the crime-scene profile to the national DNA database.[55] This type of search involves what the FBI calls a keyboard search, where database administrators manually enter the partial profile for a one-time comparison against the known offender profiles.[56] In this type of search, the partial profile is not permanently added to the database.[57]

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52 *See* NDIS MANUAL, *supra* note 29, at 41 (identifying the types of DNA database searches). The goal of searching a new crime scene profile against other crime-scene profiles is to link two previously unconnected crimes, potentially identifying serial offenders.

53 Familial searching, or partial-match searching, is a subset of this second category of searches. In these searches, which may be performed if an initial search failed to link a crime-scene profile to a known offender profile, the goal is identifying a known profile sufficiently similar to the crime-scene profile such that one would expect that the known profile is from a close relative of the actual source of the crime-scene profile. *See generally* Murphy, *supra* note 15.

54 *See* NDIS MANUAL, *supra* note 29, at 40–42.

55 *Id.* at 41–42 (describing the procedures for a manual keyboard search).

56 *Id.*

57 *Id.* The FBI's regulations for law enforcement's use of the database express a strong presumption against keyboard searches, characterizing the process as an "exceptional mechanism" that must be approved by the FBI. *Id.* This presumption is what prevented Wyatt, whose case is discussed in the Introduction, from being able to search the partial DNA profile in his case. *See id.* (outlining the FBI's policy that keyboard searches of partial profiles are only allowed if the partial profile yields a random match probability of approximately one in the size of the total number of DNA profiles in the database or if "exigent circumstances" require running a search before the normal weekly search of the database).

II. DEFENDANTS SEEK TO PROVE INNOCENCE

The DNA database's promise as a law enforcement tool with the ability to solve decades-old cold cases, is precisely why post-conviction defendants with innocence claims seek access to it. These defendants recognize the unique power of a DNA match to a known offender—a power that can undermine even very compelling cases of guilt.[58]

A. *Types of Defendants Who Seek DNA Database Searches*

Two categories of post-conviction litigants seek access to the DNA database to prove innocence. The first category includes litigants like Michael Morton—those who already possess an exclusionary DNA profile, but who seek a database search to unleash the full exculpatory value of the foreign DNA profile by identifying the actual perpetrator.[59] In these cases, a DNA database search has the potential to identify the actual perpetrator, conclusively establishing the innocence of the person initially convicted of the crime[60] and ending any opposition from prosecutors who might have remained skeptical despite the initial exclusionary DNA result.[61] Indeed, in Morton's case, the prosecutor did

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58 *See* Ethan Bronner, *Lawyers, Saying DNA Cleared Inmate, Pursue Access to Data*, N.Y. TIMES, Jan. 3, 2013, at A1 ("'Juries expect the defense to be able to prove that if your client didn't do it, who did?'" (quoting the President of the National Association of Criminal Defense Lawyers)).

59 The exculpatory value of the existing exclusionary DNA profile may also be realized if it matches with a DNA profile from an as-yet unconnected crime scene, which would point to the guilt of a serial offender.

60 Of course, as occurred in Morton's case, following a DNA database match a minimal amount of traditional investigation is often needed to confirm the probative nature of the probative value of the match. For example, law enforcement will need to confirm that the person identified through the DNA database was not an unknown co-perpetrator of the initial defendant.

61 *See* Garrett, *supra* note 17, at 1659 ("[I]n several cases, even after DNA excluded a convict, the State did not concede innocence until a cold hit occurred."); *id.* at 1660 n.136 (listing DNA exonerees who were convicted despite the fact that an exclusionary DNA result existed at trial); *Genealogy Detectives*, *supra* note 15, at 141–42 (explaining why an exclusionary DNA result is not always sufficient for exoneration); *see also* Banks v. United States, 490 F.3d 1178, 1188–89 (10th Cir. 2007) ("While a criminal defendant may submit his or her own DNA sample for comparison with the sample discovered at a crime scene, a negative result would not necessarily exculpate the defendant. If other evidence ties the defendant to a crime, even though the defendant is innocent, the government would be free to argue that two perpetrators committed the crime. The government could easily explain the evidence: the DNA came from the defendant's accomplice and the other evidence points to the defendant's participation. Because the negative DNA test does not eliminate this possibility, and because the other evidence will tie the defendant to the crime, a jury might convict the defendant despite his actual innocence and a negative DNA-test result. With a comprehensive DNA database like CODIS, however, the DNA discovered from the crime scene might match with a previously unsuspected individual, whom the innocent defendant might be able to show acted alone.").

not concede Morton's innocence or concede that he deserved a new trial even after the bloody bandana found at the crime scene was proven to have the victim's blood and hair *and* DNA from an unknown man.[62]

The second category of post-conviction litigants who seek access to the DNA database are those who do not already possess an exculpatory DNA profile but who seek DNA testing based, in part, on the possibility that the testing will yield a profile that *will* be searched in the DNA database to identify the actual perpetrator.[63]

No matter whether post-conviction litigants seek access to the DNA database to establish innocence or as a tool for securing post-conviction testing, which might ultimately lead to proving innocence, there remain significant barriers to defense-initiated access. The next section outlines the ideal process for post-conviction defense-initiated DNA database searches. It then explores the nature of the barriers that stand in the way of these searches.

B. *Process for Accessing the DNA Database*

In place of the current system, where post-conviction defendants' requests to search the DNA database often turn on the whim of law enforcement and prosecutors, there should be a formal process to review these requests. This section outlines one potential process here.[64]

First, a post-conviction defendant should seek the cooperation of the prosecutor. If the prosecutor agrees that the search is needed, a joint request for a search from the prosecution and the post-conviction defendant will face significantly fewer hurdles than a defense-initiated

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62 *See* Pamela Colloff, *Why John Bradley Lost*, TEX. MONTHLY (May 31, 2012, 12:00 AM), http://www.texasmonthly.com/story/why-john-bradley-lost (documenting how the prosecutor's refusal to concede Morton's innocence played a significant role when he lost the next election); *see, e.g.*, House v. Bell, 386 F.3d 668, 709 (6th Cir. 2004) ("Once the initial trial and appeal have occurred, it is clear from the studies that the state, and its officials who have prosecuted, sentenced and reviewed the case, are inclined to persevere in the belief that the state was right all along. They tend to close ranks and resist admission of error."); *cf.* Coolidge v. New Hampshire, 403 U.S. 443, 450 (1971) ("[T]he whole point of the basic rule [requiring a magistrate to issue warrants] is that prosecutors and policemen simply cannot be asked to maintain the requisite neutrality with regard to their own investigations.").

63 *See, e.g.*, State v. Swearingen, 424 S.W.3d 32 (Tex. Crim. App. 2014) (rejecting Swearingen's request for post-conviction DNA testing and a database search of any foreign DNA profiles). In the interest of full disclosure, I was part of Swearingen's defense team at the Innocence Project, and I argued his case before the Texas Court of Criminal Appeals in December 2013.

64 I have included this sketch—outlining one possible manner in which post-conviction defense-initiated requests for a DNA database search should be handled—here, as opposed to in Part IV, because I think it helps to highlight the barriers post-conviction defendants currently face, which are discussed in the next section.

search opposed by the prosecution.[65] Assuming that the prosecutor does not consent, the post-conviction litigant should petition the court for an order granting the search. This may be done as part of a motion for post-conviction DNA testing, as was done in Morton's case.[66] Or, if the defendant has already secured an exculpatory DNA profile and seeks only to have that profile searched against the database, he should file a stand-alone petition for the search.

The trial court should evaluate the defendant's request for a search by asking whether, assuming that the hypothetical DNA database match to a known offender had been available at the time of trial, this information would have created a reasonable probability that the defendant would not have been convicted.[67] In making this determination, the trial court should presume that the search will generate a DNA database hit.[68] Before ordering the search, the trial court should also confirm that the DNA profile that the defendant seeks to search was generated in a reliable manner. If the profile was obtained from a DNA laboratory accredited by one of the national accrediting agencies, the court should apply a rebuttable presumption that the profile is reliable.

Assuming that a trial court makes these findings, it should issue an order to the state DNA database administrator to perform a keyboard search of the DNA profile in question. If such a keyboard search does not produce a hit, the trial court should order follow-up keyboard searches at regular intervals to address the possibility that new DNA profiles added to the database might be a match. If a keyboard search yields a match, the court should order that the results of the match be disclosed simultaneously, but under seal, to the prosecutor, the court, and the post-conviction petitioner.[69] These results should be disclosed

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65 *See infra* Part II.C.1.

66 *See Michael Morton*, *supra* note 3; *see also Know the Cases: Michael Morton*, *supra* note 3.

67 Here, the Article borrows the Court's *Brady* materiality standard. *See* United States v. Bagley, 473 U.S. 667, 682 (1985) (holding that the *Brady* materiality standard asks whether there is a reasonable probability of a different result had the favorable evidence been disclosed to the defendant before trial). Using a higher or more restrictive threshold does not make sense at the initial stage where a defendant merely seeks a database search, particularly because even if the search produces a hit, the defendant will have to file a new post-conviction petition to vacate his conviction based on the new evidence.

68 *See, e.g.*, TEX. CODE CRIM. PROC. ANN. art. 64.03(a) (West 2006) (requiring, in the context of a defendant's request for post-conviction DNA testing, that the court presume that the testing will produce exculpatory results). Requiring anything less than this ignores the long list of DNA exonerations that overcame what seemed to be overwhelming evidence of guilt. *See* Garrett, *supra* note 17, at 1713 (documenting examples of DNA exonerations in which the initial evidence of guilt was characterized as "'overwhelming'" (citation omitted)).

69 There are several reasons for this, but they all relate to the potential investigation of the subject of the DNA hit. For example, it would be imperative that the prosecutor and/or the

even if the search generates several potential matches, as might be the case if the DNA profile searched was a partial profile. Armed with information about individuals who are now potential alternate perpetrators, the prosecution and defense could pursue whatever lines of investigation are necessary to re-investigate the case, and, in the case of the defendant, to prepare a motion to vacate his conviction.

As outlined above, the process of actually performing the keyboard search presents a minimal burden, nothing more than typing in a string of numbers that represent a foreign DNA profile.[70] Of course, if a search generates a hit, the case might require extensive resources for a re-investigation. However, at that point, the prosecutor and the defendant will benefit from the truth-seeking power of DNA to determine if the original conviction resulted in an innocent person going to prison and the actual perpetrator avoiding punishment.

C. *Barriers to Defense-Initiated DNA Database Searches*

Defense requests to search the DNA database do not often follow the path outlined above. Some post-conviction litigants, like Morton, have been lucky enough to obtain DNA database searches;[71] however, post-conviction defendants face significant barriers when trying to obtain searches. Furthermore, they are often at the whim of the law enforcement officials who control the databases. The barriers range from opposition to the initial post-conviction DNA testing, which may yield a foreign DNA profile that could be searched in the database, to law enforcement opposition even where a defendant's request to search the DNA database has been joined by the prosecutor.

1. Anchoring Effect of a Conviction

Because "[p]rosecutorial resistance to an innocence claim can serve the death knell to a case or at least make the process infinitely more painful for the defendant,"[72] convincing a prosecutor to support a post-conviction defense-initiated DNA database search is perhaps the

defendant obtain other relevant information about the identity of the database hit before approaching that person.

70 *See supra* notes 55–57 and accompanying text.

71 *See, e.g.*, *infra* Part II.C.2 (discussing the case of Juan Rivera).

72 DANIEL S. MEDWED, PROSECUTION COMPLEX: AMERICA'S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT 126 (2012); *see also* Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 3 (1940) (concluding that prosecutors have "more control over life, liberty, and reputation than any other person in America").

clearest path to access to the database.[73] However, winning the support of the prosecutor to pursue a post-conviction innocence claim, or even convincing the prosecutor not to oppose one's pursuit, is most challenging in the types of cases in which DNA database searches are needed to prove innocence. In these cases, the anchoring effect of a conviction is the strongest.[74] These cases will not be resolved by performing DNA testing on a probative item of evidence and excluding the defendant as the source of the DNA, as is the case in most exonerations in single-perpetrator sexual assault cases. Rather, in the more complex cases—like Morton's—obtaining the foreign DNA profile is only the first step. The foreign DNA profile may not be dispositive of anything without linking it to a known individual who can be established as the actual perpetrator.[75] For example, in Larry Swearingen's capital case in Texas, prosecutors have been successful in opposing his request for post-conviction DNA testing for nearly a decade, relying on their belief that the "overwhelming evidence" of his guilt makes testing unnecessary.[76] As such, unlike Morton and Wyatt,

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73 *See, e.g.*, Geoff Fox, *DNA Prompts Court to Overturn Conviction in Hernando Death*, HERNANDO TODAY (June 26, 2014), http://hernandotoday.com/he/list/news/dna-prompts-court-to-overturn-conviction-in-hernando-death-20140626 (describing the reversal of Paul Hildwin's death sentence, which only happened after he was able to convince the Florida Supreme Court to order a CODIS search, ending seven years of opposition to the search from the prosecutors); *see also Florida Supreme Court Reverses Murder Conviction of Man Who Has Served 28 Years on Death Row*, INNOCENCE PROJECT BLOG (June 26, 2014, 6:05 PM), http://www.innocenceproject.org/Content/Florida_Supreme_Court_Reverses_Murder_Conviction_of_Man_Who_Has_Served_28_Years_on_Death_Row.php (same). *But see infra* Part II.C.2 (discussing the case of Juan Rivera and demonstrating that prosecutorial support and cooperation is not always sufficient).

74 It is helpful to compare Michael Morton's case, where a DNA database match to the actual perpetrator was needed to establish Morton's innocence, to most single-perpetrator sexual assault DNA exonerations in which the exclusionary DNA result was sufficient to demonstrate innocence despite the fact that the actual perpetrator was not identified. *See Know the Cases*, INNOCENCE PROJECT, http://www.innocenceproject.org/know/Search-Profiles.php?check=check&title=&yearConviction=&yearExoneration=&jurisdiction=&cause=&perpetrator=Yes&compensation=&conviction=&x=26&y=6 (last visited Jan. 13, 2015) (documenting that the actual perpetrator was found in 153 of the first 317 DNA exonerations). *See generally* Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291 (discussing how tunnel vision at all stages of criminal investigations and prosecutions can corrupt the search for the truth).

75 *See, e.g.*, State v. Swearingen, 424 S.W.3d 32 (Tex. Crim. App. 2014) (overturning the lower court's order granting Swearingen DNA testing in a capital case, in part, because Swearingen's reliance on a potential DNA database hit was, in the eyes of the court, too remote of a possibility).

76 *See, e.g.*, *id.*; Seth F. Kreimer & David Rudovsky, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, 151 U. PA. L. REV. 547, 554–64 (2002) (comparing prosecutors who welcome post-conviction DNA testing as a means to correct wrongful convictions with those who have opposed access to post-conviction DNA testing); *see also* Garrett, *supra* note 17, at 1675–84, 1719 (reviewing state post-conviction statutes and the many hurdles to obtaining post-conviction DNA testing); Kathy Swedlow, *Don't Believe Everything You*

Swearingen has not even been able to obtain the DNA testing that might lead to a foreign DNA profile that could be searched in the database.

The anchoring effect of a conviction also played a role in Gerard Richardson's murder case in New Jersey. In Richardson's case, even after DNA testing demonstrated that the DNA collected from a bite mark on the victim that was left by the perpetrator was not from Richardson, the prosecutor refused to consider that Richardson might be innocent.[77] In addition, the prosecutor, citing the regulations for law enforcement's use of the DNA database, failed to support Richardson's request for a DNA database search of the foreign DNA profile, and New Jersey DNA database administrators refused to perform the search.[78]

2. FBI Opposition—The Case of Juan Rivera

The FBI has been the primary force opposing defense-initiated DNA database searches.[79] To understand the FBI's opposition to these defense-initiated searches, it is helpful to consider Juan Rivera's case from Illinois.[80] Rivera was convicted of the 1992 rape and murder of an

Read: A Review of Modern "Post-Conviction" DNA Testing Statutes, 38 CAL. W. L. REV. 355 (2002) (same).

77 *See* Julie O'Connor, *The Hard Road to Innocence for Elizabeth Man*, STAR-LEDGER (Oct. 13, 2013, 7:22 AM), http://blog.nj.com/perspective/2013/10/the_hard_road_to_innocence_opi.html (noting the prosecutor's opposition even after the DNA exclusion and new experts concluded that the bite mark itself was inconsistent with Richardson).

78 *See id.* (noting the opposition from New Jersey officials to a DNA database search based on FBI regulations for law enforcement use of the database despite the fact that the officials conceded the reliability of the testing procedures that produced the foreign DNA profile). Notably, officials who operate state and local DNA databases that are a part of the national network of DNA databases administered by the FBI have a strong incentive not to take any actions that might be in tension with the FBI's assertion that the DNA database is a law enforcement tool. *See* Kaye, *supra* note 37, at 149 ("The Bureau reportedly has threatened states with cutting off their participation in the national database system that pools the state and federal data if they release their databases to outside scientists or to defendants."). The court ultimately dismissed Richardson's conviction, and he was exonerated even though the foreign DNA profile was never searched in the national DNA database. *See* Press Release, Innocence Project, New Jersey Man Exonerated After Serving 19 Years for a Murder that New DNA Evidence Shows He Didn't Commit (Dec. 17, 2013), *available at* http://www.innocenceproject.org/Content/New_Jersey_Man_Exonerated_After_Serving_19_Years_for_a_Murder_that_New_DNA_Evidence_Shows_He_Didnt_Commit.php.

79 Given the fact that the authorizing statute for the national DNA database describes the database as a law enforcement tool, and the fact that the statute gave the FBI the authority to create and draft the regulations for the database for law enforcement's use of it, see *supra* Part I, it is not surprising that the FBI regularly opposes searches initiated by non-law enforcement sources.

80 *See generally* Andrew Martin, *The Prosecution's Case Against DNA*, N.Y. TIMES (Nov. 25, 2011), http://www.nytimes.com/2011/11/27/magazine/dna-evidence-lake-county.html?page wanted=all; *see also* Rob Warden, *Juan Rivera*, BLUHM LEGAL CLINIC: CENTER ON WRONGFUL CONVICTIONS, http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/exonerations/il/juan-rivera.html (last visited Jan. 13, 2015) (including pleadings from his successful appeal,

eleven-year-old girl in a suburb of Chicago.[81] Eventually, Rivera obtained post-conviction DNA testing of the sexual assault kit from the young victim, and, in 2005, the results of the testing demonstrated that Rivera was not the source of the male DNA.[82] With this exculpatory result in hand, Rivera sought to compare the foreign DNA profile to the DNA database to identify the actual perpetrator.

The prosecutor and local law enforcement joined Rivera in his quest to identify the source of the foreign DNA profile.[83] However, manual keyboard searches of these statewide databases failed to yield a match.[84] Rivera next requested a search of the national DNA database. The prosecutor again joined Rivera's request, and in June 2008, the state trial court judge entered an order directing the FBI to perform a manual keyboard search of the national DNA database, noting that "[t]he interests of justice would be advanced" by doing the search.[85] The FBI refused to comply with the court order for the search, which prompted Rivera to sue the FBI in federal court, alleging, in part, that the FBI's refusal to perform the search violated the Administrative Procedures Act and the spirit of the legislation that authorized the national DNA database.[86]

In response to Rivera's suit, the FBI submitted an affidavit from the official in charge of the national DNA database.[87] This official stated that the singular purpose of the national DNA database was to "generate leads for the law enforcement community."[88] He added that the FBI would not follow the state court order to perform the keyboard search for five reasons, including: (1) the request to search did not originate with the official in charge of Illinois' state DNA database system—the official who is tasked with being the initial "gatekeeper" of any profiles from Illinois searched in the national DNA database—but rather was submitted by an unauthorized source, namely Rivera's defense attorneys;[89] (2) the request was accompanied by a state court order as opposed to a federal court order to perform the search; (3) the

media coverage of the exoneration, and a description of his nineteen year battle to overturn his conviction).

81 Rivera v. Mueller, 596 F. Supp. 2d 1163, 1164 (N.D. Ill. 2009) (recounting the procedural history of the case). Rivera's conviction was built on inculpatory statements he signed after four days of questioning by the local police. *See generally supra* note 80.

82 *Mueller*, 596 F. Supp. 2d at 1164.

83 *Id.* at 1169 (noting that the prosecutor requested state authorities in Illinois and Wisconsin to search their state DNA databases to identify a match).

84 *Id.*

85 *Id.* at 1169–70 (quoting the order of the state court).

86 *Id.* at 1165.

87 *Id.* at 1166.

88 *Id.*

89 *Id.* at 1165.

underlying DNA testing was not performed by or at the direction of a state or local criminal justice agency; (4) the underlying DNA testing was performed by a DNA laboratory that was not accredited by one of the two main private accrediting bodies; and (5) the underlying DNA testing was performed by a laboratory that did not meet the FBI's standards for ensuring that it was capable of producing a reliable DNA result.[90] The FBI made clear that in opposing Rivera's request for a keyboard search of the national database it was motivated by a desire to ensure the database maintained the "highest quality standards" to ensure its continued effectiveness as a law enforcement tool.[91]

The federal district court addressed each of the FBI's concerns, refuted them, and ordered the keyboard search. As a threshold matter, the district court recognized that the FBI admitted that doing the search would not be "costly or time-consuming."[92] Furthermore, it reasoned that the FBI's requirement that keyboard searches are only permissible at the request of a state DNA database administrator, as opposed to defendants like Rivera, wrongly "puts a criminal defendant at the mercy of state law enforcement authorities, who sadly may not be motivated or able to pursue a reopened investigation."[93] It dismissed the FBI's claim that only a federal court had the authority to direct it to conduct a keyboard search as inconsistent with the purpose of the database and impractical, particularly because the vast majority of crimes involving biological evidence are prosecuted in state courts.[94] Finally, the district court characterized the FBI's concerns for maintaining the quality and reliability of the database as the most important,[95] but dismissed them as not relevant to Rivera's case, because the order only required a keyboard search—a procedure that the FBI admitted would not "contaminate or alter the data[base] in any way."[96]

In the end, Rivera received the database search. Notably, while the initial search did not yield a hit, in 2014, the foreign DNA profile from the crime for which Rivera was convicted was linked to a separate Chicago-area murder that occurred in 2000.[97] As such, while Rivera was trying to prove his innocence, the actual perpetrator remained free to

90 *Id.* at 1171–73 (identifying the reasons for the FBI's opposition to the database search and concluding that these reasons were "unpersuasive").

91 *Id.* at 1165.

92 *Id.* at 1171.

93 *Id.* at 1172.

94 *Id.*

95 *Id.*

96 *Id.* at 1172–73.

97 Steve Mills & Dan Hinkel, *DNA Links Murder and Rape of Holly Staker, 11, to Second Murder 8 Years Later*, CHI. TRIB. (June 10, 2014), http://articles.chicagotribune.com/2014-06-10/news/chi-dna-links-murder-and-rape-of-holly-staker-11-to-second-murder-8-years-later-20140610_1_holly-staker-dna-evidence-dna-match.

murder again.[98] But the path his case followed—moving from state court to a separate federal lawsuit—is remarkably inefficient and cumbersome. To negate the need for such meandering litigation, Parts III and IV explain why the Due Process Clause and the fundamental liberty interest in proving one's innocence requires recognition of a limited right to defense-initiated DNA database searches.

III. POST-CONVICTION LIBERTY INTEREST IN PROVING INNOCENCE

Following Jeff Deskovic's exoneration in New York, the prosecutor appointed an outside panel to investigate what caused Deskovic's wrongful conviction and prevented him from proving his innocence for over fifteen years.[99] The panel concluded that Deskovic's exoneration and the identification of the actual perpetrator were delayed for years as a result of the prosecutor's repeated efforts to block Deskovic's request to search a foreign DNA profile from the crime scene in the DNA database.[100] It recommended that

> [a] defendant—either pretrial or post-conviction—should have a right to have an unidentified DNA profile . . . run through the DNA Databases to see if the real perpetrator or an accomplice can be identified. The defendant's application should be granted unless the prosecutor can show (perhaps by a preponderance of the evidence) that it is frivolous and devoid of merit.[101]

Despite trumpeting the database's ability to conclusively prove innocence and confirm guilt, lawmakers have not heeded the panel's call for recognition of a right to defense-initiated DNA database searches.[102] In response, this Part outlines the constitutional authority for a right to post-conviction defense-initiated DNA database searches, grounding it in the Due Process Clause. First, it identifies the liberty interest at stake, namely the interest a factually innocent defendant has in vacating his procedurally legitimate, but nonetheless, factually inaccurate, conviction.[103] This interest arises from (1) state-created rights that

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98 *Id.* Rivera was ultimately exonerated in January 2012, after the Illinois appellate courts overturned his conviction as "unjustified" and the prosecutor dismissed all of the charges against Rivera. *See Know the Cases: Juan Rivera*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Juan_Rivera.php (last visited Jan. 13, 2015).

99 LESLIE CROCKER SYDER ET AL., REPORT ON THE CONVICTION OF JEFFREY DESKOVIC (2007), *available at* http://www.westchesterda.net/Jeffrey%20Deskovic%20Comm%20Rpt.pdf.

100 *Id.* at 32.

101 *Id.*

102 *See supra* note 13.

103 While the liberty interest in this situation is quite clear, that is not always the case when identifying the reach of the Due Process Clause. *See* SULLIVAN & MASSARO, *supra* note 26, at 44

provide access to post-conviction DNA testing and procedures for vacating one's conviction based on newly discovered evidence of innocence; and (2) the Due Process Clause itself. It argues that the liberty interest that arises from the Due Process Clause is based on fundamental traditions and beliefs in protecting innocence. The Part then demonstrates the Due Process Clause's innocence-protecting characteristics by analogizing to the due process principles that protect the right to present a defense of third-party guilt, protections provided by the *Brady* line of cases, and a still-solidifying constitutional right to present a bare or freestanding innocence claim.[104] Finally, it demonstrates that despite the Court's holding in *Osborne*,[105] this liberty interest in proving one's innocence survives a procedurally sound conviction.

A. *State-Created Liberty Interest*

The state-created liberty interest that necessitates turning to the Due Process Clause arises from two sources, each dealing with state-created rights that serve to protect innocence in post-conviction proceedings.[106] First, every state provides a state-based procedural path to secure post-conviction DNA testing to vindicate innocence claims with new DNA evidence.[107] In addition, every state has a more general procedural mechanism for post-conviction defendants to challenge their convictions with new evidence of innocence.[108] These state-created

("Defining the 'liberty' interest that will trigger procedural due process rights has been the most complicated interpretation issue of all.").

104 The state-created liberty interests at stake here fit nicely into the procedural due process framework. Whereas the liberty interest found directly in the Due Process Clause's truth-promoting and innocence-protecting principles is closer to a substantive due process right. Regardless, "[t]hat protected liberty interests of either type can be deprived only through the application of adequate procedures has been widely accepted." *Id.* (citation omitted).

105 Dist. Attorney's Office for the Third Judicial Dist. v. Osborne, 557 U.S. 52, 67 (2009).

106 *See id.* at 67 (recognizing that the Due Process Clause "imposes procedural limitations on a State's power to take away protected entitlements"); *id.* at 68 (recognizing that "'[a] state-created right can, in some circumstances, beget yet other rights to procedures essential to the realization of the parent rights'" (quoting Conn. Bd. of Pardons v. Dumschat, 452 U.S. 458, 463 (1981))).

107 *See Osborne*, 557 U.S. at 68 (recognizing that post-conviction litigants retain "a liberty interest in demonstrating . . . innocence with new evidence under state law"); *Access to DNA Testing*, INNOCENCE PROJECT, http://www.innocenceproject.org/fix/DNA-Testing-Access.php (last visited Jan. 13, 2015).

108 *See* Garrett, *supra* note 12, at 2952 (recognizing that "forty-nine of fifty states now provide at least one, and sometimes more than one, mechanism by which a prisoner may seek relief based on evidence of innocence . . . even after the ordinary applicable time limits have expired" and adding that the last state, South Dakota, also appeared to recognize such a procedure).

rights create a liberty interest that requires the application of due process principles to ensure that the interest can be vindicated.[109]

B. *Due Process Clause-Based Liberty Interest*

In addition to a state-created liberty interest, the Due Process Clause's interest in promoting accurate, not just procedurally fair, results creates a liberty interest that is fundamental to our system of criminal justice.[110] This interest, which promotes and protects innocence, has long been recognized as a core due process right.[111] Its roots are in the extensive innocence-promoting protections that due process requires in an area that is most often left to the states—the creation and prosecution of our criminal laws. This section first describes this liberty interest by analyzing how the Due Process Clause's quest for accuracy affects criminal procedure at the trial level, and in Part III.C, it demonstrates why this fundamental concept survives, even if in lesser form, a procedurally legitimate conviction.

The Due Process Clause's quest for accuracy, as opposed to solely focusing on procedural fairness, provides the constitutional support for perhaps the most fundamental principle of our criminal justice system—reliably sorting those deserving criminal punishment from everyone else.[112] The corollary of this principle is that those who have not committed criminal acts should not be punished and that they should have the tools and resources to shield themselves from wrongful

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109 *See Osborne*, 557 U.S. at 67, 89–90 (Stevens, J., dissenting) ("Although States are under no obligation to provide mechanisms for postconviction relief, when they choose to do so, the procedures they employ must comport with the demands of the Due Process Clause . . . by providing litigants with fair opportunity to assert their state-created rights." (citing Evitts v. Lucey, 469 U.S. 387, 393 (1985)); Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272 (1998) (recognizing that the Due Process Clause imposes limits on state clemency procedures).

110 *See* SULLIVAN & MASSARO, *supra* note 26, at 72 ("The Court historically has recognized two sources of protected liberty interests: the Due Process Clause, and state laws or regulations."); *id.* (citing Washington v. Harper, 494 U.S. 210 (1990), and Vitek v. Jones, 445 U.S. 480 (1980), as two examples in which the Court recognized a post-conviction liberty interest derived directly from the Due Process Clause).

111 *See* Garrett, *supra* note 12, at 2945 ("The Court adopts or rejects criminal procedures protections citing to concerns regarding accuracy, including due process protections to ensure that unreliable evidence is not presented to a jury at trial. Examples include rules regulating eyewitness identifications, confessions, defense access to expert assistance, and defense access to exculpatory evidence.").

112 Herring v. New York, 422 U.S. 853, 862 (1975) ("The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.").

convictions.[113] This fundamental value of due process weaves through nearly all aspects of criminal law. The Court relied on it in finding that due process requires that criminal convictions must be based on proof beyond a reasonable doubt,[114] in recognizing the right to counsel,[115] and in justifying the need for an avenue to pursue successive federal habeas petitions.[116] Furthermore, it is at the heart of the Court's analysis of allegations of prosecutorial misconduct.[117]

Courts have used the same rationale to ensure that factually guilty defendants are convicted.[118] For example, in *Oregon v. Hass*,[119] the Court held that a defendant's inculpatory statements given in violation of *Miranda* are barred from being used in the prosecution's case-in-chief, but can be used to impeach a defendant's testimony.[120] The Court reasoned, "[w]e are, after all, always engaged in a search for truth in a criminal case so long as the search is surrounded with the safeguards provided by our Constitution."[121] Similarly, in the Fourth Amendment context the Court found that the exclusionary rule does not apply where police officers fail to obtain warrants based on a good faith belief that they are not required.[122]

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113 5 JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 1477, at 359 (Chadbourn rev. ed. 1974) ("[A]ny rule which hampers an honest man in exonerating himself is a bad rule, even if it also hampers a villain in falsely passing for an innocent.").

114 *See* Schlup v. Delo, 513 U.S. 298, 325 (1995) (citing THOMAS STARKIE, EVIDENCE 756 (1824) ("The maxim of the law is . . . that it is better that ninety-nine . . . offenders should escape, than that one innocent man should be condemned.")); *In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) ("[I]t is far worse to convict an innocent man than to let a guilty man go free."); Coffin v. United States, 156 U.S. 432, 455–56 (1895) (documenting that early common law commentators articulating Blackstone's oft-quoted principle gave a range of five-to-twenty for the number of guilty people who should escape punishment before condemning an innocent man); *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 352 (Univ. of Chi. Press 1979) ("[I]t is better that ten guilty persons escape, than that one innocent suffer."); Alexander Volokh, *n Guilty Men*, 146 U. PA. L. REV. 173, 176 (1997) (tracing the history of presumption of innocence "through all lands and eras"). *But see* Jon O. Newman, *Beyond "Reasonable Doubt,"* 68 N.Y.U. L. REV. 979, 980 (1993) (critiquing the reasonable doubt standard, in part, because as currently applied it does not accurately divide "the guilty from the innocent").

115 *See* Powell v. Alabama, 287 U.S. 45 (1932).

116 *See Schlup*, 513 U.S. at 325 (1995) ("[C]oncern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system.").

117 *See* Berger v. United States, 295 U.S. 78, 88 (1935) (recognizing that the interest of the prosecutor is "not that it shall win a case, but that justice shall be done. . . . It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.").

118 *See* Tom Stacy, *The Search for the Truth in Constitutional Criminal Procedure*, 91 COLUM. L. REV. 1369, 1373 (1991) ("The Court has repeatedly relied upon the importance of accurate adjudication as a basis for restrictively interpreting truth-impairing rights, which withhold relevant evidence of guilt from the criminal process.").

119 420 U.S. 714 (1975).

120 *See id.* at 722.

121 *Id.*

122 *See* Davis v. United States, 131 S. Ct. 2419, 2429 (2011).

While the criminal justice system focuses on reliably sorting the guilty and innocent, three specific constitutional doctrines demonstrate the extent to which the Due Process Clause protects innocence. These doctrines exemplify the liberty interest in proving innocence that is at the core of the Due Process Clause itself. After describing these doctrines and the procedures they require, this section demonstrates that providing post-conviction access to defense-initiated DNA database searches represents a modest procedural requirement that serves the same liberty interest in protecting innocence.

1. Third-Party Guilt Defense

Criminal defendants are under no obligation to present evidence in their defense and can rely solely on the presumption of innocence that the government must overcome.[123] However, if they chose to do so, criminal defendants enjoy an expansive constitutional right to present evidence in their defense.[124] The Supreme Court has repeatedly upheld this right in various contexts. For example, this right is violated where a state rule of evidence prohibits a defendant from introducing evidence of third-party guilt even in the face of presumably damning forensic evidence pointing to the defendant's guilt.[125] The Court has also held that it is a violation of a defendant's right to present a defense of third-party guilt where a trial court prohibits cross-examination aimed at demonstrating that it was the government witness, not the defendant,

123 *See, e.g.*, Estelle v. Williams, 425 U.S. 501, 503 (1976) ("The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice."); Coffin v. United States, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.").

124 *See* Holmes v. South Carolina, 547 U.S. 319, 324 (2006) ("Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" (quoting Crane v. Kentucky, 476 U.S. 683 (1986), and California v. Trombetta, 467 U.S. 479, 485 (1984))); *Trombetta*, 467 U.S. at 485 ("We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense."); *id.* at 486 (recognizing that the Due Process right to present a defense is implicated where the government delays prosecution "for so long that the defendant's ability to mount an effective defense [i]s impaired" and where "by deporting potential witnesses, [the government] diminishe[s] a defendant's opportunity to put on an effective defense").

125 *Holmes*, 547 U.S. at 330 ("Just because the prosecution's evidence, *if credited*, would provide strong support for a guilty verdict, it does not follow that evidence of third-party guilt has only a week logical connection to the central issues in the case." (alteration in original)).

who was the actual perpetrator.[126] Similarly, where a defendant is prevented from presenting evidence challenging the reliability of his confession, this violates due process.[127] It is also violated where a state statute prohibits a co-defendant from testifying in support of one of his co-defendants unless the testifying co-defendant has already been acquitted.[128] Furthermore, at least two Justices have found that the right to present a defense includes the right to present evidence that the prosecution has taken inconsistent factual positions in different trials.[129]

Beyond the Supreme Court, other courts have also concluded that the right to present a complete defense, including a defense of third-party guilt, prevents a trial court from prohibiting a defendant from presenting evidence that the government argued inconsistent theories in successive trials.[130] For example, the Oklahoma Court of Criminal Appeals reversed a conviction and death sentence where the defendant was prevented from presenting evidence that Oklahoma had previously convicted two other individuals—individuals who were ultimately exonerated before the defendant was charged and convicted—of the murder and that one of the individuals was sentenced to death.[131] In addition, the U.S. Court of Appeals for the District of Columbia recognizes that a prosecutor violates a defendant's right to present a

126 *See* Davis v. Alaska, 415 U.S. 308, 311, 319–20 (1974) (finding a violation of the Confrontation Clause where the trial court enforced a state law requiring juvenile delinquency adjudications to remain confidential, which prevented the defendant from cross-examining the juvenile witness about his alleged responsibility for the crime). The Court explained that in "[i]n this setting . . . the right of confrontation is paramount to the State's policy of protecting a juvenile offender." *Id.* at 319.

127 *Crane*, 476 U.S. at 690 (finding that the right to present a defense "would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence").

128 *See* Washington v. Texas, 388 U.S. 14, 23 (1967).

129 *See* Bradshaw v. Stumpf, 545 U.S. 175, 191–92 (Thomas, J., concurring) ("The Bill of Rights guarantees vigorous adversarial testing of guilt and innocence and conviction only by proof beyond a reasonable doubt. These guarantees are more than sufficient to deter the State from taking inconsistent positions; a prosecutor who argues inconsistently risks undermining his case, for opposing counsel will bring the conflict to the factfinder's attention.").

130 *See, e.g.*, United States v. Salerno, 937 F.2d 797 (2d Cir. 1991) ("Confidence in the justice system cannot be affirmed if any party is free, wholly without explanation, to make a fundamental change in its version of the facts between trials, and then conceal that change from the trier of fact." (quoting United States v. GAF Corp., 928 F.2d 1253, 1260 (2d Cir. 1991))), *rev'd on other grounds*, 505 U.S. 317 (1992).

131 Gore v. State, 119 P.3d 1268, 1276–77 (Okla. Crim. App. 2005). Ironically, the two men who were initially convicted of the murder in this case, Dennis Fritz and Ron Williamson, were exonerated after post-conviction DNA tests exculpated them and linked Gore to the murder. *See generally* JOHN GRISHAM, THE INNOCENT MAN: MURDER AND INJUSTICE IN A SMALL TOWN (2006).

defense by "effectively denying defense counsel access to the witnesses except in his presence."[132]

While expansive, the right to present evidence of third-party guilt is not unlimited.[133] Principally, the limit is reached where the assertion of third-party guilt amounts to nothing more than groundless suspicion of another.[134] This limitation is consistent with the due process rationale for this right—namely to protect innocence by ensuring that defendants have the opportunity to demonstrate that someone else committed the crime. As demonstrated in Part I, DNA database searches are an extremely effective tool for this purpose in cases involving biological evidence, promising the possibility of a DNA match that can be dispositive of innocence and guilt.[135]

2. Access to Innocence-Protecting Evidence

The liberty interest that arises from the Due Process Clause—an interest rooted in the Clause's truth-promoting and innocence-protecting principles—is demonstrated by more than the right to present a defense of third-party guilt. For example, the Court has long recognized the truth-telling role that due process plays in the criminal justice system by providing defendants access to information that can establish their innocence.[136] The doctrine that most animates a defendant's right of access to information is *Brady*,[137] which requires the

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132 Gregory v. United States, 369 F.2d 185, 188 (D.C. Cir. 1966). The court's holding in *Gregory* was motivated in part by its concern for the possibility of convicting an innocent person. *Id.* at 190 ("Without doubt, conviction of the wrong man is the greatest single injustice that can arise out of our system of criminal law. The fear that a completely innocent man may be executed or sent to the penitentiary constantly haunts not only those of us concerned with the law, but sensitive people generally. Thus the obligation to guard against this danger is obvious.").

133 Holmes v. South Carolina, 547 U.S. 319, 326 (2006) ("[W]ell-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury.").

134 *Id.* at 328. *But see* United States v. Vallejo, 237 F.3d 1008, 1023 (9th Cir. 2001) ("[I]f the evidence [of third-party guilt] is in truth calculated to cause the jury to doubt, the court should not attempt to decide for the jury that this doubt is purely speculative and fantastic but should afford the accused every opportunity to create that doubt.").

135 *See supra* Part I.

136 California v. Trombetta, 467 U.S. 479, 485 (1984) (recognizing that due process "delivers exculpatory evidence into the hands of the accused, thereby protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system").

137 Brady v. Maryland, 373 U.S. 83 (1963). The right of access to information also requires a prosecutor to disclose perjury, the contents of some plea agreements, and the identity of some undercover informants, particularly where the disclosure may impact a defendant's innocence claim. *See Trombetta*, 467 U.S. at 485 (citing Giglio v. United States, 405 U.S. 150 (1972) (duty to disclose plea agreements)); Napue v. Illinois, 360 U.S. 264 (1959) (duty to disclose perjury); and Roviaro v. United States, 353 U.S. 53 (1957) (duty to disclose the identity of informants)). In *Roviaro*, the Court specifically recognized that the disclosure of an informant's identity is

disclosure of evidence favorable to the defense, including impeachment evidence,[138] where the evidence is material to guilt or punishment.[139] Under *Brady*, the materiality requirement is met "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[140] Furthermore, the due process guarantees of *Brady* require prosecutors to "learn of any favorable evidence known to the others acting on the government's behalf . . . including the police."[141]

On its face, *Brady* is not about innocence.[142] Nonetheless, it is clear that *Brady* serves at least two purposes,[143] one of which is protecting innocence by giving defendants access to information "to ensure that a miscarriage of justice does not occur."[144] This section analyzes the cases that formed the due process foundation for *Brady*, emphasizing how *Brady*'s goal of guarding against miscarriages of justice grew out of a fundamental concern for protecting innocence that arises directly from the Due Process Clause.[145] The arc of these cases demonstrates that the Due Process Clause's innocence-protecting qualities run deep, generating a liberty interest in proving innocence independent of any state-created right.

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necessary where an innocent defendant needs to cross-examine the informant to establish innocence. 353 U.S. at 64.

138 *See Giglio*, 405 U.S. at 155 (clarifying that the definition of favorable evidence includes impeachment evidence).

139 *Brady*, 373 U.S. at 87.

140 United States v. Bagley, 473 U.S. 667, 682 (1985). The Court has interpreted this to mean a probability sufficient to "'undermine[] confidence in the outcome of the trial.'" Kyles v. Whitley, 514 U.S. 419, 434 (1995) (quoting *Bagley*, 473 U.S. at 678).

141 *Kyles*, 514 U.S. at 437.

142 *Brady*, 373 U.S. at 84 (noting that, at trial, Brady admitted that he participated in the crime, but, in an effort to challenge his death sentence, he claimed that his co-defendant performed the actual killing).

143 *See* Colin Starger, *Expanding Stare Decisis: The Role of Precedent in the Unfolding Dialectic of* Brady v. Maryland, 46 LOY. L.A. L. REV. 77, 127 (2012) (contrasting *Brady*'s substantive focus of protecting the innocent with its procedural focus of ensuring a fair trial); *see also id.* at 82 ("*Brady* remains the flagship *constitutional* doctrine for putting evidence of innocence into the hands of criminal defendants." (emphasis added)). *But see Brady*, 373 U.S. at 87 (emphasizing *Brady*'s focus on procedural fairness by concluding that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly").

144 *Bagley*, 473 U.S. at 675.

145 *See* Starger, *supra* note 143, at 110–20 (providing an overview and analysis of the Court's pre-*Brady* due process cases and how these cases demonstrate a due process concern for substantive justice and protecting innocence). Professor Starger traces the line leading to *Brady* as starting with Justice Holmes's dissent in *Frank v. Magnum*, 237 U.S. 309 (1915) and moving through *Moore v. Dempsey*, 261 U.S. 86 (1923); *Mooney v. Holohan*, 294 U.S. 103 (1935); *Pyle v. Kansas*, 317 U.S. 213 (1942); and *Napue v. Illinois*, 360 U.S. 264 (1959). Starger, *supra* note 143, at 110. This Article follows that line here with a few additions.

To be fair, the Court has not always recognized the Due Process Clause's innocence-protecting core. The Court initially held that due process required only that defendants receive notice of the charges and an opportunity to be heard in court.[146] Under that standard, announced in *Frank v. Mangum*,[147] the Court held that due process was not violated despite the fact that Frank was convicted of murder under such a threat of mob violence that the trial court convinced Frank's counsel that it would be unsafe for defense counsel and Frank to be in court at the time the jury rendered its verdict.[148] The Court reasoned that in evaluating an alleged due process violation the "essential question . . . is not the guilt or innocence of the prisoner, or the truth of any particular fact asserted by him, but whether the state, taking into view the entire course of its procedure, has deprived him of due process of law."[149] Thus, the Court accepted the possibility that a convicted offender might be innocent yet unable to turn to the Due Process Clause to protect his innocence.[150]

This narrow interpretation of due process continued in *Moore v. Dempsey*,[151] where the Court once again asserted that due process claims do not turn on questions of innocence or guilt.[152] However, the Court's handling of Moore's case created an opening for due process's concern for innocence to grow. Specifically, the Court reversed the district court's dismissal of Moore's habeas petition.[153] In so doing, it recognized that due process required more than formal procedures, particularly if, as happened in Moore's case, those procedures were so infected by the threat of mob violence that the proceedings amounted to a mere formality.[154] Thus, the Court's understanding of the Due Process Clause expanded, forming the initial foundation for a liberty interest

146 Frank v. Mangum, 237 U.S. 309, 326, 340 (1915) ("[R]epeated decisions of [the C]ourt have put it beyond the range of further debate that the 'due process' clause of the 14th Amendment has not the effect of imposing upon states any particular form or mode of procedure, so long as the essential rights of notice and a hearing, or opportunity to be heard, before a competent tribunal, are not interfered with.").

147 *Id.*

148 *Id.* at 315, 338, 345.

149 *Id.* at 334.

150 In an ironic and tragic turn, the Court's narrow interpretation of due process in *Frank* failed to protect an innocent man. *See* Starger, *supra* note 143, at 114 n.141 (recounting Frank's posthumous pardon).

151 261 U.S. 86 (1923).

152 *Id.* at 87–88 (electing not to consider appellant's innocence claim by stating, "that we leave on one side as what we have to deal with is not the petitioner's innocence or guilt but solely the question whether their constitutional rights have been preserved").

153 *Id.* at 92.

154 *Id.* at 91. Moore and his co-defendants, all black men, were convicted of killing a white man during a night of racial violence in Phillips County, Arkansas, on September 30, 1919. *Id.* at 87–88. The defendants alleged that their convictions and death sentences were predetermined by negotiations between a committee appointed by the Governor to investigate the violence and a mob who sought to lynch the defendants. *Id.* at 87–89.

based on protecting innocence arising directly from the Due Process Clause.

If the question of whether due process required anything more than a minimal level of fair procedures—notice and the opportunity to be heard—was left unsettled after *Moore*, the Supreme Court signaled in *Mooney v. Holohan*,[155] that due process implicated substantive justice, not just procedure justice.[156] Specifically, the Court found that due process protects a defendant from a prosecutor's knowing use of perjury, because securing a conviction in that manner would make the trial a mere "pretense."[157] Notably, the starting point for the Court's analysis was rooted in a substantive concern that due process, "in safeguarding the liberty of the citizen against deprivation through the action of the state, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions."[158]

The Court's recognition that the Due Process Clause protects innocence, as opposed to requiring only procedural fairness, continued after *Mooney*. Less than three months later, in *Berger v. United States*,[159] the Court reversed Berger's conviction on account of the prosecutor's "calculated" tactics to mislead the jury,[160] recognizing that such tactics increased the risk of wrongful convictions.[161] In overturning the conviction, the Court offered a stinging rebuke of the prosecutor's actions and championed the need for fair procedures and fair play to protect, among other things, innocent defendants from being convicted.[162] It explained: "[the prosecutor's] interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done[, which necessitates] refrain[ing] from improper methods calculated to produce a wrongful conviction . . . ."[163] The Court specifically highlighted the substantive concern for protecting innocent defendants by noting that "the twofold aim of [the law] is that guilt shall not escape or innocence suffer."[164]

Six years later, the Court relied on the Due Process Clause and its concern for protecting innocence in holding that a guilty plea resulting

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155 294 U.S. 103 (1935).

156 *Id.* at 112 (rejecting the state's claim that actions by the prosecutor cannot violate due process unless they denied a defendant notice or the opportunity to be heard).

157 *Id.* at 112.

158 *Id.* at 112. Like Frank, who was pardoned after his death, Mooney ultimately received a pardon based on his innocence. *See* Starger, *supra* note 143, at 117 n.161.

159 295 U.S. 78 (1935).

160 *Id.* at 85, 88.

161 *Id.*

162 *Id.* at 88–89.

163 *Id.* at 88.

164 *Id.*

from deceit or coercion by a prosecutor violates the Constitution.[165] The next year, the Court extended this principle to cases involving guilty pleas resulting from coercion by law enforcement officials.[166]

The substantive concern with shielding innocent defendants from conviction and the corresponding liberty interest arising from the Due Process Clause was again central to the Court's opinion in *Napue v. Illinois*.[167] There, the Court clarified that a prosecutor's knowing use of false testimony violates due process even if the false testimony is limited to impeachment evidence, because such false testimony could be the difference between the jury's determination of "guilt or innocence."[168] In finding that the use of false testimony risked failing to adequately protect innocence, the Court concluded that the Due Process Clause's prohibition of this tactic was "implicit in any concept of ordered liberty."[169]

This line of due process cases culminated in *Brady*, and cases since *Brady* have continued to demonstrate that a significant motivating factor of the Court's due process jurisprudence is protecting innocent defendants.[170] For example, the Court reversed John Giglio's conviction for using forged money orders, finding that the prosecutor violated due process in failing to turn over evidence that would have impeached "the only witness linking [Giglio] with the crime."[171] The Court reasoned that "[w]hen the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility" violates due process.[172]

In *United States v. Agurs*,[173] the Court again recognized this principle.[174] It noted that *Brady* violations "corrupt[] . . . the truth-

165 Walker v. Johnston, 312 U.S. 275, 286 (1941).

166 Waley v. Johnston, 316 U.S. 101, 104 (1942). In *Waley*, the petitioner alleged that he pled guilty after law enforcement threatened him with violence and possible execution. *Id.* at 102. Finding that Waley raised a constitutional claim, the Court remanded his case for a hearing. *Id.* at 105.

167 360 U.S. 264 (1959).

168 *Id.* at 269 (reversing a conviction based on the prosecutor's knowing use of false testimony).

169 *Id.*

170 *But see* Starger, *supra* note 143, at 128–44, (concluding that the Court's recent *Brady* cases have focused more on procedural as opposed to substantive fairness).

171 Giglio v. United States, 405 U.S. 150, 151 (1972).

172 *Id.* at 154 (quoting *Napue*, 360 U.S. at 269).

173 427 U.S. 97 (1976).

174 *Id.* at 111. While highlighting the important role due process plays in achieving substantive justice and protecting the innocent, *id.* at 111 (citing Berger v. United States, 295 U.S. 78, 88 (1935)), the Court rejected Agurs's due process claim, finding that the prosecutor's failure to disclose the murder victim's criminal record did not deny Agurs a fair trial despite the fact that Agurs raised a self-defense claim based on the fact that the victim was assaulting her when she stabbed him. *Id.* at 99, 114.

seeking function of the trial process,"[175] and clarified that *Brady*'s due process protections worked, in part, to ensure that "evidence . . . so clearly supportive of a claim of innocence" is disclosed to the defense.[176] Justice Marshall elaborated this principle in his dissent.[177] He explained:

> One of the most basic elements of fairness in a criminal trial is that available evidence tending to show innocence, as well as that tending to show guilt, be fully aired before the jury; more particularly, it is that the State in its zeal to convict a defendant not suppress evidence that might exonerate him.[178]

In *United States v. Bagley*,[179] the Court again recognized that the due process guarantees outlined in *Brady* are built on the "'overriding concern with the justice of the finding of guilt.'"[180] Again, Justice Marshall emphasized due process's focus on protecting innocent defendants, characterizing *Brady* evidence as evidence that "enhances the quest for truth," and noting that "'[t]he purpose of a trial is as much the acquittal of an innocent person as it is the conviction of a guilty one.'"[181]

Finally, in *Connick v. Thompson*,[182] the Court referred once again to its opinion in *Berger*, which recognized that prosecutors have a "duty to refrain from improper methods calculated to produce a wrongful conviction."[183] In her opinion, Justice Ginsburg dramatically emphasized the risks when prosecutors fail to respect the Due Process Clause's innocence-protecting core.[184] She explained, "a municipality that empowers prosecutors to press for a death sentence without

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175 *Id.* at 104.

176 *Id.* at 107.

177 *Id.* at 114 (Marshall, J., dissenting). Justice Marshall characterized the Court's application of *Brady*'s materiality prong as being "completely at odds with the overriding interest in assuring that evidence tending to show innocence is brought to the jury's attention." *Id.* at 117.

178 *Id.* at 116.

179 473 U.S. 667 (1985).

180 *Id.* at 678 (quoting *Agurs*, 427 U.S. at 112). Despite the Court's reference in *Bagley* about the "overriding concern with the justice of the finding of guilt," because of the materiality standard the Court adopted, Professor Starger has characterized *Bagley* as a "turning point," Starger, *supra* note 143, at 138 n.278, in which the *Brady* doctrine began to have more of a concern with the right to a fundamentally fair trial as opposed to a general concern with justice and protecting innocence.

181 *Bagley*, 473 U.S. at 692–93 (Marshall, J., dissenting) (quoting Application of Kapatos, 208 F. Supp. 883, 888 (S.D.N.Y. 1962)).

182 131 S. Ct. 1350 (2011).

183 *Id.* at 1365. The Court's reference to *Berger* is ironic because Thompson's case was the result of a civil suit in which he was awarded $14 million as a result of *Brady* violations that led to his wrongful conviction and the eighteen years he spent incarcerated, fourteen of which he spent on death row. *Id.* at 1355–56. Ultimately, the Court reversed the civil judgment and overturned the jury's monetary award, finding that Thompson had not met the strict requirements for holding prosecutors civilly liable for *Brady* violations. *Id.* at 1366.

184 *Id.* at 1385 (Ginsburg, J., dissenting).

ensuring that those prosecutors know and honor *Brady* rights may . . . risk . . . innocent lives."[185]

The Court's understanding of due process as outlined in these cases is animated by its belief that the Due Process Clause is about rational, non-arbitrary government action, which means here that it seeks to protect innocence, even at the expense of imposing significant burdens on the prosecution. The willingness to impose this burden demonstrates that the Due Process Clause itself creates and recognizes a fundamental liberty interest in protecting innocence. Furthermore, the role that the *Brady* line of cases plays in protecting innocence is not just judicial rhetoric.[186] Rather, *Brady*'s due process protections have played a significant role in many exonerations.[187] And there is good reason to believe that many cases that ended in exonerations contain unpursued and unrecognized *Brady* violations. Morton's and Wyatt's cases demonstrate why this is so. The *Brady* violations in Morton's case only came to light because the state opposed DNA testing for several years. Had the state consented to Morton's initial request for DNA testing, his defense team would not have needed to pursue a full-scale re-investigation of the case. Similarly, had the exculpatory DNA profile in Wyatt's case been more complete, which alone would have established Wyatt's innocence, Wyatt would not have been forced to continue investigating and litigating his ultimately successful *Brady* claim.[188]

3. Freestanding Innocence Claim

The liberty interest that flows from the Due Process Clause itself is readily evident in the Court's handling of third-party guilt claims and the access to evidence cases in the *Brady* line. This same liberty interest in protecting innocence is also at the core of a solidifying right to present a constitutionally-based freestanding or bare innocence claim.

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185 *Id.*

186 *See, e.g.*, Jason Kreag, *The* Brady *Colloquy*, 67 STAN. L. REV. ONLINE 47, 48, 51–52 (2014) (discussing Ninth Circuit Chief Judge Alex Kozinski's belief that the judiciary needs to take a more active role in ensuring that prosecutors meet their *Brady* disclosure obligations).

187 *See, e.g.*, *Connick*, 131 S. Ct. 1350 (recognizing that Thompson's wrongful conviction was the result of *Brady* violations); *see also* Cynthia E. Jones, *A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence*, 100 J. CRIM. L. & CRIMINOLOGY 415, 429–31 (2010) (documenting many exonerations that involved *Brady* violations); *cf.* Taylor v. Illinois, 484 U.S. 400, 419 (1988) (Brennan, J., dissenting) ("Criminal discovery is not a game. It is integral to the quest for truth and the fair adjudication of guilt or innocence.").

188 *See Ex parte* Wyatt, No. AP–76797, 2012 WL 1647004 (Tex. Crim. App. May 9, 2012).

Scholars,[189] litigants,[190] and judges[191] have long-wrangled over whether the Constitution, through a combination of the Due Process Clause and the Eighth Amendment, gives rise to a bare innocence claim. The Supreme Court came closest to explicitly recognizing such a right in its decision in *Herrera v. Collins*.[192] There, in separate opinions, five Justices signaled that a freestanding innocence claim, at least for a defendant facing execution, is recognized by the Constitution.[193] The Court's reluctance to categorically recognize such a claim in *Herrera* can be attributed, in part, to the fact that in 1993, when *Herrera* was decided, the DNA era was in its infancy.[194] Thus, the Court could credibly claim that "[o]ther constitutional provisions . . . ha[d] the effect of ensuring against the risk of convicting an innocent person."[195]

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189 *See, e.g.*, Garrett, *supra* note 17, at 1636 ("Adopting a uniform freestanding innocence claim that entitles a court to review the probative impact of new evidence of innocence would require changing existing constitutional criminal procedure."); *id.* at 1699–1716 (outlining why DNA's truth-telling capability necessitates recognizing a bare innocence claim under the Eighth Amendment and Due Process Clause); Sarah A. Mourer, *Gateway to Justice: Constitutional Claims to Actual Innocence*, 64 U. MIAMI L. REV. 1279 (2010).

190 *See* Garrett, *supra* note 17, at 1691–92 (listing five DNA exonerees whose bare innocence claims were denied by courts prior to securing the dispositive DNA results).

191 *See, e.g.*, Dist. Attorney's Office for the Third Judicial Dist. v. Osborne, 557 U.S. 52, 71 (2009) ("Osborne also obliquely relies on an asserted federal constitutional right to be released upon proof of 'actual innocence.' Whether such a federal right exists is an open question."); *see also In re* Davis, No. CV409–130, 2010 WL 3385081, at *38 (S.D. Ga. Aug. 24, 2010) (recognizing that while the Supreme Court's factual resolution of Herrera's bare innocence claim was "clear," the Court's analysis of the "underlying constitutional question was muddled").

192 Herrera v. Collins, 506 U.S. 390, 417 (1993) ("[A]ssum[ing] . . . a truly persuasive demonstration of 'actual innocence' made after trial would render execution of a defendant unconstitutional . . . .").

193 *Id.* at 419 (O'Connor, J., concurring, joined by Kennedy, J.) ("[T]he execution of a legally and factually innocent person would be a constitutionally intolerable event."); *id.* at 430 (Blackmun, J., dissenting, joined by Stevens, J. and Souter, J.) ("Nothing could be more contrary to contemporary standards of decency, or more shocking to the conscience, than to execute a person who is actually innocent." (citations omitted)); *id.* at 431 ("[T]he Constitution forbids the execution of a person who has been validly convicted and sentenced but who, nonetheless, can prove his innocence with newly discovered evidence."); *id.* at 437 ("[Because] it violates the Eighth and Fourteenth Amendments to execute a person who is actually innocent, [there should be] no bar . . . to consideration of an actual innocence claim."); *see also Osborne*, 557 U.S. at 71 ("Whether such a federal right exists is an open question.").

194 Over 300 of the 317 DNA exonerations tracked by the Innocence Project have occurred since 1994. *Know the Cases*, INNOCENCE PROJECT, http://www.innocenceproject.org/know/Browse-Profiles.php (last visited Jan. 13, 2015). The Court's reluctance to recognize a bare innocence claim is also explained by the narrow question before the Court. *See Herrera*, 506 U.S. at 407 n.6, ("The question before us . . . is not whether due process prohibits the execution of an innocent person, but rather whether it entitles petitioner to judicial review of his 'actual innocence' claim[.]"); *id.* at 420 (O'Connor, J., concurring) ("[T]he issue before us is not whether a State can execute the innocent. It is, as the Court notes, whether a fairly convicted [man] . . . is constitutionally entitled to yet another judicial proceeding in which to adjudicate his guilt anew . . . .").

195 *Id.* at 398–99 (majority opinion); *see also id.* at 420 (O'Connor, J., concurring) ("Our society has a high degree of confidence in its criminal trials, in no small part because the

Despite the fact that the Court has never specifically recognized a bare innocence claim based on the Constitution, there is good reason to believe that such a right exists. In addition to the many nods that the Court has made to the importance of protecting innocent defendants,[196] it has provided direct support for the concept that incarcerating an innocent person is unconstitutional.[197] For example, in the first case to reach the Supreme Court that presented a question about the ability of DNA testing to prove innocence even in decades-old cases, the Court seemed to deliver more than an assumption that a constitutionally-based freestanding innocence claim exists. Specifically, in *District Attorney's Office for the Third Judicial District v. Osborne*,[198] the Court suggested that Osborne pursue post-conviction DNA testing in federal habeas based on a freestanding innocence claim.[199]

Most recently, in 2009, Troy Davis sought to vacate his conviction and death sentence with an original writ of habeas corpus to the Supreme Court, in which he raised a freestanding innocence claim.[200] Davis' bare innocence claim was all that he had left.[201] The Court transferred Davis' case to the district court for a hearing to determine whether new evidence "clearly establishe[d]" his innocence.[202] In so doing, the Court implicitly recognized that if the evidence demonstrated Davis' innocence, the district court had the authority to vacate his conviction as unconstitutional.[203] Ultimately, after an evidentiary

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Constitution offers unparalleled protections against convicting the innocent."); *id.* at 428 (Scalia, J., concurring) ("With any luck, we shall avoid ever having to face this embarrassing question again, since it is improbable that evidence of innocence as convincing as today's opinion requires would fail to produce an executive pardon.").

196 *See supra* Part III.B.1–2; *see also* Schlup v. Delo, 513 U.S. 298, 324–25 (1995) ("The quintessential miscarriage of justice is the execution of a person who is entirely innocent."); United States v. U.S. Coin & Currency, 401 U.S. 715, 726 (1971) (Brennan, J., concurring) ("[T]he government has no legitimate interest in punishing those innocent of wrongdoing . . . ."); Calder v. Bull, 3 U.S. 386, 388 (1798) ("The Legislature may . . . declare new crimes . . . but they cannot change innocence into guilt; or punish innocence as a crime.").

197 *Cf.* Robinson v. California, 370 U.S. 660, 667 (1962) ("Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold.").

198 557 U.S. 52 (2009).

199 *Id.* at 72 (evaluating Osborne's ability to obtain post-conviction DNA testing through discovery in federal habeas proceedings); *see also* Garrett, *supra* note 12, at 2927 (characterizing the Court's apparent recognition of Osborne's ability to raise a freestanding innocence claim in federal habeas as "extremely significant").

200 *In re* Davis, 557 U.S. 952 (2009). For a description of the procedural and factual history of Davis's case, see Mourer, *supra* note 189, at 1279–81.

201 Mourer, *supra* note 189, at 1281 ("Davis is a compelling example of a case in which all constitutional errors (other than his actual innocence) have been resolved and what is left is the glaring conclusion that he very well might be innocent and on his way to execution.").

202 *In re* Davis, 557 U.S. at 952.

203 Justice Scalia's dissent supports this conclusion. Because Justice Scalia continues to believe that the Constitution does not give rise to a bare innocence claim in post-conviction—as he makes clear in *In re Davis*, 557 U.S. at 955 (Scalia, J., dissenting) ("This Court has *never* held that

hearing and despite finding that the evidence did not establish Davis' innocence,[204] the district court found that "executing an innocent person would violate the Constitution."[205] The court summarized:

> If there is a principle more firmly embedded in the fabric of the American legal system than that which proscribes punishment of the innocent, it is unknown to this Court. It is well established that the punishment of the innocent or those otherwise without culpability is at odds with the constitution, including the Eighth Amendment.[206]

These cases provide substantial support for the fact that the Constitution recognizes a bare innocence claim in post-conviction proceedings. The Eighth Amendment and the Due Process Clause provide textual anchors for this right. In doing so, they demonstrate that a liberty interest in protecting innocence is central to our traditions and notions of fundamental fairness. Furthermore, in suggesting that Osborne pursue DNA testing in federal habeas proceedings through a freestanding claim of innocence, the Court has confirmed that this liberty interest in protecting innocence survives conviction. The next session explores that idea further, refuting the arguments that a procedurally fair trial extinguishes a defendant's liberty interest in proving innocence.

C. *Liberty Interest in Proving Innocence Survives Conviction*

Those who oppose the recognition of a constitutional right to post-conviction defense-initiated DNA database searches will likely argue that the authority upon which this Article relies is based primarily on trial-based rights. They will argue that the Court was correct to limit these rights to the trial setting, and that limiting these rights to the trial

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the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is 'actually' innocent.")—he concluded that the Court's transfer order amounted to a "fool's errand." *Id.* at 957. Contrary to Justice Scalia's conclusion, however, we can be confident that the Court did not transfer Davis's case to the district court with the understanding that had Davis demonstrated his actual innocence he would have still been left without a constitutional remedy to vacate his conviction and avoid his execution. *See id.* at 952–54 (Stevens, J., concurring) (refuting Justice Scalia's accusation that the Court's transfer order amounted to a "fool's errand").

204 *In re* Davis, No. CV409–130, 2010 WL 3385081, at *61 (S.D. Ga. Aug. 24, 2010).

205 *Id.* at *1. The District Court based its holding on the Eighth Amendment's ban on cruel and unusual punishment, noting three reasons to support its conclusion: 1) the near total consensus that a "truly persuasive demonstration of innocence subsequent to trial renders punishment unconstitutional"; 2) prior judicial interpretations of the Eighth Amendment support the consensus that punishing an innocent person is unconstitutional; and 3) such punishment does "not serve any legitimate penological purpose." *Id.* at *43.

206 *Id.* at *41.

setting is consistent with the Court's long held desire to ensure that the trial is the "main event"—where guilt and innocence is most reliably determined.[207] They will also point to the Court's opinion in *District Attorney's Office for the Third Judicial District v. Osborne*[208] to argue that these trial rights do not apply in post-conviction proceedings. This line of critique, however, is far from fatal to recognizing a liberty interest rooted in the Due Process Clause.

First, the liberty interest in proving one's innocence with a post-conviction DNA database search is analogous to the liberty interest that guarantees the trial-based rights requiring the disclosure of *Brady* evidence and the right to present a defense of third-party guilt.[209] That is, my argument is not dependent on, for example, *Brady* being extended to the post-conviction setting. Rather, it is that the due process principles that give rise to *Brady* and the right to present a defense of third-party guilt in the trial setting, apply in the post-conviction setting to give rise to a limited procedural right to defense-initiated DNA database searches.[210]

Second, it is true that due process protections weaken after conviction, but they do not vanish, and the Court has never held as such.[211] Indeed, the fact that the Due Process Clause applies in post-

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207 *See* Kyles v. Whitely, 514 U.S. 419, 439–40 (1995) (recognizing that holding a prosecutor liable for disclosing *Brady* material that was never disclosed to the prosecutor by the police would "preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations"); Colorado v. Connelly, 479 U.S. 157, 166 (1986) ("'[T]he central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence.'" (quoting Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986))); Murray v. Carrier, 477 U.S. 478, 506 (1986) (Stevens, J., concurring) (noting that one rationale for the contemporaneous-objection rule is the state's interest in "making the trial the 'main event' in which the issue of guilt or innocence can be fairly resolved").

208 557 U.S. 52 (2009) (rejecting a substantive due process right to post-conviction DNA testing, but recognizing a limited procedural due process right).

209 *See* Kreimer & Rudovsky, *supra* note 76, at 588 (rejecting the proposition that the due process principles underlying *Brady* do not apply in post-conviction proceedings and concluding that "[t]he basis of the *Brady* obligation, like much of the 'extratextual' criminal procedure adopted by the Supreme Court, is not the perfection of the rules of a sporting contest, but the achievement of justice"); *id.* at 592 ("The analysis that generated *Brady*—and the fundamental role of innocence in the criminal justice system—extends to postconviction proceedings.").

210 *See Osborne*, 557 U.S. at 95 (Stevens, J., dissenting) (arguing in the context of a request for a post-conviction right to DNA testing, as opposed to a DNA database search, that while "*Brady* does not directly provide for a postconviction right to such evidence, the concerns with fundamental fairness that motivated our decision in that case are equally present when convicted persons such as Osborne seek access to dispositive DNA evidence following conviction"). *But see* Garrett, *supra* note 17, at 1660 ("The *Brady* due process rule should be understood to ensure a defendant's access to [DNA database searches] both at the time of trial and at the post-conviction stage.").

211 *See* Shaw v. Murphy, 532 U.S. 223, 228–29 (2001) ("[I]ncarceration does not divest prisoners of all constitutional protections."); *see also* Kuhlmann v. Wilson, 477 U.S. 436, 452 (1986) (Powell, J., plurality opinion) ("The prisoner may have a vital interest in having a second chance to test the fundamental justice of incarceration. Even where, as here, . . . many judges who

conviction proceedings is consistent with the Clause's interest in protecting procedural fairness at trial. For example, although *Brady* is aimed at protecting the innocent, an equally compelling force is its concern for fair proceedings regardless of factual innocence.[212] The post-conviction litigants that are the focus of this Article have, by definition, been convicted, but their cases are still being litigated in state proceedings. Just as due process seeks to ensure that the trial proceedings are fair, it also seeks to ensure that these post-conviction proceedings are fair.[213]

Moreover, even a weakened due process liberty interest in demonstrating innocence remains powerful, particularly because a right to post-conviction defense-initiated DNA database searches to prove innocence both asks for less and promises more than either a *Brady* or a right-to-present-a-defense claim. A convicted person raising a *Brady* or right-to-present-a-defense claim seeks to vacate his conviction. On the contrary, a constitutional right to defense-initiated DNA database searches merely requires a search.[214] In this way, this right seeks less as a remedy when compared to other due process claims.

At the same time, it promises more. An appellant raising a *Brady* claim must demonstrate that, had the evidence been disclosed, there is a reasonable probability of a different outcome.[215] Similarly, built into a right-to-present-a-defense claim is a requirement that the prohibited evidence must have some "logical connection to the central issues."[216] Furthermore, each of these standards must be analyzed against the backdrop of the state's burden at trial to prove its case beyond a reasonable doubt. That is, a post-conviction litigant can have his conviction vacated based on a *Brady* or right-to-present-a-defense claim without providing anything near the level of certainty that would

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have reviewed the prisoner's claims . . . a prisoner retains a powerful and legitimate interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated."); Wolff v. McDonnell, 418 U.S. 539, 555–56 (1974) ("There is no iron curtain drawn between the Constitution and the prisons of this country.").

212 *See supra* note 137.

213 *See Osborne*, 557 U.S. at 70 (holding that procedural due process regulates proceedings regarding the state-based right to post-conviction DNA testing).

214 Ultimately, the goal of the search is to generate new information that will lead to a motion to vacate the conviction, but that is a second proceeding. *See infra* Part IV.A.1.a (discussing the difference between a search and vacating one's conviction and why the former does not implicate finality in the same way as the latter).

215 *See* United States v. Bagley, 473 U.S. 667, 682 (1985). The Court has interpreted this to mean a probability sufficient to "'undermine[] confidence in the outcome of the trial.'" Kyles v. Whitley, 514 U.S. 419, 434 (1995) (quoting *Bagley*, 473 U.S. at 678).

216 Holmes v. South Carolina, 547 U.S. 319, 330 (2006).

demonstrate innocence.[217] On the other hand, the promise of a DNA database search is the possibility of identifying evidence that conclusively establishes innocence *and* has the potential for the salutary benefit of confirming the actual perpetrator's guilt.[218]

The Court's placement of the outer bounds of due process with respect to the right to present a defense of third-party guilt in the trial setting is also helpful to demonstrate why a defendant's weakened liberty interest that remains after conviction is still powerful enough to necessitate a limited right to defense-initiated DNA database searches. In *Holmes v. South Carolina*,[219] the Court explained that it is not a constitutional violation where the limitations on the right to present a defense of third-party guilt "focus the trial on the central issues by excluding evidence that has only a very weak logical connection to the central issues."[220] This standard expresses a clear preference for the trier of fact to focus its attention on reliable evidence that is central to the issue of guilt. As is outlined in Part II, in some cases there is no more reliable evidence about guilt or innocence than linking DNA from crime-scene evidence to a known offender in the DNA database.[221] Such evidence is the opposite of "evidence that has only a very weak logical connection to [guilt or innocence]."[222]

Furthermore, while *Osborne* is a formidable hurdle, it is far from insurmountable. As an initial matter, the Court recognized in *Osborne* that post-conviction defendants retain a limited due process liberty interest in proving their innocence even after a procedurally valid conviction.[223] The Court simply held that Alaska's procedures for providing post-conviction DNA testing were constitutionally

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217 *See, e.g.*, *Kyles*, 514 U.S. at 434 (recognizing that the *Bagley* materiality prong merely requires a probability sufficient to "'undermine[] confidence in the outcome of the trial'" (quoting *Bagley*, 473 U.S. at 678)).

218 *Cf.* Harvey v. Horan, 278 F.3d 370 (4th Cir.), *reh'g denied*, 285 F.3d 298, 317 (4th Cir. 2002) (Luttig, J., concurring) ("[A]t least where the government holds previously-produced forensic evidence, the testing of which concededly could prove beyond any doubt that the defendant did not commit the crime . . . 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. And it does so out of recognition of the same systemic interests in fairness and ultimate truth.").

219 547 U.S. 319 (2006).

220 *Id.* at 330.

221 *See supra* Part II.

222 *Holmes*, 547 U.S. at 330.

223 Dist. Attorney's Office for the Third Judicial Dist. v. Osborne, 557 U.S. 52, 68 (2009) ("Osborne does . . . have a liberty interest in demonstrating his innocence with new evidence under state law."); *see* Garrett, *supra* note 12, at 2938 (characterizing this as a "remarkable new postconviction liberty interest").

sufficient.[224] The Court did express its reluctance to recognize a substantive due process right to post-conviction DNA testing or a liberty interest inherent in the Due Process Clause, but it did so largely because state legislatures had adequately addressed the need for post-conviction DNA testing.[225] The same cannot be said with respect to defense access to DNA database searches, where legislatures have been slow to add such provisions.[226]

Relying on the fact that the states were committed to providing an avenue to obtain post-conviction DNA testing, the Court in *Osborne* ducked Osborne's substantive due process claim.[227] The Court's sleight-of-hand in dismissing Osborne's argument that the principles of due process—which, for example, led to *Brady*—support a right to post-conviction DNA testing reflects an unwillingness to take the issue head-on.[228] The Court simply asserted that "*Brady* [was] the wrong framework" for analyzing Osborne's claim that due process required a right to post-conviction DNA testing.[229] Curiously, two paragraphs above this assertion, the Court recognized that Osborne had not argued that *Brady* controlled the case.[230] Rather, it was the truth-promoting due process principles that underlie *Brady* that formed the basis of Osborne's claim. The Court simply passed on addressing this argument.[231]

Regardless of the Court's handling of Osborne's substantive due process claim, this Article focuses on a procedural due process framework that starts with the liberty interest generated at the core of the Due Process Clause—an interest that is both fundamental and consistent with our traditions and one that serves to protect innocence. Rather than refuting this liberty interest in proving one's innocence in post-conviction proceedings, in *Osborne* the Court simply did not address it.

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224 *Osborne*, 557 U.S. at 69 ("We see nothing inadequate about the procedures Alaska has provided to vindicate its state right to postconviction relief in general, and nothing inadequate about how those procedures apply to those who seek access to DNA evidence.").

225 *See id.* at 72–73 (rejecting the need for a substantive due process right to post-conviction DNA testing, in part, so as not to "short-circuit what looks to be a prompt and considered legislative response").

226 *See supra* note 13.

227 *See* Starger, *supra* note 143, at 155 (characterizing the Court's handling of this claim as "decidedly brief"); *see also* Garrett, *supra* note 12, at 2943 ("[T]he Court simply failed to discuss how a fundamental concern with accuracy animates criminal and postconviction procedure.").

228 *See* Garrett, *supra* note 12, at 2924 (noting that "the Court omitted any mention of the importance of accuracy to due process jurisprudence" in dismissing Osborne's claim).

229 *Osborne*, 557 U.S. at 69.

230 *Id.* at 68.

231 *Id.* at 88 (Stevens, J., dissenting) (criticizing the Court's "mischaracterization of the right to liberty that Osborne [sought] to vindicate" and its refusal "to acknowledge . . . any right to access the evidence that is grounded in the Due Process Clause itself").

IV. LIMITED POST-CONVICTION RIGHT TO DNA DATABASE SEARCHES

Having identified the liberty interest, this Part turns to what process is due to protect this interest. Here, the right to defense-initiated DNA database searches is a subsidiary procedural right serving the higher-level liberty interest in proving one's innocence.[232] This limited procedural right ensures that the liberty interest in proving one's innocence is meaningful.[233] Furthermore, this Part concludes that the Due Process Clause requires recognition of this right under the traditional balancing test or under the test outlined in *Medina v. California*,[234] which asks whether the state action "'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"[235]

A. *Due Process Balancing Test*

The Court has applied a balancing test to settle due process claims in the *Brady* context[236] and when addressing a right-to-present-a-defense claim.[237] For example, in holding that due process does not require the disclosure of impeachment evidence during plea bargaining, the Court balanced "(1) the nature of the private interest . . . (2) the value of the additional safeguard, and (3) the adverse impact of the requirement upon the Government's interests."[238] This Part applies this test and demonstrates that the interests in recognizing a right to post-

232 *See, e.g.*, *id.* at 67 (recognizing that the Due Process Clause "imposes procedural limitations on a State's power to take away protected entitlements"); *id.* at 68 (recognizing that a "'state-created right can, in some circumstances, beget yet other rights to procedures essential to the realization of the parent right'" (quoting Conn. Bd. of Pardons v. Dumschat, 452 U.S. 458, 463 (1981))).

233 *See, e.g.*, *id.* at 89–90 ("Although States are under no obligation to provide mechanisms for postconviction relief, when they choose to do so, the procedures they employ must comport with the demands of the Due Process Clause . . . by providing litigants with fair opportunity to assert their state-created rights." (citing Evitts v. Lucey, 469 U.S. 387, 393 (1985))); Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272 (1998) (recognizing that the Due Process Clause imposes limits on state clemency procedures).

234 505 U.S. 437 (1992).

235 *Id.* at 445 (quoting Patterson v. New York, 432 U.S. 197, 201–02 (1977)).

236 *See* United States v. Ruiz, 536 U.S. 622, 631 (2002) (applying the balancing test to conclude that due process does not require the disclosure of impeachment evidence during plea negotiations).

237 *See* United States v. Valenzuela-Bernal, 458 U.S. 858, 872–73 (1982) (rejecting defendant's due process claim based on the government's deportation of a potential defense witness after applying a balancing test to weigh the government's interest against the defendant's interest).

238 *Ruiz*, 536 U.S. at 631 (citing Ake v. Oklahoma, 470 U.S. 68, 77 (1985)).

conviction defense-initiated searches far outweigh the interests opposing such a right.

1. State Interests

The interests in not recognizing a right to defense-initiated DNA database searches lie in three categories. First, there is the interest in finality of verdicts that permeates much of post-conviction procedure[239] and animates many trial procedures.[240] Second, law enforcement officials who administer the DNA database have an interest in avoiding the burdens of performing defense-initiated searches and a more fundamental interest in protecting the database's crime-solving power by ensuring the integrity of the information in the database. Third, law enforcement officials have raised privacy concerns about allowing defense access to the DNA database.

a. Finality

In *Osborne*, the Court concluded that Osborne's claim of a freestanding due process right to post-conviction DNA testing involved a "dilemma [about] how to harness DNA's power to prove innocence without unnecessarily overthrowing the established system of criminal justice."[241] In framing the issue in this manner—that DNA evidence may "overthrow[] the established system"—the Court implied that DNA's truth-telling power must somehow be constrained to fit into our existing system as opposed to allowing the system to change in response to the unique power of DNA evidence.[242] Indeed, the Court admitted that its concern hinged on DNA's ability to undermine "traditional notions of finality."[243] The Court's recognition of the criminal justice

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239 *See, e.g.*, Garrett, *supra* note 12, at 2952 ("State postconviction rules adopted chiefly beginning in the 1970s restricted efforts to raise new trial motions and newly discovered evidence of innocence."); Andrew Chongseh Kim, *Beyond Finality: How Making Criminal Judgments Less Final Can Further the "Interests of Finality*," 2013 UTAH L. REV. 561, 568 ("Debates about the proper scope of posttrial review often reduce to a balancing of the importance of the defendants' rights against the harm protecting those rights would inflict on the state's unitary 'interests in finality.'" (quoting Brecht v. Abrahamson, 507 U.S. 619, 637 (1993))).

240 *See infra* Part IV.A.1.a. (describing rules that attempt to ensure the trial is the "main event").

241 Dist. Attorney's Office for the Third Judicial Dist. v. Osborne, 557 U.S. 52, 62 (2009). The Court used similar language about DNA's power throughout the opinion. *Id.* at 55 ("DNA . . . has an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty."); *id.* at 62 (characterizing the truth-telling power of DNA as "unlike anything known before [it]"); *id.* at 72–73 ("DNA technology poses [challenges] to our criminal justice system and our traditional notions of finality . . . .").

242 *Id.* at 62.

243 *Id.* at 72.

system's interest in finality is not misplaced. There is a long history of valuing finality at the expense of procedures that enable challenges to convictions.[244]

This interest in finality is reflected in the Court's desire to maintain the trial as the "main event in which the issue of guilt or innocence can be fairly resolved."[245] This notion is premised on the belief that the trial process, with all of its due process elements, is the best tool to accurately sort innocence from guilt. The Court relied on this premise to protect against unreliable evidence entering post-conviction proceedings.[246] Justice Scalia used this same rationale to criticize the lengthy appellate paths that follow many convictions.[247] While this interest is strong, there are several reasons why it is not sufficient to offset the benefits of recognizing a right to post-conviction defense-initiated DNA database searches.

First, recognizing a right to post-conviction defense-initiated DNA database searches arguably does not threaten finality at all. Rather, such a right provides only a search of the database. At the first step, only access to the database, not the validity of the conviction, is at issue. A search may ultimately lead to a conviction being overturned, but only if it yielded a probative match to a profile in the database. Even then, post-conviction defendants would have to file new petitions to vacate their convictions based on this new evidence.[248]

The Court recognized this narrower concept of finality in *Skinner v. Switzer*.[249] Skinner, an inmate on death row in Texas, sought post-conviction DNA testing pursuant to Texas statute.[250] The Texas courts

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244 *See* Kim, *supra* note 239, at 568–75 (describing the traditional finality arguments and their influence on criminal procedure). The presumption against allowing repeated challenges to procedurally valid convictions is, in part, justified by the fact that the reliability of evidence generally diminishes over time. *See* Herrera v. Collins, 506 U.S. 390, 403 (1993) (recognizing that "the passage of time only diminishes the reliability of criminal adjudications").

245 Murray v. Carrier, 477 U.S. 478, 506 (1986) (Stevens, J., concurring) (internal quotation marks omitted).

246 *See, e.g.*, Garrett, *supra* note 17, at 1719 n.101 (documenting how courts review recantation evidence critically).

247 Kyles v. Whitley, 514 U.S. 419, 456 (1995) (Scalia, J., dissenting) ("In a sensible system of criminal justice, wrongful conviction is avoided by establishing, at the trial level, lines of procedural legality that leave ample margins of safety . . . not by providing recurrent and repetitive appellate review of whether the facts in the record show those lines to have been narrowly crossed.").

248 *See, e.g.*, *In re* Davis, No. CV409–130, 2010 WL 3385081, at *45 (S.D. Ga. Aug. 24, 2010) (finding that in order to vacate a conviction based on innocence one must demonstrate "by clear and convincing evidence, that no reasonable juror would have convicted [the defendant] in light of the [new] evidence"); Garrett, *supra* note 17, at 1710–12 (advocating that courts use a more-likely-than-not standard for reviewing these claims as opposed to the clear and convincing evidence standard).

249 131 S. Ct. 1289 (2011).

250 *Id.* at 1295.

denied his request, and he turned to federal court, filing a civil suit pursuant to 42 U.S.C. § 1983 alleging that Texas violated his right to due process in refusing him access to the evidence to perform DNA testing.[251] The issue before the Court was whether Skinner's claim was proper under § 1983 or should have been raised in federal habeas proceedings.[252] The answer turned on whether Skinner's suit sought to vacate his conviction. If it did, habeas was the proper forum; if it did not, a § 1983 claim was permissible.[253] The Court allowed Skinner's § 1983 claim to proceed, holding that because Skinner only sought testing, the results of which could prove innocence, confirm guilt, or remain inconclusive, his request did not challenge the validity of his conviction.[254] Applying the rationale of *Skinner* to the situation where a post-conviction petitioner seeks a DNA database search demonstrates that the interest in the finality of convictions is not implicated at this preliminary step.

The second reason why traditional notions of finality do not justify prohibiting defense access to DNA database searches is that, in practice, the trial is no longer the "main event" in our system.[255] Rather, the vast majority of convictions result from negotiated guilty pleas.[256] The defendants in these cases only benefit from the truth-seeking protections of trial-based constitutional rights to the extent that the force of these rights is factored into the plea negotiations.[257] To identify but one example, defendants are not protected by *Brady*'s full truth-seeking protections before agreeing to plead guilty.[258] In our current system, where defendants do not benefit from the truth-protecting trial-based rights in the vast majority of convictions, there is less of a reason to believe that the finality achieved from negotiated guilty pleas is an accurate finality, particularly if we believe that trials, with all of their associated rights, produce the most accurate results.

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251 *Id.* at 1295–96.

252 *Id.* at 1298.

253 *Id.*

254 *Id.* at 1293.

255 *See* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 7 (2011) (recognizing the rarity of trials and advocating for a return to a time when criminal accusations were resolved by trials as opposed to negotiated guilty pleas).

256 *See id.*; *see also* Ion Meyn, *The Unbearable Lightness of Criminal Procedure* 1 (Univ. of Wis. Legal Studies Research, Paper No. 1239, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2350953 (criticizing current pretrial criminal procedures for failing to adequately promote the due process protections promised by trials).

257 *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004) (explaining how structural forces and biases prevent the plea bargaining process from accurately reflecting the expected outcomes of trials).

258 *See* United States v. Ruiz, 536 U.S. 622 (2002) (holding that prosecutors do not need to disclose impeachment evidence in advance of a guilty plea).

Third, to the extent that defense-initiated DNA database searches undermine finality, this result is consistent with the criminal justice system's recognition that the grip of finality should be relaxed in the face of the ability to establish innocence.[259] While it has not always been the case, this recognition is a tenet of current post-conviction procedures.[260] For example, states have demonstrated the importance of protecting innocence at the expense of finality by providing statutory rights to post-conviction DNA testing[261] and by providing procedures for convicted individuals to seek to vacate their conviction based on new evidence of innocence.[262] A limited right to search the DNA database would be a small, incremental step that carries significant potential to serve justice, particularly in the most difficult cases which cannot be solved with a mere DNA exclusion.[263]

In sum, the state's interest in finality must not be untethered from the force seeking to challenge it.[264] If that force's truth-promoting power equals or exceeds the ability of the trial process to protect innocence, principles of finality should be relaxed. The promise of the law enforcement DNA database carries precisely this potential for identifying truth. Recognizing a right to defense-initiated DNA database searches will certainly lead to overturning some convictions. But these convictions will be overturned based on conclusive evidence of innocence.[265] In this sense, new evidence generated by DNA database

259 *See generally* Kim, *supra* note 239.

260 *See* McQuiggin v. Perkins, 133 S. Ct. 1924 (2013) (holding that a showing of actual innocence may overcome the statute of limitations in federal habeas); Schlup v. Delo, 513 U.S. 298, 314–15 (1995) (recognizing that a showing of innocence can overcome a procedural bar in federal habeas); Murray v. Carrier, 477 U.S. 478, 495 (1986) ("[T]he principles of comity and finality that inform the concepts of cause and prejudice 'must yield to the imperative of correcting a fundamentally unjust incarceration.'" (quoting Engle v. Isaac, 456 U.S. 107, 135 (1982))).

261 *See supra* note 107 and accompanying text.

262 *See supra* note 108 and accompanying text.

263 *See supra* Part II.C.

264 *See* Dist. Attorney's Office for the Third Judicial Dist. v. Osborne, 557 U.S. 52, 98 (2009) (Stevens, J., dissenting) ("[F]inality is not a stand-alone value that trumps a State's overriding interest in ensuring that justice is done in its courts and secured to its citizens."); *In re* Davis, No. CV409–130, 2010 WL 3385081, at *43 n.36 (S.D. Ga. Aug. 24, 2010) ("Finally, even if this right [to raise a bare actual innocence claim] does implicate a state's interest in finality of judgment, it is difficult to imagine that a state's finality interest can actually override an innocent individual's interest in not being punished."); Kim, *supra* note 239.

265 Of course, even a DNA database match requires minimal investigative follow-up to confirm that the person identified is the actual perpetrator. For example, in many cases follow-up investigation must confirm that the person linked to the foreign DNA was not an acquaintance of the defendant. Furthermore, to confirm that there was not an error in the testing process, it is often helpful to prove that the person was not incarcerated at the time of the crime. For example, Morton's defense team performed similar investigation in the days after it was notified of the DNA database match in his case. *See Michael Morton*, *supra* note 3.

matches can demonstrate that what we thought was final, was not, and simultaneously create a new, and more reliable, finality.[266]

b. Institutional Burdens

The institutional burdens of recognizing a right to post-conviction defense-initiated DNA database searches are small. As is outlined in Part II.B, a keyboard search involves nothing more than typing in a string of numbers representing a forensic DNA profile.[267] The DNA database software then does the work, comparing this profile to those in the database.[268] In the litigation involving Juan Rivera's case, the FBI confirmed that this process is not "costly or time-consuming."[269]

Furthermore, even if a DNA database search was more time intensive, it is unlikely that the number of post-conviction litigants seeking access to the database will come anywhere close to overwhelming the system.[270] Critics of allowing post-conviction DNA testing raised similar claims that the system would be overburdened with requests for testing, but these concerns turned out to be unfounded.[271] They are even less likely to be an issue in the context of DNA database searches, particularly because only a subset of the defendants who seek, and are granted, post-conviction DNA testing will ultimately need DNA database searches to prove their innocence.[272] Some will be exonerated without identifying the actual perpetrator with a database hit.[273] Furthermore, some post-conviction litigants will never

266 The power of DNA to overcome what was once thought to be final does not only benefit innocent defendants seeking to overturn their convictions. The state benefits from the same power. Before the DNA-age, it was reasonable for the state to conclude that a long-unsolved case would likely never be solved. Today, as long as biological evidence was collected from a crime scene that is no longer a safe assumption. Rather, the power of the DNA database has proven that even decades-old cold cases can be solved. *See supra* notes 48–49 (citing examples of cold cases solved with DNA database hits).

267 *See* Murphy, *supra* note 15, at 294–97 (describing forensic DNA profile).

268 There is an additional step once the database returns a hit. The database only contains the DNA profiles and a unique specimen identification number associated with each profile, rather than the name of the person associated with the DNA profile. *See* NDIS MANUAL, *supra* note 29, at 25. To get the name of the person associated with the profile, one must contact the law enforcement agency that submitted the DNA profile. That agency can match the specimen number to the name of a specific individual. *Id.* at 43–48.

269 Rivera v. Mueller, 596 F. Supp. 2d 1163, 1171 (N.D. Ill. 2009).

270 *See* Garrett, *supra* note 12, at 2944, 2959 (refuting the Court's assertion in *Osborne* that the use of post-conviction DNA testing to prove innocence risked overthrowing the system by pointing out that while the DNA exonerations are powerful, they are still relatively rare).

271 *See id.*; Garrett, *supra* note 17, at 1708–09 (recognizing that there are a limited number of DNA cases).

272 *See supra* Part II.C.1.

273 *See supra* Part II.C.1.

reach the stage where access to the database will become an issue because the biological evidence from their cases will not be found.[274]

To understand the minimal institutional burden recognizing a limited right to post-conviction defense-initiated DNA database searches will create, it is helpful to compare the burdens that are imposed on the state by due process principles that seek to protect innocent defendants during plea negotiations.[275] While *Ruiz* did not directly settle the issue, many interpret the Court's opinion to require the disclosure of pure exculpatory, but not impeachment, evidence during plea negotiations.[276] This burden—to identify and disclose exculpatory evidence during plea negotiations—is a significant burden on prosecutors, and it undermines one of the chief benefits of negotiated pleas, namely resolving cases efficiently.[277] Compared to this burden, the process of searching the DNA database is negligible.

While the process of performing DNA database searches imposes negligible burdens, the law enforcement interest in protecting the integrity of its DNA database is significant. Failure to do so would undermine the truth-telling power of the database.[278] It could also lead to false matches or missed opportunities, allowing factually guilty people to escape punishment.[279] Such problems could undermine political and public support for the database and ultimately lead to restrictions on its use by law enforcement.[280] While these interests are real and significant, they are not implicated by the specifics of my

274 *See DNA Exonerations Nationwide*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/DNA_Exonerations_Nationwide.php (last visited Jan. 13, 2015) (documenting that from 2004 to 2010 the Innocence Project closed nearly a quarter of its cases because the physical evidence in those cases was lost or destroyed). *But see Evidence Found*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Evidence_Found.php (last visited Jan. 13, 2015) (listing twenty-eight DNA exonerations where the biological evidence was initially reported lost or destroyed but was later found and used to prove innocence).

275 *See* United States v. Ruiz, 536 U.S. 622 (2002) (holding that prosecutors do not need to disclose impeachment evidence before a guilty plea is entered). The Court has not decided whether exculpatory material, as opposed to mere impeachment evidence, must be disclosed during plea negotiations.

276 *But see* R. Michael Cassidy, *Plea Bargaining, Discovery, and the Intractable Problem of Impeachment Disclosures*, 64 VAND. L. REV. 1429, 1444 (2011) (speculating that the Court's decision in *Ruiz* may be interpreted broadly to mean that *Brady* obligations do not apply in the plea bargaining context).

277 *See Ruiz*, 536 U.S. at 632 (documenting the burden imposed on prosecutors by *Brady*).

278 *See* Rivera v. Mueller, 596 F. Supp. 2d 1163, 1172 (N.D. Ill. 2009) (recognizing the need for quality assurance standards to ensure the "usefulness" of the DNA database).

279 *See* Joseph Goldstein, *F.B.I. Audit of Database That Indexes DNA Finds Errors in Profiles*, N.Y. TIMES, Jan. 24, 2014, at A15 (documenting how errors in the database have hampered some investigations).

280 *See Rivera*, 596 F. Supp. 2d at 1166 (noting that the FBI attributes the success of the database to its strict regulation and control over the procedures for using the database).

proposal for a limited constitutional right to defense-initiated DNA database searches.

As envisioned, a post-conviction right to DNA database searches could be limited to a keyboard search of the database.[281] Such searches do not add new DNA profiles to the database. Rather, the process only compares the DNA profile from a known source to the DNA profiles already in the database. Law enforcement officials and DNA database administrators have conceded that such searches do not alter the structure of information in the law enforcement DNA databases.[282] Indeed, law enforcement routinely use similar keyboard searches when they seek to search a DNA profile that for whatever reason cannot be added to the database.[283]

c. Privacy

The potential for the law enforcement DNA database to erode traditional privacy interests was a central concern of Congress and the FBI from the database's inception.[284] Law enforcement and DNA database officials have used these concerns for privacy to oppose defense-initiated DNA database searches.[285] However, it is crucial to recognize that law enforcement's concern for privacy is serving a different purpose today than it did in the database's infancy. When the DNA database was created, law enforcement possessed a strong self-interest in responding to the concerns of privacy advocates by restricting the use of the DNA database.[286] In short, law enforcement wanted to ensure that this promising new tool gained a certain level of public and political support to ensure its existence.[287] This interest has

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281 *See supra* Part II.B (proposing keyboard searches for defense-initiated database searches).

282 *See Rivera*, 596 F. Supp. 2d at 1172–73 (noting that the FBI did not contest Rivera's assertion that performing a keyboard search will not "contaminate or alter" the database).

283 *See id.*; NDIS MANUAL, *supra* note 29, at 41–42 (outlining the procedures for law enforcement's use of keyboard searches).

284 *See* NDIS MANUAL, *supra* note 29, at 5 ("In the early 1990s when the initial version of the CODIS software was being developed, the FBI Laboratory convened a group of privacy advocates to obtain feedback on its plans for this new law enforcement tool.").

285 *See* Kaye, *supra* note 37, at 165 (noting law enforcement's assertion of this privacy interest). In addition, the FBI has opposed scholars who have sought access to anonymized information from the database to evaluate and study the database's effectiveness. *See* Roth, *supra* note 15, at 1140 n.43 (documenting the scholars who have advocated for greater transparency and access to the database for research purposes).

286 *See* Maryland v. King, 133 S. Ct. 1958, 1980 (2013) ("[A] statutory or regulatory duty to avoid unwarranted disclosures generally allays . . . privacy concerns." (citation and internal quotation marks omitted)).

287 The FBI used the same justification in 2006, citing privacy concerns to block the Denver District Attorney from using the DNA database to try to solve three separate sexual assaults by searching for potential family members of the actual perpetrators. *See* Murphy, *supra* note 15, at 292–93. Interestingly, in that instance, after the prosecutor appealed directly to the Director of the FBI, the FBI responded quickly by changing its procedures to allow for the familial DNA searches

decreased significantly today as the DNA database has become a routine and accepted part of policing. Despite this, law enforcement officials still raise the possibility of privacy violations as a reason to block defense-initiated searches.

The primary interest that law enforcement often cites today to block defense access to the database is the privacy interest of the people whose DNA profiles are in the database.[288] While often left unexplained, the assertion of this privacy interest is driven by two concerns. First, there is the concern that one might derive private details about a person by examining their forensic DNA profile.[289] Second, there is the concern that defense use of the database might generate a DNA match that is ultimately not probative of the actual perpetrator, but is nonetheless embarrassing to the person whose DNA is identified.[290]

Before addressing whether these privacy interests should trump the right of post-conviction defendants to use the database to prove innocence, we must first explore the nature of these privacy interests. Whether there is a privacy interest in keeping one's forensic DNA profile secret has been the subject of significant debate.[291] However, the consensus is that one's privacy interest is in the DNA material that the government collects to obtain a forensic DNA profile, not in the forensic profile itself, which is an extremely small section of one's entire DNA profile.[292] As such, privacy advocates have argued for a requirement that the government discard any remaining biological material after obtaining one's forensic DNA profile.[293]

With respect to the second concern for protecting the privacy interests of the people whose DNA is already included in the law enforcement database—a concern driven by the possibility that some

like the one used by the Denver District Attorney. *Id.* Thus, the FBI's concern for privacy quickly eroded in the face of a request from law enforcement.

288 *See* Kaye, *supra* note 37, at 165 (noting law enforcement's assertion of this privacy interest).

289 *See King*, 133 S. Ct. at 1979 (noting the dispute about whether a forensic DNA profile can reveal genetically significant information about a person, but concluding that such a result is unlikely today).

290 *See Fourth Amendment Theory*, *supra* note 15, at 1135 (recognizing the possibility that a search might lead to a match of a "DNA sample found in the bedroom of a murdered woman, which in turn, might lead to the discovery that the [source of the DNA] was having an affair with [the woman]").

291 *See id.* at 1145–47 (summarizing the debate).

292 *See id.* at 1148 n.301; Kaye, *supra* note 37, at 168 ("The interest of individuals in keeping their STR profiles secret is comparable to their interest in not revealing their blood groups or fingerprints."); *id.* (recognizing that as of 2009, none of the biological markers in one's forensic DNA profile had been shown to serve a predictive function, but admitting that this did not completely extinguish the possibility that this conclusion would change at some point in the future). *But see King*, 133 S. Ct. at 1979 (noting that advances in science could alter the analysis).

293 *See Fourth Amendment Theory*, *supra* note 15, at 1153–58 (describing the clear privacy interests in the actual biological sample as opposed to one's more limited forensic DNA profile).

DNA database searches will result in non-probative matches that ultimately might reveal embarrassing or otherwise private information—the addition of a small number of defense-initiated DNA database searches to the weekly law enforcement searches, which have resulted in over 230,000 database hits,[294] would only marginally increase this risk. That is, this privacy risk is most implicated by the vast majority of DNA database searches that are directed by law enforcement. Moreover, these privacy interests could be adequately dealt with through limited regulation of defense-initiated searches. For example, a court could require a hearing once a DNA match is detected but before the identity of the hit is disclosed to the prosecution or post-conviction defendant.[295]

Finally, the privacy interest of individuals whose DNA is already in the DNA database is not the same in all situations. That is, these individuals certainly retain a legitimate privacy interest in not allowing the government or anyone else to mine their full genetic profile.[296] However, they do not retain a legitimate privacy interest in preventing their forensic DNA profiles from identifying them as actual perpetrators of criminal activity.[297] To put it differently, a post-conviction defendant's liberty interest in proving innocence with the law enforcement DNA database should trump the limited privacy interest individuals retain in keeping their forensic DNA profiles secret once their profiles are a part of the DNA database.[298]

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294 *See CODIS—NDIS Statistics*, *supra* note 48.

295 *See Genealogy Detectives*, *supra* note 15, at 148–49 (proposing a hearing before releasing the name of a potential DNA database match in the context of law enforcement's use of the database for familial searches).

296 *See Fourth Amendment Theory*, *supra* note 15, at 1153–58 (describing the clear privacy interests in the actual biological sample); *see also* SHELDON KRIMSKY & TANIA SIMONCELLI, GENETIC JUSTICE: DNA DATA BANKS, CRIMINAL INVESTIGATIONS, AND CIVIL LIBERTIES 233–41 (2011) (recognizing the privacy interest in one's genetic code and proposing that law enforcement destroy the samples after gleaning the forensic DNA profile from the full genetic profile of known offenders).

297 *See King*, 133 S. Ct. at 1978 ("Once an individual has been arrested on probable cause for a dangerous offense that may require detention before trial, however, his or her expectations of privacy and freedom from police scrutiny are reduced.").

298 *Cf.* Pennsylvania v. Ritchie, 480 U.S. 39, 60–61 (1987) (balancing defendant's due process right to favorable evidence with the state's assertion that records related to child abuse investigations are privileged and secret, and concluding that defendant's due process rights necessitated limited access to the records in the form of an *in camera* review by the judge to determine if information in the records should be disclosed).

2. Defendant's Interests

The most obvious interest weighing in favor of recognizing a right to post-conviction defense-initiated DNA database searches is that, without it, some innocent individuals convicted of crimes that they did not commit will remain incarcerated while the actual perpetrators remain free. Even in the current environment, where defendants lack a procedural right to DNA database searches, there have been over 310 DNA exonerations.[299] These exonerations represent tragic errors, in which innocent people spent years incarcerated, while, in many cases, the actual perpetrators remained free to commit additional crimes.

Beyond this obvious interest lie other compelling interests that support recognizing this right. Michael Morton's case provides a useful example of how the benefits extend beyond the wrongly convicted. Had he not steadfastly maintained his innocence, fought a multi-year battle to obtain post-conviction DNA testing, and obtained a DNA database search, Morton would likely still be fighting to prove his innocence, and the actual perpetrator would be free. Lamentably, in Morton's case, while he was in prison, the actual perpetrator committed a second murder.[300] As Justice Stevens explained in *Osborne*, "When a person is convicted for a crime he did not commit, the true culprit escapes punishment. . . . Crime victims, the law enforcement profession, and society at large share a strong interest in identifying and apprehending the actual perpetrators of vicious crimes . . . ."[301]

There is also a more general societal interest in recognizing a right to post-conviction DNA database searches. Given the extensive media coverage exonerations generate,[302] the public is most assuredly aware of the ability of DNA to establish innocence even in the face of seemingly overwhelming evidence of guilt.[303] This alone may cause some people to lose faith in the criminal justice system. However, if this understanding about the fallibility of the system is met with a system that recognizes a

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299 *Know the Cases*, *supra* note 194 (listing the DNA exonerations).

300 *See* Pamela Colloff, *Mark Alan Norwood Found Guilty of Christine Morton's Murder: "The Big Monster with the Big Mustache" is Sentenced to Life in Prison*, TEX. MONTHLY (Mar. 27, 2013, 11:45 PM), http://www.texasmonthly.com/story/mark-alan-norwood-found-guilty-christine-mortons-murder.

301 Dist. Attorney's Office for the Third Judicial Dist. v. Osborne, 557 U.S. 52, 99 (Stevens, J., dissenting); *cf.* Manson v. Brathwaite, 432 U.S. 98, 128 (1977) (Marshall, J., dissenting) (recognizing that police practices that result in unreliable eyewitness evidence "allow dangerous criminals to remain on the streets while citizens assume that police action has given them protection").

302 *See, e.g.*, *supra* note 3 (documenting the media coverage of Morton's case).

303 *Cf.* Kansas v. Marsh, 548 U.S. 163, 207–08 (2006) (Souter, J., dissenting) ("[T]he period starting in 1989 has seen repeated exonerations of convicts under death sentences, in numbers never imagined before the development of DNA tests.").

right to defense-initiated DNA database searches, it would buoy society's faith and support of a criminal justice system that seeks truth.[304] The Court recognized this important consideration in *In re Winship*,[305] when it recognized that "[i]t is crucial that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."[306]

Weighing the interests on both sides, it is clear that those supporting the recognition of a right for post-conviction defendants to access the powerful truth-promoting nature of the DNA database to prove innocence far outweigh any competing interests.[307] This conclusion is unremarkable, particularly when compared to the burden the Due Process Clause, and its focus on protecting innocent defendants, imposes on society at the trial stage. In requiring the government to prove guilt beyond a reasonable doubt, "our society has willingly chosen to bear a substantial burden in order to protect the innocent."[308] This "substantial burden"—the beyond a reasonable doubt standard—allows some factually guilty defendants to escape punishment. Even after taking into account the limited due process protections in post-conviction proceedings, it would be inconsistent to conclude that the goal of protecting innocence commanded by the Due Process Clause imposes such a substantial burden at trial, but does not require the significantly smaller burden of simply providing access to post-conviction defense-initiated DNA database searches. Such a conclusion would effectively strip the innocence-protecting principles of due process from one of the few categories of post-conviction litigants who can establish innocence conclusively—those with probative biological evidence that can lead to a DNA database hit.

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304 *See, e.g.*, United States v. Nixon, 418 U.S. 683, 709 (1974) ("The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence."); WIGMORE, *supra* note 113, § 1477, at 359 ("[A]ny rule which hampers an honest man in exonerating himself is a bad rule, even if it also helps a villain in falsely passing for an innocent.").

305 *In re* Winship, 397 U.S. 358, 364 (1970).

306 *Id.* at 364.

307 *Cf.* United States v. Bagley, 473 U.S. 667, 699 (1985) (Marshall, J., dissenting) ("I simply do not find any state interest that warrants withholding from a presumptively innocent defendant, whose liberty is at stake in the proceeding, information that bears on his case and that might enable him to defend himself.").

308 Patterson v. New York, 432 U.S. 197, 208 (1977).

B. *Fundamental Principles of Justice*

In *Medina v. California*,[309] the Court announced a shift in criminal cases away from the traditional due process balancing test.[310] It replaced the balancing test with a question: do the criminal procedures at issue offend "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental?"[311] If so, the procedures violate due process. In deciding what ranks as a fundamental principle of justice, the Court has "relied heavily on an analysis of historical and contemporary practices."[312] While this test may seem to narrow the applicability of due process principles, the focus on "fundamental fairness" leaves sufficient room for the Due Process Clause to regulate a broad array of procedures.[313]

In the context of a post-conviction right to DNA database searches, *Medina* asks: Does it violate traditional and fundamental principles of justice for the state to create and use a law enforcement tool that is so powerful that it can categorically prove innocence and confirm guilt in a certain subset of criminal cases, yet at the same time deny access to this tool to defendants in the same subset of cases who seek to prove their innocence? To some degree, answering this question by focusing on historical practice is not helpful. The Court has reminded us that there is no historical counterpart to DNA's ability to confirm guilt and innocence.[314] But perhaps there is an analogous historical situation that does not depend on the power of DNA. Suppose a defendant was convicted of murder, yet despite the conviction, the defendant continued to assert his innocence. Ten years into his sentence he hears rumors that the person he was convicted of killing was still alive and was a member of the United States military.[315] If the state refused to confirm

309 505 U.S. 437, 442–47 (1992).

310 *Id.* at 443 (concluding that the balancing test was not the appropriate test in evaluating due process claims related to state criminal procedures).

311 *Id.* at 445 (quoting *Patterson*, 432 U.S. at 202).

312 SULLIVAN & MASSARO, *supra* note 26, at 96.

313 *See* Garrett, *supra* note 12, at 2940 ("To say that the Court regulates areas only affected by concerns of fundamental fairness is to say that the Court regulates almost all aspects of criminal process."); *id.* ("The Court's array of freestanding due process decisions regulate an 'extraordinary range' of criminal investigation, charging, trial, guilty pleas, sentencing, and posttrial procedures." (quoting Jerold H. Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*, 45 ST. LOUIS U. L.J. 303, 389 (2001))).

314 *See* Dist. Attorney's Office for the Third Judicial Dist. v. Osborne, 557 U.S. 52, 55 (2009) ("DNA testing has an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty."); *id.* at 62 ("Modern DNA testing can provide powerful new evidence unlike anything known before.").

315 *See, e.g.*, EDWIN M. BROCHARD, CONVICTING THE INNOCENT: ERRORS IN CRIMINAL JUSTICE (1932) (documenting exonerations based on an alleged murder victim turning up alive).

if the alleged murder victim was alive, it would certainly violate traditional and fundamental principles of fairness.[316] In many ways, the DNA database, and its ability to conclusively identify actual perpetrators, is similar to this historical example. As such, what the Due Process Clause requires should be the same.

Contemporary practice also supports the conclusion that prohibiting defense-initiated DNA database searches to prove innocence offends fundamental principles of fairness. Modern procedures have been rewritten to respond to concerns for protecting innocence even after procedurally valid convictions.[317] Many of these changes have been driven by the DNA exonerations themselves. Moreover, as is explained in Part III.B, these procedures are consistent with the rich history of the Due Process Clause's concern for accuracy and truth-promoting procedures.

Finally, even though the Court endeavored to make a break with the due process balancing test in the criminal context with its decision in *Medina*, the break was far from clean.[318] Rather, equitable concerns continue to influence the Court even as it applies the *Medina* test.[319] To the extent that equity remains an integral part of the due process analysis under *Medina*, the balancing of interests clearly supports recognizing a limited right to defense-initiated DNA database searches to prove innocence.[320]

CONCLUSION

As a pure crime-solving tool, the DNA database offers the same promise to law enforcement officials investigating unsolved crimes and convicted defendants seeking to prove their innocence: truth—a truth that can overcome the challenges of time, stale evidence, inaccurate memories, and a truth that surpasses the ability of trial procedures to deliver factually reliable results. Despite this promise, post-conviction

316 *See* Kreimer & Rudovsky, *supra* note 76, at 588–89 ("The central and common ground for declaring certain rights fundamental under the Due Process Clause is the protection those rights provide against conviction of innocent persons.").

317 *See, e.g.*, *Access to DNA Testing*, *supra* note 107 (documenting that every state has a post-conviction DNA testing law).

318 *See* SULLIVAN & MASSARO, *supra* note 26, at 97 ("In *Medina*, the same decision in which the Court rejected *Eldridge* balancing approach, the concurring and dissenting opinions noted that the majority used an analysis that was strikingly similar to the flexible analysis employed in *Eldridge*."); *see also* United States v. Ruiz, 536 U.S. 622 (2002) (applying the due process balancing test in a criminal case several years after *Medina*).

319 *See* SULLIVAN & MASSARO, *supra* note 26, at 97 nn.139–42 (listing the equitable concerns the Court considered in *Medina*).

320 *See supra* Part IV.A.

defendants have largely been relegated to the sidelines, blocked from using the database to prove innocence.

Restricting the DNA database to law enforcement use is inconsistent with the criminal justice system's response to the promise of DNA in other contexts. Every state has adopted legislation providing a path for post-conviction defendants to obtain new DNA testing in post-conviction proceedings. On the contrary, only nine states provide for defense-initiated searches of the DNA database. This imbalance continues despite the fact that the leaders of the National Association of Criminal Defense Lawyers and the National District Attorneys Association have called for broader defense access.[321] In response, this Article proposes the recognition of a limited constitutional right to defense-initiated DNA database searches that is built on core due process principles.

Recognizing a constitutional right to defense-initiated DNA database searches will ensure that some post-conviction defendants will have the tools to prove their innocence. But this recognition also generates new questions about the use of the DNA database and, more broadly, about the criminal justice system's commitment to factually reliable results. With respect to the former, courts will have to sort out how far such a right extends. For example, currently there are strict regulations for law enforcement's use of the database to perform near-match or familial DNA searches. While these regulations are appropriate for law enforcement, they may be less appropriate for restricting post-conviction defendants seeking to prove innocence. In addition, to the extent that courts prohibit defense-initiated searches based on the FBI regulations that control law enforcement's use of the DNA database, would recognition of a constitutional right to defense-initiated searches render those regulations as applied to defendants unconstitutional? The district court in Juan Rivera's case faced a similar issue. However, because his case arose under the Administrative Procedures Act, the court did not have to rule on the constitutionality of the law enforcement regulations as they were applied to Rivera, but only had to find that the FBI's refusal to comply with the search was arbitrary and unreasonable.

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321 *See* Bronner, *supra* note 58 ("'Science doesn't belong to the government, but they act like it does. Unless the defense is given access to this information, the playing field remains uneven in criminal justice.'" (quoting the President of the National Association of Criminal Defense Lawyers)); *id.* ("'We, as law enforcement and prosecutors, are obligated to seek the truth and follow the evidence, and DNA should be entered into [the DNA database] . . . . It seems like there should be laws for [defense access], and I agree that the defense should be given the information [from the database].'" (quoting the Executive Director of the National District Attorneys Association)).

More generally, recognizing a limited right to defense-initiated DNA database searches raises questions about the system's commitment to reliable results. For example, how should the system respond to the creation of new law enforcement tools that are so powerful that defendants seek access to them even if these tools do not offer the full promise of the DNA database? With respect to prosecutors, when do their ethical obligations to seek justice require them to relax the adversarial aspects of the system and support a post-conviction defendant's request for a DNA database search? Even more broadly, does the system's heavy reliance on privately negotiated dispositions in the form of guilty pleas weigh in favor of relaxing the barriers to post-conviction relief in the face of credible claims of innocence?

Regardless of how these questions are answered and regardless of whether the Court ultimately recognizes a limited constitutional right to defense-initiated DNA database searches, we can be sure that defendants with innocence claims—like Morton and Wyatt before them—will continue to push all avenues available to obtain searches and vindicate their innocence.[322] To the extent they are blocked from using the only tool that could conclusively establish their innocence,[323] some innocent people will continue to suffer—a result that is inconsistent with core due process truth-protecting principles and common sense.

322 *See* Garrett, *supra* note 17, at 1709 (recognizing that innocent individuals "will instead pursue traditional remedies and assert innocence through indirect and procedurally difficult-to-adjudicate means"); *cf. id.* at 1717 (recognizing that until the system ensures adequate access to DNA evidence, including the DNA database, "post-conviction DNA exonerations will maintain pressure on political actors to create more effective remedies").

323 *See* Little v. Streater, 452 U.S. 1, 12 (1981) (recognizing that a state violates the Due Process Clause where it "forecloses what is potentially a conclusive means for an indigent defendant to . . . exonerate himself").