A Unilateral Hope: Reliance on the Clemency Process as a Trigger for a Right of Access to State-held DNA Evidence

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A UNILATERAL HOPE: RELIANCE ON THE CLEMENCY PROCESS AS A TRIGGER FOR A RIGHT OF ACCESS TO STATE-HELD DNA EVIDENCE

Public confidence in the criminal justice system is consistently haunted by the possibility that constitutionally mandated procedures are insufficient to prevent conviction of the innocent.\(^1\) Although recent advances in DNA technology have demonstrated this possibility to be a reality,\(^2\) the Supreme Court has stood by its determination that a post-conviction finding of actual innocence does not afford an otherwise constitutionally convicted individual the right to be released.\(^3\) Instead, the Supreme Court and lower courts have concluded that the proper channel for the wrongfully, yet constitutionally convicted prisoner to pursue a claim of innocence is through the clemency process.\(^4\) This strict reliance on clemency as a “fail safe” mechanism is at odds with the Supreme Court’s view that the decision to grant clemency is completely protected from the due process restraints of judicial review.\(^5\) Therefore, to ensure the integrity of clemency as the sole remedy for the wrongfully convicted, “principles of justice”\(^6\) mandate

1. See, e.g., Patterson v. New York, 432 U.S. 197, 208 (1977) (stating that “due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person”); U.S. v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923) (noting that “[o]ur procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream”).


4. See id. at 411-12 (stating that “it is clear that clemency has provided the historic mechanism for obtaining relief” in actual innocence cases); Lucas v. Johnson, 132 F.3d 1069, 1074 (5th. Cir. 1998) (finding that without the existence of the clemency process, a claim of actual innocence may be constitutionally warranted); Royal v. Taylor, 188 F.3d 239, 243 (4th Cir. 1999) (justifying the failure to recognize the existence of an actual innocence claim on the availability of the Virginia clemency process).


6. See Medina v. California, 505 U.S. 437, 445 (1992) (quoting Speiser v. Randall, 357 U.S. 513, 523 (1992) (holding that in issues of criminal procedure, in order to prevent intrusion “[u]pon the administration of justice by the individual States,” a decision is “not subject to proscription 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’”).

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that prisoners be given a meaningful opportunity to present evidence of actual innocence to the clemency authority.

This Comment discusses the constitutional consequences of placing this "fail safe" duty in the clemency authority. While the Supreme Court has charged the clemency process with this critical function, it has nevertheless insulated the clemency decision from constitutional due process. Accordingly, this Comment advocates for a due process right to meaningful access to evidence and an opportunity to present that evidence to the clemency authority. Specifically, this Comment advocates the right to access state-held evidence for the purposes of modern DNA testing.

I. LEGAL BACKGROUND

In order to understand the necessity of a constitutional right of post-conviction access to state-held DNA evidence, it is important to first be familiar with the evolution of four developments of our criminal justice system. To that end, this Part discusses, first, the consequences of the Supreme Court's failure to recognize the role of courts in adjudicating claims of "actual innocence." 7 Second, this Part examines the Supreme Court's historical dependency on, and designation of, the clemency process as a fail safe for constitutionally convicted yet innocent prisoners. 8 Third, this Part discusses the constitutional limitations that the Supreme Court has placed on the clemency process. 9 Finally, this Part discusses the courts' treatment of an individual's constitutional right of access to state-held evidence for the purpose of subjecting it to newly developed DNA testing technology. 10

A. The Supreme Court's Refusal to Recognize a Claim of Actual Innocence

The United States Constitution does not guarantee that only the guilty will be convicted, but instead ensures that the proper proce-
dures are followed en route to those convictions. Among these constitutionally mandated procedures are protections against self-incrimination, an impartial jury, the ability to confront adverse witnesses, and the right to a jury trial. These constitutional safeguards recognize the trial as the ultimate forum for the determination of an accused’s guilt or innocence.

In addition to these procedural rights, our state and federal criminal justice systems guarantee an accused a presumption of innocence before the factfinder. However, after a person is determined to be guilty beyond a reasonable doubt, this presumption of innocence “disappears” and the convicted person becomes “legally guilty.” Although the role of our criminal justice system is to convict only those who are actually guilty, the Supreme Court has stopped short of stating that the avoidance of an erroneous conviction should be the ultimate objective. Instead, the Court has held that the proper conviction of a person found “guilty beyond a reasonable doubt” is the paramount event under the Constitution allowing states to deprive convicted individuals of certain rights.

A convicted person, however, retains certain rights, including those granted by the state that convicted him. Although not constitutionally mandated, all states allow a prisoner to request a new trial.

11. See Patterson v. New York, 432 U.S. 197, 208 (1977) (stating that “due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person”).

12. U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed...; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.”); Duncan v. Louisiana, 391 U.S. 145, 149-50 (1968) (finding a right to trial by jury in criminal adjudications).


15. Id. at 399-400 (stating that after his conviction, the petitioner “[d]id not come before the Court as one who is innocent, but, on the contrary, as one who has been convicted by due process of law” (internal quotation marks omitted)); id. at 419 (O’Connor, J., concurring).

16. Herrera, 506 U.S. at 398 (noting the “elemental appeal” of the proposition that the Constitution prohibits the imprisonment of innocent persons).

17. See Patterson v. New York, 432 U.S. 197, 208 (1977) (stating that “[p]unishment of those found guilty by a jury, for example, is not forbidden merely because there is a remote possibility in some instances that an innocent person might go to jail”).


based on new evidence not available at the first trial. While some states have no time limit for such requests, Maryland has a time limit of one year and Virginia has a much shorter time limit of twenty-one days. Once this period expires, the prisoner may not request a new trial based solely on the claim that new evidence demonstrates complete innocence.

In 1993, the Supreme Court examined whether these statutory limitations on the ability to request a new trial could withstand constitutional muster if a prisoner requesting a new trial after a statutory deadline can prove actual innocence using newly discovered evidence. In *Herrera v. Collins*, the Supreme Court determined that a constitutionally convicted prisoner could not present a claim of innocence even if he could prove that he was factually innocent using newly discovered evidence. The Court held that a showing of "actual innocence" was of little importance without the presence of an independent constitutional violation. Although the Court noted that states were free to create judicial mechanisms for prisoners to request new trials after valid convictions, the failure to do so did not amount to a constitutional violation.

In *Herrera*, the Court also rejected the petitioner's contention that the incarceration of an innocent prisoner violated the due process clause of the United States Constitution. By classifying the prisoner's claim as one of procedural rather than substantive due process, the Court relied on the historical common-law ability to request a new trial to determine whether the failure to provide a judicial

20. *See Herrera*, 506 U.S. at 410-411 (recognizing the right of the states to provide a method, or in fact no method at all, for bringing a motion for a new trial based on newly discovered evidence).
22. Md. R. 4-331(c).
23. VA. SUP. CT. R. 3A:15(b) (1992). While Virginia's statute certainly provides less time than the average state, it is by no means the stingiest. *See*, e.g., FLA. R. CRIM. PROC. § 3.590 (1992) (providing Florida's time limit of ten days).
25. *Id.* at 407.
27. *Id.* at 411.
28. *Id.* at 404.
29. *Id.* at 411 (stating that "[i]n light of the historical availability of new trials . . . and the contemporary practice in the States, we cannot say that Texas' refusal to entertain petitioner's newly discovered evidence eight years after his conviction [is unconstitutional]").
30. *Id.* at 407.
31. *See id.* (stating that "[t]his issue is properly analyzed only in terms of procedural due process").
remedy was unconstitutional. Indeed, the Court held that criminal process was "lacking only where it 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" Because state legislatures and the federal government have traditionally limited a prisoner's ability to request a new trial based on newly discovered evidence, the Court held that the failure to allow for a post-conviction request for a new trial did not amount to a constitutional violation.

Although the Court stated that the Herrera decision was based on procedural due process, it briefly addressed the petitioner's substantive due process claim. In an oft quoted paragraph, the Court addressed whether a capital prisoner who could produce a "truly persuasive demonstration of 'actual innocence'" would be entitled to present such a claim. Chief Justice Rehnquist, writing for the majority, stated that such a showing would "render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim." However, the Chief Justice ultimately stated that any prisoner attempting to demonstrate "actual innocence" would need to meet an "extraordinarily high" threshold. The Court then stated that, given this extraordinarily high threshold, the prisoner failed to present a claim of actual innocence solely on the basis of newly discovered evidence.

Using this language from the Herrera opinion as a guide, several lower courts have suggested that a claim of actual innocence may indeed be a valid claim. While many courts have addressed whether

32. See id. at 408 (stating that "[h]istorical practice is probative of whether a procedural rule can be characterized as fundamental" (quoting Medina v. California, 505 U.S. 437, 446 (1999))).
33. Id. at 407-08 (quoting Medina, 505 U.S. at 445-46).
34. Id. at 411.
35. Id. at 417.
36. Id.
37. Id.
38. Id.
39. Id.
40. See Wilson v. Greene, 155 F.3d 396, 404 (4th Cir. 1998) (stating that "[c]laims of actual innocence, whether presented as freestanding ones . . . or merely as gateways to excuse a procedural default . . . should not be granted causally"); Spencer v. Murray, 5 F.3d 758, 766 (4th Cir. 1993) (holding that Herrera left open a free-standing claim of actual innocence, but concluding that the prisoner did not meet the "'extraordinarily high burden' a defendant claiming factual innocence would have to show"); United States v. Quiñones, 205 F. Supp. 2d 256 (S.D.N.Y. 2002) (recognizing the existence of an "actual innocence" claim); Harvey v. Horan, 2001 WL 419142, *6 (E.D. Va. 2001) (finding that there is a constitutional right of access to DNA evidence for the purpose of bringing an actual innocence claim); Cherrix v. Braxton, 131 F. Supp. 2d 756, 766 (E.D. Va. 2001) (stating that the "Herrera court left open the question of whether a truly persuasive showing
Herrera expressly creates a free-standing claim of actual innocence, they have yet to adequately define the standard that should be applied. For example, in Wilson v. Greene, the United States Court of Appeals for the Fourth Circuit considered whether a prisoner's demonstration of actual innocence was a viable claim. The court, citing to the Herrera opinion, stated that a free-standing claim of actual innocence "should not be granted casually." The Wilson court then evaluated whether the prisoner could demonstrate, in light of the new evidence, that "it is more likely than not that no reasonable juror would have convicted [the prisoner]." In applying this standard, the court ultimately determined that the prisoner did not present a valid claim.

In Cherrix v. Braxton, the United States District Court for the Eastern District of Virginia considered a prisoner's attempts to obtain funding for re-testing evidence using DNA testing procedures not available at trial. The court concluded that Herrera had left open the question of whether a free-standing claim of actual innocence could be sustained. The court noted Herrera's indication that a prisoner would have to make a "truly persuasive showing of actual innocence," but nevertheless stated that if the prisoner acquired exculpatory results using DNA evidence, the court "would not be required to ignore such persuasive evidence of actual innocence." However, the court stressed that any new evidence would have to "unquestionably establish the person's innocence."

Given this "extraordinarily high" standard, it has proved difficult for convicted persons to demonstrate actual innocence. Although many courts have examined the existence of a claim of actual inno-

of actual innocence could be an independent constitutional basis for federal habeas relief); Jenner v. Dooley, 590 N.W.2d 463, 471 (S.D. 1999) (stating that "courts should solemnly consider reopening a case if a 'truly persuasive' showing of actual innocence lies close at hand").

41. 155 F.3d 396 (4th Cir. 1998).
42. Id. at 404.
43. Id.
44. Id. at 405.
45. Id.
47. Id. at 761.
48. Id. at 766.
49. Id. at 767.
50. Id. at 766 (quoting Schlup v. Delo, 513 U.S. 298, 317 (1995)).
51. Herrera v. Collins, 506 U.S. 390, 417 (1993); see also Spencer v. Murray, 5 F.3d 766, 768 (4th Cir. 1993) (failing to articulate a standard for "actual innocence," but holding that the prisoner did not meet that standard).
censure, none has upheld such a claim. However, a constitutionally convicted yet innocent prisoner’s ability to obtain freedom is not limited to the judicial process.

B. The Supreme Court’s Reliance on Clemency as the “Fail Safe” for Innocent Prisoners

According to the Herrera Court, just because an actually innocent prisoner cannot use the judicial system to obtain habeas relief solely from new evidence does not leave the individual “without a forum to raise his actual innocence claim.” The Court in Herrera stated that the existence of clemency proceedings creates a “fail safe” for actually innocent prisoners without an otherwise recognized remedy. In its analysis of the traditions of the criminal justice system, the Court recognized the clemency process as the “historic remedy for preventing miscarriages of justice where judicial process has been exhausted.” Indeed, the Court found that clemency has been a part of the American criminal landscape since the country’s founding and part of the English criminal justice system since “time immemorial.” The Court thus held that the creation of a judicial remedy was not necessary for the constitutionally convicted yet actually innocent prisoner because clemency is the appropriate forum for adjudicating actual innocence claims.

In Royal v. Taylor, the United States Court of Appeals for the Fourth Circuit expressly stated that the existence of Virginia’s clemency process precluded the availability of a free-standing claim of actual innocence. The court held that when a prisoner does not allege an underlying independent constitutional violation, “state clemency proceedings provide the proper forum for pursuing claims of actual innocence based on new facts.” After noting the existence of Vir-

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52. See supra note 40 (describing courts which have entertained the existence of a claim of actual innocence).
53. Herrera, 506 U.S. at 411.
54. Id. at 415.
55. Id. at 411-12 (reaffirming the proposition that if the Constitution or a statute has not been violated, the judicial branch cannot provide a remedy).
56. Id. at 412-13 (stating that clemency has been available in America since the British Colonies were founded, and has “been exercised from time immemorial by the executive of that nation whose language is our language” (quoting United States v. Wilson, 32 U.S. (7 Pet.) 150, 160-61 (1833) (Marshall, J.))).
57. Id. at 412 (stating that “it is clear that clemency has provided the historic mechanism for obtaining relief” for constitutionally convicted prisoners claiming to be innocent).
58. 188 F.3d 239 (4th Cir. 1999).
59. Id. at 243.
60. Id.
ginia's clemency process, the court denied the prisoner's request for federal habeas relief.\textsuperscript{61}

In addition, the United States Court of Appeals for the Fifth Circuit in \textit{Lucas v. Johnson}\textsuperscript{62} pointed to the "restrictive language" of \textit{Herrera} as justification for holding that the availability of the Texas clemency process gives the court no option but to deny an actual innocence claim.\textsuperscript{63} Indeed, the \textit{Lucas} court interpreted the \textit{Herrera} decision as automatically precluding an actual innocence claim whenever the executive clemency process is available.\textsuperscript{64}

However, this reliance on the clemency process is not universally shared. In \textit{United States v. Quinones},\textsuperscript{65} Judge Rakoff of the United States District Court for the Southern District of New York dismissed the holding in \textit{Herrera} that the clemency process is a suitable method for gaining relief when an otherwise constitutionally convicted prisoner makes a convincing showing of innocence.\textsuperscript{66} Instead, Judge Rakoff noted that several studies have shown that in recent years there has been a steep decline in the number of clemencies granted.\textsuperscript{67} Judge Rakoff then held that the \textit{Herrera} Court's refusal to recognize a claim of actual innocence was flawed because recent advances in DNA technology could sufficiently provide the "truly persuasive demonstration" of actual innocence that the court had suggested would trigger such a claim.\textsuperscript{68} In fact, Judge Rakoff went as far as to declare the federal death penalty unconstitutional because it cuts short the innocent capital prisoners' potential ability to discover and demonstrate his or her actual innocence.\textsuperscript{69}

Nonetheless, most courts recognize the clemency process as the appropriate venue for an innocent prisoner to obtain relief.\textsuperscript{70} Although the courts have traditionally relied on the clemency authority to handle claims of "actual innocence," the courts have not mandated

\textsuperscript{61} \textit{Id.}
\textsuperscript{62} 132 F.3d 1069 (5th Cir. 1998).
\textsuperscript{63} \textit{Id.} at 1075.
\textsuperscript{64} \textit{Id.}
\textsuperscript{65} 196 F. Supp. 2d 416 (S.D.N.Y. 2002).
\textsuperscript{66} \textit{Id.} at 417.
\textsuperscript{67} \textit{Id.} at 420; see also Hugo Adam Bedau & Michael L. Radelet, \textit{Miscarriages of Justice in Potentially Capital Cases}, 40 STAN. L. REV. 21 (1987) (cataloging errors in capital convictions that have led to the execution of innocent prisoners).
\textsuperscript{68} \textit{Quinones}, 196 F. Supp. 2d at 419-20.
\textsuperscript{69} United States v. Quinones, 205 F. Supp. 2d 256, 268 (S.D.N.Y. 2002).
\textsuperscript{70} See, e.g., Royal v. Taylor, 188 F.3d 239 (4th Cir. 1999) (stating that "state clemency proceedings provide the proper forum to pursue claims of actual innocence based on new facts").
procedural or substantive due process protections to ensure the integrity of the clemency process.

C. The Supreme Court's Failure to Place Due Process Restraints on the Clemency Decision-Making Process

The Supreme Court has been extremely reluctant to place any due process or other judicial restraints on the clemency decision.\textsuperscript{71} In fact, the courts have generally been unwilling to recognize any constitutional right to a clemency hearing.\textsuperscript{72} In \textit{Connecticut Board of Pardons v. Dumschat},\textsuperscript{73} the Supreme Court held that "pardon and commutation decisions have not traditionally been the business of the courts" and therefore cannot be subject to anything but minimal judicial review.\textsuperscript{74} Describing an inmate's expectation of clemency as nothing more than "a unilateral hope," the Court in \textit{Dumschat} stated that the subjective nature of the pardoning authority to consider any and all factors insulates the clemency process from due process implications.\textsuperscript{75}

In \textit{Greenholtz v. Nebraska Penal Inmates},\textsuperscript{76} the Supreme Court determined that a prisoner did not have a constitutional right to parole because there is no constitutional right to be "released before the expiration of a valid sentence."\textsuperscript{77} The Court also held that once convicted, a prisoner has been effectively and constitutionally deprived of his liberty interest.\textsuperscript{78} In addition, the Court held that absent a right conferred by the state, a prisoner has no constitutional entitlement to be released from a valid prison sentence.\textsuperscript{79}

In \textit{Ohio Adult Parole Authority v. Woodard},\textsuperscript{80} the Supreme Court held that the clemency process is not an indispensable part of the judicial process of determining the guilt or innocence of a defen-

\textsuperscript{72} Woratzeck v. Stewart, 118 F.3d 648, 653 (9th Cir. 1997) (recognizing also that "clemency does not depend upon actual innocence").
\textsuperscript{73} 452 U.S. 458 (1981).
\textsuperscript{74} Id. at 464.
\textsuperscript{75} Id. at 464-65; see also Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 280-81 (1998) (finding that the clemency process does not ensure due process procedural safeguards, but is a "matter of grace" which allows "the executive to consider a wide range of factors not comprehended by earlier judicial proceedings and sentencing determinations").
\textsuperscript{76} 442 U.S. 1 (1979).
\textsuperscript{77} Id. at 7 (finding no liberty right in commutation).
\textsuperscript{78} Id.
\textsuperscript{79} Dumschat, 452 U.S. at 463-64 (citing Greenholtz, 442 U.S. at 7).
\textsuperscript{80} 523 U.S. 272 (1998).
The Court confirmed the independence of the clemency process from the judiciary, but rejected the assertion that it "is an integral part of the judicial system." The Court found that because clemency proceedings are not part of the determination of guilt or innocence at the trial, the clemency decision is insulated from review by the judiciary. In addition, the Court confirmed the independence of the clemency process by stating that clemency is most appropriately left to the executive branch of government and is "not intended primarily to enhance the reliability of the trial process.

While the courts have generally recognized that clemency decisions are not subject to judicial review, Justice O'Connor argued in a concurring opinion in Woodard that the clemency process should not exist without "some minimal procedural safeguards." Justice O'Connor argued that while a clemency authority should have broad authority to grant pardons, judicial intervention might "be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process." Justice Stevens, in his dissenting opinion in Woodard, further stressed that a lack of procedural safeguards would allow for clemency procedures "infected by bribery, personal or political animosity, or the deliberate fabrication of false evidence" to be constitutional. However, the question of whether a truly illegal or entirely arbitrary clemency process violates constitutional safeguards has never been decided by the Supreme Court.

D. The Uncertainties Surrounding a Right of Post-Conviction Access to DNA Evidence

While the Supreme Court has held that the clemency authority's decision to grant or reject clemency is free from judicial review, the increasing use of post-conviction DNA testing has strengthened a pris-
oner's ability to present a case of actual innocence to the clemency authority.90 Advances in DNA technology have revolutionized the American criminal justice system within the last decade.91 Whether it is the ability to identify suspects for murders that have been unsolved for decades or the ability to demonstrate the innocence of a prisoner many years after his conviction, advances in DNA testing procedures have had important post-conviction implications.92 According to the Innocence Project, an organization comprised of law students and attorneys who work to exonerate prisoners using modern DNA testing, over 131 prisoners have been found innocent as a result of favorable DNA testing that was not available at the time of their trial.93 Although access to old evidence for the purpose of modern DNA testing is sometimes available through the prerogative of the prosecutor’s office, or by statute, such access to evidence has rarely been based on constitutional due process.94

In Cherrix v. Braxton,95 the United States District Court for the Eastern District of Virginia upheld an order granting a prisoner’s request for re-testing of old evidence using advanced DNA technology not available at his trial.96 The court held that the prisoner was entitled to DNA re-testing under a federal statute97 that provides for federal funding for indigent capital defendants to pursue services that may support a post-conviction proceeding seeking to set aside a death sentence.98 The court held that the re-testing was necessary so that

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90. *See* National Institute of Justice, Office of Justice Programs, U.S. Department of Justice, Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence after Trial (1996) (presenting case studies of twenty-eight instances where long-term prisoners were exonerated using DNA evidence).

91. *See* United States v. Quinones, 205 F. Supp. 2d 256, 264 (S.D.N.Y. 2002) (stating that “[w]hat DNA testing has proved, beyond cavil, is the remarkable degree of fallibility in the basic fact-finding processes on which we rely in criminal cases”).

92. Ralph Brave, *DNA as Evidence: A Work in Progress*, BALTIMORE SUN, Sept. 8, 2002, at F1 (describing the use of DNA evidence to solve crimes that have remained unsolved for decades).


96. *Id.* at 770.


98. Cherrix, 131 F. Supp. 2d at 765.
the prisoner could pursue a claim of actual innocence.\footnote{Id. at 767.} While the court noted the holding in \textit{Herrera} rejecting the existence of a claim of actual innocence, the court stated that such exculpatory DNA evidence may be enough to "meet the standard of a truly persuasive showing of actual innocence."\footnote{Id. at 766.} In addition, the court held that the prisoner was entitled to DNA re-testing so that he could present a meaningful clemency petition.\footnote{Id. at 768-69.} On appeal, the United States Court of Appeals for the Fourth Circuit refused to vacate the order authorizing the funding of DNA testing.\footnote{\textit{In re Braxton}, 258 F.3d 250, 259 (4th Cir. 2001).} While the Fourth Circuit upheld the order because it determined the warden's appeal lacked jurisdiction, Judge King's opinion left undisturbed the district court's reasoning that DNA re-testing was "necessary to support [defendant] Cherrix's claims of actual innocence . . . and innocence as a 'gateway' to proving other constitutional claims . . . as well as a potential clemency petition."\footnote{Id. at 255 (citing Schlup v. Delo, 513 U.S. 298, 327 (1995)).}

In \textit{Quinones}, the United States District Court for the Southern District of New York also found that the recent advances in DNA technology since the \textit{Herrera} decision invalidated the holding of \textit{Herrera} that a claim of actual innocence does not exist.\footnote{United States v. Quinones, 196 F. Supp. 2d 416, 417 (S.D.N.Y. 2002).} The court stated that modern DNA technology can "supply the kind of 'truly persuasive demonstration' of actual innocence to which Chief Justice Rehnquist had hypothetically alluded to [in \textit{Herrera}]."\footnote{Id. at 420.} The court then concluded that because scientific advances such as modern DNA technology have shown the criminal justice system to be more fallible than previously thought, there is an intolerable possibility that capital prisoners may be executed before technology is developed that could prove their innocence.\footnote{Id. at 268 (E.D. Va. 2002).} Therefore, because the implementation of capital punishment "cut[s] off the opportunity for exoneration, denies due process, and indeed, is tantamount to foreseeable, state-sponsored murder of innocent human beings," the court found the federal death penalty unconstitutional.\footnote{United States v. Quinones, 205 F. Supp. 2d 256, 268 (E.D. Va. 2002).}

Recently, the Fourth Circuit considered whether due process mandated that a prisoner be granted access to state-held DNA evidence so that the prisoner could pursue a claim of actual inno-
cence. In Harvey v. Horan, the court held that there is no constitutional right of access to old evidence for the purpose of DNA testing. In an opinion denying a rehearing en banc, Chief Judge Wilkinson reaffirmed that the prisoner's petition for access to old evidence was procedurally defaulted, and held that there was no constitutional right of post-conviction access to DNA evidence. Chief Judge Wilkinson expressed concern over the consequences of declaring such a right, including issues of federalism and the conditions under which the right would be triggered. Although he recognized that technological advances are integral to the evolution of the criminal justice system, Chief Judge Wilkinson argued that this did not "mean that we are free to constitutionalize a right of access to the fruits of scientific discoveries." In contrast, Chief Judge Wilkinson stated that the proper forum for determining the existence of a right, and the scope of such a right, was the legislature, not the courts.

Judge Luttig, in an opinion respecting the denial of a rehearing, argued that a constitutional right of access to DNA evidence existed as a matter of fairness. Rejecting the district court's reasoning for finding a constitutional right under traditional constitutional jurisprudence, Judge Luttig stated that under Mathews v. Eldridge, and

109. Harvey, 285 F.3d at 301 (Wilkinson, C.J., concurring in the denial of rehearing and rehearing en banc).
110. Id.
111. Id. at 300-04.
112. Id. at 301.
113. Id. at 304 (stating that Judge Luttig's "approach treats both state legislatures and state court systems as junior partners with respect to their own trials and judgments"). Prior to the final decision being issued, Harvey utilized a recently enacted Virginia statute, Va. Code Ann. § 19.2-327.1 (2001), to obtain access to old evidence and subsequently was able to perform the DNA testing that he originally had requested from the court. Brooke A. Masters, DNA Testing Confirms Man's Guilt in Va. Rape, Wash. Post, May 16, 2002, at B1. The test results confirmed that he was indeed involved in the 1989 rape of a Virginia woman. Id.
114. Harvey, 285 F.3d at 304 (Luttig, J., respecting the denial of rehearing en banc).
115. Judge Luttig did not find support for a constitutional right within relevant case law. See Brady v. Maryland, 373 U.S. 83, 86 (1963) (holding that suppression of evidence favorable to a defendant violates the due process clause), Herrera v. Collins, 506 U.S. 390, 391 (1993) (holding that there is no free-standing claim of "actual innocence," but stating arguendo that a truly persuasive showing of freestanding actual innocence may state a claim), or Arizona v. Youngblood, 488 U.S. 51, 57 (1988) (finding that the due process clause is violated if the prosecution fails to preserve potentially exculpatory evidence in bad faith). Harvey, 285 F.3d at 315 (Luttig, J., respecting the denial of rehearing en banc).
116. 424 U.S. 319, 348-49 (1976) (creating a standard of review of constitutional violations whereby the interests of the government and the individual are balanced).
the more stringent standard developed in *Medina v. California*, there is a constitutional due process right to access evidence for re-testing when that evidence was used by the government to obtain the defendant's conviction.

While courts generally recognize the importance of post-conviction DNA testing to the integrity of the criminal justice system, there is no consensus as to whether the Constitution mandates that prisoners be granted access to such evidence and testing. Instead, most courts recognize the legislative process as the proper forum for creating such a right. However, Congress and state legislatures have yet to fully heed the call to provide prisoners with a statutory mechanism to access evidence for DNA testing.

II. Analysis

This Comment advocates the recognition of a constitutional due process right of access to state-held DNA evidence based on the recognition of an implied constitutional right of meaningful access to the clemency process. Because the Supreme Court has held that the appropriate venue for a convicted yet innocent prisoner to present an "actual innocence" claim is not in front of the courts but in front of a clemency authority, it violates due process to deny a prisoner the meaningful ability to present evidence of innocence to the clemency authority.

117. 505 U.S. 437, 445 (1992) (stating that a criminal law is "not subject to proscription 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'" (quoting Speiser v. Randall, 357 U.S. 513, 523 (1958) (internal citations omitted)).

118. *Harvey*, 285 F.3d at 315 (Luttig, J., respecting the denial of rehearing en banc).

119. See, e.g., *Harvey*, 285 F.3d at 301 (Wilkinson, C.J., concurring in the denial of rehearing and rehearing en banc) (stating that although the court does not hold that there is a constitutional right of access, prisoners should be granted access to the use of scientific technologies through legislatively created mechanisms).

120. *Id.*

121. The Innocence Protection Act, which has been languishing in Congress since 2001, would grant federal prisoners the ability to access DNA evidence for the purpose of testing under modern DNA technology. Innocence Protection Act of 2001, S.B. 486, 107th Cong. (2001). In addition, the legislation would require "States to adopt comparable procedures as a condition of receiving federal funds for DNA-related programs." One Page Summary of the Leahy-Specter-Feinstein-Biden-Durbin-Edwards Substitute Amendment to S. 486, The Innocence Protection Act (July 16, 2003), at http://leahy.senate.gov/press/200207/071102a.html. This legislation, co-sponsored by Sen. Patrick Leahy (D-Vt.), is likely to be reintroduced, and is expected to pass with bipartisan support. The Innocence Project: Legislation (July 16, 2003), at http://www.innocenceproject.org/legislation/index.php.

122. See *Herrera v. Collins*, 506 U.S. 390, 411-12 (1993) (stating that clemency is "the historic remedy for preventing miscarriages of justice where judicial process has been exhausted").
This Part begins by briefly reviewing the Supreme Court decisions that have impacted a prisoner's ability to bring an "actual innocence" claim or a clemency petition, and the dilemma that those holdings create. Next, this Part describes the origins and rationales for recognizing both a right of meaningful access to the clemency process and a right to access state-held DNA evidence. Third, this Part confronts the traditional rationales for refusing to recognize such a right, and demonstrates how framing the right within an ability to meaningfully access the clemency process can avoid those traditional pitfalls. Finally, this Part outlines the contours of such a right, including requirements of materiality of the evidence and of reliability of the testing technology.

A. The Dilemma Created by Herrera and Dumschat

To understand the necessity for a constitutional due process right of meaningful access to the clemency process, one must understand the dilemma created by the conflicting nature of two lines of Supreme Court jurisprudence. In Herrera, the Supreme Court refused to recognize a prisoner's ability to bring a habeas corpus claim based on his actual innocence.123 The Court held that because of the historical unavailability of such a claim, there was no need to create a free-standing "actual innocence" claim that would disturb the finality of constitutional convictions.124 The Court, instead, held that the proper forum for presenting such an "actual innocence" claim was in front of the clemency authority, not the courts.125 Describing the clemency process as a "fail safe" for innocent prisoners, the Court relied on the historical availability of clemency as its rationale for refusing to allow the prisoner's habeas relief.126

In Dumschat and Woodard, the Supreme Court held that the clemency decision could not be subjected to anything but minimal judicial review.127 The Court held that the clemency process was completely separate from the judicial process, and rejected the assertion that clemency was "not intended primarily to enhance the reliability of the trial process."128

123. Id. at 406-07.
124. Id. at 401-02.
125. Id. at 411-12.
126. Id. at 411, 415.
128. Woodard, 523 U.S. at 284.
By holding that the proper forum for determining actual innocence claims is the clemency process, the Court has removed an innocent prisoner's last chance for freedom from the constitutionally protected judicial process to the constitutionally void clemency process.129 This reflects not a disdain for the actually innocent prisoner but a deep respect and faith in the clemency process as a "fail safe" for ensuring that innocent prisoners are not incarcerated, or worse yet, executed.130 It appears hypocritical for the Supreme Court to place great faith and respect in a process that is essentially outside the scope of constitutional review. Nevertheless, this faith and respect are in serious jeopardy if prisoners are not equipped with a right to meaningfully access the clemency process.

For example, in Harvey, the United States Court of Appeals for the Fourth Circuit considered a prisoner's request for access to potentially exculpatory state-held DNA evidence.131 Although the prisoner, Harvey, proclaimed his innocence of the rape he had been convicted of twelve years earlier, the court found that his request did not present any constitutionally recognized claim for habeas corpus relief.132 However, Harvey's actual innocence claim was to be based on the results of modern DNA testing on evidence that had been tested twelve years ago using obsolete technology.133 Nonetheless, the court denied his request for access to this DNA evidence based on the lack of a constitutional right of access to such evidence.134 By failing to allow a judicial remedy, the court left Harvey with few viable options, one being an appeal to the clemency authority.135 However, without exculpatory DNA results, Harvey's appeal to the clemency authority would be at best impotent. A failure of the clemency authority to provide Harvey with an effective avenue of relief would, therefore, undermine

129. See Herrera, 506 U.S. at 417 (stating that the "traditional remedy for claims of innocence based on new evidence, discovered too late in the day to file a new trial motion, has been executive clemency"); Dunnchat, 452 U.S. at 464 (stating that "pardon and commutation decisions . . . are rarely, if ever, appropriate subjects for judicial review").

130. Herrera, 506 U.S. at 415.


132. Id. at 372, 377.

133. Id. at 375.

134. Id. at 377.

135. See Herrera, 506 U.S. at 417 (stating that the "traditional remedy for claims of innocence based on new evidence, discovered too late in the day to file a new trial motion, has been executive clemency").
the faith and responsibility the Herrera Court places in the clemency process.136

B. Supreme Court Relegation of Actual Innocence Claims to the Clemency Process Necessitates a Due Process Right of Access to Evidence to Present a Meaningful Claim in Front of the Clemency Authority

In Harvey, the United States Court of Appeals for the Fourth Circuit denied Harvey's request for the DNA evidence because they saw his request as part of an attempt to bring an actual innocence claim before the court.137 The court found that because the Supreme Court had already precluded free-standing claims of actual innocence, Harvey's request was an impermissible method of attacking a valid conviction.138 However, the court's opinion did not discuss whether access to the evidence would have been granted had the request been based on an ability to meaningfully present that evidence to the clemency authority.

Because the Supreme Court has placed great weight and faith in the clemency process as the "fail safe" for innocent prisoners,139 the Court should recognize a right of meaningful access to the clemency process. Although the Court has held that the clemency decision itself is free from judicial review,140 the Court has consistently affirmed the importance of the clemency process in ensuring the integrity of the criminal justice system.141 Indeed, the Court in Herrera described the deep history and entrenched role that clemency has played in preventing the constitutionally convicted yet innocent prisoner from languishing in prison or from being executed.142 In addition, several courts have relied on the holding in Herrera and based their decisions not to grant "actual innocence" relief on the mere fact that a clemency process existed in those jurisdictions.143

136. Id. at 411-12 (stating that clemency "is the historic remedy for promoting miscarriages of justice where judicial process has been exhausted").
137. Harvey, 278 F.3d at 375 (stating that "Harvey is seeking access to DNA evidence for one reason and one reason only—as the first step in undermining his conviction").
139. Herrera, 506 U.S. at 415.
141. Herrera, 506 U.S. at 411-17.
142. Id.
143. See Royal v. Taylor, 188 F.3d 239, 243 (4th Cir. 1999) (stating that because Virginia has a clemency process available to the prisoner, "we cannot grant [the prisoner] the requested habeas relief based simply on his assertion of actual innocence due to newly discovered evidence"); Lucas v. Johnson, 132 F.3d 1069, 1074-76 (5th Cir. 1998) (interpreting the Herrera language to automatically preclude the existence of an actual innocence claim
In relying on the clemency process to fulfill an articulated and unique position in the criminal justice system,\textsuperscript{144} it is imperative that the Court uphold and maintain the integrity of the process. Therefore, the Court must ensure that prisoners have the tools necessary to present a meaningful petition to the clemency authority. Part of this meaningful ability to access the clemency process should be the ability to access state-held evidence for the purposes of modern DNA testing.

Although recognizing a right of meaningful access to the clemency process injects the shadow of due process over an area traditionally free from judicial review,\textsuperscript{145} this proposed right would have no bearing on the independence of the clemency authority's decision-making process. Although \textit{Dumschat} and \textit{Woodard} held that the clemency process and decision itself are free from judicial review,\textsuperscript{146} a constitutional right to meaningfully access the clemency process does nothing to disturb these holdings. Part of the uniqueness of the clemency decision is the clemency authority's ability to use essentially any rationale or reasoning as a basis for its clemency decision.\textsuperscript{147} A constitutional right of meaningful access would only ensure that the prisoner would be provided with the tools to fully craft his or her plea of innocence. Once that plea arrives on the desk of the clemency authority, that authority would remain free to reject or grant clemency based on whatever factors that authority sees fit.\textsuperscript{148} However, if a prisoner was given the ability to meaningfully present evidence to the clemency authority, this would allow the clemency authority to more fully fulfill its traditional "fail safe" role by making more informed, and thereby accurate, clemency decisions.\textsuperscript{149}

Because of the long-standing history and the confidence that the Supreme Court has placed in the clemency authority, the denial of a prisoner's ability to meaningfully present a clemency petition violates "a principle of justice so rooted in the traditions and conscience of whenever the executive clemency process is available); \textit{Herrera}, 506 U.S. at 428 (Scalia, J., concurring) (refusing to create a free-standing claim of actual innocence based partly on the notion that "it is improbable that evidence of innocence as convincing as today's opinion requires would fail to produce an executive pardon").

\textsuperscript{144} \textit{Herrera}, 506 U.S. at 411-17.
\textsuperscript{145} \textit{Dumschat}, 452 U.S. at 464.
\textsuperscript{147} \textit{Dumschat}, 452 U.S. at 464 (stating that a commutation decision "generally depends not simply on objective factfinding, but also on purely subjective evaluations and on predictions of future behavior by those entrusted with the decision").
\textsuperscript{148} \textit{Id.}
\textsuperscript{149} \textit{Herrera}, 506 U.S. at 417.
our people [that it is] ranked as fundamental.\textsuperscript{150} By recognizing a constitutional right of access to state-held DNA evidence, the Court could ensure the integrity and utility of the clemency process as the last hope and "fail safe" for the constitutionally convicted yet innocent prisoner.\textsuperscript{151}

C. Addressing the Traditional Concerns in Establishing a Post-Conviction Constitutional Right of Access to DNA Evidence

The resistance to the creation of a right of post-conviction access to DNA evidence has not been purely theoretical. Indeed, the court in \textit{Harvey} identified several concerns with the consequences of such a right, including issues of compromising finality, creating a burden on the criminal justice system, and disruptions of notions of federalism.\textsuperscript{152} Although the \textit{Harvey} court's concerns are legitimate, a constitutional right of access premised on the ability to meaningfully access the clemency process would not offend the principles the \textit{Harvey} court used to trump the creation of that right.\textsuperscript{153}

1. Finality.—The Fourth Circuit misidentified the issue in \textit{Harvey} when it stated: "[w]e are asked to declare a general constitutional right for every inmate to continually challenge a valid conviction based on whatever technological advances may have occurred since his conviction became final."\textsuperscript{154} The court further claimed that the "possibility of post-conviction developments, whether in law or science, is simply too great to justify judicially sanctioned constitutional attacks upon final criminal judgments."\textsuperscript{155} However, what is proposed in this Comment is not a method for pursuing the invalidity of judgments through the judicial system, but a method of ensuring that pris-

\textsuperscript{150} Medina v. California, 505 U.S. 437, 445 (1992) (holding that in issues of criminal procedure, in order to prevent intrusion "upon the administration of justice by the individual States," a decision is "not subject to proscription 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" (quoting Speiser v. Randall, 357 U.S. 513, 523 (1992) (internal citations omitted))).

\textsuperscript{151} Herrera, 506 U.S. at 411-17.

\textsuperscript{152} Harvey v. Horan, 285 F.3d 298, 298-304 (4th Cir. 2002) (Wilkinson, C.J., concurring in the denial of rehearing and rehearing \textit{en banc}).

\textsuperscript{153} Chief Judge Wilkinson's resistance to a right of post-conviction access to DNA evidence was premised on a prisoner's ability to use this evidence in an actual innocence claim presented in court. \textit{Id}. at 299. This Comment does not dispute that a right of post-conviction access to DNA evidence, coupled with the ability to bring a claim of actual innocence, would have farther reaching consequences than a right of access for the purpose of presenting material evidence to a clemency authority.

\textsuperscript{154} Harvey v. Horan, 278 F.3d 370, 375 (4th Cir. 2002).

\textsuperscript{155} \textit{Id}. at 376.
oners can meaningfully participate in the clemency process, free from judicial review.

Indeed, the Harvey court’s refusal to recognize a right to judicially attack constitutional convictions properly respects the concept of finality of constitutional convictions that has been one of the cornerstones of our criminal justice system. However, if a right of access is instead premised on an ability to access the clemency process, the integrity of constitutional convictions will not be threatened. Had the prisoner, Harvey, been given a right of access to his DNA evidence, he would have still had no right to present that evidence in a judicial forum. Instead, Harvey would have had to rely on the strength of his evidence to win a pardon from the executive. The constitutional right of access proposed in this Comment recognizes that the clemency process is the proper forum for raising actual innocence claims.

Therefore, because a constitutional right premised on the meaningful right of access to clemency is not based on the ability to attack final judgments in state courts, no court would be forced to face the “embarrassing question” of whether an innocent person has been convicted, despite the broad protections of the Constitution. Rather, this duty would remain with the clemency authority, whose decision is not subject to judicial review.

2. Burden on the System.—The Harvey court also suggested that the creation of a constitutional right of access to DNA testing would create an undue burden on the criminal justice system. However, this argument is premised on a broad creation of such a right. Despite the legitimate questions posed by Chief Judge Wilkinson concerning the scope of an assumed right, and Judge Luttig’s failure to articulate the scope of his proposed right to access state-held DNA

156. Herrera, 506 U.S. at 404 (failing to recognize a freestanding claim of actual innocence).
157. Id. at 417.
158. Id.
159. Id. at 428 (Scalia, J., concurring).
161. See Harvey v. Horan, 285 F.3d 298, 301 (4th Cir. 2002) (Wilkinson, C.J., concurring in the denial of rehearing and rehearing en banc) (finding that the benefits of creating a federal constitutional right to access DNA evidence do not outweigh the drain on resources that would result).
162. Id. Chief Judge Wilkinson characterizes the intent of Judge Luttig as one to create a constitutional “right of access to the fruits of scientific discoveries.” Id.
evidence, the existence of a narrowly confined right, described in the
next section, would create no more burden on the system than is nec-
essary to ensure that all viable claims of actual innocence are ad-
dressed by the proper authority. 163 Judge King of the United States
Court of Appeals for the Fourth Circuit, addressing an identical ques-
tion in In re Braxton, 164 rejected the argument that "an influx of mo-
tions for DNA testing and preservation of evidence in the district
courts . . . would result in 'serious, perhaps irreparable consequences,'
where the courts presumably would dispose of the motions on their
merits in the regular course of business." 165 Indeed, using the con-
cept of a broad right as a strawman ignores the impact that a narrowly
defined right would have in balancing the burden on the system with
the interest of preventing the incarceration (and possible execution)
of innocent individuals. A constitutional right premised on access to
the clemency process would have no more impact on the system than
would a statute granting this same right. Indeed, had a burden on the
system been a legitimate interest, the Virginia legislature would not
have enacted a statute granting prisoners access to old DNA evi-
dence. 166 Although Chief Judge Wilkinson's interest in an efficient
criminal justice system is well-founded, establishing a limited right of
access to DNA testing recognizes the stronger interest of preventing
the confinement of innocent prisoners. 167

3. Federalism.—In addition to concerns over finality and burden-
ing the system, the Harvey court also stated that the proper forum for
determining a right to post-conviction access to DNA testing is the
legislature, not the judiciary. 168 However, this notion is based on con-
fidence, albeit well-founded, that the legislature will provide the ap-
propriate remedy. In placing the responsibility with the legislature,
the court avoids the question that would be raised had the Virginia

163. Id. at 300-01; id. at 320-21 (Luttig, J., respecting the denial of rehearing en banc).
164. 258 F.3d 250 (4th Cir. 2001).
165. Id. at 259.
166. See VA. CODE ANN. § 19.2-327.1 (2002) (allowing convicted felons in Virginia to
apply to the court for DNA testing if biological evidence was not tested using modern DNA
technology and the testing is "materially relevant, noncumulative, and necessary and may
prove the convicted person's actual innocence").
purpose of any system of criminal justice is to convict the guilty and free the innocent").
168. Harvey, 285 F.3d at 301, 303 (Wilkinson, C.J., concurring in the denial of rehearing
and rehearing en banc) (finding that constitutionalization of the right of access to DNA
evidence despite "all this legislative activity and variation is to evince nothing less than a
loss of faith in democracy").
legislature refused to recognize such a right.\textsuperscript{169} Indeed, it is up to the legislature to determine what post-conviction options are available to a prisoner.\textsuperscript{170} However, for the judiciary to recognize a right of post-conviction access to DNA testing neither disturbs nor supercedes the ability of the legislature to determine a prisoner's ability to utilize the judiciary to attack the validity of a conviction. Because the courts do not recognize a claim of actual innocence, Harvey's access to DNA testing affords him no more ability to attack his proper conviction than if he was denied the access to testing.\textsuperscript{171} Indeed, had Harvey's testing been favorable, he would have had to rely either on the discretion of the prosecutor to re-open his case, or appeal to the traditional avenue of the clemency process.\textsuperscript{172} The ability to pass on the innocence or guilt of a properly convicted individual remains firmly independent from the judiciary.\textsuperscript{173} Therefore, affording a prisoner a constitutional right to access and test old evidence does not "improperly short-circuit legislative activity."\textsuperscript{174}

Despite the fact that many legislatures have acted and passed statutes granting post-conviction access to evidence for DNA testing, the need for a judicial recognition of a constitutional right of meaningful access to the clemency process still persists.\textsuperscript{175} However, it remains up to the state legislatures to determine a prisoner's ability to utilize the new test results in the judicial arena.\textsuperscript{176}

\textsuperscript{169} Chief Judge Wilkinson curiously neglected to mention this possibility, even though he stated, as the first sentence in his opinion: "There is no doubt that Harvey should receive the biological evidence in this case for DNA testing using technology that was unavailable at the time his Virginia conviction became final." \textit{Id.} at 298.


\textsuperscript{171} \textit{Herrera}, 506 U.S. at 404.

\textsuperscript{172} Masters, \textit{supra} note 113; \textit{see Herrera}, 506 U.S. at 412 n.13 (stating "clemency has provided the historic mechanism for obtaining relief in such circumstances").

\textsuperscript{173} \textit{See} Conn. Bd. of Pardons v. Dumschat, 452 U.S. 458, 464 (1981) (finding the clemency process free from the limits of the due process clause); Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 280 (1998) (supporting the executive branch's control over clemency because the executive can consider a whole range of factors that the judiciary cannot).

\textsuperscript{174} \textit{Harvey}, 278 F.3d at 376.

\textsuperscript{175} Harvey v. Horan, 285 F.3d 298, 302 (4th Cir. 2002) (Wilkinson, C.J., concurring in the denial of rehearing and rehearing \textit{en banc}).

\textsuperscript{176} \textit{See Herrera}, 506 U.S. at 410-11 (noting the diversity in the length of time in which different states allow prisoners to bring motions for new trials based on newly discovered evidence).
D. The Parameters of an Effective Constitutional Right of Post-Conviction Access to DNA Evidence

Although Judge Luttig, in Harvey, recognized the existence of a due process right of post-conviction access to DNA testing, he failed to fully define the parameters of such a right. Indeed, Judge Luttig merely stated that he would "narrowly confine the right," and that "the standards governing when this right may be asserted would be correspondingly strict and limiting." It is proper to note, as Chief Judge Wilkinson did, that there is significant disagreement as to the specifics of such a right. Although the scope of such a right has been strenuously debated in both state legislatures and Congress, it is apparent that there is near universal agreement on the basic framework that would make up a "narrowly confine[d]" right of access.

1. The Substantive Right.—As a substantive matter, the right to access DNA testing should only be available in situations where a favorable test result would be "materially relevant . . . and may prove the convicted person's actual innocence." This standard, based on Virginia's recently enacted statute concerning a prisoner's right to access, is not trivial. The Court in United States v. Bagley defined material evidence as evidence that if disclosed, has the potential to "undermine confidence in the outcome" of a criminal proceeding. Although the Court has refused to create a specific standard for determining "actual innocence," the Court in Schlup v. Delo used the "undermine confidence in the outcome" standard to craft a standard for when a prisoner may use "actual innocence" as a gateway to pursue a time-barred constitutional violation. The nature of the right of post-conviction access proposed in this Comment is essentially a method to present evidence of factual evidence to a clemency author-

177. Harvey, 285 F.3d at 321 (Luttig, J., respecting the denial of rehearing en banc) (stating that the mootness of the issue rendered it imprudent to flesh out the parameters and standards of a theoretical right).
178. Id.
179. Id. at 302-03 (highlighting the differences in state statutes granting prisoners the right of post-conviction access to DNA evidence).
180. Id. at 300-01 (stating "Harvey would have the federal courts disregard the fact that both the Congress of the United States and the various state legislatures are presently wrestling with exactly these sorts of questions").
182. Id.
184. Id. at 682.
186. Id. at 316; see Herrera v. Collins, 506 U.S. 390, 392 (1993) (suggesting that any claim of actual innocence would have to meet an "extraordinarily high" threshold).
ity. Therefore, it is proper to apply a Bagley standard since the inherent goal of the clemency process is to ensure that confidence remains in an infallible criminal justice system by “preventing miscarriages of justice where judicial process has been exhausted.” 187

In addition, several sources suggest that a right of access to DNA testing should only be available when identity was an issue at trial. 188 However, this requirement is not necessary, as any favorable DNA test result which would prove a prisoner’s “actual innocence,” would by definition involve a situation in which identity was an issue at trial. In Jenner v. Dooley, 189 the Supreme Court of South Dakota, in recognizing a right of access, considered post-conviction testing to be most appropriate when:

(a) identity of a single perpetrator is at issue; (b) evidence against the defendant is so weak as to suggest real doubt of guilt; (c) the scientific evidence, if any, used to obtain the conviction has been impugned; and, (d) the nature of the biological evidence makes testing results on the issue of identity virtually dispositive. 190

While these guidelines assist in presenting examples of the proper use of the right, such articulation of the boundaries of a right may be unnecessarily limiting. Indeed, a court utilizing this right of access should have the discretion to determine the circumstances under which exculpatory modern DNA testing could undermine confidence in a criminal conviction.

2. The Procedural Right.—Next, it is important to define the procedural safeguards that would ensure that any post-conviction DNA testing is reliable and valid. First, courts and statutes, such as Virginia’s recently enacted DNA access statute, 191 have consistently provided access only where the evidence has been subjected “to a chain of custody sufficient to establish that the evidence has not been altered, tampered with, or substituted in any way.” 192 In addition, the testing method utilized must itself be recognized as reliable. 193 Therefore, the testing method must meet the reliability standards of those testing

189. 590 N.W.2d 463 (S.D. 1998).
190. Id. at 472.
192. Id.
193. Id.
methods used for test results admissible during a valid trial.\textsuperscript{194} In the interest of finality, any right of access to DNA testing should also require that the requested method of testing be of a type not available at the time that a prisoner's conviction became final.\textsuperscript{195} Also, pursuant to Supreme Court precedent finding no right to counsel subsequent to a first appeal of right, a constitutional right of post-conviction access to DNA testing would not confer a right of counsel on a prisoner who wishes to exercise his right.\textsuperscript{196}

Chief Judge Wilkinson, in \textit{Harvey}, also raised the question of who would bear the costs of the DNA testing.\textsuperscript{197} Although some statutes present a scheme in which the cost of a DNA test is predicated on the outcome of such a test, the fundamental nature of the right as a method of preventing a miscarriage of justice dictates that the "determination of when the State should pay for DNA testing should be left to the discretion of the trial court."\textsuperscript{198} Although a state's legislature may deem that additional safeguards are necessary, these requirements would ensure that a right of access to post-conviction DNA testing would only be granted in "extraordinary circumstances."\textsuperscript{199}

\section*{III. Conclusion}

The Supreme Court has recognized that unless a state provides an additional remedy, clemency is the sole remedy for the constitutionally convicted yet innocent prisoner.\textsuperscript{200} Therefore, certain safeguards must exist to ensure that an actually innocent prisoner has the ability to properly communicate his innocence to the appropriate authority. If a prisoner has been convicted on the basis of DNA evidence and new testing procedures have the ability to substantially demonstrate actual innocence, the due process clause of the Constitution mandates that the prisoner be given access to that exculpatory evidence. While a limited right of meaningful access to the clemency process does not eliminate the nature of clemency as an "act of grace" not

\begin{thebibliography}{9}
\bibitem{194} Id.
\bibitem{195} Id.
\bibitem{197} Harvey v. Horan, 285 F.3d 298, 300-01 (4th Cir. 2002) (Wilkinson, C.J., concurring in the denial of rehearing and rehearing \textit{en banc}).
\bibitem{198} See \textit{MD. CRIM. PROC. CODE ANN.} § 8-201 (2001); \textit{see also} Mebane v. State, 902 P.2d 494, 498 (Kan. Ct. App. 1995) (leaving the decision to provide funds for the DNA testing to the "sound discretion of the trial court").
\bibitem{199} Jenner v. Dooley, 590 N.W.2d 463, 472 (S.D. 1999) (stating that "[o]nly in extraordinary circumstances should a court allow post-conviction scientific testing").
\end{thebibliography}
subject to judicial review,\textsuperscript{201} a prisoner's ability to adequately communicate his post-conviction innocence at the clemency stage serves the interests of justice while preserving the integrity of the criminal justice system.

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