

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 DISTRICT ATTORNEY'S OFFICE :

4 FOR THE THIRD JUDICIAL :

5 DISTRICT, ET AL., :

6 Petitioners :

7 v. : No. 08-6

8 WILLIAM G. OSBORNE. :

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10 Washington, D.C.

11 Monday, March 2, 2009

12

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

16 APPEARANCES:

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18 Anchorage, Alaska; on behalf of the Petitioners.

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

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

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P R O C E E D I N G S

(10:05 a.m.)

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

Mr. Rosenstein.

ORAL ARGUMENT OF KENNETH M. ROSENSTEIN

ON BEHALF OF THE PETITIONERS

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

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

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

1 validity of his confinement.

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

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

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

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

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

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

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

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

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

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

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

25 MR. ROSENSTEIN: But the -- this evidence

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

3 JUSTICE SOUTER: No.

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

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

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

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

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

25 JUSTICE SOUTER: Oh, that -- that may be.

1 I'm not getting into that here.

2 JUSTICE SCALIA: Would the other side
3 concede the premise that he doesn't say that this is
4 going to exonerate him? That he has -- you know --
5 here's some -- some evidence out there. It may help me;
6 it may hurt me. I don't know which, but I -- I'd like
7 to see it.

8 Is -- is that the only claim he's making?
9 If so, it's -- it's a lot less -- what should I say -- a
10 lot less plausible a constitutional claim. There's some
11 evidence that I'd like to look at; I'm not saying it
12 will prove me innocent. I'd just like to look at this
13 evidence. Might, might not. That's a lot weaker claim
14 than what I had thought he was making, which is -- is
15 the claim that this -- this new scientific evidence will
16 -- will prove my innocence.

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

18 JUSTICE SCALIA: Well, which is he doing
19 here? Is -- is he saying the latter or not?

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

24 JUSTICE SCALIA: So -- so it's not a
25 constitutional claim of entitlement to evidence which he

1 asserts will prove his innocence, but rather a
2 constitutional claim to evidence which might or then
3 might not prove his innocence? Is that --

4 MR. ROSENSTEIN: He -- he has hedged, Your
5 Honor.

6 JUSTICE GINSBURG: Perhaps we should let
7 the -- let Osborne -- Osborne's attorney, address that
8 question, because you're not really equipped to answer
9 for the other side.

10 JUSTICE SCALIA: Well, we were -- we're
11 assuming the premise, though, in -- in the questioning.

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

20 JUSTICE GINSBURG: There was -- there was
21 evidence in -- at his trial at the state of the art at
22 that time. There was whatever the test was.

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

25 JUSTICE SCALIA: And that was not the state

1 of the art at the time, was it?

2 MR. ROSENSTEIN: That's my understanding,
3 that the RFLP testing was a much more discriminating
4 type of -- would yield a much more discriminating result
5 than the DQ Alpha.

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

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

8 JUSTICE GINSBURG: But -- but when did the
9 current technology become available? When did the test
10 -- testing that he now requests --

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

15 CHIEF JUSTICE ROBERTS: Does the State
16 routinely keep evidence of the sort Osborne is seeking
17 available? Or is there a cutoff point at which they
18 dispose of the evidence?

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

25 JUSTICE BREYER: What now? As far as I

1 understand, there's a procedural problem. I tried to
2 figure out the Heck line once in Balisok. My impression
3 of it is that if, Mr. Prisoner, you're bringing an
4 action challenging some confinement, or the effect of
5 your action is going to be to let you go out of solitary
6 or out of prison, then proceed your habeas. But if what
7 you're trying to get is relief that may or may not mean
8 you get out of solitary or you get out of prison, then
9 you go to 1983. But, by the way, if you're in 1983 you
10 are complaining about an action or inaction by a State
11 official that violates a constitutional right.

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

19 So I would appreciate your telling me why it
20 doesn't.

21 MR. ROSENSTEIN: Justice Breyer, the State
22 doesn't have an obligation to provide this evidence to
23 him because there is no -- a -- prisoners have no
24 Federal right to postconviction relief, and the State of
25 Alaska has provided procedures by which -- which Mr.

1 Osborne if he chose to use them could make available the
2 evidence that he seeks. But he hasn't chosen to invoke
3 those procedures.

4 JUSTICE GINSBURG: Would you explain that --

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

7 CHIEF JUSTICE ROBERTS: Justice Breyer.

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

13 MR. ROSENSTEIN: That's correct.

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

22 MR. ROSENSTEIN: Yes, Justice Ginsburg.

23 Alaska has a postconviction relief statute
24 and that is at page -- starts at page 10a of the blue
25 brief. And under that statute, a prisoner can assert a

1 claim for -- for postconviction relief when there exist
2 material facts -- I'm quoting from Alaska Statute
3 12.72.010. For -- postconviction relief is there
4 available when a person claims that there exists
5 evidence of material facts not previously presented and
6 heard by the court that requires vacation of the
7 conviction or sentence in the interest of justice.

8 Now, if you -- if Mr. Osborne were to state
9 a cognizable claim under that statute, the Alaska rules
10 of court then apply the full civil rules pertaining to
11 discovery as a right to the applicant.

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

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

22 So in that case the relief was granted, but
23 through the destruction of the evidence the -- no
24 testing was possible.

25 JUSTICE KENNEDY: Can you give me some idea

1 of how many cases there are in, say, the last 10 years
2 in which in State postconviction proceedings the
3 convicted prisoner has asked for DNA evidence?

4 MR. ROSENSTEIN: I believe --

5 JUSTICE KENNEDY: Three? Or 300?

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

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

17 He doesn't want to do that; he just wants to
18 say, you know, I'd just like to see this evidence.

19 MR. ROSENSTEIN: Well --

20 JUSTICE SCALIA: It might help me. It might
21 not help me, but --

22 MR. ROSENSTEIN: That's -- prisoners have
23 never been able to postconviction simply seek over the
24 counter the evidence that -- that was used in
25 their earlier -- in their --

1 JUSTICE SOUTER: Look, I don't know that
2 they're -- they're arguing with you on that score. What
3 they -- what they are saying -- I think what they're
4 saying, and this goes to a variety of -- Justice Scalia's
5 question is that under the Alaska statute, in order to
6 get to the evidence, or indeed in order to make his -
7 his postconviction claim, he's got to claim that the --
8 that the evidence of material fact requires vacation of
9 the conviction or sentence.

10 And his argument is, I don't know whether it
11 requires it; because I haven't been able to test it.
12 What I want is to test it.

13 And as I understand it, under this
14 particular statute, he has no chance of doing so because
15 he can't tell you in advance what the test is going to
16 show. That's -- isn't that correct?

17 MR. ROSENSTEIN: But Justice Souter --

18 JUSTICE SOUTER: Well, first tell me whether
19 that's correct or not.

20 MR. ROSENSTEIN: That --

21 JUSTICE SOUTER: He doesn't know what the
22 test is going to -- he doesn't know what the test is
23 going to show; so --

24 MR. ROSENSTEIN: That is correct.

25 JUSTICE SOUTER: -- he cannot say that it

1 requires vacation of the conviction; isn't that correct?

2 MR. ROSENSTEIN: That is correct.

3 JUSTICE SOUTER: Okay.

4 MR. ROSENSTEIN: But, but -- but only Mr.
5 Osborne knows whether he is innocent. And if he is
6 innocent --

7 JUSTICE SOUTER: But Mr. Osborne doesn't
8 know what that evidence is going to show.

9 MR. ROSENSTEIN: If --

10 JUSTICE SOUTER: He hasn't tested it.

11 MR. ROSENSTEIN: That -- that's correct.

12 JUSTICE SOUTER: Whether -- whether he
13 believes he's innocent or whether he doesn't believe
14 he's innocent, he can walk into court, as I understand
15 it, and say, I am absolutely innocent. But what he
16 cannot do prior to testing the evidence is tell you, is
17 allege that the evidence is going to require the
18 vacation of the conviction.

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

21 JUSTICE SCALIA: Well, I thought you said
22 the State has -- has indeed granted a habeas request.
23 In that case, where it granted the habeas request,
24 although it turned out that the evidence was destroyed,
25 in that case, surely the same situation -- the same

1 situation existed.

2 MR. ROSENSTEIN: Well, I think actually,
3 Your Honor, it did not, because in that case he never
4 asserted his innocence. That was a request he made on
5 reconsideration after the denial of his ineffective
6 assistance claim. And he said that under the due --
7 under due process, I am entitled to have this evidence
8 so that I can present an actual innocence claim. So the
9 case that you are referring to is --

10 JUSTICE SCALIA: It is the case you are
11 referring to. I didn't -- I didn't make it up. You
12 did.

13 (Laughter.)

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

17 JUSTICE SCALIA: No. I'm talking about the
18 case you alluded to earlier, where you say the State of
19 Alaska had indeed provided DNA evidence or had agreed to
20 provide it --

21 MR. ROSENSTEIN: Oh, okay. Yes.

22 JUSTICE SCALIA: -- but for the fact that it
23 no longer existed. Now, in that case surely the same
24 problem existed that Justice Souter is -- is raising.
25 That -- that person also, while claiming innocence,

1 couldn't say for sure what the evidence would produce,
2 but that didn't stop the -- the State from providing it;
3 did it?

4 MR. ROSENSTEIN: Right. You're --

5 JUSTICE BREYER: I know your time is up, but
6 I really have only one question this morning and I would
7 like to have a chance to ask it, and I am trying to
8 clear away some undergrowth. And the undergrowth first
9 I have cleared away in my mind is this Heck question.
10 The second is the Alaska court decision. And my
11 impression is that Alaska refused the test because,
12 among other things, they couldn't say -- they said the
13 conviction rested primarily on eyewitness testimony, and
14 they have a bunch of reasons. But the Ninth Circuit, as
15 a matter of fact, tried to blow apart those reasons.
16 Okay?

17 Suppose I agree with the Ninth Circuit.
18 Then my question is this: Does the Constitution of the
19 United States require you to give this evidence to the
20 defendant? And one of the relevant points in my mind is
21 I see it would be of significant advantage to the
22 defendant. Even if he's guilty, he can be proved to --
23 whatever. It is an advantage to him. Okay?

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

25 MR. ROSENSTEIN: Because, Your Honor, the

1 State of Alaska has a procedure that was not invoked in
2 the --

3 JUSTICE BREYER: I -- I -- there I -- that's
4 the undergrowth I tried to clear away. I am saying I
5 read all that procedure. Suppose I believe that the
6 Ninth Circuit is right about that procedure, namely that
7 the tests that they're using in that procedure are not
8 favorable enough to a defendant who is seeking, as this
9 defendant is seeking, the DNA.

10 He just wants some DNA. He'll pay for it.
11 The odds are eight to one he's going to lose. But he
12 thinks: I'm willing to run those odds. I won't put you
13 at any trouble. Now, why don't you want to give it to
14 him?

15 MR. ROSENSTEIN: Because, Your Honor, the
16 State of Alaska has a procedure that would enable him to
17 obtain that evidence.

18 JUSTICE BREYER: No. The procedure has the
19 tests in it that the Alaska court -- didn't the Alaska
20 Supreme Court say, we will not give you DNA evidence
21 unless you can demonstrate, one, that the conviction
22 rested primarily on eyewitness ID evidence; two, that
23 there was a demonstrable doubt concerning his ID as the
24 perpetrator; and, three, that scientific testing would
25 likely would be conclusive. Wasn't that their test?

1 MR. ROSENSTEIN: With respect, Your Honor,
2 that was the test they applied in that case, but that is
3 not the test that would apply if Mr. Osborne were to
4 file a new postconviction relief application asserting
5 that he is actually innocent. If he were to do that,
6 then the full civil rules of discovery would available
7 to him.

8 JUSTICE BREYER: And then -- a different --
9 then they'd give it to him?

10 MR. ROSENSTEIN: Pardon me?

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

14 MR. ROSENSTEIN: Right. But Alaska --
15 Alaska has procedures for this.

16 JUSTICE BREYER: Okay.

17 JUSTICE GINSBURG: But you said something
18 significant. That -- you said that he would have to
19 allege his actual innocence, which he hasn't done. So
20 if he continues not to -- not to put in a sworn
21 statement that, I am actually innocent, under your
22 current procedure he still couldn't get the DNA.

23 MR. ROSENSTEIN: If he doesn't allege his
24 actual innocence, Your Honor, then this is really an
25 empty exercise, a fishing expedition. He wants to just

1 see what -- what the evidence says. And that -- that is
2 not the way litigation works.

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

6 On how many occasions when postconviction
7 someone moved for the DNA evidence did the Alaska courts
8 deny the request?

9 MR. ROSENSTEIN: My -- my -- there were --
10 as I said, there were seven cases; And my understanding
11 is there have -- has not been a denial.

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

14 MR. ROSENSTEIN: There -- well --

15 JUSTICE SCALIA: I thought you said they
16 were still pending.

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

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.
22 We'll afford you rebuttal time since the Court used up
23 your time.

24 MR. ROSENSTEIN: Thank you.

25 CHIEF JUSTICE ROBERTS: Mr. Katyal.

1 ORAL ARGUMENT OF NEAL K. KATYAL
2 ON BEHALF OF THE UNITED STATES,
3 AS AMICUS CURIAE,
4 SUPPORTING THE PETITIONERS

5 MR. KATYAL: Mr. Chief Justice, and may it
6 please the Court:

7 The Ninth Circuit created a novel
8 constitutional right by extending Brady to the
9 postconviction setting. Mr. Osborne doesn't attempt to
10 defend that rationale. Instead, he attempts to mint a
11 previously unrecognized liberty interest in access to
12 clemency or State postconviction procedures. Assuming
13 the Court reaches the second question presented, it
14 should not constitutionalize rules for postconviction
15 access to DNA, an area of great legislative ferment in
16 just the last few years. And even were it inclined to
17 do so, the unusual facts of this case, which include
18 failure to attest to actual innocence under threat of
19 perjury, two recent confessions to the crime, and a
20 tactical decision at trial to forego a highly
21 discriminating RFLP DNA test, all together make this a
22 particularly poor candidate for recognizing a new
23 constitutional entitlement.

24 JUSTICE GINSBURG: What -- what were the two
25 confessions? I know the one before the parole

1 authorities. But what was the other one?

2 MR. KATYAL: There are two confessions to
3 the parole authorities. One is found at page --
4 petition appendix 71a. There's a small reprint which is
5 the written portion of the -- of the confession.
6 There's also separately in the record -- this is at
7 supplemental excerpts of the record, pages 248 to 61, in
8 the Ninth Circuit, which --

9 JUSTICE STEVENS: Yes, but isn't it true
10 that we've had DNA cases where the person has been found
11 innocent despite the fact they confessed?

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

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

15 MR. KATYAL: Well, I am not quite sure that
16 we have had any situation like this, in which you have
17 had so many different facts all together that -- that
18 suggested both that he -- that he's guilty and that --
19 and you are talking about a confession that's taking
20 place years after. I think the cases that are referred
21 to by the amici are situations in which someone has
22 confessed generally at trial or something like that.

23 Here you have two confessions years later.
24 They are very detailed. The one in the -- in the
25 supplemental excerpts to the record is a very long

1 story, and he says that he told his attorney about it
2 and talks all about how he had confessed to his mother,
3 how it was very difficult to exorcise. It is a very
4 in-depth confession, and it is a confession that the --
5 that the Alaska courts have credited.

6 It is not just our word. At joint appendix
7 page 221, the Alaska court found -- listened to that
8 2004 confession in light of the 2006 affidavit that Mr.
9 -- Mr. Osborne makes much of, claiming that he is
10 innocent, and put those two documents side by side and
11 said, taken together, they don't -- the 2006 affidavit
12 does not really take --

13 JUSTICE STEVENS: Am I right in
14 understanding that the State has agreed that if this
15 evidence is exonerating -- that this evidence potentially
16 could exonerate him?

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

18 JUSTICE STEVENS: Yes.

19 JUSTICE BREYER: And is it true that all he
20 has to do is file a piece of paper in the court that
21 says: Whatever I said before, I did it under pressure;
22 I am innocent? And if he says those words, "I am
23 innocent," then he will get this DNA?

24 MR. KATYAL: Well, it is -- it is not clear
25 to me under State law. I think as I understood my

1 friend -- but that's what I understood him to say. I
2 can tell you, for -- Justice Breyer, for purposes of the
3 Federal law, the 18 USC 3600, has this requirement in
4 it which says that in order to get DNA testing you must
5 attest under threat of perjury that you are actually
6 innocent. That is a very serious requirement, done
7 after years of congressional debate. That is something
8 that the Ninth Circuit rule would disregard, and it
9 would permit someone to come in without that --

10 JUSTICE SCALIA: You think we could attach
11 that to the new constitutional right that we invent? It
12 would be a constitutional right to get it if -- if --
13 but if you lose, you get another three years? Could we
14 say that?

15 MR. KATYAL: Our position, Justice Scalia,
16 is that there is no constitutional right to DNA, but
17 if -- were the Court inclined to find one and locate it
18 somewhere in Brady or the procedural due process clause,
19 something we think which would be very difficult to do,
20 but were it -- if that were the Court's inclination,
21 absolutely, it should at least mirror the Federal
22 statute and the -- and the rock solid requirements of
23 3600, which do require that perjury -- that perjury
24 statement to be made in order to --

25 JUSTICE KENNEDY: Do you think there's a

1 constitutional right to establish innocence in some
2 cases where there is new and -- evidence that could not
3 previously have been discovered, that has a high
4 likelihood of exonerating?

5 MR. KATYAL: Well, this Court has struggled
6 with that and so far has said no. And the latest
7 decision is *Herrera v. Collins*.

8 JUSTICE KENNEDY: I'm asking for your
9 position.

10 MR. KATYAL: Our position is that the logic
11 of this Court's precedents is that there is no right at
12 present to actual innocence.

13 JUSTICE SOUTER: Mr. Katyal, the -- the
14 right that they're asserting may be located not in
15 procedural, but in substantive due process. And what
16 I -- what I would like you to comment on is what the
17 government's or any government's interest, the United
18 States or that of a State, may -- may be in, in effect,
19 in denying that there should be such a right.

20 And this question occurred to me when I was
21 going through the briefs: What if -- we'll make this
22 Federal for your sake -- what if the United States had
23 imprisoned an individual who came forward and said:
24 Nobody realized it, but I was an eyewitness to the crime
25 for which X is -- is -- has been convicted and is

1 currently being incarcerated; and, in fact, I saw that
2 crime committed and he did not commit it. X's lawyer
3 arrives at this individual's prison and says: I want to
4 talk to the guy.

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

7 MR. KATYAL: The United States wouldn't --
8 wouldn't have an interest as a -- would -- would
9 generally permit as a matter of prosecutorial ethics
10 access to -- if the United States knew that there was
11 some exculpatory material that it had within its
12 purview, it would turn that over. It just wouldn't be a
13 constitutional --

14 JUSTICE SOUTER: Well, you know, prisoners
15 say all sorts of things. We -- we don't know whether in
16 the long run it is going to be exculpatory or whether
17 this guy has some axe to grind.

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

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

24 JUSTICE SOUTER: Why wouldn't it?

25 MR. KATYAL: Well, Let me talk about DNA,

1 for example.

2 JUSTICE SOUTER: Why do you need a rule, I
3 guess is what I'm saying?

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

8 JUSTICE SOUTER: Oh, okay --

9 MR. KATYAL: -- so that's why --

10 JUSTICE SOUTER: Are you starting with the
11 premise that the United States would not have a
12 legitimate interest in my hypothetical in saying, you
13 can't even talk to him?

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

18 With respect to DNA, there is --

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

24 Would you still say -- would the government
25 still say, we have an interest for that reason in not

1 even letting him talk to him?

2 MR. KATYAL: It's possible, because there
3 is -- it may be that as a policy matter they will allow
4 it, but as a matter of constitutional law, Justice
5 Souter, this Court has repeatedly said --

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

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

12 JUSTICE STEVENS: You mentioned the
13 floodgates. There are seven cases in this State, in the
14 whole history of Alaska.

15 (Laughter.)

16 JUSTICE STEVENS: Is that right? And that's
17 floodgates?

18 MR. KATYAL: Seven thus far,
19 Justice Stevens. If this Court were to recognize a
20 constitutional right to DNA --

21 JUSTICE STEVENS: Yes.

22 MR. KATYAL: -- for all 50 States, there
23 would really be, I think, quite a dramatically different
24 result.

25 JUSTICE SCALIA: And especially, I would

1 assume, one constitutional right in which you do not
2 even have to assert your innocence.

3 MR. KATYAL: Precisely. And so we're
4 talking about seven in one State right now, but I think
5 the numbers could be great, and that was what Congress
6 said when they passed 3600, which said there has to be
7 something to lose on the stake of defendants, so that
8 they can't come in, like Mr. Osborne, and have
9 questionable statements as to whether they're actually
10 innocent or not.

11 JUSTICE BREYER: Why can't you do this?
12 Look at the consensus of the statutes in the States and
13 the Federal Government and say there's a range of
14 appreciation here, and there is a right but it catches
15 only the outliers? And so the worst that would happen
16 is that the outlying States would have to bring
17 themselves into conformity with the outer reaches of
18 whatever the set of statutes is now in all the other
19 States.

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

24 JUSTICE BREYER: I'm not saying every
25 instance in which there are outliers is

1 unconstitutional. I'm just saying in this instance for
2 other reasons it might be unconstitutional; namely, you
3 have a good way of proving guilty or innocence, and if
4 that's so, the practical problem is not great. You
5 solve the practical problem in the way I just mentioned.

6 MR. KATYAL: But you enter the thicket of
7 practical problems, it seems to me, Justice Breyer, when
8 you do that, because the 44 States that have these
9 statutes do it in a variety of different ways with
10 respect to perjury requirements, felonies versus
11 misdemeanors, who gets access, who pays for it, do they
12 get lawyers. There's a host of policy questions that
13 arise once you start --

14 JUSTICE BREYER: So the constitutional right
15 is bring yourself within any one of them, unless that
16 any one of them is a real outlier, which you can make as
17 an argument that you will never win.

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

21 Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.

23 Mr. Neufeld.

24 ORAL ARGUMENT OF PETER NEUFELD

25 ON BEHALF OF THE RESPONDENT

1 MR. NEUFELD: Thank you very much.

2 Mr. Chief Justice, and may it please the
3 Court:

4 It is absolutely undisputed in this case
5 that there is a DNA test that Mr. Osborne seeks that
6 could conclusively prove his actual innocence.

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

12 JUSTICE SCALIA: Which apparently he had
13 told her about.

14 MR. NEUFELD: The test actually, the RFLP
15 test I assume you are referring to, is not actually more
16 reliable. It's more discriminating. And the reason it
17 didn't get used -- even the prosecutor didn't want to
18 use it as well, Mr. Chief Justice, because they felt
19 that the evidence was so degraded that if they tried
20 using that test, there was a grave risk that it would
21 destroy all the evidence and not get any result. And
22 that's why they chose that DQ alpha test, which is more
23 sensitive, albeit not as discriminating.

24 JUSTICE ALITO: But what was the reason that
25 -- that Respondent's counsel provided for not requesting

1 that test?

2 MR. NEUFELD: Respondent's counsel said that
3 she was doing it for strategic reasons, although I think
4 it is quite important that Mr. Osborne at all points
5 said he wanted the testing, okay, and that his counsel
6 rejected his advice. He even wrote to a Nobel Prize
7 winner to see what he could do about getting this
8 additional testing.

9 JUSTICE ALITO: Well, let's assume for the
10 sake of argument that there is some constitutional right
11 to obtain DNA evidence for testing postconviction.
12 Would you still -- would you say that that right
13 includes the situation where, A, the prisoner refuses to
14 assert under penalty of perjury that he or she is
15 actually innocent; and applies, even if there was a
16 tactical decision at trial not to seek DNA testing at
17 all or not to seek the most reliable form of DNA testing
18 that was available at the time?

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

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

24 MR. NEUFELD: Well, no, no. It's in the --
25 in 1983, it is not required or even asked that he make

1 that kind of statement. He did all through the State
2 courts. In the State courts he always asserted his
3 innocence; through his lawyers he asserted his
4 innocence, and indeed --

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

7 MR. NEUFELD: No, because it wasn't
8 required. Indeed, Your Honor, to respond directly to
9 your question, to both of your questions, if this Court
10 decided, as Justice Scalia mentioned before as well,
11 that one requirement of this right is that a person
12 swear under the penalties of perjury, knowing that he
13 could be prosecuted, that he is actually innocent, then
14 so be it. It can be remanded for that purpose.

15 JUSTICE BREYER: Well, he just doesn't --

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

18 JUSTICE BREYER: Well, why isn't that the
19 end of this case, because I heard opposing counsel say
20 if you go tomorrow and file a piece of paper and swear
21 on that piece of paper you're innocent, Alaska will give
22 you the DNA. Isn't that what he said? I heard him say
23 that, I thought.

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

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

4 MR. NEUFELD: Well, they took the same
5 position in the -- in the trial court in Alaska they
6 said that he is not entitled to DNA testing under the
7 postconviction statute under any circumstances.

8 JUSTICE BREYER: Well, wait. What -- what I
9 heard was that if your client files a piece of paper
10 that says, I am innocent, then under this new procedure,
11 which apparently I hadn't read about because I didn't
12 find it, or it wasn't obvious in the brief, that then
13 they will give him the DNA. Now that's either right or
14 it's wrong; and if it's right, I think that's the end of
15 it, and if it's wrong, well, then we'll have to proceed.
16 But I would proceed on the basis that this swearing
17 requirement is not sufficient.

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

22 CHIEF JUSTICE ROBERTS: Well, but the whole
23 point is that, Justice Ginsburg brought out the point,
24 that he hasn't asserted his innocence under oath. So
25 there's no cost to him for asking for the DNA evidence.

1 If there's -- if we're writing up a new constitutional
2 right and we require as part of that that he assert his
3 innocence under perjury, and if he fails to do that,
4 he'll be prosecuted for perjury, that might at least put
5 some limitation on the number of people who can assert
6 the right.

7 MR. NEUFELD: And I would agree with that.
8 I think that's an excellent idea. And the problem is no
9 one's suggesting that Alaska can't do that as a
10 restriction. Indeed they can, but Alaska has had no
11 mechanism at all.

12 JUSTICE SCALIA: If you accept that -- of
13 course it does; and this is not a new procedure. I -- I
14 didn't understand it to be a new procedure, as
15 Justice Breyer has described it. It is the procedure of
16 habeas corpus.

17 They have a procedure for habeas corpus
18 which includes discovery, and all he has to do is come
19 in and say, you know, I have been wrongfully convicted;
20 I am innocent; and I want to -- I want to discover this
21 evidence in order to establish it, so that I can get out
22 of jail.

23 MR. NEUFELD: That contradicts the position
24 they took in the -- in the State court, Your Honor.
25 They specifically said in the State courts that it is

1 not enough to simply assert one's innocence; that you
2 actually have to have proofs, facts that -- that
3 demonstrate your innocence before you get to that
4 discovery. It is a Catch-22 situation. He, in fact --

5 JUSTICE GINSBURG: Well, we can ask your
6 opposite, opposing counsel. We can put it to him point
7 blank. That's what I thought he said, and we -- we
8 certainly will clarify that.

9 But there's another possible impediment here
10 to your claim. If we assume that there is this
11 constitutional right, and it's available in 1983, this
12 trial was in 1993. He brings the 1983 action in 2003.
13 Counsel told us that this better method of testing has
14 been available since the late nineties. With any
15 constitutional right, there's an obligation of due
16 diligence on the part of the claimant. You can't come
17 in 10 years later, for example, and say -- say there was
18 a tainted juror or something like that. It was -- it --
19 when you're claiming even evidence that wasn't available
20 at the trial, you have to make the application with due
21 diligence.

22 MR. NEUFELD: I agree with that, Your Honor.
23 I mean, not only is Alaska not making a claim that he
24 did not act with due diligence here, but they're not
25 doing -- they're making that claim for a reason. As

1 soon as he finished his direct appeal, he immediately
2 filed a pro se petition seeking postconviction DNA
3 testing, within months. And then -- in the late 1990s.
4 And then eventually he was assigned a public defender to
5 represent him, and that led to the 2001 filing in the
6 State court which predated the 2003 filing in the
7 Federal court.

8 So he's moved as quickly as he possibly
9 could as soon as he knew that there was this powerful
10 evidence that could be dispositive.

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

15 JUSTICE SCALIA: You know, it is very
16 strange. Why did they do that, I wonder?

17 MR. NEUFELD: Well it's very --

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

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

21 JUSTICE SCALIA: I don't know what they
22 thought they were doing.

23 MR. NEUFELD: 10 -- 10 years ago,
24 Justice Scalia, the U.S. Department of Justice
25 articulated a materiality test for DNA testing; and they

1 said, like you're saying: Yes, let's look at the
2 evidence of guilt; but then let's say to ourselves,
3 looking out of the other eye, what if there's a
4 favorable results? What impact would that have on the
5 favorable results?

6 That was the position adopted by the United
7 States Department of Justice 10 years ago. That was the
8 position, of course, that we're urging here. That was
9 the position adopted by the U.S. Congress five years
10 ago, and that materiality test has been adopted by 41
11 States to date.

12 CHIEF JUSTICE ROBERTS: So if it is so
13 clear --

14 MR. NEUFELD: Only Alaska --

15 CHIEF JUSTICE ROBERTS: Sorry, counsel. If
16 it is so clear that this is the right way to go, that
17 the Federal Government, 41 States -- does it make sense
18 for us to devise a constitutional right to displace what
19 the legislatures have done?

20 MR. NEUFELD: It is not a question of
21 displacing what the legislatures have done,
22 Mr. Chief Justice. It is a question of when the State
23 of Alaska chooses to provide a mechanism for
24 postconviction relief -- and here they do. If they --

25 CHIEF JUSTICE ROBERTS: It is exactly a

1 question of displacing what the States have done,
2 because now this question is going to be subject to
3 constitutional law and it's going to be litigated in a
4 variety of cases with a variety of claims.

5 Do you get the right to it when you've
6 confessed? Do you get the right to it when you've
7 waived it at trial? Do you get the continuous right to
8 it as technology advances and makes the test more
9 sensitive? All of those matters will be Federal
10 constitutional questions for us to decide.

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

15 We have seen, and which is interesting, we
16 actually think the Innocence Protection Act as passed by
17 Congress is a marvelous statute that no one is -- is
18 questioning one bit. It is odd that the Solicitor
19 General walks into this courtroom and asks this Court to
20 adopt a materiality test that was rejected by Congress.

21 The one that we are asking for here is
22 simply that you look at the evidence, the evidence of
23 guilt that Justice Scalia pointed out --

24 CHIEF JUSTICE ROBERTS: Well, but the whole
25 question -- it is kind of along the same lines I've been

1 talking. The reason there might -- they're saying
2 don't adopt that test is because the question is whether
3 it should be adopted as a matter of constitutional law.
4 They may, and I suspect they do since they represent the
5 government, think Congress's balancing is -- makes
6 perfect sense. It is a different question here.

7 MR. NEUFELD: Well, I agree with you. Our
8 position is, is that the test that they're calling for
9 here is irrational; that it's completely irrational when
10 you have something as powerful and new as DNA evidence,
11 which can conclusively -- unlike any other forensic
12 discipline that --

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

17 MR. NEUFELD: That is -- that is correct. I
18 only use what Congress said and what the other 41 states
19 said to illustrate how there is an overwhelming
20 consensus now that to do it the way that Alaska wants to
21 do it is frankly irrational.

22 JUSTICE SOUTER: Is the irrationality
23 ultimately that they require a -- an assertion, with
24 some basis for the assertion, that in fact there is
25 evidence that would show innocence? Is the

1 irrationality the cart before the horse?

2 MR. NEUFELD: I think I understand the
3 question.

4 JUSTICE SOUTER: Well, you were --

5 MR. NEUFELD: Please interrupt me if I don't
6 and I apologize.

7 JUSTICE SOUTER: I'll put it in a broader
8 context. I'll do it quickly. You -- you were
9 asked a
10 question earlier what it was in effect about the
11 Alaska

12 procedure which -- which in effect was -- was
13 constitutionally frustrating.

14 I understood that you did not claim that the
15 requirement to claim innocence was the problem, although
16 they did require that; but that the -- that the real
17 problem was that you not only had to claim innocence;
18 you had to be in a position to claim that the evidence
19 you were seeking would exonerate you. And in the DNA
20 case you couldn't do that, ultimately, until it had been
21 tested. And so it was that second point, in effect that
22 they are putting the cart before the horse -- tell us
23 what the test is going to show before you test it --
24 that I thought was the sticking point for you. Am I
25 correct about your position?

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

8 JUSTICE SOUTER: Well, that -- that goes --
9 that goes to the first point.

10 MR. NEUFELD: Yes.

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

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

25 You will see cases where 50 percent of the

1 judges that reviewed those cases found the evidence to
2 be very compelling evidence of guilt or indeed
3 overwhelming evidence of guilt, but nonetheless DNA
4 trumped all that evidence and excluded those.

5 JUSTICE SCALIA: And you will see cases
6 where the defendant maintained that the defendant was
7 innocent. Now, whether this was a requirement imposed
8 by Alaska or not, it seems to me you cannot point to the
9 practice of the other States and say Alaska must have
10 the same practice -- when, in fact, you don't comply
11 with the practices of the other States. Almost all of
12 them do require an assertion of innocence, which --
13 which your client has not made.

14 I -- I cannot imagine how you can simply --
15 oh, look at all these other -- 44 other states, when
16 your client does not meet the requirements that those
17 States would impose.

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

21 JUSTICE SOUTER: Why shouldn't --

22 MR. NEUFELD: -- didn't require it, but if
23 you do --

24 JUSTICE SOUTER: Whether 1983 requires it
25 depends in part on whether we recognize a free-standing

1 right to test DNA evidence. As I -- as I conceive it,
2 that sounds to me like substantive due process and
3 rightly so.

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

7 What would be unreasonable about that?

8 MR. NEUFELD: There would -- nothing would
9 be unreasonable about that, Your Honor.

10 JUSTICE SOUTER: Is your client prepared to
11 make that claim?

12 MR. NEUFELD: Your Honor, I assume he
13 certainly would. I --

14 JUSTICE SOUTER: Well, I'm not asking you.
15 I'm asking for his position through counsel now. Do you
16 know?

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

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

23 MR. NEUFELD: I believe it was made under
24 oath, Your Honor --

25 CHIEF JUSTICE ROBERTS: So he's guilty of

1 perjury one way or the other, either before the parole
2 board or in his assertions of actual innocence here.

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

10 CHIEF JUSTICE ROBERTS: Well, wouldn't it be
11 ironic --

12 MR. NEUFELD: Two of our --

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

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

22 JUSTICE BREYER: Could you say this -- could
23 you say, suppose -- I'm just testing this out -- that
24 like any other governmental action, this action of
25 refusing the DNA evidence is subject to the Fourteenth

1 Amendment's requirement that there be a reasonable
2 basis? Can't be arbitrary.

3 Now, withholding DNA is a governmental
4 action, and so you cannot do so arbitrarily. If you
5 were to do so simply because the defendant would not
6 sign a new complaint under this new procedure, which I
7 somehow missed in the reply brief, that's a good basis
8 for withholding it. He should be willing to do that.

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

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

22 Suppose we said that: The rule is
23 non-arbitrary, with illustrations, send it back to the
24 States. And of course when they apply their own
25 statutes, by and large they're not being arbitrary.

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

3 JUSTICE BREYER: Well, it does help you win.

4 (Laughter.)

5 MR. NEUFELD: It has that added advantage,
6 Justice Breyer.

7 (Laughter.)

8 JUSTICE BREYER: Yes.

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

17 CHIEF JUSTICE ROBERTS: Would you have a --

18 JUSTICE ALITO: For -- sorry.

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

23 MR. NEUFELD: Well --

24 CHIEF JUSTICE ROBERTS: In other words,
25 limits it to -- what was it -- 16 percent or something

1 like that?

2 MR. NEUFELD: I think you would -- probably
3 because number -- number one --

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

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

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

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

25 And so when you try and compare this to

1 other types of either earlier DNA or other types of
2 scientific evidence, you can't. And it's because of the
3 unique power of these STRs, and the CODIS system, which
4 allows for cold hits. You know, it's not just the 232
5 people

6 who have been exonerated. We've also identified in --

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

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

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

17 MR. NEUFELD: And --

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

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

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

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

12 JUSTICE ALITO: How can this constitutional
13 right be limited just to DNA evidence? I presume that
14 there are -- there may be other scientific advances in
15 the testing of physical evidence, and if that happens,
16 why wouldn't the right apply to those as well?

17 MR. NEUFELD: I hope --

18 JUSTICE ALITO: Advances in -- advances in
19 detecting fingerprints or testing fibers or all sorts of
20 other things.

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

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

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

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

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

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

1 JUSTICE KENNEDY: But can we get an answer
2 to Justice Alito's question? A hypothetical, the one he
3 put: Could you put that condition on a statute or a
4 rule consistently with the Constitution of the United
5 States?

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

11 JUSTICE KENNEDY: Well -- well, let's assume
12 that counsel and the defendant -- after full discussion
13 and being fully advised, say this is too dangerous; we
14 don't want the DNA test; we'll shoot the dice; we're not
15 going to have the DNA test. He loses. Can you then get
16 the DNA test?

17 Or, as Justice Alito's question pointed out,
18 could you have a condition that when you've made this
19 conscious choice, you lost your right for later DNA
20 testing? That's what he asked, and I still don't have
21 the answer.

22 MR. NEUFELD: Okay. I would say, yes, in
23 much the same way that the Innocence Protection Act says
24 if a defendant expressly and voluntarily waives on the
25 record a right to that DNA testing, because it is so

1 fundamental because it goes right to the core of
2 everything, innocence versus guilt, then it would not be
3 unreasonable to prohibit him from having the DNA test.
4 But that was --

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

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

17 That -- the voluntary and knowing waiver is
18 a requirement in the IPA, and if -- and if Alaska did
19 something like that, I think that would be -- that would
20 not be irrational.

21 However, I must point out in all honesty
22 that there are a number of people who are mentioned in
23 the exonerating briefs such as Eduardo Velasquez and Mr.
24 Tomey, whose lawyers did just that. They said, for
25 strategic reasons, we don't want the DNA test. And then

1 -- boom -- years later they get the DNA test, and they
2 are completely exonerated. So --

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

8 MR. NEUFELD: Why would it --

9 JUSTICE KENNEDY: You have a -- you have a
10 built-in -- you have a -- a built-in second chance.

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

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

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

20 If they get the DNA test years later,
21 they're not getting a new hearing. They are not getting
22 a vacatur; they are not getting a new trial. They are
23 not getting any of the other things that this Court
24 often is worried about. All they are getting is a
25 darned test. And they stay in prison while they get

1 that darned test. And if that test shows that they
2 actually committed the crime -- okay -- if it shows they
3 committed the crime, then they get nothing.

4 Not only do they get nothing, they get
5 punished. They get punished because no -- no court in
6 habeas or in any other postconviction relief will ever
7 think about them again.

8 JUSTICE SCALIA: But they will --

9 MR. NEUFELD: And, in fact, the parole board
10 will --

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

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

1 other remedies. So he is in a much worse position.

2 On the other hand, if it proves he's
3 innocent, then he's out. So how does that game the
4 system?

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

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

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

15 MR. NEUFELD: In all practice, it is a moot
16 point. Because this is a transitional right for a very
17 small group of people who were tried during the 1980s
18 and early 1990s.

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

23 MR. NEUFELD: No. He would -- he would
24 qualify.

25 JUSTICE KENNEDY: He would qualify.

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

4 JUSTICE KENNEDY: No, no -- well, but -- but
5 as the case now stands he does not qualify.

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

8 JUSTICE KENNEDY: As the case now stands, he
9 does not qualify.

10 MR. NEUFELD: Other than -- other than that,
11 he meets every single other criterion.

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

13 JUSTICE KENNEDY: So you're -- you're, in
14 effect, asking us -- and you say the -- the Solicitor
15 General appears here -- you're -- you're, in effect,
16 asking us to say that the Federal Witness Protection Act
17 on these facts is unconstitutional.

18 MR. NEUFELD: Oh, not at -- not at all, sir.
19 All I'm saying is that if he was on notice that that was
20 required as part of the procedure in Alaska, then no
21 doubt he would sign that affidavit even under penalty of
22 perjury. The problem is that it's not a requirement of
23 1983, and there was no legislative scheme. I assure --
24 you know --

25 JUSTICE SCALIA: I am quite dubious that --

1 that he would indeed sign it. I -- I was really struck
2 by his affidavit in this case, number -- paragraph 9 of
3 which says: "I have no doubt whatsoever that retesting
4 of the condom will prove once and for all time" -- and
5 one expects to follow -- my innocence. That's not what
6 it says. "Will prove once and for all time either my
7 guilt or innocence."

8 MR. NEUFELD: Your Honor --

9 (Laughter.)

10 JUSTICE SCALIA: I mean, you know, what is
11 this?

12 (Laughter.)

13 MR. NEUFELD: Well, first of all, each and
14 every time with his own counsel, Justice Scalia, he was
15 adamant about asserting his innocence. You have to
16 appreciate that at this point in time, when there's a
17 discussion about, you know, what a prize -- and it is
18 our position that this action ends, if you will, okay,
19 if the Court grants him access to the evidence under
20 1983.

21 And as was pointed out earlier during the
22 argument of my adversary, there is a possibility that --
23 that the testing -- because, look, I wasn't at the -- at
24 the commission of the crime. I don't have a videotape
25 in my head. I'm trying to be as honest and forthright

1 with you as I possibly can.

2 CHIEF JUSTICE ROBERTS: What if there was a
3 videotape? Is that covered by the constitutional right
4 you are asserting?

5 MR. NEUFELD: I -- well, you know, given
6 what I now know about --

7 CHIEF JUSTICE ROBERTS: Or photographs or
8 other evidence that --

9 MR. NEUFELD: I don't think so. Given what
10 I now know about Photo Shop, I don't have --

11 (Laughter.)

12 MR. NEUFELD: -- I don't necessarily hold
13 out that much reliability for that either, Justice
14 Roberts.

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

18 MR. NEUFELD: Under the Constitution there
19 is no duty under current law to preserve the evidence.
20 We --

21 CHIEF JUSTICE ROBERTS: Would that be a
22 corollary of the constitutional right you are asking for
23 here?

24 MR. NEUFELD: I don't believe so. I --
25 however, with one caveat. And the one caveat is it is a

1 different situation if a person like Mr. Osborne or
2 somebody else specifically says, I want to do DNA
3 testing in this case, files whatever appropriate
4 procedure in whatever court to commence that action, and
5 then, and only then, the other side goes out and
6 destroys the res that is the subject of that litigation.
7 At that point I think that would be in bad faith.

8 CHIEF JUSTICE ROBERTS: No. I agree that
9 would be -- that -- yes. I am just wondering if there
10 would be any objection to an absolute rule that says
11 what -- after two years, after one year of conviction?

12 MR. NEUFELD: No -- no objection. But on a
13 practical level again, what we're seeing is that States
14 all over the country want to preserve this evidence, not
15 just for the wrongful conviction cases but also to
16 enable detectives who are working cold cases to have
17 access to evidence. And if the evidence isn't there any
18 more, they can't work them. So we're seeing a movement
19 across the country now to preserve that evidence.

20 JUSTICE KENNEDY: May I -- may I just ask
21 one point?

22 MR. NEUFELD: Certainly.

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

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

1 JUSTICE KENNEDY: Not for this offense?

2 MR. NEUFELD: Well, I -- I think what
3 happened is -- and I -- and I -- I can't swear to this
4 -- is -- is he was -- he got a conditional release on
5 the other matter. And then the conditional release was
6 violated as well.

7 JUSTICE KENNEDY: He's being held on other
8 charges.

9 MR. NEUFELD: That's right.

10 JUSTICE KENNEDY: But he's not now in
11 custody for this offense.

12 MR. NEUFELD: He's -- he's not, but I don't
13 think that would make a difference in the outcome.
14 Certainly, if a person had a death warrant in one State
15 and then they were charged in another State, they would
16 still have a liberty interest in the outcome of that
17 other case.

18 CHIEF JUSTICE ROBERTS: Was he released on
19 parole with respect to this offense?

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

22 CHIEF JUSTICE ROBERTS: And was his
23 confession a necessary predicate to that release?

24 MR. NEUFELD: Well, under Alaska law one of
25 the key requirements to get parole is that you accept

1 responsibility for the crime. And so without a
2 certain --

3 CHIEF JUSTICE ROBERTS: So a confession that
4 would be perjurious if he claimed actual innocence now
5 was responsible for his release?

6 MR. NEUFELD: I would hope, Mr. Chief
7 Justice, that I would be principled enough that if I was
8 actually innocent and they told me that the only way I
9 could get out was to say I committed a crime, that I
10 might say: "Forget it. I'll spend the next thirty
11 years in prison." But I can certainly understand --

12 CHIEF JUSTICE ROBERTS: No, I understand --
13 I understand that.

14 MR. NEUFELD: Yes.

15 CHIEF JUSTICE ROBERTS: But he's been --
16 other than other crimes he committed, he's been released
17 on the basis of what you say is an unprincipled
18 confession. And now he is --

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

22 He had a parole -- I'm -- I'm told that he
23 had a parole revocation hearing on the other case and
24 that he was given six more years to serve on the -- on
25 the underlying case which is the core of this oral

1 argument.

2 CHIEF JUSTICE ROBERTS: So his parole was
3 revoked because he committed another offense?

4 MR. NEUFELD: That's my understanding.

5 CHIEF JUSTICE ROBERTS: Okay. Thank you,
6 counsel.

7 MR. NEUFELD: Thank you very much.

8 CHIEF JUSTICE ROBERTS: Counsel, we'll give
9 you three more minutes.

10 REBUTTAL ARGUMENT OF KENNETH M. ROSENSTEIN
11 ON BEHALF OF THE PETITIONERS

12 MR. ROSENSTEIN: Three minutes, Your Honor?

13 JUSTICE STEVENS: May I -- before you start,
14 would you -- I want you to clear up the question that
15 Justice Breyer asked. Assume that on remand he would
16 now make the declaration under perjury that he's
17 innocent. I understood you to say that would enable him
18 to get discovery, but not necessarily to say he would
19 get the DNA evidence. Am I right?

20 MR. ROSENSTEIN: If he were to file a new
21 application for postconviction relief with an affidavit
22 that the civil rules of discovery would apply, and he, I
23 believe, would be -- be able to obtain the evidence that
24 he seeks. However --

25 JUSTICE GINSBURG: How about --

1 JUSTICE KENNEDY: Would you resist that
2 request?

3 MR. ROSENSTEIN: Well, there are -- there
4 are possibilities of procedural default. But -- and
5 that would be for the court --

6 JUSTICE KENNEDY: You cannot confirm that
7 you would acquiesce and recommend that he get the DNA
8 sample under those conditions?

9 MR. ROSENSTEIN: I -- yes. I -- I believe I
10 could.

11 JUSTICE SCALIA: Well, you would still want
12 to leave yourself open to make the objection that he had
13 a chance to get this at trial and -- and -- and decided
14 not to get it.

15 MR. ROSENSTEIN: As I say there are --

16 JUSTICE SCALIA: Wouldn't those objections
17 continue to apply?

18 MR. ROSENSTEIN: I'm --

19 JUSTICE SCALIA: I mean, it -- it seems to
20 me that -- that all -- all that you have to concede is
21 that there is some means for him to get into court, with
22 those -- those exceptions that other States make; and
23 other States do make an exception for gaming the system.

24 So, so long as he can get in in habeas
25 corpus it seems to me you can very well leave for later

1 whether you are going to concede that even though --
2 even though he didn't ask for it at trial, he can get it
3 now.

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

6 JUSTICE SCALIA: Well, why give it away?

7 MR. ROSENSTEIN: Well --

8 JUSTICE SCALIA: -- any more than you gave
9 away the fact that this is going to is going to prove
10 his innocence --

11 JUSTICE STEVENS: I'm just trying to
12 understand --

13 JUSTICE BREYER: I would like to know what
14 you do --

15 CHIEF JUSTICE ROBERTS: Why don't we do it
16 -- I'm sorry. Justice Stevens.

17 JUSTICE STEVENS: Yes. I just want to be
18 sure. Your answer, as I understand it, is he can now
19 apply for discovery, but you don't know what will happen
20 then.

21 MR. ROSENSTEIN: Well, before you reach the
22 discovery issues there would be the issues of procedural
23 default.

24 JUSTICE STEVENS: Right.

25 MR. ROSENSTEIN: Once those were cleared

1 away then he would be able to --

2 JUSTICE STEVENS: But the net result is that
3 it is perfectly clear to me from the argument that you
4 have not conceded that if he now files the paper, he
5 will definitely get the DNA.

6 MR. ROSENSTEIN: Not that he would -- that's
7 correct. Not that he will definitely get that.

8 JUSTICE STEVENS: Okay.

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

10 JUSTICE GINSBURG: But you -- you referred
11 to the civil rules, and in discovery, in criminal cases
12 as in civil cases, it -- ordinarily you have to prove
13 that you have a basis for a claim. Like you don't get
14 on the civil side discovery before you can pass the
15 12(b)(6) threshold that you have stated a claim.

16 Are you giving that up here? Because he's
17 seeking the discovery but he hasn't established that he
18 has a tenable claim.

19 MR. ROSENSTEIN: Justice Ginsburg, Mr.
20 Osborne, by filing an affidavit that would accompany his
21 application, that would -- I think that would operate to
22 state a claim.

23 JUSTICE KENNEDY: Would there be instances
24 when you, as the Attorney General of Alaska, would waive
25 procedural defaults, in order to determine if there was

1 guilt or innocence in a case where DNA conclusively
2 proved it, simply because of your interest in not
3 confining innocent people?

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

8 JUSTICE KENNEDY: All you can say in answer
9 to my question, as to your particular approach to your
10 duties here, is that that's conceivable?

11 MR. ROSENSTEIN: Yes, Your Honor. It -- it
12 is. Because I don't think that the mere existence of
13 the possibility that DNA could exonerate is necessarily
14 sufficient -- a sufficient basis to then do the testing.

15 JUSTICE BREYER: Okay. This is where I --
16 look.

17 He files a new piece of paper. Now, if
18 you're going to oppose that, on the ground that it
19 wasn't procedurally correct, one; on the ground, two, he
20 didn't ask for this DNA at trial, though he might have;
21 met with the charge, what was at issue at trial is
22 something very different; three, that he wasn't
23 guilty -- you know, too much evidence against him, met
24 with the claim, there wasn't much evidence against
25 him -- okay, we have the case in front of us; we'll

1 decide it.

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

5 MR. ROSENSTEIN: I -- I'm not sure I
6 understand your -- your question, Your Honor. I'm
7 sorry.

8 JUSTICE BREYER: I don't want to just repeat
9 it.

10 I -- he -- his client follows your procedure: "Please
11 give me DNA."

12 Now will you give it to him? Or are you
13 going to meet him with the same defenses that you raise
14 here?

15 MR. ROSENSTEIN: The --

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

21 MR. ROSENSTEIN: If he -- if he were to do
22 as you say, then with respect to a -- the request for
23 discovery, I believe that our only defense would be the
24 procedural defense of -- you know -- lack of due
25 diligence or -- or something along -- or untimely --

1 JUSTICE BREYER: If the only defense is
2 procedure --

3 JUSTICE SOUTER: -- that defense --

4 MR. ROSENSTEIN: Pardon me?

5 JUSTICE SOUTER: If he walks into court and
6 swears, "I am innocent, subject to penalties of perjury.
7 Please let me look at the DNA," as I understand your
8 answer, your answer will be, "we will then raise issues
9 of procedural default, waiver," et cetera. You will not
10 say, on the contrary: "Let him look at the DNA." Is
11 that -- is my understanding correct?

12 MR. ROSENSTEIN: I -- I can't say that we
13 would actually do that, but we certainly have the -- the
14 right to do that. And there's nothing wrong with
15 proceeding --

16 JUSTICE SOUTER: In any --

17 CHIEF JUSTICE ROBERTS: Thank you - thank
18 you,
19 counsel. The case is submitted.

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

22

23

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