

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 DISTRICT ATTORNEY'S OFFICE :

4 FOR THE THIRD JUDICIAL :

5 DISTRICT, ET AL., :

6 Petitioners :

7 v. : No. 08-6

8 WILLIAM G. OSBORNE. :

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10 Washington, D.C.

11 Monday, March 2, 2009

12

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States
15 at 10:05 a.m.

16 APPEARANCES:

17 KENNETH M. ROSENSTEIN, ESQ., Assistant Attorney General,
18 Anchorage, Alaska; on behalf of the Petitioners.

19 NEAL K. KATYAL, ESQ., Deputy Solicitor General,
20 Department of Justice, Washington, D.C.; on behalf of
21 the United States, as amicus curiae, supporting the
22 Petitioners.

23 PETER NEUFELD, ESQ., New York, N.Y., on behalf of the
24 Respondent.

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4	On behalf of the Petitioners
5	NEAL K. KATYAL, ESQ.
6	On behalf of the United States, as amicus
7	curiae, supporting the Petitioners
8	PETER NEUFELD, ESQ.
9	On behalf of the Respondent
10	REBUTTAL ARGUMENT OF
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12	On behalf of the Petitioners
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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 08-6, District Attorney's Office for the Third Judicial District v. Osborne.

Mr. Rosenstein.

ORAL ARGUMENT OF KENNETH M. ROSENSTEIN

ON BEHALF OF THE PETITIONERS

MR. ROSENSTEIN: Thank you, Mr. Chief Justice, and may it please the Court:

The State of Alaska fully recognizes the importance of DNA evidence. The State provides criminal defendants with pretrial access to that evidence and it has postconviction procedures that give prisoners a fair opportunity to retest that evidence should new technology become available.

So this case really isn't about the importance or power of DNA evidence. Rather it's about three things: First, it's about the proper procedural device for asserting in Federal court a right to postconviction testing. Section 1983 is not the correct device because Mr. Osborne's claim clearly sounds in Federal habeas corpus. The evidence he seeks has a singular relevance to support a direct attack on the

1 validity of his confinement.

2 JUSTICE SOUTER: Well, he's -- he's not at
3 this point. All he's doing is seeking evidence. We
4 don't know -- he doesn't know presumably -- exactly what
5 that evidence is going to show. The evidence may prove
6 to be exonerating and it may not be.

7 Until one knows the tendency of the
8 evidence, one can't say that we have a Preiser problem.
9 So if -- if we don't have that kind of a problem, then I
10 don't see -- I guess I don't follow your argument that
11 this necessarily sounds in habeas.

12 MR. ROSENSTEIN: Well, Your Honor, the --
13 Mr. Osborne's case is comparable to Balisok v. Edwards,
14 where the Petitioner was seeking damages for -- as a
15 result of a biased hearing in prison.

16 JUSTICE SOUTER: Right. And if he was
17 seeking damages in this 1983 action for false
18 imprisonment or imprisonment under an invalid
19 conviction, I would understand your argument. But what
20 he is saying in effect is: I want process to know what
21 this evidence has to say. And that is not seeking
22 damages, and it's not seeking release.

23 MR. ROSENSTEIN: That's correct, Your Honor.
24 It's not seeking damages, but the proof -- the
25 difference between this case -- the only difference

1 between this case and Balisok is that in this case the
2 proof is going to be happening in a laboratory; whereas,
3 in Balisok the --

4 JUSTICE SOUTER: No. The difference -- the
5 difference is that if he succeeds in this case in
6 getting access to the evidence, that doesn't get him
7 outside or even in position to go outside the prison
8 door. All it does is get him some evidence to test.
9 And what he does with that later, if he finds it
10 favorable, presumably is necessarily going to be in
11 habeas.

12 MR. ROSENSTEIN: But this -- his request is
13 simply a discovery request. He's split his -- his claim
14 away from his underlying claim of actual innocence, his
15 --

16 JUSTICE SOUTER: Well, he's got to because
17 he doesn't know whether he has any evidence of actual
18 innocence at this point.

19 MR. ROSENSTEIN: But he -- to assert a claim
20 of actual innocence, he doesn't need to have the result
21 of a DNA test, and --

22 JUSTICE SOUTER: He's not asserting it. He
23 just says: I want to get to this evidence and see what
24 it has to say.

25 MR. ROSENSTEIN: But the -- this evidence

1 has a singular relevance, and his -- his true intent is
2 to -- is to assert --

3 JUSTICE SOUTER: No.

4 MR. ROSENSTEIN: -- a claim of innocence.

5 JUSTICE SOUTER: He has a singular objective
6 in getting the evidence, but we don't know what the
7 evidence means. The evidence may conclusively prove
8 that he is guilty, for all we know.

9 MR. ROSENSTEIN: That's true, Your Honor,
10 but what this represents, what his request represents,
11 is a discovery request.

12 JUSTICE SOUTER: Well, it's a -- that's --
13 that's a fair way of putting it, but what he -- I think
14 ultimately his strongest argument or his -- his basic
15 argument is this evidence is potentially so important
16 that the State has no valid interest in keeping me at
17 least from seeing it; i.e., testing it. And you can
18 call that discovery if you want to, but it's something
19 very different from the normal discovery that goes on as
20 an ancillary process to a criminal prosecution.

21 MR. ROSENSTEIN: Well, the State does have
22 an interest in -- in insisting that Mr. Osborne follow
23 the established procedures.

24 JUSTICE SOUTER: Oh, that may be. I'm not
25 getting into that here.

1 JUSTICE SCALIA: Would the other side
2 concede the premise that he doesn't say that this is
3 going to exonerate him? That he has -- you know --
4 here's some -- some evidence out there. It may help me;
5 it may hurt me. I don't know which, but I'd like to see
6 it. Is that the only claim he's making? If so, it's --
7 it's a lot less -- what should I say -- a lot less
8 plausible a constitutional claim. There's some evidence
9 that I'd like to look at; I'm not saying it will prove
10 me innocent. I'd just like to look at this evidence.
11 Might, might not. That's a lot weaker claim than what I
12 had thought he was making, which is the claim that this
13 -- this new scientific evidence will -- will prove my
14 innocence.

15 MR. ROSENSTEIN: That's correct, Your Honor.

16 JUSTICE SCALIA: Well, which is he doing
17 here? Is he saying the latter or not?

18 MR. ROSENSTEIN: Well, he hasn't -- he has
19 never really asserted that he is actually innocent. He
20 holds out the possibility, and he's filed an affidavit
21 which is at joint appendix --

22 JUSTICE SCALIA: So it's not a
23 constitutional claim of entitlement to evidence which he
24 asserts will prove his innocence, but rather a
25 constitutional claim to evidence which might or then

1 might not prove his innocence? Is that --

2 MR. ROSENSTEIN: He has hedged, Your Honor.

3 JUSTICE GINSBURG: Performance we should let
4 the -- let Osborne, Osborne's attorney, address that
5 question, because you're not really equipped to answer
6 for the other side.

7 JUSTICE SCALIA: Well, we're assuming the
8 premise, though, in the questioning.

9 MR. ROSENSTEIN: Well, as this case started,
10 Your Honor, Mr. Osborne was asserting that it would
11 establish his innocence. But yet he has never -- he has
12 never made a declaration under penalty of penalty of
13 perjury that he is innocent. So, Your Honor, you're
14 correct. He seems to be, for lack of a better word,
15 fishing for evidence that -- that might help him.
16 And --

17 JUSTICE GINSBURG: There was evidence in --
18 at his trial at the state of the art at that time.
19 There was whatever the test was.

20 MR. ROSENSTEIN: Justice Ginsburg, at trial
21 the State performed what is known as DQ alpha testing.

22 JUSTICE SCALIA: That was not the state of
23 the art at the time, was it?

24 MR. ROSENSTEIN: That's my understanding,
25 that the RFLP testing was a much more discriminating

1 type of -- would yield a much more discriminating result
2 than the DQ Alpha. -

3 JUSTICE SCALIA: He didn't ask for that.

4 MR. ROSENSTEIN: That's correct, Your Honor.

5 JUSTICE GINSBURG: But when did the current
6 technology become available? When did the testing that
7 he now requests --

8 MR. ROSENSTEIN: I'm not certain about that,
9 Your Honor. My -- I would guess that it was around the
10 late nineties. It was available before he filed his --
11 this Federal action.

12 CHIEF JUSTICE ROBERTS: Does the State
13 routinely keep evidence of the sort Osborne is seeking
14 available? Or is there a cutoff point at which they
15 dispose of the evidence.

16 MR. ROSENSTEIN: I can't answer whether the
17 State has a policy. It seems to be a decision that is
18 made jointly with the police, the crime lab, and the
19 prosecutors, and it depends, I would think, on the
20 status of the case as it proceeds after conviction
21 through direct appeal.

22 JUSTICE BREYER: What now? As far as I
23 understand, there's a procedural problem. I tried to
24 figure out the Heck line once in Balisok. My impression
25 of it is that if, Mr. Prisoner, you're bringing an

1 action challenging some confinement or the effect of
2 your action is going to be to let you go out of solitary
3 or out of prison, then proceed your habeas. But if what
4 you're trying to get is relief that may or may not mean
5 you get out of solitary or you get out of prison, then
6 you go to 1983. But, by the way, if you're in 1983 you
7 are complaining about an action or inaction by a State
8 official that violates a constitutional right.

9 Now, as I look at this case the prisoner, if
10 he wins, is not going to get out, and he is complaining
11 about the State violating a constitutional right by
12 refusing to give him DNA. It seems to me that second
13 question is the question that's the heart of the case:
14 Does the State have a constitutional obligation to give
15 him the DNA?

16 So I would appreciate your telling me why it
17 doesn't.

18 MR. ROSENSTEIN: Justice Breyer, the State
19 doesn't have an obligation to provide this evidence to
20 him because there is no -- a -- prisoners have no
21 Federal right to postconviction relief, and the State of
22 Alaska has provided procedures by which -- which Mr.
23 Osborne if he chose to use them could make available the
24 evidence that he seeks. But he hasn't chosen to invoke
25 those procedures.

1 JUSTICE GINSBURG: Would you explain that --

2 JUSTICE BREYER: Is there any reason to
3 think that if, in fact -- sorry.

4 CHIEF JUSTICE ROBERTS: Justice Breyer.

5 JUSTICE GINSBURG: Just to clarify his
6 statement, he said that the State of Alaska provides a
7 means for him to get at this information; but if it did,
8 I think we wouldn't be here. So would you -- Alaska is
9 one of the few States that has no statute.

10 MR. ROSENSTEIN: That's correct.

11 JUSTICE GINSBURG: So what -- you say --
12 this whole controversy is whether the State is obliged
13 to give him this information; but you're saying it's
14 simply that he picked the wrong procedure. That's what
15 I thought I heard you say just now; that there is a
16 means under Alaska law where he could get this DNA
17 postconviction. So would you please explain what the
18 Alaska procedure is?

19 MR. ROSENSTEIN: Yes, Justice Ginsburg.

20 Alaska has a postconviction relief statute
21 and that is at page -- starts at page 10a of the blue
22 brief. And under that statute, a prisoner can assert a
23 claim for -- for postconviction relief when there exist
24 material facts -- I'm quoting from Alaska Statute
25 12.72.010. Postconviction relief is available when a

1 person claims that there exists evidence of material
2 facts not previously presented and heard by the court
3 that requires vacation of the conviction or sentence in
4 the interest of justice.

5 Now, if Mr. Osborne were to state a
6 cognizable claim under that statute the Alaska rules of
7 court then apply the full civil rules pertaining to
8 discovery as of right to the applicant.

9 JUSTICE GINSBURG: Has there been any case
10 in Alaska where a defendant postconviction was, in fact,
11 able to get DNA testing under the procedure you just
12 described?

13 MR. ROSENSTEIN: Well, Your Honor,
14 there's -- there was one case and it's cited in the
15 yellow brief, Patterson v. State, that a prisoner did
16 apply in court and was granted access to the DNA
17 evidence, but then it came to pass that the evidence had
18 been destroyed by that time.

19 So in that case the relief was granted, but
20 through the destruction of the evidence no testing was
21 possible.

22 JUSTICE KENNEDY: Can you give me some idea
23 of how many cases there are in, say, the last 10 years
24 in which in State postconviction proceedings the
25 convicted prisoner has asked for DNA evidence?

1 MR. ROSENSTEIN: I believe --

2 JUSTICE KENNEDY: Three? 300?

3 MR. ROSENSTEIN: Less -- we did an informal
4 search and found seven cases where there were actual
5 requests; and I believe that five of them involved court
6 cases, the one that I have just mentioned where the
7 relief was granted, and I believe the remaining are
8 pending decision.

9 JUSTICE SCALIA: Of course, that relief
10 would require him to assert his innocence, wouldn't it?
11 He would have to bring a habeas corpus action claiming
12 that the State has no business holding him because in
13 fact he's innocent?

14 He doesn't want to do that? He just wants
15 to say, I'd just like to see this evidence. It might
16 help me. It might not help me, but --

17 MR. ROSENSTEIN: That's -- prisoners have
18 never been able to postconviction simply seek
19 over-the-counter the evidence that was used in
20 their earlier -- in their --

21 JUSTICE SOUTER: I don't know that they're
22 arguing with you on that score. What they are saying --
23 I think what they're saying, and this goes to a variety
24 of Justice Scalia's question, is that under the Alaska
25 statute in order to get to the evidence, or indeed in

1 order to make his -- his postconviction claim, he's got
2 to claim that the evidence of material fact requires
3 vacation of the conviction or sentence.

4 His argument is, I don't know whether it
5 requires it; because I haven't been able to test it.
6 What I want is to test it.

7 And as I understand it, under this
8 particular statute, he has no chance of doing so because
9 he can't tell you in advance what the test is going to
10 show. Isn't that correct?

11 MR. ROSENSTEIN: Justice Souter --

12 JUSTICE SOUTER: Well, first tell me whether
13 that's correct or not. He doesn't know what the test is
14 going to -- he doesn't know what the test is going to
15 show; so --

16 MR. ROSENSTEIN: That is correct.

17 JUSTICE SOUTER: -- he cannot say that it
18 requires vacation of the conviction; isn't that correct?

19 MR. ROSENSTEIN: That is correct.

20 JUSTICE SOUTER: Okay.

21 MR. ROSENSTEIN: But, but -- but only Mr.
22 Osborne knows whether he is innocent. And if he is
23 innocent --

24 JUSTICE SOUTER: But Mr. Osborne doesn't
25 know what that evidence is going to show. He hasn't

1 tested it.

2 MR. ROSENSTEIN: That's correct.

3 JUSTICE SOUTER: Whether -- whether he
4 believes he's innocent or whether he doesn't believe
5 he's innocent, he can walk into court, as I understand
6 it, and say, I am absolutely innocent. But what he
7 cannot do prior to testing the evidence is tell you, is
8 allege, that the evidence is going to require the
9 vacation of the conviction.

10 MR. ROSENSTEIN: But if he is innocent, then
11 he does know the -- the result of the testing.

12 JUSTICE SCALIA: I thought you said the
13 State has -- has indeed granted a habeas request. In
14 that case, where it granted the habeas request, although
15 it turned out that the evidence was destroyed, in that
16 case surely the same situation -- the same situation
17 existed.

18 MR. ROSENSTEIN: Well, actually, Your Honor,
19 it did not, because in that case he never asserted his
20 innocence. That was a request he made on
21 reconsideration after the denial of his ineffective
22 assistance claim. And he said that under the due --
23 under due process, I am entitled to have this evidence
24 so that I can present an actual innocence claim. So the
25 -- the case that you are referring to is --

1 JUSTICE SCALIA: It is the case you are
2 referring to. I didn't -- I didn't make it up. You
3 did.

4 MR. ROSENSTEIN: Well, in -- in Mr.
5 Osborne's first postconviction relief case that was
6 decided in -- are you talking about the --

7 JUSTICE SCALIA: No. I'm talking about the
8 case you alluded to earlier where you say the State of
9 Alaska had indeed provided DNA evidence or had agreed to
10 provide it --

11 MR. ROSENSTEIN: Oh, okay. Yes.

12 JUSTICE SCALIA: -- but for the fact that it
13 no longer existed. Now, in that case surely the same
14 problem existed that Justice Souter is -- is raising.
15 That -- that person also, while claiming innocence,
16 couldn't say for sure what the evidence would produce,
17 but that didn't stop the State from providing it; did
18 it?

19 MR. ROSENSTEIN: Right.

20 JUSTICE BREYER: I know your time is up, but
21 I really have only one question this morning and I would
22 like to have a chance to ask it, and I am trying to
23 clear away some undergrowth. And the undergrowth first
24 I have cleared away in my mind is this Heck question.
25 The second is the Alaska court decision. And my

1 impression is that Alaska refused the test because,
2 among other things, they couldn't say -- they said the
3 conviction rested primarily on eyewitness testimony, and
4 they have a bunch of reasons. But the Ninth Circuit, as
5 a matter of fact, tried to blow apart those reasons.
6 Okay?

7 Suppose I agree with the Ninth Circuit.
8 Then my question is this: Does the Constitution of the
9 United States require you to give this evidence to the
10 defendant? And one of the relevant points in my mind is
11 I see it would be of significant advantage to the
12 defendant. Even if he's guilty, he can be proved to --
13 whatever. It is an advantage to him. Okay?

14 Now, why don't you want to give it to him?

15 MR. ROSENSTEIN: Because, Your Honor, the
16 State of Alaska has a procedure that was not invoked in
17 the --

18 JUSTICE BREYER: I -- I -- there I -- that's
19 the undergrowth I tried to clear away. I am saying I
20 read all that procedure. Suppose I believe that the
21 Ninth Circuit is right about that procedure, namely that
22 the tests that they're using in that procedure are not
23 favorable enough to a defendant who is seeking, as this
24 defendant is seeking, the DNA.

25 He just wants some DNA. He'll pay for it.

1 The odds are eight to one he's going to lose. But he
2 thinks: I'm willing to run those odds. I won't put you
3 at any trouble. Now, why don't you want to give it to
4 him?

5 Because, Your Honor, the State of Alaska has
6 a procedure that would enable him to obtain that
7 evidence.

8 JUSTICE BREYER: No. The procedure has the
9 tests in it that the Alaska court -- didn't the Alaska
10 Supreme Court say, we will not give you DNA evidence
11 unless you can demonstrate: One, that the conviction
12 rested primarily on eyewitness ID evidence; two, that
13 there was a demonstrable doubt concerning his ID as the
14 perpetrator; and, three, that scientific testing would
15 likely would be conclusive. Wasn't that their test?

16 MR. ROSENSTEIN: With respect, Your Honor,
17 that was the test they applied in that case, but that is
18 not the test that would apply if Mr. Osborne were to
19 file a new postconviction relief application asserting
20 that he is actually innocent. If he were to do that,
21 then the full civil rules of discovery would available
22 to him.

23 JUSTICE BREYER: And then -- are different
24 -- then they'd give it to him?

25 MR. ROSENSTEIN: Pardon me.

1 JUSTICE BREYER: In other words, all he has
2 to do is file a new piece of paper tomorrow, and he gets
3 the DNA?

4 MR. ROSENSTEIN: Right. But Alaska --
5 Alaska has procedures for this.

6 JUSTICE BREYER: Okay.

7 JUSTICE GINSBURG: But you said something
8 significant. You said that he would have to allege his
9 actual innocence, which he hasn't done. So if he
10 continues not to -- not to put in a sworn statement
11 that, I am actually innocent, under your current
12 procedure he still couldn't get the DNA.

13 MR. ROSENSTEIN: If he doesn't allege his
14 actual innocence, Your Honor, then this is really an
15 empty exercise, a fishing expedition. He wants to just
16 see what -- what the evidence says. And that -- that is
17 not the way litigation works.

18 JUSTICE GINSBURG: You gave the one case in
19 which in the habeas in Alaska the court granted access
20 to DNA, but the evidence wasn't there.

21 On how many occasions when postconviction
22 someone moved for the DNA evidence did the Alaska courts
23 deny the request?

24 MR. ROSENSTEIN: My -- my -- there were --
25 as I said, there were seven cases. And my understanding

1 is there have -- has not been a denial.

2 JUSTICE GINSBURG: Well, you told us it was
3 granted in one case. What happened in the other six?

4 MR. ROSENSTEIN: There -- well --

5 JUSTICE SCALIA: I thought you said they
6 were still pending.

7 MR. ROSENSTEIN: There were -- there are
8 four or five that are pending. One of them is Mr.
9 Osborne's case, and another is being reviewed by the --
10 by the attorney general.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.
12 We'll afford you rebuttal time since the Court used up
13 your time.

14 MR. ROSENSTEIN: Thank you.

15 CHIEF JUSTICE ROBERTS: Mr. Katyal.

16 ORAL ARGUMENT OF NEAL K. KATYAL

17 ON BEHALF OF THE UNITED STATES,

18 AS AMICUS CURIAE,

19 SUPPORTING THE PETITIONERS

20 MR. KATYAL: Mr. Chief Justice, and may it
21 please the Court:

22 The Ninth Circuit created a novel
23 constitutional right by extending Brady to the
24 postconviction setting. Mr. Osborne doesn't attempt to
25 defend that rationale. Instead, he attempts to mint a

1 previously unrecognized liberty interest in access to
2 clemency or State postconviction procedures. Assuming
3 the Court reaches the second question presented, it
4 should not constitutionalize rules for postconviction
5 access to DNA, an area of great legislative ferment in
6 the last few years. And even were it inclined to do so,
7 the unusual facts of this case, which include failure to
8 attest to actual innocence under threat of perjury, two
9 recent confessions to the crime, and a tactical decision
10 at trial to forego a highly discriminating RFLP DNA
11 test, all together make this a particularly poor
12 candidate for recognizing a new constitutional
13 entitlement.

14 JUSTICE GINSBURG: What were the two
15 confessions? I know the one before the parole
16 authorities. What was the other one?

17 MR. KATYAL: There are two confessions to
18 the parole authorities. One is found at page --
19 petition appendix 71a. There's a small reprint which is
20 the written portion of the -- of the confession.
21 There's also separately in the record -- this is at
22 supplemental excerpts of the record, pages 248 to 261,
23 in the Ninth Circuit, which --

24 JUSTICE STEVENS: Yes, but isn't it true
25 that we've had DNA cases where the person has been found

1 innocent despite the fact they confessed?

2 MR. KATYAL: That is -- that is correct.

3 JUSTICE STEVENS: How do we know this isn't
4 one of those cases?

5 MR. KATYAL: Well, I am not quite sure that
6 we have had any situation like this, in which you have
7 had so many different facts altogether that -- that
8 suggested both that he -- that he's guilty and that --
9 and you are talking about a confession that's taken
10 place years after. I think the cases that are referred
11 to by the amici are situations in which someone has
12 confessed generally at trial or something like that.

13 Here you have two confessions years later.
14 They are very detailed. The one in the -- in the
15 supplemental excerpts to the record is a very long
16 story. And he says that he told his attorney about it
17 and talks all about how he had confessed to his mother,
18 how it was very difficult to exorcise. It is a very
19 in-depth confession, and it is a confession that the --
20 that the Alaska courts have credited.

21 It is not just our word. At joint appendix
22 page 221, the Alaska court found -- listened to that
23 2004 confession in light of the 2006 affidavit that Mr.
24 Osborne makes much of claiming that he is innocent and
25 put those two documents side by side and said, taken

1 together, they don't -- the 2006 affidavit does not
2 really take --

3 JUSTICE STEVENS: Am I right in
4 understanding that the State has agreed that this
5 evidence is exonerating; that this evidence potentially
6 could exonerate him?

7 MR. KATYAL: The -- the State has so agreed.

8 JUSTICE BREYER: And is it true that all he
9 has to do is file a piece of paper in the court that
10 says: Whatever I said before, I did it under pressure;
11 I am innocent. And if he says those words, "I am
12 innocent," then he will get this DNA?

13 MR. KATYAL: Well, it is -- it is not clear
14 to me under State law. I think as I understood my
15 friend -- but that's what I understood him to say. I
16 can tell you, Justice Breyer, for purposes of the
17 Federal law, 18 USC 3600 has a requirement in it which
18 says that in order to get DNA testing you must attest
19 under threat of perjury that you are actually innocent.
20 That is a very serious requirement, done after years of
21 congressional debate. That is something that the Ninth
22 Circuit rule would disregard, and it would permit
23 someone to come in without that.

24 JUSTICE SCALIA: You think we could attach
25 that to the new constitutional right that we invent? It

1 would be a constitutional right to get it if -- if --
2 but if you lose, you get another three years? Could we
3 say that?

4 MR. KATYAL: Our position, Justice Scalia,
5 is that there is no constitutional right to DNA, but
6 if -- were the Court inclined to find one and locate it
7 somewhere in Brady or the procedural due process clause,
8 something we think which would be very difficult to do,
9 but were it -- if that were the Court's inclination,
10 absolutely, it should at least mirror the Federal
11 statute and the -- and the rock solid requirements of
12 3600, which do require that perjury -- that perjury
13 statement to be made in order to --

14 JUSTICE KENNEDY: Do you think there's a
15 constitutional right to establish innocence in some
16 cases where there is new and -- evidence that could not
17 previously have been discovered, that has a high
18 likelihood of exonerating?

19 MR. KATYAL: Well, this Court has struggled
20 with that and so far has said no. And the latest
21 position is *Herrera v. Collins*.

22 JUSTICE KENNEDY: I'm asking for your
23 position.

24 MR. KATYAL: Our position is that the logic
25 of this Court's precedents is that there is no right at

1 present to actual innocence.

2 JUSTICE SOUTER: Mr. Katyal, the -- the
3 right that they're asserting may be located not in
4 procedural, but in substantive due process. What I --
5 what I would like you to comment on is what the
6 government's or any government's interest, the United
7 States or that of a State, may be in, in effect, in
8 denying that there should be such a right.

9 And this question occurred to me when I was
10 going through the briefs: What if -- we'll make this
11 Federal for your sake -- what if the United States had
12 imprisoned an individual who came forward and said:
13 Nobody realized it, but I was an eyewitness to the crime
14 for which X is -- is -- has been convicted and is
15 currently being incarcerated; and, in fact, I saw that
16 crime committed and he did not commit it. X's lawyer
17 arrives at this individual's prison and says: I want to
18 talk to the guy.

19 Would the United States have an interest in
20 saying, you cannot talk to him?

21 MR. KATYAL: The United States wouldn't --
22 wouldn't have an interest as a -- would generally permit
23 as a matter of prosecutorial ethics access to -- if the
24 United States knew that there was some exculpatory
25 material that it had within its purview, it would turn

1 that over. It just wouldn't be a constitutional --

2 JUSTICE SOUTER: Well, you know, prisoners
3 say all sorts of things. We don't know whether in the
4 long run it is going to be exculpatory or whether this
5 guy has some axe to grind.

6 But the question is, would the United States
7 have any legitimate interest in saying to X's lawyer,
8 you can't even talk with him?

9 MR. KATYAL: Well, I think that it would --
10 it would have to -- if it adopted such a rule and
11 allowed the talking in any situation --

12 JUSTICE SOUTER: Why wouldn't it?

13 MR. KATYAL: Let me talk about DNA, for
14 example.

15 JUSTICE SOUTER: Why do you need a rule, I
16 guess is what I'm saying.

17 MR. KATYAL: Let me talk about DNA. The
18 reason why with respect to DNA is it's a no-cost
19 proposition for a defendant to say: Hey, I'm innocent,
20 I want to get tested --

21 JUSTICE SOUTER: Oh, okay --

22 MR. KATYAL: -- So that's why --

23 JUSTICE SOUTER: Are you starting with the
24 premise that the United States would not have a
25 legitimate interest in my hypothetical in saying, you

1 can't even talk to him?

2 MR. KATYAL: Well, it depends on the
3 circumstances of the hypothetical and whether or not
4 there's some -- whether or not it would open up the
5 floodgates, I guess, to other requests and so on.

6 With respect to DNA, there is --

7 JUSTICE SOUTER: Well, let's assume that if
8 you let this guy talk to -- X's lawyer talk to this guy,
9 other individuals may say, boy, I can have my moment in
10 the sun, too; I'm going to claim this. You know, let's
11 assume the worst case there.

12 Would you still say, would the government
13 still say, we have an interest for that reason in not
14 even letting him talk to him?

15 MR. KATYAL: It's possible, because there --
16 it may be that as a policy matter they will allow it.
17 But as a matter of constitutional law, Justice Souter,
18 this Court has repeatedly said --

19 JUSTICE SOUTER: I haven't gotten to the
20 constitutional law yet. I just -- I just want to know
21 whether there would be a legitimate interest in saying
22 no. I mean, you can see --

23 MR. KATYAL: Again, there may be because of
24 floodgates or other reasons. But for the --

25 JUSTICE STEVENS: You mentioned the

1 floodgates. There are seven cases in this State in the
2 whole history of Alaska.

3 (Laughter.)

4 JUSTICE STEVENS: Is that right? That's
5 floodgates?

6 MR. KATYAL: Seven thus far,
7 Justice Stevens. If this Court were to recognize a
8 constitutional right to DNA for all 50 States, there
9 would really be, I think, quite a dramatically different
10 result.

11 JUSTICE SCALIA: Especially, I would assume,
12 one constitutional right in which you do not even have
13 to assert your innocence.

14 MR. KATYAL: Precisely. So we're talking
15 about seven in one State right now, but I think the
16 numbers could be great. That was what Congress said
17 when they passed 3600, which said there has to be
18 something to lose on the stake of defendants, so that
19 they can't come in, like Mr. Osborne, and have
20 questionable statements as to whether they're actually
21 innocent or not.

22 JUSTICE BREYER: Why can't you do this?
23 Look at the consensus of the statutes in the States and
24 the Federal Government and say there's a range of
25 appreciation here, and there is a right but it catches

1 only the outliers? And so, the worst that would happen
2 is that the outlying States would have to bring
3 themselves into conformity with the outer reaches of
4 whatever the set of statutes is now in all the other
5 States.

6 MR. KATYAL: Because, Justice Breyer, that's
7 not the way this Court approaches due process questions.
8 Were it, for example, non-unanimous jury verdicts, which
9 two States have, would be impermissible.

10 JUSTICE BREYER: I'm not saying every
11 instance in which there are outliers is
12 unconstitutional. I'm just saying in this instance for
13 other reasons it might be unconstitutional; namely, you
14 have a good way of proving guilty or innocence, and if
15 that's so, the practical problem is not great. You
16 solve the practical problem in the way I just mentioned.

17 MR. KATYAL: But you enter the thicket of
18 practical problems, it seems to me, Justice Breyer, when
19 you do that, because the 44 States that have these
20 statutes do it in a variety of different ways with
21 respect to perjury requirements, felonies versus
22 misdemeanors, who gets access, who pays for it, do they
23 get lawyers. There's a host of policy questions that
24 arise --

25 JUSTICE BREYER: So the constitutional right

1 is bring yourself within any one of them, unless that
2 any one of them is a real outlier, which you can make as
3 an argument that you will never win?

4 MR. KATYAL: Were that the case, then Alaska
5 itself would be within that framework, because it
6 already has a process in place.

7 Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.

9 Mr. Neufeld.

10 ORAL ARGUMENT OF PETER NEUFELD

11 ON BEHALF OF THE RESPONDENT

12 MR. NEUFELD: Thank you very much.

13 Mr. Chief Justice, and may it please the
14 Court:

15 It is absolutely undisputed in this case
16 that there is a DNA test that Mr. Osborne seeks that
17 could conclusively prove his actual innocence.

18 CHIEF JUSTICE ROBERTS: Well, there was a
19 more reliable one at the time of trial as well, and his
20 counsel made the tactical decision not to use it
21 because, I assume, she was concerned it would show his
22 guilt beyond a reasonable doubt.

23 JUSTICE SCALIA: Which apparently he had
24 told her about.

25 MR. NEUFELD: The test actually, the RFLP

1 test I assume you are referring to, is not actually more
2 reliable. It's more discriminating. And the reason it
3 didn't get used -- even the prosecutor didn't want to
4 use it as well, Mr. Chief Justice, because they felt
5 that the evidence was so degraded that if they tried
6 using that test there was a grave risk that it would
7 destroy all the evidence and not get any result. And
8 that's why they chose that DQ alpha test, which is more
9 sensitive, albeit not as discriminating.

10 JUSTICE ALITO: But what was the reason that
11 Respondent's counsel provided for not requesting that
12 test?

13 MR. NEUFELD: Respondent's counsel said that
14 she was doing it for strategic reasons, although I think
15 it is quite important that Mr. Osborne at all points
16 said he wanted the testing, okay, and that his counsel
17 rejected his advice. He even wrote to a Nobel Prize
18 winner to see what he could do about getting this
19 additional testing.

20 JUSTICE ALITO: Well, let's assume for the
21 sake of argument that there is some constitutional right
22 to obtain DNA evidence for testing postconviction.
23 Would you still -- would you say that that right
24 includes the situation where, A, the prisoner refuses to
25 assert under penalty of perjury that he or she is

1 actually innocent; and applies if there was a tactical
2 decision at trial not to seek DNA testing at all or not
3 to seek the most reliable form of DNA testing that was
4 available at the time?

5 MR. NEUFELD: Justice Alito, first of all,
6 he was never asked in this pleading to assert his actual
7 innocence. As represented by his counsel --

8 JUSTICE ALITO: You think that -- you think
9 that's a novel idea that never occurred to him?

10 MR. NEUFELD: Well, no, no. It's in the --
11 in 1983, it is not required or even asked that he make
12 that kind of statement. He did all through the State
13 courts. In the State courts he always asserted his
14 innocence; through his lawyers he asserted his
15 innocence, and indeed --

16 JUSTICE GINSBURG: Under oath? Under oath
17 so that he would be subject to penalty for perjury?

18 MR. NEUFELD: No, because it wasn't
19 required. Indeed, Your Honor, to respond directly to
20 your question, to both of your questions, If this Court
21 decided, as Justice Scalia mentioned before as well,
22 that one requirement of this right is that a person
23 swear under the penalties of perjury, knowing that he
24 could be prosecuted, that he's actually innocent, then
25 so be it. It can be remanded for that purpose.

1 JUSTICE BREYER: Well, he just --

2 MR. NEUFELD: That is what the Innocence
3 Protection Act requires, and no one has opposed that.

4 JUSTICE BREYER: Well, why isn't that the
5 end of this case, because I heard opposing counsel say
6 if you go tomorrow and file a piece of paper and swear
7 on that piece of paper you're innocent, Alaska will give
8 you the DNA. Isn't that what he said? I heard him say
9 that, I thought.

10 MR. NEUFELD: He said it, but I don't
11 believe that --

12 JUSTICE BREYER: Well, if he said it in this
13 Court in answer to a question, I don't see why that
14 isn't binding.

15 MR. NEUFELD: Well, they took the same
16 position in the trial court in Alaska. They said that
17 he is not entitled to DNA testing under the
18 postconviction statute under any circumstances.

19 JUSTICE BREYER: Well, wait. What I heard
20 was that if your client files a piece of paper that
21 says, I am innocent, then under this new procedure,
22 which apparently I hadn't read about because I didn't
23 find it or it wasn't obvious in the brief, that then
24 they will give him the DNA. Now that's either right or
25 it's wrong; and if it's right, I think that's the end of

1 it, and if it's wrong, well, then we'll have to proceed.
2 But I would proceed on the basis that this swearing
3 requirement is not sufficient.

4 MR. NEUFELD: Well, I don't believe that you
5 need the swearing requirement, because he has previously
6 asserted his innocence; but what's most important
7 here --

8 CHIEF JUSTICE ROBERTS: Well, but the whole
9 point is that, Justice Ginsburg brought out the point,
10 that he hasn't asserted his innocence under oath. So
11 there's no cost to him for asking for the DNA evidence.
12 If there's -- if we're writing up a new constitutional
13 right and we require as part of that that he assert his
14 innocence under perjury, and if he fails to do that,
15 he'll be prosecuted for perjury, that might at least put
16 some limitation on the number of people who can assert
17 the right.

18 MR. NEUFELD: And I would agree with that.
19 I think that's an excellent idea. And the problem is no
20 one's suggesting that Alaska can't do that as a
21 restriction. Indeed they can, but Alaska has had no
22 mechanism at all.

23 JUSTICE SCALIA: If you accept that -- of
24 course it does; and this is not a new procedure. I -- I
25 didn't understand it to be a new procedure, as

1 Justice Breyer has described it. It is the procedure of
2 habeas corpus.

3 They have a procedure for habeas corpus
4 which includes discovery, and all he has to do is come
5 in and say, you know, I have been wrongfully convicted;
6 I am innocent; and I want to discover this evidence in
7 order to establish it, so that I can get out of jail.

8 MR. NEUFELD: That contradicts the position
9 they took in the -- in the State court, Your Honor.
10 They specifically said in the State courts that it is
11 not enough to simply assert one's innocence; that you
12 actually have to have proofs, facts that -- that
13 demonstrate your innocence before you get to that
14 discovery. It is a Catch-22 situation.

15 JUSTICE GINSBURG: Well, we can ask your
16 opposite, opposing counsel. We can put it to him point
17 blank. That's what I thought he said, and we -- we
18 certainly will clarify that. But there's another
19 possible impediment here to your claim. If we assume
20 that there is this constitutional right, and it's
21 available in 1983, this trial was in 1993. He brings
22 the 1983 action in 2003. Counsel told us that this
23 better method of testing has been available since the
24 late nineties.

25 With any constitutional right, there's an

1 obligation of due diligence on the part of the claimant.
2 You can't come in 10 years later, for example, and say
3 -- say there was a tainted juror or something like that.
4 It was -- it -- when you're claiming even evidence that
5 wasn't available at the trial, you have to make the
6 application with due diligence.

7 MR. NEUFELD: I agree with that, Your Honor.
8 I mean, not only is Alaska not making a claim that he
9 did not act with due diligence here, but they're not
10 doing -- they're making that claim for a reason. As
11 soon as he finished his direct appeal, he immediately
12 filed a pro se petition seeking postconviction DNA
13 testing, within months. And then -- in the late 1990s.
14 And then eventually he was assigned a public defender to
15 represent him, and that led to the 2001 filing in the
16 State court which predated the 2003 filing in the
17 Federal court.

18 So he's moved as quickly as he possibly
19 could as soon as he knew that there was this powerful
20 evidence that could be dispositive.

21 This is the very first case litigated to our
22 knowledge anywhere in the country where the prosecutor
23 concedes that a DNA would be absolutely slam-dunk
24 dispositive of innocence, but doesn't consent to it.

25 JUSTICE SCALIA: It is very strange. Why

1 did they do that, I wonder.

2 MR. NEUFELD: Well it's --

3 JUSTICE SCALIA: There was a lot of other
4 evidence in the case, wasn't there?

5 MR. NEUFELD: Well, that's --

6 JUSTICE SCALIA: I don't know what they
7 thought they were doing.

8 MR. NEUFELD: 10 -- 10 years ago,
9 Justice Scalia, the U.S. Department of Justice
10 articulated a materiality test for DNA testing; and they
11 said, like you're saying: Yes, let's look at the
12 evidence of guilt; but then let's say to ourselves,
13 looking out of the other eye, what if there's a
14 favorable result? What impact would that have on the
15 favorable results?

16 That was the position adopted by the United
17 States Department of Justice 10 years ago. That was the
18 position, of course, that we're urging here. That was
19 the position adopted by the U.S. Congress five years
20 ago, and that materiality test has been adopted by 41
21 States to date.

22 CHIEF JUSTICE ROBERTS: So if it is so
23 clear --

24 MR. NEUFELD: Only Alaska --

25 CHIEF JUSTICE ROBERTS: Sorry, counsel. If

1 it is so clear that this is the right way to go, that
2 the Federal Government, 41 States -- does it make sense
3 for us to devise a constitutional right to displace what
4 the legislatures have done?

5 MR. NEUFELD: It is not a question of
6 displacing what the legislatures have done,
7 Mr. Chief Justice. It is a question of when the State
8 of Alaska chooses to provide a mechanism for
9 postconviction relief. And here they do.

10 CHIEF JUSTICE ROBERTS: It is exactly a
11 question of displacing what the States have done because
12 now this question is going to be subject to
13 constitutional law and it's going to be litigated in a
14 variety of cases with a variety of claims. Do you get
15 the right to it when you confess? Do you get the right
16 to it when you've waived it at trial? Do you get the
17 continuous right to it as technology advances and makes
18 the test more sensitive? All of those matters will be
19 Federal constitutional questions for us to decide.

20 MR. NEUFELD: I don't think necessarily,
21 Your Honor. I think first of all, here we have a clean
22 slate if you will, because there were no mechanisms
23 passed by the Alaska legislature.

24 We have seen, and which is interesting, we
25 actually think the Innocence Protection Act as passed by

1 Congress is a marvelous statute that no one is -- is
2 questioning one bit. It is odd that the Solicitor
3 General walks into this courtroom and asks this Court to
4 adopt a materiality test that was rejected by Congress.

5 The one that we are asking for here is
6 simply that you look at the evidence, the evidence of
7 guilt that Justice Scalia pointed out --

8 CHIEF JUSTICE ROBERTS: Well, but the whole
9 question -- it is kind of along the same lines I've been
10 talking. The reason they might -- they're saying don't
11 adopt that test, is because the question is whether it
12 should be adopted as a matter of constitutional law.
13 They may, and I suspect they do since they represent the
14 government, think Congress's balancing makes perfect
15 sense. It is a different question here.

16 MR. NEUFELD: Well, I agree with you. Our
17 position is, is that the test that they're calling for
18 here is irrational; that it's completely irrational when
19 you have something as powerful and new as DNA evidence,
20 which can conclusively -- unlike any other forensic
21 discipline that --

22 CHIEF JUSTICE ROBERTS: So, just to get back
23 to the point you were making earlier, it really doesn't
24 matter what the Congress said. It is a question of
25 rationality under the Constitution.

1 MR. NEUFELD: That is -- that is correct. I
2 only use what Congress said and what the other 41 states
3 said to illustrate how there is an overwhelming
4 consensus now that to do it the way that Alaska wants to
5 do it is frankly irrational.

6 JUSTICE SOUTER: Is the irrationality
7 ultimately that they require an assertion, with some
8 basis for the assertion, that in fact there is evidence
9 that would show innocence? Is the irrationality the
10 cart before the horse?

11 MR. NEUFELD: I think I understand the
12 question. Please interrupt me if I don't and I
13 apologize.

14 JUSTICE SOUTER: You -- you were asked a
15 question earlier what it was in effect about the Alaska
16 procedure which -- which in effect was constitutionally
17 frustrating. I understood that you did not claim that
18 the requirement to claim innocence was the problem,
19 although they did require that; but that the -- that the
20 real problem was that you not only had to claim
21 innocence; you had to be in a position to claim that the
22 evidence you were seeking would exonerate you. And in
23 the DNA case you couldn't do that, ultimately, until it
24 had been testing. And so it was that second point, in
25 effect that they are putting the cart before the horse,

1 tell us what the test is going to show before you test
2 it, that I thought was the sticking point for you. Am I
3 correct about your position?

4 MR. NEUFELD: You are correct; and
5 Justice Souter, they never ever said in -- in their
6 brief, in their petition for certiorari, that they
7 believed that a condition for getting the test should be
8 that a person swear out an affidavit asserting
9 innocence. They are raising that now in a reply brief a
10 week before this oral argument.

11 JUSTICE SOUTER: Well, that goes -- that
12 goes to the first point.

13 MR. NEUFELD: Yes.

14 JUSTICE SOUTER: And I -- I was concerned
15 with the second. I will be happy to get back to the
16 first, but I just want to know your position on the
17 second, the cart before the horse point.

18 MR. NEUFELD: The second point is -- and
19 that -- which is why the only rational test is the
20 Catch-22 or cart before the horse that you're referring
21 to -- which is we can't speculate, based on the other
22 evidence, whether it's going to be a DNA exclusion or a
23 DNA inclusion. If you look at the amicus briefs that
24 have been submitted here by exonerees, by people who
25 received clemency, all kinds of people, you will see

1 cases where the evidence of guilt was much more
2 overwhelming than it was here. You will see cases where
3 50 percent of the judges that reviewed those cases found
4 the evidence to be very compelling evidence of guilt or
5 indeed overwhelming evidence of guilt, but nonetheless
6 DNA trumped all that evidence and excluded those.

7 JUSTICE SCALIA: And you will see cases
8 where the defendant maintained that the defendant was
9 innocent. Now, whether this was a requirement imposed
10 by Alaska or not, it seems to me you cannot point to the
11 practice of the other States and say Alaska must have
12 the same practice.

13 When, in fact, you don't comply with the
14 practices of the other States. Almost all of them do
15 require an assertion of innocence, which your client has
16 not made. I cannot imagine how you can simply -- oh,
17 look at all these other -- 44 other states, when your
18 client does not meet the requirements that those States
19 would impose.

20 MR. NEUFELD: I'm not ignoring it at all;
21 I'm simply saying that 1983, by its very nature, doesn't
22 require it, and Alaska practice --

23 JUSTICE SOUTER: Why shouldn't --

24 MR. NEUFELD: -- didn't require it, but if
25 you do --

1 JUSTICE SOUTER: Whether 1983 requires it
2 depends in part on whether we recognize a free-standing
3 right to test DNA evidence. As I -- as I conceive it,
4 that sounds to me like substantive due process and
5 rightly so.

6 One condition for recognizing a substantive
7 due process right could be that the individual claiming
8 the right to test claims that he is actually innocent.

9 What would unreasonable about that?

10 MR. NEUFELD: There would -- nothing be
11 unreasonable about that, Your Honor.

12 JUSTICE SOUTER: Is your client prepared to
13 make that claim?

14 MR. NEUFELD: Your Honor, I assume he
15 certainly would. I --

16 JUSTICE SOUTER: I'm not asking you. I'm
17 asking for his position through counsel now. Do you
18 know?

19 MR. NEUFELD: I know he has told every other
20 lawyer who has represented him that he was actually
21 innocent. I --

22 CHIEF JUSTICE ROBERTS: Was his assertion
23 before -- his confession -- his confessions before the
24 parole board made under oath?

25 MR. NEUFELD: I believe it was made under

1 oath, Your Honor --

2 CHIEF JUSTICE ROBERTS: So he's guilty of
3 perjury one way or the other, either before the parole
4 board or in his assertions of actual innocence here.

5 MR. NEUFELD: Well, wouldn't it be ironic,
6 Your Honor, if we do the DNA test and he's exonerated
7 and it proves he didn't do it at all, then the State
8 went ahead and prosecuted him for perjury because he did
9 something just so he knew he could get out because,
10 under Alaskan law, unless you accept responsibility,
11 you're not going to get out.

12 CHIEF JUSTICE ROBERTS: Well, wouldn't it be
13 ironic --

14 MR. NEUFELD: Two of our --

15 CHIEF JUSTICE ROBERTS: Excuse me, counsel.
16 Would it be ironic to say that you do not have access
17 when you're guilty of perjury one way or the other?

18 MR. NEUFELD: I think that would be
19 terrible. If the -- if the primary goal of our criminal
20 justice system or one of them is that someone who is
21 actually innocent of the crime for which he is serving a
22 sentence can't -- okay -- present the evidence that will
23 win him his freedom. He --

24 JUSTICE BREYER: Could you say this -- could
25 you say, suppose -- I'm just testing this out -- that

1 like any other governmental action, this action of
2 refusing the DNA evidence is subject to the Fourteenth
3 Amendment's requirement that there be a reasonable
4 basis? Can't be arbitrary. Now, withholding DNA is a
5 governmental action, and so you cannot do so
6 arbitrarily. If you were to do so simply because the
7 defendant would not sign a new complaint under this new
8 procedure, which I somehow missed in the reply brief,
9 that's a good basis for withholding it. He should be
10 willing to do that.

11 If the reason they won't give him the DNA is
12 because before the parole board he said he was innocent,
13 that, to me -- not to others but to me -- that would
14 mean nothing. Of course, he's going to say he's
15 innocent. He doesn't want to spend the rest of his life
16 in prison. Okay?

17 So, I -- I would say, but not maybe others
18 would say, that if that's their reason for not giving
19 it, I'd hear further argument, but that would be
20 arbitrary. But if their reason for not giving it is
21 just because he won't file a new piece of paper in which
22 he says he's innocent or there's nothing to lose there,
23 then I think the State's being arbitrary. Okay?

24 Suppose we said that: The rule is
25 non-arbitrary with illustrations, send it back to the

1 States. And of course when they apply their own
2 statutes, by and large they're not being arbitrary.

3 MR. NEUFELD: I think that's a very sound
4 approach to this, Justice Breyer.

5 JUSTICE BREYER: Well, it does help you win.
6 (Laughter.)

7 MR. NEUFELD: It has that added advantage,
8 Justice Breyer.

9 (Laughter.)

10 JUSTICE BREYER: Yes.

11 MR. NEUFELD: But -- but, quite honestly,
12 we've had two exonerees that are pointed out in the
13 prosecutors' brief and in the exonerees' brief who did
14 in fact that. They actually said to the parole board,
15 yes, they were guilty, because they knew that was the
16 only way they could get out. And then the DNA testing
17 was done a couple of years later and, boom, it turned
18 out they were completely innocent.

19 CHIEF JUSTICE ROBERTS: Do you have a --

20 JUSTICE ALITO: Sorry.

21 CHIEF JUSTICE ROBERTS: Do you have a
22 constitutional right to the DNA evidence if the accuracy
23 of the test was the same as the one that your counsel
24 submitted at trial?

25 JUSTICE ALITO: Well --

1 CHIEF JUSTICE ROBERTS: In other words,
2 limits it to -- what was it -- 16 percent or something
3 like that?

4 MR. NEUFELD: I think you would -- because
5 number one --

6 CHIEF JUSTICE ROBERTS: Well, all right.
7 Then, obviously, the next question is at level of
8 accuracy does your constitutional right no longer apply?

9 MR. NEUFELD: Well, the constitutional right
10 doesn't apply with a -- with a level of accuracy. The
11 constitutional right applies in prohibiting the State
12 from arbitrarily preventing you access to the evidence.
13 There's a very compelling record --

14 CHIEF JUSTICE ROBERTS: Well, just so to
15 follow up on that -- so you -- if -- if the evidence
16 showed that there was -- would show that there was a one
17 out of two chance that your client was innocent, then
18 you think you still have a right -- a constitutional
19 right of access to that evidence?

20 MR. NEUFELD: No. I think the reason you
21 have it here, Your Honor, is that Alaska concedes -- I
22 mean, when have you ever heard it before in a case?
23 Alaska concedes that this powerful DNA test is so
24 powerful that if he gets a favorable result, it is
25 dispositive, he is actually innocent. Okay. That's how

1 powerful this is.

2 And so when you try and compare this to
3 other types of either earlier DNA or other types of
4 scientific evidence, you can't. And it's because of the
5 unique power of these STRs, and the CODIS system, which
6 allows for cold hits. So, it's not just the 232 people
7 who have been exonerated. We've also identified --

8 CHIEF JUSTICE ROBERTS: So fingerprint --
9 fingerprints apparently are covered by it. They have
10 fingerprint evidence that they are not releasing. So do
11 you have a constitutional right of access to that
12 evidence?

13 MR. NEUFELD: Well, I know it's slightly
14 outside the record, but just this week the National
15 Academy of Science said that fingerprints don't have the
16 same indicia of reliability that these DNA tests have.

17 CHIEF JUSTICE ROBERTS: No, I'm sure --

18 MR. NEUFELD: And --

19 CHIEF JUSTICE ROBERTS: I'm sure they're not
20 as accurate as the DNA tests. I'm trying to figure out
21 what the limit of the constitutional right you're
22 asserting is.

23 MR. NEUFELD: The limit is -- the limit is
24 -- it's the same limit, if you will, that the Innocence
25 Protection Act articulated and at least 41 of the States

1 that passed acts have articulated, and by common law the
2 other States all gave DNA testing, the ones that didn't
3 have a statute, with the sole exception in the country
4 being Alaska, is if there's either a reasonable
5 probability that the DNA tests will -- that a favorable
6 DNA test result can prove innocence, okay, and you did
7 not -- you know -- that's the standard if you will,
8 okay, to get the test.

9 I would point out that I could understand
10 people having some disagreement about where that bar
11 should be in terms of how much proof of innocence the
12 test would provide.

13 JUSTICE ALITO: How can this constitutional
14 right be limited to DNA evidence? I presume that there
15 are -- that there may be other scientific advances in
16 the testing of physical evidence, and if that happens,
17 why wouldn't the right apply to those as well? Advances
18 in -- advances in detecting fingerprints or testing
19 fibers or all sorts of other things?

20 MR. NEUFELD: Well, again, fibers didn't do
21 any better than fingerprints. In fact, they did a lot
22 worse in the National Academy report issued last week.
23 I do think, however -- and I would hope that the day
24 comes that will be more truth machines like DNA, which
25 will make it easier for factfinders to have dispositive

1 evidence of guilt or innocence. But right now, there's
2 only one test that caused the President of the United
3 States to appropriate billions of dollars for testing,
4 that caused Congress to create a special statute saying,
5 we don't even want this in habeas; we want this statute
6 to be very special. We'd like to give people --

7 JUSTICE ALITO: I'd like to get back to the
8 second part of the question I asked at the start, which
9 you never really got a chance to answer: Would it be
10 unconstitutional for a State to say that a -- a prisoner
11 can get postconviction access to DNA evidence, but not
12 where it appears that the prisoner is gaming the system?
13 Not where the prisoner declined at trial to ask for DNA
14 testing for a tactical reason because there was a chance
15 that the DNA evidence would be inculpatory? Would that
16 be unconstitutional?

17 MR. NEUFELD: Well, first of all, in this
18 case, that didn't happen. The record is very clear that
19 he personally requested the DNA testing, and --

20 JUSTICE SCALIA: His counsel -- his counsel
21 forwent the DNA testing, and we attribute the actions of
22 counsel to the defendant.

23 MR. NEUFELD: And the prosecutor also
24 forwent the DNA testing because they --

25 JUSTICE KENNEDY: But can we get an answer

1 to Justice Alito's question -- a hypothetical, the one
2 he put -- could you put that condition on a statute or a
3 rule consistently with the constitutional of the United
4 States?

5 MR. NEUFELD: I don't think so if you -- if
6 you couch it in the loosest terms that Justice Alito
7 did, namely, "gaming the system." Because I don't
8 believe a person in Mr. Osborne's position could ever be
9 gaming the system. Now, let me explain why so.

10 JUSTICE KENNEDY: Well -- well, let's assume
11 that counsel and the defendant -- after full discussion
12 and being fully advised, say this is too dangerous; we
13 don't want the DNA test; we'll shoot the dice; we're not
14 going to have the DNA test. He loses. Can you then get
15 the DNA test? Or, as Justice Alito's question pointed
16 out, could you have a condition that when you've made
17 this conscious choice, you lost your right for later DNA
18 testing? That's what he asked. I still don't have the
19 answer.

20 MR. NEUFELD: Okay. I would say, yes, in
21 much the same way that the Innocence Protection Act says
22 if a defendant expressly and voluntarily waives on the
23 record a right to that DNA testing, which is so
24 fundamental because it goes right to the core of
25 everything, innocence versus guilt, then it would not be

1 unreasonable to prohibit him from having the DNA test.
2 But that was --

3 CHIEF JUSTICE ROBERTS: Sorry. I'm sorry.
4 With the different questions asked, I have lost where
5 the answer is. You say it is still part of the
6 constitutional right if he forewent the test at trial,
7 or it is not?

8 MR. NEUFELD: What I'm saying is it would
9 not be an unconstitutional restriction like the
10 Innocence Protection Act if the State of Alaska required
11 -- which it does not now because there is no legislative
12 scheme but in the future required -- that the -- a
13 defendant who doesn't want DNA testing has to
14 voluntarily and explicitly waive that on the record.
15 That -- the voluntary and knowing waiver is a
16 requirement in the IPA, and if -- if Alaska did
17 something like that, I think that would be -- that would
18 not be irrational.

19 However, I must point out in all honesty
20 that there are a number of people who are mentioned in
21 the exonerating briefs such as Eduardo Velasquez and Mr.
22 Tony, whose lawyers did just that. They said, for
23 strategic reasons, we don't want the DNA test. And then
24 -- boom -- years later they get the DNA test, and they
25 are completely exonerated. So --

1 JUSTICE KENNEDY: Well, you seem to be
2 sympathetic to that position. But as Justice Alito's
3 question again points out, what you are doing is setting
4 up a game in which it would be really unwise to have the
5 DNA test. Take your chances.

6 MR. NEUFELD: Why would it --

7 JUSTICE KENNEDY: You have a -- you have a
8 built-in -- you have a -- a built-in second chance.

9 MR. NEUFELD: Let's for a moment --

10 JUSTICE KENNEDY: And that's just -- that's
11 just not sound trial strategy, counsel, and you know
12 that.

13 MR. NEUFELD: Justice Kennedy, let's for a
14 moment think about it in a purely logical way. If
15 someone is innocent and wants to have a DNA test -- okay
16 -- as Mr. Osborne did, they will do what they can to try
17 and get that DNA test.

18 If they get the DNA test years later,
19 they're not getting a new hearing. They are not getting
20 a -- or they are not getting a new trial. They are not
21 getting any of the other things that this Court often is
22 worried about. All they are getting is a darn test.
23 And they stay in prison while they get that darn test.
24 And if that test shows that they actually committed the
25 crime -- okay -- if it shows they committed the crime,

1 then they get nothing.

2 Not only do they get nothing, they get
3 punished. They get punished because no -- no court in
4 habeas or in any other postconviction relief will ever
5 think about them again. And, in fact, the parole board
6 will --

7 JUSTICE SCALIA: But they will have acquired
8 the advantage of having a chance of the jury's
9 acquitting them at the trial. Because by not asking for
10 the DNA testing, they was a chance the jury might let
11 them off. Had they asked for it then and had it shown
12 conclusively, the game was over. So it is gaming the
13 system.

14 MR. NEUFELD: Well, the reason why I -- I
15 don't believe it is gaming the system -- and perhaps,
16 you know, you can help me with this -- is if he's
17 getting the test now and he doesn't get out of prison
18 while he's having the test and he's actually using his
19 own money to pay for the test and if the test shows he's
20 guilty, the parole board is going to turn him down. He
21 can't go back in any other courts asking for any other
22 remedies. So he is in a much worse position.

23 On the other hand, if it proves he's
24 innocent, then he's out. So how does that game the
25 system?

1 JUSTICE SCALIA: Ex-ante. We're -- we're
2 looking at it at the time of the trial. Does its pay
3 for the defendant to ask for a DNA test? Well, of
4 course, it doesn't. Because if he asks for it and it --
5 it finds that he's guilty, that's the end of it. There
6 is no chance of the jury acquitting him.

7 MR. NEUFELD: Well -- well, why --

8 JUSTICE SCALIA: So why not just not ask for
9 it and if it turns out that the jury happens to convict
10 him anyway, then ask for it?

11 MR. NEUFELD: In -- in all practice, it is a
12 moot point. Because this is a transitional right for a
13 very small group of people who were tried during the
14 1980s and early 1990s.

15 JUSTICE KENNEDY: On that -- on that point,
16 I just want to make clear: In the present posture of
17 this case, I take it that if the Federal Innocence
18 Protection Act applied, he would not qualify?

19 MR. NEUFELD: No. He would -- he would
20 qualify.

21 JUSTICE KENNEDY: He --

22 MR. NEUFELD: All he would have to do is --
23 is go back and actually swear out a declaration under
24 penalty of perjury --

25 JUSTICE KENNEDY: Well, but -- but as the

1 case now stands he does not qualify.

2 MR. NEUFELD: Well, he's never been required
3 to do that or asked to do that.

4 JUSTICE KENNEDY: As the case now stands, he
5 does not qualify.

6 MR. NEUFELD: Other than -- other than that,
7 he meets every single other criterion.

8 JUSTICE SCALIA: That's a biggie, though.

9 JUSTICE KENNEDY: You're -- you're, in
10 effect, asking us -- and you would say the -- the
11 Solicitor General appears here -- you're -- you're, in
12 effect, asking us to say that the Federal Witness
13 Protection Act on these facts is unconstitutional.

14 MR. NEUFELD: Oh, not at -- not at all, sir.
15 All I'm saying is that if he was on notice that that was
16 required as part of the procedure in Alaska, then no
17 doubt he would sign that affidavit even under penalty of
18 perjury. The problem is that it's not a requirement of
19 1983, and there was no legislative scheme. I -- you
20 know --

21 JUSTICE SCALIA: I am quite dubious that --
22 that he would indeed sign it. I -- I was really struck
23 by his affidavit in this case, number -- or paragraph 9
24 of which says: "I have no doubt whatsoever that
25 retesting of the condom will prove once and for all

1 time" -- and one expects to follow -- my innocence.
2 That's not what it says. "Will prove once and for all
3 time either my guilt or innocence."

4 MR. NEUFELD: Your Honor --

5 JUSTICE SCALIA: I mean, you know, what is
6 this?

7 MR. NEUFELD: Well, first of all, each and
8 every time with his own counsel, Justice Scalia, he was
9 adamant about asserting his innocence. You have to
10 appreciate that at this point in time, when there's a
11 discussion about, you know, what a prize -- and it is
12 our position that this action ends, if you will, okay,
13 and the Court grants him access to the evidence under
14 1983.

15 And as was pointed out earlier during the
16 argument of my adversary, there is a possibility that --
17 that the testing -- because, look, I wasn't at the -- at
18 the commission of the crime. I don't have a videotape
19 in my head. I'm trying to be as honest and forthright
20 with you as I possibly can.

21 CHIEF JUSTICE ROBERTS: What if there was a
22 videotape? Is that covered by the constitutional right
23 you are asserting?

24 MR. NEUFELD: I -- well, you know, given
25 what I now know about --

1 CHIEF JUSTICE ROBERTS: Are there
2 photographs or other evidence that --

3 MR. NEUFELD: I don't think so. Given what
4 I now know about Photo Shop, I don't have -- I don't
5 necessarily hold out that much reliability for that
6 either, Justice Roberts.

7 CHIEF JUSTICE ROBERTS: That's a good point.
8 What -- how long under the Constitution does the State
9 have to retain this evidence?

10 MR. NEUFELD: Under the Constitution there
11 is no duty under current law to preserve the evidence.
12 We --

13 CHIEF JUSTICE ROBERTS: Would that be a
14 corollary of the constitutional right you are asking for
15 here?

16 MR. NEUFELD: I don't believe so. I --
17 however, with one caveat. And the one caveat is it is a
18 different situation if a person like Mr. Osborne or
19 somebody else specifically says, I want to do DNA
20 testing in this case, files whatever appropriate
21 procedure in whatever court to commence that action, and
22 then, and only then, the other side goes out and
23 destroys the res that is the subject of that litigation.
24 At that point I think that would be in bad faith.

25 CHIEF JUSTICE ROBERTS: And I agree that

1 would be -- that -- yes. I am just wondering if there
2 would be any objection to an absolute rule that says
3 what: After two years, after one year of conviction?

4 MR. NEUFELD: No -- no objection. But on a
5 practical level again, what we're seeing is that States
6 all over the country want to preserve this evidence, not
7 just for the wrongful conviction cases but also to
8 enable detectives who are working cold cases to have
9 access to evidence.

10 And if the evidence isn't there any more,
11 they can't work them. So we're seeing a movement across
12 the country now to preserve that evidence.

13 JUSTICE KENNEDY: May I -- may I just ask
14 one point.

15 MR. NEUFELD: Certainly.

16 JUSTICE KENNEDY: I take it he is not now in
17 custody for this offense?

18 MR. NEUFELD: I believe he is in custody --

19 JUSTICE KENNEDY: Not for this offense?

20 MR. NEUFELD: Well, I -- I think what
21 happened is -- and I -- and I -- I can't swear to this
22 -- is -- is that he was -- he got a conditional release
23 on the other matter. And then the conditional release
24 was violated as well.

25 JUSTICE KENNEDY: He's being held on other

1 changes.

2 MR. NEUFELD: That's right.

3 JUSTICE KENNEDY: But he's not now in
4 custody for this offense.

5 MR. NEUFELD: He's -- he's not, but I don't
6 think that would make a difference in the outcome.
7 Certainly, if a person had a death warrant in one State
8 and then they were charged in another State, they would
9 still have a liberty interest in the outcome of that
10 other case.

11 CHIEF JUSTICE ROBERTS: Was he released on
12 parole with respect to this offense?

13 MR. NEUFELD: I -- I believe he -- he was
14 released on what's called conditional release.

15 CHIEF JUSTICE ROBERTS: And was his
16 confession a necessary predicate to that release?

17 MR. NEUFELD: Well, under Alaska law one of
18 the key requirements to get parole is that you accept
19 responsibility for the crime. And so without a certain
20 --

21 CHIEF JUSTICE ROBERTS: So a confession that
22 would be perjurious if he claimed actual innocence now
23 was responsible for his release?

24 MR. NEUFELD: I would hope, Mr. Chief
25 Justice, that I would be principled enough that if I was

1 actually innocent and they told me that the only way I
2 could get out was to say I committed a crime, that I
3 might say, forget it. I'll spend the next thirty years
4 in prison. But I can certainly understand --

5 CHIEF JUSTICE ROBERTS: I understand that.

6 MR. NEUFELD: Yes.

7 CHIEF JUSTICE ROBERTS: But he's been --
8 other than other crimes he committed, he's been released
9 on the basis of what you say is an unprincipled
10 confession. And now he is --

11 MR. NEUFELD: I believe he has been -- he's
12 back in, though, I think, because of the conditional
13 release. It's been violated. One second.

14 He had a parole -- I'm -- I'm told that he
15 had a parole revocation hearing on the other case and
16 that he was given six more years to serve on the -- on
17 the underlying case which is the core of this oral
18 argument.

19 CHIEF JUSTICE ROBERTS: So his parole was
20 revoked because he committed another offense?

21 MR. NEUFELD: That's my understanding.

22 CHIEF JUSTICE ROBERTS: Okay. Thank you,
23 counsel.

24 MR. NEUFELD: Thank you very much.

25 CHIEF JUSTICE ROBERTS: Now, counsel, we'll

1 give you three more minutes.

2 REBUTTAL ARGUMENT OF KENNETH M. ROSENSTEIN

3 ON BEHALF OF THE PETITIONERS

4 JUSTICE STEVENS: May I -- before you start,
5 would you -- I want you to clear up the question that
6 Justice Breyer asked. Assume on remand he would now
7 make the declaration under perjury that he's innocent.
8 I understood you to say that would enable him get
9 discovery, not necessarily to say he would get the DNA
10 evidence. Am I right?

11 MR. ROSENSTEIN: If he were to file a new
12 application for postconviction relief with an affidavit
13 that the civil rules of discovery would apply, and he, I
14 believe, would be -- be able to obtain the evidence that
15 he seeks. However --

16 JUSTICE GINSBURG: How about --

17 JUSTICE KENNEDY: Would you resist that
18 request?

19 MR. ROSENSTEIN: Well, there are -- there
20 are possibilities of procedural default. Right. And
21 that would be for the court --

22 JUSTICE KENNEDY: You cannot confirm that
23 you would acquiesce and recommend that he get the DNA
24 sample under those conditions?

25 MR. ROSENSTEIN: I -- yes. I -- I believe I

1 could.

2 JUSTICE SCALIA: Well, you would still want
3 to leave yourself open to make the objection that he had
4 a chance to get this at trial and -- and -- and decided
5 not to get it.

6 MR. ROSENSTEIN: As I say --

7 JUSTICE SCALIA: Wouldn't those objections
8 continue to apply?

9 MR. ROSENSTEIN: I'm --

10 JUSTICE SCALIA: I mean, it -- it seems to
11 me that -- that all -- all that you have to concede is
12 that there is some means for him to get into court, with
13 those -- those exceptions that other States make; and
14 other States make an exception for gaming the system.
15 So, so long as he can get in in habeas corpus it seems
16 to me you can very well leave for later whether you are
17 going to concede that even though -- even though he
18 didn't ask for it at trial, he can get it now.

19 MR. ROSENSTEIN: That's true, Your Honor.
20 And -- and that was --

21 JUSTICE SCALIA: Well, why give it away?

22 MR. ROSENSTEIN: Well --

23 JUSTICE SCALIA: -- any more than you gave
24 away the fact that this is going to --

25 JUSTICE STEVENS: Why don't --

1 JUSTICE BREYER: We would like to know what
2 you do --

3 CHIEF JUSTICE ROBERTS: Why don't we -- I'm
4 sorry. Justice Stevens.

5 JUSTICE STEVENS: Yes. I just want to be --
6 if your answer, as I understand it, is he can now apply
7 for discovery, but you don't know what will happen then.

8 MR. ROSENSTEIN: Well, before you reach the
9 discovery issues there would be the issues of procedural
10 default.

11 JUSTICE STEVENS: Right.

12 MR. ROSENSTEIN: Once those were cleared
13 away then he would be able to --

14 JUSTICE STEVENS: But the net result is that
15 it is perfectly clear to me from the argument that you
16 have not conceded that if he now files the paper, he
17 will definitely get the DNA.

18 MR. ROSENSTEIN: Not that he would -- that's
19 correct. Not that he will definitely get that.

20 JUSTICE STEVENS: Okay.

21 MR. ROSENSTEIN: I want to clear up --

22 JUSTICE GINSBURG: But you -- you referred
23 to the civil rules, and in discovery, in criminal cases
24 as in civil cases, it -- ordinarily you have to prove
25 that you have a basis for a claim. Like you don't get

1 on the civil side discovery before you can pass the
2 12(b)(6) threshold that you have stated a claim.

3 Are you giving that up here? Because he's
4 seeking the discovery but he hasn't established that he
5 has a tenable claim.

6 MR. ROSENSTEIN: Justice Ginsburg, Mr.
7 Osborne by filing an affidavit that would accompany his
8 application, that would -- I think that would operate to
9 state a claim.

10 JUSTICE KENNEDY: Would there be instances
11 when you, as the Attorney General of Alaska, would waive
12 procedural defaults, in order to determine if there was
13 guilt or innocence in a case where DNA conclusively
14 proved it, simply pause of your interest in not
15 confining innocent people?

16 MR. ROSENSTEIN: That -- that's conceivable,
17 Your Honor; but in -- in Mr. Osborne's case, he's had 14
18 years to step forward and declare his innocence as any
19 truly innocent --

20 JUSTICE KENNEDY: All you're can say in
21 answer to my question is, to your particular approach to
22 your duties here, is that that's conceivable?

23 MR. ROSENSTEIN: Yes, Your Honor. It is.
24 Because I don't think that the mere existence of the
25 possibility that DNA could exonerate is necessarily

1 sufficient -- a sufficient basis to then do the testing.

2 JUSTICE BREYER: Okay. This is where I --
3 look.

4 He files a new piece of paper. Now, if
5 you're going to oppose that, on the ground that it
6 wasn't procedurally correct, one; on the ground, two, he
7 didn't ask for this DNA at trial, though he might have
8 met with the charge, what was at issue at trial is
9 something very different; three, that he wasn't
10 guilty -- you know, too much evidence against him, met
11 with the claim, there wasn't much evidence against
12 him -- okay, we have the case in front of us; we'll
13 decide it.

14 But if you're prepared to concede "I'm not
15 going to raise those things," then their client has what
16 he wants -- the DNA. So which is it?

17 MR. ROSENSTEIN: I -- I'm not sure I
18 understand your -- your question, Your Honor. I'm
19 sorry.

20 JUSTICE BREYER: I'm going to just repeat
21 it. He -- His client follows your procedure. "Please
22 give me DNA."

23 Now will you give it to him? Or are you
24 going to meet him with the same defenses that you raise
25 here?

1 MR. ROSENSTEIN: The --

2 JUSTICE BREYER: Wrong procedure. You
3 ask -- you could have gotten it at trial, which he says
4 isn't true, and there was too much evidence, which he
5 says isn't true. Okay? So what are we going to have,
6 Mr. Rosenstein?

7 MR. ROSENSTEIN: If he -- if he were to do
8 as you say, then with respect to the request for
9 discovery, I believe that our only defense would be the
10 procedural defense of -- you know -- lack of due
11 diligence or -- or something along -- or untimely --

12 JUSTICE BREYER: If the only defense is
13 procedure --

14 JUSTICE SOUTER: -- that defense --

15 MR. ROSENSTEIN: Pardon me?

16 JUSTICE SOUTER: If he walks into court and
17 swears, "I am innocent," subject to penalties of
18 perjury, "Please let me look at the DNA," as I
19 understand your answer, your answer will be, we will
20 then raise issues of procedural default, waiver, et
21 cetera. You will not say, on the contrary, "let him
22 look at the DNA." Is that -- is my understanding
23 correct?

24 MR. ROSENSTEIN: I -- I can't say that we
25 would actually do that, but we certainly have the -- the

1 right to do that. And there's nothing wrong with
2 proceeding --

3 JUSTICE SOUTER: In any --

4 MR. ROSENSTEIN: Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.
6 The case is submitted.

7 (Whereupon, at 11:17 a.m., the case in the
8 above-entitled matter was submitted.)

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