POST-CONVICTION DNA TESTING IN DEATH ROW: A CONSTITUTIONAL ARGUMENT UNDER THE DUE PROCESS FRAMEWORK

Chi-Hsin Esther Engelhart[†]

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I. INTRODUCTION

"If I did do it, I deserve what I get. But I don't remember doing it."—These were the answers of Sedley Alley on the crime he was ultimately convicted and executed for.[1]

As of the writing of this Note, 362 people have been exonerated by DNA evidence.[2] Of these people, twenty were on death row for an average of 15.7 years.[3] Outside of DNA exonerations, over 100 death row inmates have been exonerated.[4] One study, utilizing a medical research model that analyzed death row data collected from the Bureau of Justice Statistics of the Department of Justice,[5] concluded that "a conservative estimate of the proportion of erroneous convictions of defendants sentenced to death in the United States from 1973 through 2004" was 4.1 percent.[6] Applying that statistic to the number of people on death row—2673 as of April 1, 2019[7]—it means that close to 110 potentially innocent people are currently waiting to be executed.

Intuitively, one would think that there should be some sort of protection prior to the execution; that if there is some form of DNA evidence that could cast doubt on the conviction and thus the accuracy of

† J.D. Candidate, May 2021, Benjamin N. Cardozo School of Law; M.A., Forensic Psychology, John Jay College of Criminal Justice; B.A., Chinese Literature, National Taiwan University. I would like to thank the Innocence Project for the invaluable experience that inspired this note, as well as Professor Kyron Huigens for the keen insight that advanced this note. Additionally, I would like to thank my husband Noah for the constant encouragement and love you show me each day, especially throughout this process.

[1] Jim Dwyer, *Her Father Was Executed for Murder. She Still Wants to Know if He Did It*, N.Y. TIMES (May 1, 2019) https://www.nytimes.com/2019/05/01/us/dna-test-after-execution.html [https://perma.cc/552F-F55N].

[2] *See Exoneration Detail List*, THE NATIONAL REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx [https://perma.cc/ES22-ZC4J] (last visited Oct. 11, 2020).

[3] *See id.*

[4] See *id.*

[5] *See generally* Samuel R. Gross et al., *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death*, 111 PROC. NAT'L ACAD. SCI. 7230 (2014).

[6] *Id.* at 7234.

[7] CRIMINAL JUSTICE PROJECT OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., DEATH ROW U.S.A. SPRING 2019, 1 [hereinafter *Death Row Spring 2019*] https://www.naacpldf.org/wp-content/uploads/DRUSASpring2019.pdf [https://perma.cc/3582-YXQT] (last visited October 11, 2020).

execution, it should be tested to ensure that the prisoner's guilt remains certain. However, that is not the case.

More than three decades ago, Sedley Alley was arrested for the rape and murder of Suzanne Marie Collins.[8] On July 12, 1985, at approximately 10:30 PM, Ms. Collins, a Marine Corps Lance Corporal, was abducted from her jog in a park near the naval base where she was stationed in Tennessee.[9] A witness who saw her moments before the attack described a possible suspect as "5'6" to [5'] 8" tall, with short brown hair and a dark complexion,"[10] with "an old Ford station wagon with wood paneling [] parked 50 feet away from him."[11] Two other witnesses stated that they saw an old station wagon swerving towards the direction Ms. Collins was jogging. Immediately after that they heard a female scream and saw the station wagon speed back down the road. A "BOLO"—or "be on the lookout"—was issued for "a brown station wagon with wood paneling and Kentucky tags."[12]

Around midnight, Sedley Alley was pulled over by officers in a "'brown over brown,' late-model station wagon," pursuant to the BOLO.[13] He was taken back to the base, where his wife—a member of the Navy—met them for questioning.[14] The witnesses, all of whom were Navy personnel, identified the station wagon based on the sound of its engine, but the Alleys were released after the witnesses agreed that what they had seen was just an earlier domestic dispute between the Alleys.[15]

Ms. Collins' body was found in the park the next morning.[16] She was struck at least 100 times, mostly around the head and neck, and she had been strangled.[17] A stripped, sharpened 30-inch tree branch had been driven through her body.[18] Semen was recovered from her thighs.[19]

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[8] Dwyer, *supra* note 1.

[9] *See* Petition for Post-Conviction DNA Analysis, Estate of Alley v. Tennessee, No. 85–05087, at 2 (Tenn. Crim. Ct. May 3, 2019) [hereinafter *Alley 2019 Petition*]; WIKIPEDIA, *Murder of Suzanne Marie Collins*, https://en.wikipedia.org/wiki/Murder_of_Suzanne_Marie_Collins [https://perma.cc/8B7D-NNRY] (last visited Oct. 17, 2020).

[10] *Alley 2019 Petition*, *supra* note 9, at 5.

[11] *Id.* at 11.

[12] *Id.* at 10. *See also id.* at 9 n.30 (one of the witnesses thought the license plate to be from Kentucky because it was blue; however, other states also issued blue plates at the time).

[13] *Id.* at 10.

[14] *Id.* at 10–12.

[15] *Id.* at 12.

[16] *Id.* at 12–13.

[17] *Id.* at 2, 29; Dwyer, *supra* note 1.

[18] *Alley 2019 Petition*, *supra* note 9, at 13.

[19] *Id.*

Sedley Alley was promptly arrested and ultimately convicted for the murder at trial.[20] Although he initially denied killing Ms. Collins, the jury would later be presented with the confession he signed after twelve hours of interrogation.[21] However, his purported confession was that he accidentally hit Ms. Collins with his car; that Ms. Collins threatened him as he was taking her to a hospital; that, as they both got out of the car in the park, Alley accidentally stabbed Ms. Collins in the head with the sharp end of a screwdriver that he was using to start his car; and that eventually killed Ms. Collins with a tree branch.[22]

Physical evidence did not support Sedley Alley's account. To begin with, "Sedley Alley was 6'4" tall, had long red hair, and had a light complexion,"[23] which starkly differs from the description of the suspect.[24] Even more crucially, Ms. Collins' injuries were not consistent with being hit by a car and there was no impalement in her head. No physical evidence recovered from Sedley Alley's car showed the presence of Ms. Collins. Moreover, when asked to take the officers to where he hit Ms. Collins, Sedley Alley took them to a location that was completely inconsistent with the witnesses' account of where the abduction took place.[25]

Five years after Alley's conviction and sentencing in 1989, he filed a petition for DNA testing pursuant to the Tennessee Post-Conviction DNA Analysis Act.[26] Given the nature of this crime—extremely violent rape—DNA testing on the semen, the fingernail scraping of the victim, and the tree branch could summarily establish the identity of the perpetrator. Should that result come back to someone other than Sedley Alley, his conviction would be severely undermined, if not completely negated. However, the trial court summarily denied his request on the grounds that

> Petitioner had failed to establish that (1) a reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA analysis and (2) a reasonable probability exists that analysis of the evidence will produce DNA results which would have rendered the petitioner's verdict or sentence more

[20] See *id.* 13, 16–19.

[21] *Id.* (citing Trial & Direct Trial Record at 795, State v. Alley, 776 S.W.2d 506 (Tenn. 1989)).

[22] *Id.* at 13.

[23] *Id.* at 5.

[24] *See id.* at 5 ("5'6" to [5'] 8" tall, with short brown hair and a dark complexion").

[25] *Id.* at 14.

[26] *Alley 2019 Petition* at 16–17. *See* Alley v. State (Alley I), No. W2004-01204-CCA-R3-PD, 2004 Tenn. Crim. App. LEXIS 471 at *3–4, (Tenn. Crim. App. May 26, 2004).

> favorable if the results had been available at the proceedings leading to the judgment of conviction[,][27]

which was affirmed by the appellate court.[28] Sedley Alley's second petition under the same Act, filed in 2006 following the reprieve from the Governor, was again denied on the same grounds.[29]

On June 28, 2006, Sedley Alley was executed in Tennessee. Five years after his execution, the Tennessee Supreme Court overturned the erroneous interpretation of the Tennessee DNA testing statute utilized in the denial of Alley's second DNA petition in *Alley II*.[30] In early 2019, Sedley Alley's daughter, April Alley, filed a petition for DNA testing on behalf of her father's estate. In response, the State argued that April Alley did not have standing because the prisoner, Sedley Alley, was dead[31]—even though it was the state that executed him under an incorrect interpretation of the statute.

Such struggle in obtaining DNA testing is not uncommon outside of Sedley Alley's story. Professor Brandon Garrett, in his book that discussed the first 250 DNA exonerees in depth, provided the following average timeline for an exoneree: An average of six years from conviction to the completion of appeals; an average of another seven years of litigation from then—therefore thirteen years after the conviction—before the first DNA testing to be conducted; and, finally, more than another year before the actual exoneration.[32] In other words, even after the prisoners exhausted the appeal process, it took almost another decade of various post-conviction litigation in state and/or federal courts for them to be exonerated through DNA.

The fight to obtain post-conviction DNA testing became harder after the U.S. Supreme Court's decision in *Dist. Attorney's Office v. Osborne*,[33] a non-capital case,[34] where the Supreme Court denied a substantive due

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[27] *See Alley I*, 2004 Tenn. Crim. App. LEXIS 471, at *35–36.

[28] *Id.* at *36.

[29] Alley v. State (Alley II), No. W2006-01179-CCA-R3-PD, 2006 Tenn. Crim. App. LEXIS 470, at *74 (Tenn. Crim. App. June 22, 2006).

[30] *See* Power v. State, 343 S.W.3d 36 (Tenn. 2011).

[31] *See generally* State's response to the May 3, 2019 Petition for Post-Conviction DNA Analysis filed by the Estate, Estate of Alley v. Tennessee, No. 85-05087, at 86–87 (Tenn. Crim. Ct. May 3, 2019).

[32] BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 217 (2011).

[33] 557 U.S. 52 (2009).

[34] It is worth noting that *Osborne* was a noncapital case because, as discussed in Section III.C.1, *infra*, death penalty is generally considered to be "different" in the Supreme Court's jurisprudence. *Compare, e.g., Powell v. Alabama*, 287 U.S. 45, 71 (1932) (holding that, in a capital case, it is the court's duty to appoint counsel should the defendant be "incapable adequately of making his own defense"), *with Betts v. Brady*, 316 U.S. 455, 471–72 (1942).

process right to post-conviction DNA testing. In so ruling, the *Osborne* Court found that the petitioner's argument under *Brady v. Maryland*[35]—which mandates the disclosure of exculpatory evidence—to be unpersuasive as *Brady* concerns a trial right, not a post-conviction right.[36]

The stage of the process—trial versus post-conviction—is not the only factor obscuring the procedural due process right in post-conviction DNA testing afforded to the defendants. While the procedural due process rights have been interpreted in both civil and criminal settings—albeit sometimes inconsistently—post-conviction relief sometimes sits in a gray area between civil and criminal. For example, in Tennessee, post-conviction proceedings are considered to be "quasi civil or quasi criminal":[37]

> The base root of the proceeding is criminal. The post-conviction stage of a criminal trial is an extension of the original proceeding. The procedure by which a criminal conviction may be set aside is civil in nature, therefore it is tried under the Rules of Civil Procedure and less stringent evidentiary rules apply.[38]

As a result, the Tennessee Supreme Court has ruled that for the purposes of tolling statute of limitations, post-conviction DNA testing is civil in nature and could borrow the civil procedures to excuse some time,[39] whereas the waiver of notice of appeal should be regarded as criminal, favoring the continuation of post-conviction DNA testing.[40]

Such procedural distinctions create the most tension when death row inmates are seeking post-conviction relief through DNA testing: what procedural due process is afforded by the Constitution for these prisoners who arguably have more to lose than other prisoners? Given that the U.S. Supreme Court determined *Brady* was not an appropriate framework for post-conviction DNA testing, this Note seeks to determine what could be an appropriate framework by (1) surveying the existing due process protections in death sentence cases and death row prisoners' access to post-conviction DNA testing, and (2) contrasting such existing safeguards with the ideals expressed in the Constitution. Part I of this Note lays out the contours of the constitutional rights currently afforded to capital cases and to death row inmates in seeking post-conviction DNA testing; Part II continues the discussion by surveying such protections—or lack thereof—in the states where death sentences are still being imposed; and lastly, Part

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[35] 373 U.S. 83 (1963).

[36] *Osborne*, 557 U.S. at 68–69.

[37] State v. Styles, 1993 Tenn. LEXIS 24, at *8 (Tenn. 1993).

[38] *Id.* at *11.

[39] *See generally* Watkins v. State, 903 S.W.2d 302 (Tenn. 1995).

[40] *See generally* State v. Scales, 767 S.W.2d 157 (Tenn. 1989).

III discusses how the current framework under the Eighth Amendment should yield to an analysis under procedural due process, namely, the balancing test under *Mathews v. Eldridge*.[41] The Note then concludes that a strong argument exists for interpreting post-conviction DNA testing in death row cases as a constitutionally-based procedural due process right.

II. BACKGROUND

A. The Constitutionality of Post-Conviction DNA Testing

Although DNA—deoxyribonucleic acid—technology was originally a medical science concept, it has gradually become indispensable to criminal justice.[42] In 1984, Sir Alec Jeffreys first proposed the idea of "DNA profiling," that "individuals could be differentiated on the basis of readily detectable differences in their DNA."[43] Such technology was subsequently utilized in 1987 in two rape-and-murder cases in the United Kingdom that were believed to have been perpetrated by the same person, which led to the exoneration of Richard Buckland and the conviction of Colin Pitchfork.[44] That same year in the United States, DNA evidence was used to convict a Florida rapist, Tommie Lee Andrews, making it the first in the nation with many more to come.[45] Since the first post-conviction DNA testing statutes were passed in New York,[46] all other jurisdictions in the United States have passed some sort of DNA testing statutes.[47] However, the constitutional issues of post-conviction DNA testing outside of these statutes were not entertained by the United States Supreme Court until 2009, and later in 2011.

1. Dist. Attorney's Office v. Osborne

In 1993, William Osborne was arrested for the kidnapping and rape of K.G., who was raped at gun point and later shot in the head.[48] K.G.

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[41] 424 U.S. 319 (1976).

[42] Randy James, *A Brief History of DNA Testing*, TIME (June 19, 2009), http://content.time.com/time/nation/article/0,8599,1905706,00.html [https://perma.cc/H8LT-AQM3].

[43] THE ROYAL SOCIETY, FORENSIC DNA ANALYSIS: A PRIMER FOR COURTS 7 (2017).

[44] *Id.*; Patrick Knox, *Tragic Teens: Who killed Lynda Mann and Dawn Ashworth and When Were the Schoolgirls Murdered?*, THE SUN (Oct. 9, 2019), https://www.thesun.co.uk/news/10102210/what-happened-dawn-ashworth-lynda-mann-when-murdered/ [https://perma.cc/3C5Y-8PBJ].

[45] James, *supra* note 42.

[46] *See* N.Y. Crim. Proc. Law 440.30 (McKinney Supp. 1995).

[47] Ian J. Postman, *Re-Examining Custody and Incarceration Requirements in Postconviction DNA Testing Statutes*, CARDOZO L. REV. 1723, 1729, n.36 (2019) (a list of post-conviction DNA testing statutes).

[48] Dist. Attorney's Office v. Osborne, 557 U.S. 52, 56–57 (2009).

miraculously survived as the bullet only grazed her; pursuant to police investigation, a condom that was used in the rape was recovered from the scene, as well as a shell casing.[49] Six days later, Dexter Jackson was arrested in a car that matched the description given by K.G., and a gun that matched the shell casing was recovered therefrom.[50] Jackson implicated Osborne, and both were convicted of the charges.[51]

During the investigation, an older type of DNA testing—DQ Alpha[52]—was conducted, which did not exclude Osborne as a possible source.[53] After his conviction was affirmed on appeals, Osborne brought a § 1983[54] suit, "claim[ing] that the Due Process Clause and other constitutional provisions gave him a constitutional right to access the DNA evidence for what is known as short-tandem-repeat (STR) testing (at his own expense)."[55] STR testing not only "permits analysis of extremely small amounts of DNA"[56] but also "can, in certain circumstances, establish to a virtual certainty whether a given individual did or did not commit a particular crime."[57]

The Ninth Circuit Court ruled in Osborne's favor, holding, *inter alia*, that (1) Osborne was not restricted to federal habeas corpus actions to seek DNA testing, and (2) he was "entitled to assert in [his] § 1983 action the due process right to post-conviction access to potentially exculpatory DNA evidence."[58] Based on the "due process principles that motivated [*Brady v. Maryland*]," the Ninth Circuit reasoned that "fundamental fairness, the prosecutor's obligation to do justice rather than simply obtain convictions, and the constitutional imperatives of protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system"

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[49] *Id*.

[50] *Id.* at 57.

[51] *Id.* at 58.

[52] *See* JOHN M. BUTLER, FUNDAMENTALS OF FORENSIC DNA TYPING 43–44 (2010); NATIONAL INSTITUTE OF JUSTICE, THE FUTURE OF FORENSIC DNA TESTING 2 (2000) (while DQ-alpha is fast to apply, it is not very discriminative) [hereinafter *Forensic DNA Testing*].

[53] *Osborne,* 557 U.S. at 57–58.

[54] 42 U.S.C. § 1983 (2019) provides a remedy for civil rights violations:

Every person who. . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .

[55] *Osborne*, 557 U.S. at 60.

[56] *Forensic DNA Testing*, *supra* note 52, at 41 (2000).

[57] *Osborne*, 557 U.S. 80 (Alito, J., concurring) (quoting Harvey v. Horan, 285 F.3d 298, 305 (4th Cir. 2002)).

[58] Osborne v. Dist. Attorney's Office, 521 F.3d 1118, 1132 (2009).

compels the *Brady* principle to be applied to post-conviction proceeding as well.[59]

The U.S. Supreme Court, however, disagreed with the Ninth Circuit because "[a] criminal defendant proved guilty after a fair trial does not have the same liberty interests as a free man."[60] Citing to *Pennsylvania v. Finley*,[61] the Court ruled that the due process right in post-conviction proceedings is "not parallel to a trial right";[62] additionally, the proper question is whether "the State's procedures for postconviction relief 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,' or 'transgresses any recognized principle of fundamental fairness in operation.'"[63]

Ultimately, the *Osborne* Court did not recognize a substantive due process right for post-conviction DNA testing.[64] However, the Court recognized a "liberty interest in demonstrating his innocence with new evidence under state law,"[65] which if created by the states cannot be "fundamentally inadequate [to] vindicate the substantive rights provided."[66] Noteworthily, while beginning the opinion by stating that "DNA testing has an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty," the majority did not explore further "the core criminal justice concern with accuracy,"[67] which also lies at the center of due process.

2. Skinner v. Switzer[68]

In 1995, Henry Skinner was convicted of murdering his girlfriend, Twila Busby, and her two adult sons, all of whom he resided with at the time.[69] On New Year's Eve, 1993, Ms. Busby left Skinner to go to a party because the latter had "passed out" from drinking.[70] At the party, Ms. Busby was "followed around . . . by her drunken uncle who made rude

[59] *Id.* at 1131–32 (internal quotation marks omitted).

[60] *Osborne*, 557 U.S. at 69.

[61] 481 U.S. 551, 559 (1987).

[62] *Osborne*, 557 U.S. at 69.

[63] *Osborne*, 557 U.S. at 69 (quoting Medina v. California, 505 U.S. 437, 446, 448 (1992)).

[64] *See id.*, at 55–56.

[65] *Id.* at 68.

[66] *See id.* at 69–70.

[67] Brandon L. Garrett, *DNA and Due Process*, 78 FORDHAM L. REV. 2919, 2946 (2010) [hereinafter *DNA and Due Process*].

[68] 562 U.S. 521 (2011).

[69] Brief for Petitioner at 4, Skinner v. Switzer, 562 U.S. 521 (2011) (No. 09–9000) [hereinafter *Brief for Skinner*].

[70] Skinner v. State, 956 S.W.2d 532, 535 (Tex. Crim. App. 1997).

sexual advances toward her," and she ultimately asked her friend to take her home.[71] Shortly thereafter, Ms. Busby was found dead in her living room, having been strangled to unconsciousness and subsequently bludgeoned to death, likely with an ax handle found at the scene.[72] Ms. Busby's two sons were stabbed to death.[73] Skinner was arrested on the same night, wearing clothes stained with the victims' blood.[74] Additionally, Skinner later conceded that he was likely present during the murders[75] and had left the bloody palm prints around the house;[76] however, he contended that the high level of alcohol and codeine in his system at the time would have, and indeed had incapacitated him, and thereby prevented him from being physically capable of committing the triple murders.[77] Nonetheless, Skinner was convicted and sentenced to death.[78]

Throughout his post-conviction proceeding, Skinner asked for DNA testing of various critical items that were recovered from the scene, namely:

> vaginal swabs taken at Ms. Busby's autopsy. . . [her] fingernail clippings, which could contain the assailant's DNA if she struggled with him before she was killed. . . two knives that were likely used to kill the two sons. . . and, finally, the jacket found near Ms. Busby's body, which was spattered with blood and had its owner's sweat stains around the collar.[79]

However, although some post-conviction DNA testing was done in 2000 in response to media pressure, none of the above listed items were tested.[80] As the U.S. Supreme Court noted, since Texas enacted Article 64 of the Texas Code of Criminal Procedure in 2011 to regulate post-conviction DNA testing, Skinner's petition under such statute had twice been denied.[81]

The Supreme Court did not review Skinner's allegation "that he possesses state-created, constitutionally protected liberty and life interests in seeking state habeas relief or clemency with exculpatory DNA evidence. Accordingly, [Texas's] continued refusal to provide such evidence for DNA testing denied him due process and access to the courts. . . ." [82] Rather, the Court addressed another question that was left unanswered in *Osborne*: may

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71 *Id.*

72 *See id.* at 536.

73 *See id.* at 535–36.

74 *Brief for Skinner*, *supra* note 69, at 3–4.

75 Skinner v. Switzer, 562 U.S. at 525.

76 Skinner v. State, 956 S.W.2d at 536.

77 Skinner v. Switzer, 562 U.S. at 525.

78 *Brief for Skinner*, *supra* note 69, at 2.

79 *Brief for Skinner*, *supra* note 69, at 4–5.

80 *Id.*

81 Skinner v. Switzer, 562 U.S. at 527–28.

82 Petition for Writ of Certiorari at 14–15, Skinner v. Switzer, No. 09–9000 (Feb. 12, 2010).

a convicted prisoner seeking access to biological evidence for DNA testing assert that claim in a civil rights action under 42 U.S.C. § 1983, or is such a claim cognizable only in a petition for writ of habeas corpus?[83]

In *Heck v. Humphrey*,[84] the defendant filed a § 1983 action, alleging various unlawful activities during the investigation and trial by the police, subsequent to being convicted with and sentenced for manslaughter.[85] Although Heck "[sought] not immediate or speedier release, but monetary damages,"[86] the Court ruled that a prisoner may not proceed under § 1983 if "a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence."[87] While such principle was later affirmed in *Wilkinson v. Dotson*,[88] where a prisoner sued under § 1983 regarding parole eligibility, the Court reasoned that "[b]ecause neither prisoner's claim would necessarily spell speedier release, neither lies at "'the core of habeas corpus.'"[89]

On a similar note, the *Skinner* Court ruled that suing under § 1983 to gain access to post-conviction DNA testing is permissible because, should Skinner succeed, he would gain "only access to the DNA evidence, which may prove exculpatory, inculpatory, or inconclusive."[90] Combining this decision with *Osborne*, the door to a claim to post-conviction DNA testing through procedural due process is still open, albeit aiming at the substantive right created by the states. However, what exactly will constitute a violation under such framework remains to be seen.

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[83] *Id.*, at Question Presented. For a discussion on the differences between proceeding via § 1983 and a writ of *habeas corpus*, see Gabriel A. Carrera, note, *Section 1983 & the Age of Innocence: The Supreme Court Carves a Procedural Loophole for Post-Conviction DNA Testing in* Skinner v. Switzer, 61 AM. U.L. REV. 431, 433–34 (2001) ("Unlike in habeas claims, prisoners generally are not required to exhaust state remedies under § 1983. Additionally, § 1983 claims are not subject to the strict time limitations and rules against successive filings that characterize the federal habeas statute."). See also Benjamin Vetter, *Habeas, Section 1983, and Post-Conviction Access to DNA Evidence*, 71 U. CHI. L. REV. 587, 590–96 (2004).

[84] 512 U.S. 477 (1994).

[85] *Id.* at 478–79.

[86] *Id.* at 481.

[87] *Id.* at 487.

[88] 544 U.S. 74 (2005).

[89] *Id.* at 82.

[90] Skinner v. Switzer, 562 U.S. 521, 525 (2011).

B. Procedural Due Process

1. Substantive Due Process vs. Procedural Due Process

"No state shall. . . deprive any person of life, liberty, or property, without due process of law."[91] While the language of the Fifth and Fourteenth Amendments seems straight forward, its application has generated a body of law that is tremendously beyond the scope of this Note. Therefore, this Section focuses on how due process is conceptually understood, and, specifically, how procedural due process has developed and been applied.

"[T]he touchstone of due process is protection of the individual against arbitrary action of government[.]"[92] Traditionally, such protection can be reflected in two distinct inquiries: "*Procedural due process*. . . refers to the procedures that the government must follow before it deprives a person of life, liberty, or property. . . . *Substantive due process* . . . asks whether the government has an adequate reason for taking away a person's life, liberty, or property."[93]

Accordingly, an example of a substantive due process inquiry regarding the death penalty would be: "Does the government possess a compelling interest to deprive an individual the fundamental right to life?"[94] By contrast, an inquiry of procedural due process on the same issue may be: "What procedural rights do death row prisoners have to ensure that the government is not arbitrarily depriving them of the interest of life?" Seeing that this Note does not seek to engage in the constitutionality of the death penalty, a brief discussion of procedural due process, with an emphasis on its application in criminal procedure, is given *infra* in Part I.B.2.

As Professor Niki Kuckes succinctly points out, the core of procedural due process in an adversarial legal system such as America's is the protections of notice and opportunity to be heard.[95] Indeed, the Supreme Court has consistently ruled that "at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."[96]

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[91] U.S. CONST. amend. XIV, § 1.

[92] County of Sacramento v. Lewis, 523 U.S. 833, 845 (1998) (internal quotation marks omitted).

[93] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 7.1 (5th ed. 2015) (emphasis in original).

[94] *Cf.* Ursula Bentele, *Does the Death Penalty, by Risking Execution of the Innocent, Violate Substantive Due Process*, 40 HOUS. L. REV. 1359 (2004) (discussing "whether imposition of capital punishment under a system that risks such wrongful deprivation of life conforms with due process).

[95] *See* Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL'Y REV. 1, 2 (2006).

[96] Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

Additionally, such rights must be afforded "at a meaningful time and in a meaningful manner."[97] Accordingly, the deprivation usually needs to be predated by the process,[98] and "the extent of those protections varies with the severity of the deprivation and the importance of the government's interest."[99]

2. Procedural Due Process: Civil vs. Criminal

In the civil context, the above-described protection and principles generally apply to all stages of a civil case, most frequently when the government attempts to deprive a person's property interest.[100] To balance the governmental and individual interests, the Supreme Court utilizes the three-part test articulated in *Mathews v. Eldridge*.[101] There, the Supreme Court reaffirmed the principle that "due process is flexible and calls for such procedural protections as the particular situation demands,"[102] and developed a three-part test that would later become the model of civil due process:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[103]

Curiously, such a uniformed and structured standard is absent in the criminal context: Not only is the criminal due process protection unevenly distributed across different stages of the proceedings,[104] "no single doctrinal approach to procedural due process emerges from the Court's criminal decisions."[105] Since "the first major Supreme Court ruling on what due process requires of the criminal process[,]"[106] the Court has selectively incorporated relevant Bill of Rights into criminal due process, rendering

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97 Fuentes v. Shevin, 407 U.S. 67, 80 (1972).

98 *See id.*

99 Kuckes, *supra* note 95, at 12.

100 *See id.* Part I.

101 424 U.S. 319 (1976).

102 *Id.* at 334 (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

103 *Matthews*, 424 U.S. at 335.

104 Kuckes, *supra* note 95, Part II.

105 *Id.* at 14.

106 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, 306 (2001) (discussing the significance of Hurtado v. California, 110 U.S. 516 (1884) in the history of criminal procedure).

them binding on the states through the Fourteenth Amendment.[107] Additionally, the Court has adopted a series of "free-standing" due process rights that cover almost every stage of criminal proceedings,[108] one of the most famous examples being the requirement that the government prove its case "beyond a reasonable doubt." [109]

A main rationale undergirding the formation of these rights is the perspective of viewing due process as an "evolving concept,"[110] which is "less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights."[111] Thus, "changes in technology or 'refinement[s] in our sense of justice' may render" a previously accepted standard a violation of due process.[112] One way of evaluating whether a process is due is through the *Mathews* test. However, although the *Mathews* test had been applied in criminal context in the past, the Supreme Court has since limited such application in an attempt to rein in the operation of free-standing due process rights.

In *Medina v. California*,[113] the defendant challenged the constitutionality of a California statute that placed the burden of proof of establishing incompetency to stand trial on the party claiming such incompetency—in this case, the defendant.[114] Specifically, the defendant argued for the invalidation of said statute under the *Mathews* framework.[115] However, although the Court acknowledged that *Mathews* had been applied in past criminal cases, it declined to do so in *Medina*.[116] Rather, the Court resorted to a more restricted historical approach, under which a state's criminal procedure would not be invalidated under the Due Process Clause "unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"[117]

To reach this conclusion, the *Medina* Court first considered whether there was any settled view grounded in history or traditions regarding the

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[107] *Id.* at 385.

[108] *See id.* at 389–95 (discussing the various free-standing due process rights in criminal proceeding from pretrial through sentencing).

[109] In re Winship, 397 U.S. 358, 367 (1970).

[110] Gore v. United States, 357 U.S. 386, 392 (1958).

[111] Betts v. Brady, 316 U.S. 455, 462 (1942).

[112] 1 WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING, & ORIN S. KERR, CRIMINAL PROCEDURE § 2.4(a) (4th ed. 2018) [hereinafter, *Treatise*] (quoting Schaefer, *Federalism and State Criminal Procedure*, 70 Harv. L. Rev. 1, 6 (1956)).

[113] 505 U.S. 437 (1992).

[114] *See id.* at 442.

[115] *Id.* at 442–43.

[116] *Id.* at 444–45.

[117] *Id.* at 505 U.S. at 445 (quoting *Patterson v. New York*, 432 U.S. 197, 202 (1977)).

burden of proof in competency cases.[118] Having found none, the Court then looked to "whether the rule transgresses any recognized principle of 'fundamental fairness' in operation.'"[119] Taking into account "that the defendant is already entitled to the assistance of counsel and to a psychiatric evaluation"[120] and "that defense counsel will have 'the best-informed view' of the defendant's ability to assist in his defense,"[121] the majority in *Medina* ultimately concluded that due process was served because the defendant was afforded "a reasonable opportunity to demonstrate that he is not competent to stand trial."[122]

By weighing different factors in assessing the fairness of the procedure, the majority's approach has been criticized to be "not meaningfully distinguishable from that of the *Mathews v. Eldridge* test it earlier appears to forswear."[123] Additionally, its emphasis on "historical pedigree" may be problematic when faced with a modern context where "there [is] no historical practice to consider"[124]—such as DNA testing. It is therefore unlikely that applying *Medina* to post-conviction DNA testing proceedings, rather than *Mathews,* would prove to be productive. Additionally, proceedings on the request for post-conviction DNA testing arguably do not fall within the ambit of the *Medina* decision because they usually reach the federal courts via either a writ of *habeas corpus* or a suit pursuant to § 1983: Both of these kinds of actions have traditionally been considered civil in nature.[125]

C. Constitutional Protection(s) in Capital Cases—Cruel and Unusual

Another angle to look at when analyzing the protections afforded to death row prisoners can be found in the death penalty jurisprudence. However, as with the discussion of Due Process, a comprehensive review of the Supreme Court's jurisprudence on death penalty under the framework of Cruel and Unusual Punishment would be beyond the scope of this Note.

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[118] *Id.* at 505 U.S. at 446–48.

[119] *Id.* at 448.

[120] *Id.* at 450.

[121] *Id.*

[122] *Id.* at 448, 451.

[123] *Id.* at 462 (Blackmun, J., dissenting). *See also id.* at 454 ("I read the Court's opinion to allow some weight to be given countervailing considerations of fairness in operation, considerations much like those we evaluated in *Mathews*.") (O'Connor, J., concurring).

[124] *See id.* at 453–54 (O'Connor, J., concurring).

[125] *See, e.g., Mayle v. Felix*, 545 U.S. 644, 654 n.4 (2005) ("Habeas corpus proceedings are characterized as civil in nature") (citing *Fisher v. Baker*, 203 U.S. 174, 181 (1906)); *Heck v Humphrey,* 512 U.S. 477, 483 (1994) ("We have repeatedly noted that 42 U.S.C. § 1983 creates a species of tort liability.").

Thus, this Note will focus on highlighting the safeguards in the death sentencing and execution as relevant to post-conviction DNA testing in death row.

In *Furman v. Georgia*,[126] the U.S. Supreme Court ruled that the death penalty, as then applied, violated the Eighth and Fourteenth Amendments.[127] Although all five of the concurring Justices had different views about *why* the death penalty violated the Constitution, they all assumed the same framework: that it was cruel and unusual as then applied, violating the Eighth Amendment, which is binding on the states through the Fourteenth Amendment.[128] The analysis of the death penalty under the cruel and unusual framework was again undertaken in *Gregg v. Georgia*[129] and basically remains the framework until today, although different approaches have arisen under such framework that gave way to various protections against cruel and unusual punishment.[130]

1. Protection Against Arbitrariness

In *Furman*, while the dissenting justices mostly focused on the judiciary overstep, the concurring justices each focused on a different combination of various aspects in death sentence imposition, and each touched upon the problem that the death penalty as then applied was arbitrary.[131] For example, Justice Stewart very famously wrote that the death sentence, as a "product of a legal system," was "cruel and unusual in the same way that being struck by lightning is cruel and unusual" because it was in fact imposed on "a capriciously selected random handful."[132] Similarly, Justice White questioned the fact that "a jury, in its own discretion and without violating its trust or any statutory policy, may refuse to impose the death penalty no matter what the circumstances of the crime," reflects the excessive discretion conferred upon judges and jury.[133] In conclusion, Justice White found that "the death penalty is exacted with great infrequency even for the most atrocious crimes and that there is no

[126] 408 U.S. 238 (1972).

[127] *Id.* at 239–40.

[128] *See id.*

[129] 428 U.S. 153 (1976).

[130] *See* John D. Bessler, *Tinkering Around the Edges: The Supreme Court's Death Penalty Jurisprudence*, 49 AM. CRIM. L. REV. 1913, 1918–19 (2012).

[131] *See generally* Nicholas Scafidi, *Furman v. Georgia: A Postmortem on the Death Penalty*, 18 VILL. L. REV. 678, Section IV.B (1973).

[132] *Furman*, 408 U.S. at 309–10 (Stewart, J., concurring).

[133] *Id.* at 313–14 (White, J., concurring).

meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not."[134]

On a broader stroke, as Justice Douglas pointed out, "the basic theme of equal protection [that] is implicit in 'cruel and unusual' punishments" was challenged by the discriminatory imposition of death penalty at the time:[135]

> [I]t is "cruel and unusual" to apply the death penalty—or any other penalty—selectively to minorities whose numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the board.[136]

These concerns were taken up in *Gregg v. Georgia*.[137] Declaring that "the punishment of death does not invariably violate the Constitution,"[138] the *Gregg* Court upheld the Georgia death sentence statutes because they "focus the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant."[139] The Georgian statutes were therefore constitutional because they restrict the jury's discretion by defining the mitigating and aggravating circumstances, and by requiring the state supreme court to "review every death sentence to determine whether it was imposed under the influence of passion, prejudice, or any other arbitrary factor, [as well as the proportionality of punishment]."[140]

2. Protection Against Literal "Cruel and Unusual" Punishment

Although the Supreme Court recognized "[w]hat constitutes a cruel and unusual punishment has not been exactly decided[,]"[141] some practices have long been settled to fit the description. For example, the Court reasoned that "[p]unishments are cruel when they involve torture or a lingering death . . . [that] implies [] something inhuman and barbarous, and something more than the mere extinguishment of life."[142] In addition to punishments that "involve the unnecessary and wanton infliction of

134 *Id.* at 313 (White, J., concurring).

135 *See id.* at 240–257 (Douglas, J., concurring).

136 *Id.* at 245.

137 428 U.S. 153 (1976).

138 *Id.* at 169 (1976).

139 *Id.* at 206.

140 *Id.* at 204–07.

141 Weems v. United States, 217 U.S. 349, 368 (1910).

142 *In re* Kemmler, 136 U.S. 436, 447 (1890).

pain,"[143] the Court has also ruled that punishments disproportionate to the crime constitute cruel and unusual punishment.[144] On the other hand, the Court has held that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[145] Thus, jury sentencing becomes imperative in "maintain[ing] a link between contemporary community values and the penal system."[146]

Another branch of reasoning in the death penalty jurisprudence that has deals somewhat directly with the essence of "cruel and unusual" lies in the unreliability of the system that precedes execution. Both Justices Marshall and Brennan, who reasoned in *Furman* that death penalty is *per se* cruel and unusual, emphasized the possibility of executing innocent people: "We have no way of judging how many innocent persons have been executed but we can be certain that there were some."[147] More recently, Justice Breyer followed the same reasoning in his dissent in *Glossip v. Gross*.[148] Citing to copious social studies, Justice Breyer argued that, since DNA testing has revealed the certainty of innocent people being sentenced to death, insisting on a penalty that some of the recipients may not deserve is cruel and unusual.[149]

3. Protection for Specific Groups of Defendants

Lastly, the Court has also provide protection against the "inhuman" aspect of death penalty: "A punishment is 'cruel and unusual,' . . . if it does not comport with human dignity."[150] Pursuant to this principle, the imposition of the death penalty on juveniles[151] and the "mentally retarded,"[152] as well as the execution of the "insane,"[153] have been ruled to violate "the duty of the government to respect the dignity of all persons."[154]

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[143] Gregg v. Georgia, 428 U.S. 153, 173 (1976).

[144] *See, e.g.,* Coker v. Georgia, 433 U.S. 584, 592 (1977). The U.S. Supreme Court has held that death sentence to be disproportionate to crimes in which the defendant "neither kill nor attempt or intend to kill." Bessler, *supra* note 130, at 1919. *See Coker*, 433 U.S. at 598 (holding unconstitutional a death sentence for the crime of rape as being "grossly disproportionate" and thus a cruel and unusual punishment); unconstitutional a death); *Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008) (holding unconstitutional "a death sentence for one who raped but did not kill a child, and who did not intend to assist another in killing the child" as disproportionate and thus cruel and unusual).

[145] Trop v. Dulles, 356 U.S. 86, 101 (1958).

[146] *Gregg*, 428 U.S. at 190 (internal quotation marks omitted).

[147] Furman v. Georgia, 408 U.S. 238, 366–68 (Marshall, J., concurring). *See also Furman*, 408 U.S. at 290–91 (Brennan, J., concurring).

[148] 135 S. Ct. 2726 (2015).

[149] *See id.* at 2756–2759 (Breyer, J., dissenting).

[150] *Furman*, U.S. 408 at 270.

[151] Roper v. Simmons, 543 U.S. 551 (2005).

[152] Atkins v. Virginia, 536 U.S. 304 (2002).

However, another class of defendants came to the fore in 1993. In *Herrera v. Collins*,[155] the Court responded to the defendant's substantive claim of actual innocence by the clarification that "'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits."[156] While the majority opinion did not directly rule on whether execution of an innocent man is unconstitutional, six other justices did so in their concurring and dissenting opinions.[157] Discussing *arguendo* the hypothetical execution of an actually innocent person, the *Herrera* majority posited that the "threshold showing for such an assumed right would necessarily be extraordinarily high."[158] The Court later revisited the discussion in various cases. In *Schlup v. Delo*,[159] the Court ruled that, in order for a prisoner that was sentenced to death to raise a claim of actual innocence, the prisoner "must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence."[160] Nevertheless, since then, the Court has been "operat[ing] under what Justice Scalia called 'a strange regime' assuming that an actual innocence claim exists, but unsure of its status or context."[161]

III. CURRENT STATUTORY SCHEMES IN THE DEATH PENALTY RETAINING STATES

Having discussed the constitutional concours of post-conviction DNA testing and protections afforded in death penalty cases, it is necessary to inquire into how they play out in the state statutory regimes. As of the writing of this Note, there are twenty-eight states that have retained the death penalty.[162] Among those states, three have imposed gubernatorial moratoria—governor-issued postponement—to stay executions indefinitely.[163] Additionally, seven states have not carried out an execution

[153] Ford v. Wainright, 477 U.S. 399 (1986).

[154] *Roper*, 543 U.S. at 560. *See also Wainright,* 477 U.S. at 410. *Cf. Atkins*, 536 U.S. at 317–18.

[155] 506 U.S. 390 (1993).

[156] *Id.* at 404.

[157] See James G. Clessuras, Schlup v. Delo: *Actual Innocence as Mere Gatekeeper*, 86 J. CRIM. L. & CRIMINOLOGY 1305, 1309–10 nn.31–34 and accompanying text.

[158] *Herrera*, 506 U.S. at 417 (1993).

[159] 513 U.S. 298 (1995).

[160] *Id.* at 327.

[161] *DNA and Due Process*, *supra* note 67, at 2950. *See also id*. at 2950–52, Part II.C.

[162] DEATH PENALTY INFO. CTR., *State by State*, https://deathpenaltyinfo.org/state-and-federal-info/state-by-state [https://perma.cc/28CT-E97J] (last visited Oct. 17, 2020).

[163] *Id.* The three states are Oregon (Press Release, John Kitzhaber, Governor, State of Oregon, Statement on Capital Punishment (Nov. 22, 2011)), Pennsylvania (Memorandum from Governor Tom

in ten years or more,[164] and fourteen have executed three or fewer persons in the past ten years.[165] Therefore, the following survey will focus on the remaining eleven states where executions are routinely carried out.[166]

A. Death Penalty Sentencing Statutes

1. Aggravating and Mitigating Circumstances

To meet the requirements that the Supreme Court set under the Eighth Amendment jurisprudence, all the eleven states employ a bifurcated proceeding that requires a separate hearing on whether to impose the death penalty after defendant had been found guilty, and in which aggravating and mitigating circumstances are considered.[167] For the majority of the states, such balancing means that the State must prove, beyond a reasonable doubt, that at least one of the aggravating circumstances exists, and is not outweighed by mitigating circumstances.[168] In these states, both the aggravating and mitigating circumstances are generally statutorily defined, even though many allows for any mitigating evidence related to sentencing to be received.[169] Some of the common aggravating factors include:

- whether the defendant has a prior conviction of violent felony;
- whether the crime was conducted in an "especially heinous" fashion;

Wolf, (Feb. 13, 2015), https://www.scribd.com/doc/255668788/Death-Penalty-Moratorium-Declaration [https://perma.cc/2UKB-KXBV]), and California (EXECUTIVE DEPARTMENT, STATE OF CALIFORNIA, EXECUTIVE ORDER N-09-19 (Mar. 13, 2019)).

[164] The seven states and the last time they carried out an execution are: Indiana (2009), Kansas (none since *Gregg v. Georgia*), Kentucky (2008), Montana (2006), Nevada (2006), North Carolina (2006), and Wyoming (1992). *See* DEATH PENALTY INFORMATION CENTER, *Executions by State and Region Since 1976*, https://deathpenaltyinfo.org/executions/executions-overview/number-of-executions-by-state-and-region-since-1976 [https://perma.cc/L5JV-G52K] (last visited Oct. 17, 2020).

[165] The fourteen states and the respective number of executions in the past ten years are: Arkansas (0), Idaho (2), Indiana (1), Kansas (0), Kentucky (0), Louisiana (1), Montana (0), Nebraska (1), Nevada (0), North Carolina (0), South Carolina (3), South Dakota (3), Utah (1), and Wyoming (0). *See id.*

[166] The eleven states are Alabama, Arizona, Florida, Georgia, Mississippi, Missouri, Ohio, Oklahoma, Tennessee, Texas, and Virginia. *See id.*

[167] *See* ALA. CODE §§ 13A-5-39 to -59 (LexisNexis 2019); ARIZ. REV. STAT. §§ 13-751 to -759 (LexisNexis 2019); FLA. STAT. ANN. § 921.141 (LexisNexis 2019); GA. CODE ANN. §§ 17-10-30 to -37 (2019); MISS. CODE ANN. §§ 99-19-101 to -107 (2019); MO. REV. STAT. §§ 565.030, 565.032, 565.035 (2019); OHIO REV. CODE ANN. §§ 2929.02–.06 (LexisNexis 2019); OKLA. STAT. tit. 21, §§ 701.9–.13 (2019); TENN. CODE ANN. § 39-13-204 (LexisNexis 2019); TEX. CODE CRIM. PROC. ANN. art. 37.071 (LexisNexis 2019); VA. CODE ANN. §§ 19.2-264.2, -264.4 (2019).

[168] *See id.*

[169] *See id*.

- whether the defendant knowingly created a great risk of death to more than one person;
- whether the victim was under or over certain age;
- whether the victim is of certain profession and was killed in the course of their employment (e.g., peace officers and judicial officers);
- whether the crime was done for pecuniary gain.[170]

It is not uncommon for states to have ten or more aggravating circumstances listed, with many of them approaching or exceeding fifteen;[171] contrarily, the highest number of mitigating factors listed in these statutes is nine, one of which being "[a]ny other mitigating factor."[172] Some common mitigating circumstances include:

- the defendant did not have significant criminal history;
- the defendant committed the crime under extreme emotional disturbance or duress;
- the defendant was convicted as an accomplice but had minimal involvement in the murder;
- the defendant's age;
- the defendant's ability to appreciate or conform to the law.[173]

In sum, the mitigating circumstances are factors "that a juror might regard as reducing the defendant's moral blameworthiness."[174]

A stricter model is utilized in Texas. There, the fact finder only needs to assess (1) whether the defendant would commit crimes that "constitute a

[170] *See* ALA. CODE § 13A-5-49 (LexisNexis 2019); ARIZ. REV. STAT. § 13-751.F (LexisNexis 2019); FLA. STAT. ANN. § 921.141(6) (LexisNexis 2019); GA. CODE ANN. § 17-10-30(b) (2019); MISS. CODE ANN. § 99-19-101(5) (2019); MO. REV. STAT. § 565.032.2 (2019); OHIO REV. CODE ANN. § 2929.04(A) (LexisNexis 2019); OKLA. STAT. tit. 21, § 701.12 (2019); TENN. CODE ANN. § 39-13-204(i) (LexisNexis 2019); VA. CODE ANN. § 19.2-264.4.C (2019).

[171] *See id.*

[172] *See* ALA. CODE § 13A-5-51 (LexisNexis 2019); ARIZ. REV. STAT. § 13-751.G (LexisNexis 2019); FLA. STAT. ANN. § 921.141(7) (LexisNexis 2019); MISS. CODE ANN. § 99-19-101(6) (2019); MO. REV. STAT. § 565.032(3) (2019); OHIO REV. CODE ANN. § 2929.04(B) (LexisNexis 2019); TENN. CODE ANN. § 39-13-204(j) (LexisNexis 2019); VA. CODE ANN. § 19.2-264.5.B (2019). Georgia, Oklahoma, and Texas do not have listed mitigating circumstances.

[173] *See id*.

[174] TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2 (f)(4) (no mitigating circumstances listed). *See also* OKLA. UNIF. JURY INSTRUCTIONS-CRIMINAL § 4-78 (2008): "Mitigating circumstances are 1) circumstances that may extenuate or reduce the degree of moral culpability or blame, or 2) circumstances which in fairness, sympathy or mercy may lead you as jurors individually or collectively to decide against imposing the death penalty."

continuing threat to society" and if convicted for a crime in which the defendant acted in concert with another, and (2) whether the defendant actually caused a death or had intent to kill.[175] Should the fact finder answers both in the affirmative, they then consider whether there is any "sufficient mitigating circumstance" that warrants leniency.[176] However, the Texas statutes do not provide a list of mitigating circumstances.[177]

2. State Supreme Court Review

Another factor that was substantially relied on in *Gregg* was the state high court review.[178] As a result, it is not surprising that all eleven states provide for state high court review once the death sentence has been imposed by the fact finder.[179] Furthermore, the statutes generally describe the specific aspects of the sentences that the high court should review, including:

- whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;[180]
- whether an independent weighing of the aggravating and mitigating circumstances at the appellate level indicates that death was the proper sentence;[181] and
- whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.[182]

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[175] TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(b).

[176] *See id.* at § 2(e)(1).

[177] *See id.* at § 2 (f)(4)

[178] Gregg v. Georgia, 428 U.S. 153, 204–05 (1976).

[179] ALA. CODE § 13A-5-53 (LexisNexis 2019); ARIZ. REV. STAT. ANN. §§ 13-755 to -756 (LexisNexis 2019); FLA. STAT. ANN. § 921.141(5) (LexisNexis 2019); GA. CODE ANN. § 17-10-35 (LexisNexis 2019); MISS. CODE ANN. § 99-19-105 (2019); MO. REV. STAT. § 565.035 (2019); OHIO REV. CODE ANN. § 2929.05 (LexisNexis 2019); OKLA. STAT. tit. 21, § 701.13 (2019); TENN. CODE ANN. § 39-13-206 (LexisNexis 2019); TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(h) (LexisNexis 2019); VA. CODE ANN. § 19.2-264.5 (2019).

[180] ALA. CODE § 13A-5-53(b)(1) (LexisNexis 2019). *See also* GA. CODE ANN. § 17-10-35(c)(1) (LexisNexis 2019); MISS. CODE ANN. § 99-19-105(3)(a) (2019); MO. REV. STAT. § 565.035.3(1) (2019); OKLA. STAT. tit. 21, § 701.13(C)(1) (2019); TENN. CODE ANN. § 39-13-206(c)(1)(A) (LexisNexis 2019).

[181] ALA. CODE § 13A-5-53(b)(2) (LexisNexis 2019). *See also* ARIZ. REV. STAT. ANN. § 13-756.A (LexisNexis 2019); GA. CODE ANN. § 17-10-35(c)(2) (LexisNexis 2019); MISS. CODE ANN. § 99-19-105(3)(b), (d) (2019); MO. REV. STAT. § 565.035.3(2) (2019); OHIO REV. CODE ANN. § 2929.05(A) (LexisNexis 2019); OKLA. STAT. tit. 21, § 701.13(C)(2) (2019); TENN. CODE ANN. § 39-13-206(c)(1)(B)–(C) (LexisNexis 2019).

[182] ALA. CODE § 13A-5-53(b)(3) (LexisNexis 2019). *See also* GA. CODE ANN. § 17-10-35(c)(3) (LexisNexis 2019); MISS. CODE ANN. § 99-19-105(3)(c) (2019); MO. REV. STAT. § 565.035.3(3) (2019);

Once again, all these factors track the Supreme Court's death penalty jurisprudence under the cruel and unusual punishment framework.[183] While such review differs from non-death sentence cases in that it is generally automatic, there is no additional safeguard in terms of conviction accuracy.[184]

B. Post-Conviction DNA Testing Statutes

All eleven states have enacted statutes regarding post-conviction DNA testing.[185] To give an oversimplified picture, the statutes generally describe who is eligible for testing, what kind of evidence can be tested, under what circumstances must and/or may the court order testing, and what standard the results must meet for relief to become possible.[186] To understand the statutory procedural requirement on DNA testing in these statutes, a brief discussion with a focus on the first two issues is necessary: Who can get DNA testing and what standard must they meet to obtain it?

1. Eligibility

Naturally, post-conviction DNA testing statutes require a conviction and a sentence. However, the severity of the eligible underlying offense falls on a wide spectrum. For example, the Alabama post-conviction DNA statute—the strictest of the eleven states statutes—only allows application to those who are "convicted of a capital offense [and] serving a term of imprisonment or awaiting execution of a sentence of death[.]"[187] On the other hand, the Texas statute only specifies that "[a] convicted person may submit to the convicting court a motion for forensic DNA testing of evidence . . . ." [188] In between these two extremes, most of these states require a felony conviction[189] either of specific offenses[190] or with some requiring a "minimum" sentence.[191]

OHIO REV. CODE ANN. § 2929.05(A) (LexisNexis 2019); TENN. CODE ANN. § 39-13-206(c)(1)(D) (LexisNexis 2019).

183 *See supra* Part I.C.2.

184 *See* sources cited *supra* note 167.

185 ALA. CODE § 15-18-200 (LexisNexis 2019); ARIZ. REV. STAT. ANN. § 13-4240 (LexisNexis 2019); FLA. STAT. ANN. §§ 925.11–12, 943.3251 (LexisNexis 2019); GA. CODE ANN. § 5-5-41 (LexisNexis 2019); MISS. CODE ANN. §§ 99-39-1 to -29 (2019); MO. REV. STAT. §§ 547.035, 547.037 (2019); OHIO REV. CODE ANN. §§ 2953.21–.23, 2953.71–.84 (LexisNexis 2019); OKLA. STAT. tit. 22, §§ 1371–1373.7 (2019); TENN. CODE ANN. §§ 40-30-301 to -313 (LexisNexis 2019); TEX. CODE CRIM. PROC. ANN. art. 64.01–.05 (LexisNexis 2019); VA. CODE ANN. § 19.2-327.1 (2019).

186 *See id.*

187 ALA. CODE § 15-18-200(a) (LexisNexis 2019).

188 TEX. CODE CRIM. PROC. ANN. art. 64.01(a–1) (LexisNexis 2019).

189 ARIZ. REV. STAT. ANN. § 13-4240.A (LexisNexis 2019); FLA. STAT. ANN. § 925.11(1)(a) (LexisNexis 2019); GA. CODE ANN. § 5-5-41(c)(1) (LexisNexis 2019); OHIO REV. CODE ANN.

Aside from the Alabama statute, five of these statutes have different provisions for prisoners that were sentenced to death.[192] However, these provisions leave a great deal to be desired regarding easier access to testing for petitioners that were sentenced to death. In Florida, such provision does not even make a difference when the prisoner is still living.[193] In Ohio and Texas, the provisions specify that such petitions can be directly appealed to the high court. The Virginia statute comes the closest to providing more protection in the testing itself, which demands that the lab give priority to death cases—a protection that is indeed helpful, but only after the testing has been granted.

2. Standard of Review

One of the main hurdles that petitioners of DNA testing must overcome is the requirement to show, to different extents, that the testing results would have made a difference at trial. While the eleven states unsurprisingly vary widely on this crucial issue,[194] most have employed some sort of "reasonable probability" standard.[195] In other words, the

§ 2953.72(C) (LexisNexis 2019); VA. CODE ANN. § 19.2-327.1.A (2019). *See also* TENN. CODE ANN. § 40-30-303 (LexisNexis 2019).

190 TENN. CODE ANN. § 40-30-303 (LexisNexis 2019).

191 OKLA. STAT. tit. 22, § 1373.2(A) (2019).

192 *See* FLA. STAT. ANN. § 925.11(4)(b) (LexisNexis 2019) ("In a case in which the death penalty is imposed, the evidence shall be maintained for 60 days after execution of the sentence."); MISS. CODE ANN. § 99-39-23(9) (2019) (requiring counsel to be appointed to defendants sentenced to death who are indigent); OHIO REV. CODE ANN. §§ 2953.72(A)(8), 2953.73(E) (LexisNexis 2019) (jurisdictions over appeals depends on whether the petitioners were sentenced to death); TEX. CODE CRIM. PROC. ANN. art. 64.05 (LexisNexis 2019) (direct appeal to Court of Criminal Appeals in cases where death sentence was imposed); VA. CODE ANN. § 19.2-327.1.E (2019) ("The Department of Forensic Science shall give testing priority to cases in which a sentence of death has been imposed.").

193 FLA. STAT. ANN. § 925.11(4)(b) (LexisNexis 2019).

194 *Compare* ALA. CODE § 15–18–200(e)(1) (LexisNexis 2019) (requiring "clear and specific statement of how the requested forensic DNA testing would prove the factual innocence of the petitioner") *with* OKLA. STAT. tit. 22, § 1373.4.A.1 (2019) (requiring a showing of "[a] reasonable probability that the petitioner would not have been convicted if favorable results had been obtained through DNA testing at the time of the original prosecution").

195 *See* ALA. CODE § 15-18-200(f)(2) (LexisNexis 2019) (the court may not order a testing if "there is no reasonable possibility that the testing will produce exculpatory evidence that would exonerate the applicant"); ARIZ. REV. STAT. ANN. § 13-4240.B.1 (LexisNexis 2019) ("reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained"); FLA. STAT. ANN. § 925.11(2)(f)3 (LexisNexis 2019) ("reasonable probability that the sentenced defendant would have been acquitted or would have received a lesser sentence"); GA. CODE ANN. § 5-5-41(c)(3)(D) (LexisNexis 2019) ("reasonable probability that the petitioner would have been acquitted if the results of DNA testing had been available at the time of conviction, in light of all the evidence in the case"); MISS. CODE ANN. § 99-39-5(1)(f) (2019) ("reasonable probability that the petitioner would not have been convicted or would have received a lesser sentence if favorable results had been obtained"); MO. REV. STAT. § 547.035.2(5) (2019) ("A reasonable probability exists that the

petitioner would have to prove in advance of obtaining discovery or DNA testing that there is a reasonable probability that, had the DNA testing results been available at trial, the petitioner would not have been prosecuted or convicted.[196] While in many states meeting such, or a similar, requirement means that the court *shall* take action,[197] in some it only means that the court *may* order testing at its discretion.[198] Such standards must also be met by every petitioner, as there are no provisions in these statutes specifically designed for those who have been sentenced to death.[199]

However, although the standards appear to be objective, they can in fact be unpredictable in practice. A compelling example lies in the procedural history of the case of Larry Swearingen. The Texas Court of Criminal Appeals rejected Swearingen's motion for DNA testing on the grounds that the DNA testing had been available at trial, and that Swearingen did not prove that the evidence—i.e., ligature used to bind the victim and the fingernail scrapings taken from the victim—contained biological material.[200] In response, the Texas Legislature amended Article 64 to not only define "biological material" in a broader manner, but also "eliminated the requirement that applicants must show DNA testing was previously unavailable."[201] However, the Texas Court of Criminal Appeals once again rejected the motion because the "applicant must "prove" that biological materials actually exist on any evidence, . . . and expert opinion that biological material was 'likely' present did not meet this burden."[202] Again, the Legislature responded by amending statutes to include "evidence that has a reasonable likelihood of containing biological material."[203] Nonetheless, the Court denied testing yet again: While a "hit" in the FBI

movant would not have been convicted if exculpatory results had been obtained"); OKLA. STAT. tit. 22, § 1373.4.A.1 (2019) (a court shall order DNA testing only if there is a "reasonable probability that the petitioner would not have been convicted"); TENN. CODE ANN. § 40-30-304(1) (LexisNexis 2019) (a court shall order testing if "[a] reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained"), 40-30-305 (a court may order testing if it "would have rendered the petitioner's verdict or sentence more favorable").

196 *See id.*

197 *See, e.g.*, ARIZ. REV. STAT. ANN. § 13–4240.B (LexisNexis 2019); GA. CODE ANN. § 5-5-41(c)(6) (LexisNexis 2019); OKLA. STAT. tit. 22, § 1373.4.A (2019); TENN. CODE ANN. § 40–30–304 (LexisNexis 2019); VA. CODE ANN. § 19.2-327.1.D–.E (2019).

198 *See, e.g.*, TENN. CODE ANN. § 40-30-305 (LexisNexis 2019); TEX. CODE CRIM. PROC. ANN. art. 64.03(a)(2) (LexisNexis 2019).

199 *See supra* Part II.B.1.

200 *See* Complaint ¶¶ 27–33, Swearingen v. Keller, No. 1:16-cv-01181 (W.D. Tex. Oct. 28, 2016) [hereinafter *Swearingen Complaint*].

201 See *id.* ¶ 34.

202 *Id.* ¶ 37.

203 TEX. CODE CRIM. PROC. ANN. art. 64.01(a–1) (LexisNexis 2019). *See Swearingen Complaint*, *supra* note 200, ¶ 41.

Combined DNA Index System (CODIS) would certainly exonerate Swearingen, the Court refused to read such possibility into the statute, even though article 64 demands that the eligible DNA testing results be compared to CODIS.[204] Swearingen was sentenced to death—but that status, plus the fact that the Texas Legislature amended the law twice, did not seem enough for the Texas Court to grant testing.[205]

IV. PROPOSAL

A. The Eighth Amendment Struggles to Capture the (In)Accuracy Issue in Death Penalty

While the Supreme Court has consistently maintained that "concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system"[206] and has implemented independent procedural due process rights to safeguard the accuracy of a criminal trial,[207] the accuracy discussion fades out when it comes to execution. Thus, while the Court says that "[t]he maxim of the law is . . . that it is better that ninety nine . . . offenders shall escape than that one innocent man be condemned[,]"[208] stories like Sedley Alley's suggests that there is a gap between such principle and reality. One of the possible explanations for such a phenomenon is that the Eighth Amendment jurisprudence sets the discussion on the wrong path.

The question of whether the death penalty is a cruel and unusual punishment is a moral one. It is a judgment that resonates with the values of our society and is portrayed in popular culture as such;[209] to ask whether death penalty is constitutional *per se* under the cruel and unusual regime is equivalent to asking that, assuming a person is indeed guilty, whether putting such a person to death is morally justified. Such rationale is perfectly reflected in the bifurcated proceeding of death sentencing: Assuming guilt, is this person morally blameworthy enough to be put to

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[204] *See* TEX. CODE CRIM. PROC. ANN. art. 64.035 (LexisNexis 2019).

[205] Larry Swearingen eventually obtained DNA testing; however, the results came back inconclusive. Swearingen was subsequently executed on August 21, 2019. *See State of Texas Executes Innocence Project Client Larry Swearingen After U.S. Supreme Court Denies Stay*, INNOCENCE PROJECT: NEWS, (Aug. 22, 2019) https://www.innocenceproject.org/state-of-texas-executes-innocence-project-client-larry-swearingen-after-u-s-supreme-court-denies-stay/ [https://perma.cc/334H-G44N].

[206] Schlup v. Delo, 513 U.S. 298, 325 (1995).

[207] See *supra* Part I.B.2.

[208] *Schlup*, 513 U.S. at 325.

[209] *See, e.g.*, *The West Wing: Take This Sabbath Day* (Warner Bros. television broadcast Feb. 9, 2000) (the President of the United States spoke with his priest and the Pope to decide whether to stay an execution, rather than discussing it with his legal counsel).

death? As Part II-A discussed *supra*, none of the statutorily defined aggravating or mitigating circumstances tap into the reliability of the conviction; rather, they all address the "moral culpability" of the defendant.[210] Indeed, attempting to fit the issue of accuracy under the Eighth Amendment framework subjects one to criticism such as Justice Scalia's: "[I]t is *convictions*, not *punishments*, that are unreliable."[211] However, after precisely pointing out the accuracy issue in death penalty cases, Justice Scalia reverts back to solidifying a framework of morality.[212]

While it is unclear why the Supreme Court has rarely considered the death penalty outside of the Eighth Amendment,[213] the reliability issue has long lurked in the Court's consciousness. In *Furman*, one of the reasons that led both Justices Marshall and Brennan to conclude death penalty to be *per se* unconstitutional was the possibility of executing an innocent person: "We have no way of judging how many innocent persons have been executed but we can be certain that there were some."[214] That uncertainty has since crystalized: *At least* twenty innocent people would have been executed in the past thirty years.[215]

In addition to the fact that the "beyond reasonable doubt" standard is "not foolproof,"[216] the post-conviction relief can sometimes be "almost impossible" and subject to the whim of the state which "labored hard to secure" the conviction,[217] despite the existence of DNA statutes.[218] Such struggle is all the more pressing for death row prisoners, whose days may be numbered. Yet as discussed *supra* in Part II.B, there is no additional guarantee in terms of *accuracy* for the individuals sentenced to death or

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[210] TEX. CODE CRIM. PROC. ANN. art. 37.071 Sec. 2(e)(1) (LexisNexis 2019).

[211] Glossip v. Gross, 135 S. Ct. 2726, 2747 (2015) (Scalia, J., concurring) (responding to Justice Breyer's argument in dissent that the unreliability of death penalty makes it cruel and unusual) (emphasis in the original).

[212] *Id.* at 2749–50 (Scalia, J., concurring) ("Capital punishment presents moral questions that philosophers, theologians, and statesmen have grappled with for millennia.")

[213] For discussions that Eighth Amendment would not preempts considering the death penalty under another constitutional provision, see *Bentele*, *supra* note 94, Part III.B. *See also Israel*, *supra* note 106, Part III.B.

[214] Furman v. Georgia, 408 U.S. 238, 367–68 (1972) (Marshall, J., concurring).

[215] *See supra*, Introduction. However, in *Kansas v. Marsh*, Justice Scalia quoted a New York Times article to state that the "[felony convictions in America have an] error rate .027 percent—or, to put it another way, a success rate of 99.973 percent." *Marsh*, 548 US 163, 182 (2006) (Scalia, J., concurring) (quoting Joshua Marquis, *The Innocent and the Shammed*, N.Y. TIMES: OPINION (Jan. 26, 2006) https://www.nytimes.com/2006/01/26/opinion/the-innocent-and-the-shammed.html [https://perma.cc/A6FR-P4MG]). Nonetheless, Professor Gross criticized the quoted estimates as "silly" because the methodology was fundamentally unsound. *See* Gross et al., *supra* note 5, at 7230.

[216] *Furman*, 408 U.S. at 367 (Marshall, J., concurring).

[217] *Id.*

[218] *See supra* Part II.B.2 (discussing the case of Larry Swearingen).

already facing execution. In *Osborne*, Chief Justice Roberts reasoned that there was no need to constitutionalize post-conviction DNA testing as a substantive right, because all but three states had legislated to deal with the problem.[219] However, the reality that an individual facing execution can be denied DNA testing, of which the potentially exculpatory results can "undermine confidence"[220] in the execution, should force the Court to consider a stronger protection in ensuring that the governmental deprivation of life is not done with doubt.

B. (In)Accuracy in the Conviction Underlying a Death Sentence Fits Squarely Under Procedural Due Process Doctrine

Seeing that one of the "central concerns of procedural due process [is] the prevention of unjustified or mistaken deprivations,"[221] it follows that the issue of wrongful execution falls squarely within the procedural due process doctrine. However, not much attention has been given to such analysis.[222] While it is true that the Supreme Court has consistently upheld the heightened "reliability" in capital cases, it has again done so under the Eighth Amendment regime.[223] However, it is fundamentally different to ask whether there is a reliable method to assess one's character or culpability (i.e., moral inquiries under the Eighth Amendment) versus a method to assess one's innocence (i.e., a factual inquiry under procedural due process). Confounding the multi-meaning of "reliability" may account for the lack of attention.

The same logic reveals another possible theory behind the lack of attention in analyzing the death penalty under procedural due process: Since a death sentence is the product of a criminal trial, the procedural safeguards inherent to criminal proceeding suffice. However, while it is true that prisoners do not enjoy the presumption of innocence that they do during a criminal trial, such contention does not address the fact that death row inmates face a different situation from other inmates: The latter are being deprived of their liberty interests, whereas the former are being deprived of their life interest.

In addition to the qualitative difference between execution and incarceration, the Fourteenth Amendment unequivocally prescribes: "No state shall . . . deprive any person of life, liberty, or property, without due

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219 Dist. Attorney's Office v. Osborne, 557 U.S. 52, 72–73 (2009).

220 United States v. Bagley,473 U.S. 667, 682 (1985); Strickland v. Washington, 466 U.S. 668, 694 (1984).

221 Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980) (unanimous opinion).

222 *See Bentele*, *supra* note 94, at 1363 n. 11 and accompanying text.

223 *See infra* note 222 and accompanying text.

process of law."[224] If one of the strongest arguments for sustaining the death penalty is because "[i]t is impossible to hold unconstitutional that which the Constitution explicitly *contemplates*[,]"[225] it follows naturally that one should not mingle the life interest and liberty interest where the Constitution explicitly separates them. Moreover, the heightened reliability required by the Court in capital cases is rooted precisely on the premise that "the penalty of death is qualitatively different from a sentence of imprisonment, however long."[226] However, this distinction did not translate to more stringent *factual* inquiries: While criminal proceedings (involving liberty interest) are afforded additional factual reliability than civil proceedings (involving property interest) via the imposition of different burdens of proof, no procedure to safeguard such extra reliability is provided in capital cases as opposed to noncapital cases.

Of course, this Note does not suggest an implementation of a rigid hierarchy ranking interests by importance in the criminal justice system, for it is not only beyond the scope of any one article but also likely to create new problems.[227] Rather, it simply points out that the differences in interests should be reflected in the equation of deciding what additional procedural due process rights should be afforded to death row prisoners to increase accuracy in the face of execution—such as DNA testing. Additionally, this Note does not aspire to invent new rules, but rather proposes to begin engaging in such a process by utilizing what the Supreme Court has already created in protecting "mere" property interest: The *Mathews v. Eldridge* test.

In *Pennsylvania v. Finley*,[228] the Supreme Court ruled that "[p]ostconviction relief is . . . not part of the criminal proceeding itself, and [] is in fact considered to be civil in nature."[229] Since post-conviction DNA testing is a form of post-conviction relief, it is reasonable to consider it at least quasi-civil/quasi-criminal in nature, if not completely civil in nature as *Finley* suggests. Additionally, as mentioned *supra* in Section I.B.2, most of the actions in federal courts seeking post-conviction DNA testing are civil

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[224] U.S. CONST. amend. XIV, § 1.

[225] *Glossip*, 135 S. Ct. at 2747 (Scalia, J., concurring).

[226] Woodson v. North California, 428 U.S. 280, 305 (1976). However, it should be distinguished that the heighted reliability required by court was pursuant to the moral principle of ensuring that "death is the appropriate punishment", rather than to the idea of factual reliability. *See Woodson*, 428 U.S. at 304.

[227] For example, under such scheme of operation, a defendant facing the same charge—capital murder—may be subjected to a more stringent evidence standard in Texas, where he/she faces death penalty, than in New York, where death penalty has been abolished.

[228] 481 U.S. 551 (1987).

[229] *Id.* at 556–57.

in nature, which was also affirmed by the recognition in *Skinner* of § 1983 claims as a proper route for seeking post-conviction DNA testing.[230] Consequently, applying the *Mathews v. Eldridge* test in the post-conviction DNA testing context is consistent with the Court's jurisprudence.

Not only has the Supreme Court consistently employed the *Mathews v. Eldridge* test in civil settings, it has also applied it in cases where the line between civil and criminal cannot easily be drawn, which was prominently illustrated in the "enemy combatant" cases. In her article, Professor Niki Kuckes analyzed the Court's decision in *Hamdi v. Rumsfeld*[231] through the lens of the "doctrinal split between the clear due process rules on the civil side and the more vague criminal approach": Should civil or criminal due process apply to the pre-trial detention? What about the trial that may ensue?[232] Despite the dissent from Justice Scalia arguing for a traditional criminal approach, the Court applied the *Mathews v. Eldridge* test. A similar analysis had also been seen in *Morrissey v. Brewer*, where the plaintiffs were parolees whose parole was revoked without a hearing.[233] Although decided before *Mathews*, *Morrissey* engaged in a similar balancing test; additionally, the Court reaffirmed the principle that "due process is flexible and calls for such procedural protections as the particular situation demands."[234] Figuring out whether DNA testing should be a right afforded in a post-conviction process where life interests are facing deprivation calls for a flexible test like *Mathews*.

C. Applying Mathews v. Eldridge to Post-Conviction DNA Testing in Death Row Cases

1. The Individual Interest: Life

The deprivation that death row inmates face is not simply that of liberty, but their very lives. The value of life and its qualitative difference from imprisonment is well-founded in, and reflected by, the society's understanding of culpability.[235] Additionally, it is clear from the discussion *supra* in Section III.B that the Court's jurisprudence is consistent with recognizing death as a different kind of punishment by affording such proceedings additional safeguards,[236] albeit under a different philosophy.[237]

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230 *See supra* Parts I.A.2 & I.B.2.

231 542 U.S. 507 (2004).

232 Kuckes, *supra* note 95, at 5–7, 16.

233 408 U.S. 471 (1972).

234 *Id.* at 481.

235 *See supra* Part II.A.

236 *See supra* Parts I.C, II.

2. The Probative Value of Post-Conviction DNA Testing

The second prong of the *Mathews* test considers the "ability of additional procedures to increase the accuracy of the fact finding."[238] Accordingly, what is the probative value of DNA testing? One of most fundamental strengths of DNA testing is that it is rooted in scientific fields that are independent of crime investigation.[239] In contrast, many "forensic science" disciplines, such as bite mark comparison and microscopic comparison, lack such scientific bases.[240] As some of the latter categories become debunked,[241] DNA technology continues to thrive and evolve on the basis of molecular biology. As a result, DNA testing is supported by the type of data that can yield statistical results specifying the likelihood that the biological material found at a crime scene came from someone other than the prisoner.

The most famous value of forensic DNA testing, of course, lies in the fact that it is both highly sensitive and discriminatory. The latest "short tandem repeats" test can be done on only a few cells and can narrow the odds down to one in billions.[242] Furthermore, DNA tests can also be done on hairs, albeit with a less robust discriminatory power.[243] Taken together, this means that DNA "can, in certain circumstances, establish to a virtual certainty whether a given individual did or did not commit a particular crime."[244] Since DNA testing can be done on minimal residual skin cells, it can also extract "touch DNA" on weapons that were handled by the perpetrator or clothing of the perpetrator that were left at the crime scene.[245]

Concededly, DNA testing is not perfect; the results cannot reveal when the biological material was deposited and can be subject to

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[237] *See supra* Part III.A.

[238] CHEMERINSKY, *supra* note 93, at § 7.4.2.

[239] *See* Suzanne Bell et al., *A Call for More Science in Forensic Science*, 115 PROC. NAT'L ACAD. SCI. 4541, 4542 (2018), available at https://www.pnas.org/content/pnas/115/18/4541.full.pdf [https://perma.cc/X598-RPLA].

[240] *See generally id*. *See also* PRESIDENT'S COUNCIL OF ADVISORS ON SCI. & TECH., EXECUTIVE SUMMARY, FORENSIC SCIENCE IN CRIMINAL COURTS: ENSURING SCIENTIFIC VALIDITY OF FEATURE-COMPARISON METHODS 8–9, 13–14 (2016).

[241] *See, e.g.*, Spencer S. Hsu, *FBI Admits Flaws in Hair Analysis Over Decades*, WASH. POST (Apr. 8, 2015) https://www.washingtonpost.com/local/crime/fbi-overstated-forensic-hair-matches-in-nearly-all-criminal-trials-for-decades/2015/04/18/39c8d8c6-e515-11e4-b510-962fcfabc310_story.html [https://perma.cc/FPY8-2F4R].

[242] THE ROYAL SOCIETY, *supra* note 44, at 37. *See* BUTLER, *supra* note 52, at 32.

[243] THE ROYAL SOCIETY, *supra* note 44, at 12.

[244] Harvey v. Horan, 285 F.3d 298, 305 (4th Cir. 2002).

[245] *See* BUTLER, *supra* note 52, at 331. *Cf. supra* Part I.A.2.

contamination.[246] However, not only can such factors be controlled through careful lab procedures and through comparison with potential depositors, but there are also situations where the nature of the results can overcome such concerns.[247] For example, since whoever raped Ms. Collins likely murdered her as well,[248] DNA results on the semen recovered from Ms. Collins' body would be outcome determinative given the context. In such cases, where an exculpatory result, if obtained, would undercut the certainty in executing the prisoner, DNA is highly probative.

3. The Costs to the Government

As tempting as it is to just claim that an innocent life is worth the cost in running the test, there are more realistic arguments that the cost of DNA testing should not overcome. For one, there are established forensic DNA testing facilities and protocols in all fifty states.[249] Additionally, death row prisoners account for only less than 0.2 percent of the prison population;[250] naturally, not all of them would have DNA evidence in their cases. Therefore, opening DNA testing to death row prisoners not only does not require the states to invent the logistics from the ground up, it is also unlikely to create undue burden for the states. Additionally, many death row prisoners would be willing to pay for the testing in a private laboratory as well.[251] Considering the effect of DNA testing in dispersing any residual doubt on the factual basis of executing a potentially innocent prisoner, the costs to the states are clearly trumped.

[246] *See, e.g.*, Katie Worth, *Framed for Murder by His Own DNA*, WIRED (Apr. 19, 2018 7:00 AM), https://www.wired.com/story/dna-transfer-framed-murder [https://perma.cc/DN4N-N2W2]; Katie Worth, *The Surprisingly Imperfect Science of DNA Testing*, THE MARSHALL PROJECT (Jun. 24, 2015 7:15 AM), https://www.themarshallproject.org/2015/06/24/the-surprisingly-imperfect-science-of-dna-testing [https://perma.cc/UJ7P-TRVW].

[247] For example, when the same DNA profile comes back on multiple items collected from the crime scene (*i.e.*, "redundancy") or when the DNA profile "hit" in CODIS to another person that has no other explanation for being at the crime scene.

[248] *See supra* Introduction.

[249] *See* NAT'L CLEARINGHOUSE FOR SCI., TECH., & LAW, *Statewide/Centralized Evidence Laboratories*, http://webcache.googleusercontent.com/search?q=cache:HuYfet9bKDgJ:www.ncstl.org/resources/laboratories+&cd=2&hl=en&ct=clnk&gl=us [https://perma.cc/3SY5-9HZS] (last visited Oct. 19, 2020).

[250] *See Death Row Spring 2019, supra* n.7 and accompanying text; BUREAU OF JUSTICE STATISTICS, *Prisoners in 2017* (Apr. 2019) https://www.bjs.gov/content/pub/pdf/p17.pdf [https://perma.cc/9TTQ-24SJ] (last visited Oct. 17, 2020).

[251] *See, e.g.*, *Swearingen Complaint*, *supra* note 200, ¶ 72.

V. CONCLUSION

Although the Supreme Court has described due process in various phrases, executing an innocent person perhaps is antithetical to all of them. In an era where DNA evidence exonerates prisoners on a regular basis, the possibility of one of them being executed should be haunting the courts and the public. Given that the death penalty has mostly been dealt with as a matter of character and culpability under the Eighth Amendment, this Note proposes a perspective through the lens of procedural due process. Seeing that post-conviction relief is generally a civil proceeding, in which *Mathews v. Eldridge* is regularly applied to determine what due process is warranted, it follows that an evaluation of the post-conviction DNA testing under such framework is appropriate. Factoring in the "qualitatively different" interest of life and the cogent sensitivity and specificity of DNA testing, it appears that the governmental cost of running such tests are sufficiently overcome. Accordingly, a strong argument exists for extending a procedural due process right in post-conviction DNA testing in death row cases under the Fourteenth Amendment.

Similar to a prisoner who was competent at trial can become incapacitated enough to warrant a psychological evaluation to ensure the *morality* of the execution, signs of innocence since a prisoner's conviction should prompt a factual assessment to ensure the *accuracy* of the execution. Indeed, "[a] man should not die as long as a believable question of innocence hangs over him."[252] While "[d]ue process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of *convicting* an innocent person,"[253] nothing shocks the conscience more than deliberately not taking a step of insignificant cost to eliminate the possibility of *executing* an innocent person. While the system can never be perfect, it is incumbent upon the Court to better it to the best of its ability: DNA testing may never eradicate the possibility of more Sedley Alleys, but at least there will not be any more April Alleys—"always haunted by the ghost of the innocent man [executed.]"[254]

[252] Richard Parker, *Gov. Abbott, Delay This Execution*, HOUS. CHRONICLE: OPINION (Oct. 13, 2019) https://www.houstonchronicle.com/opinion/outlook/article/Richard-Parker-Gov-Abbott-delay-this-execution-14516225.php [https://perma.cc/5GBD-KS3F].

[253] Herrera v. Collins, 506 U.S. 390, 399 (1993) (alteration in original).

[254] *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923) (Hand., J.) ("Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream.").