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Citation: **2001 U.S. Dist. LEXIS 9587**

*2001 U.S. Dist. LEXIS 9587, **

JAMES HARVEY, Plaintiff, v. ROBERT F. HORAN, JR., COMMONWEALTH'S ATTORNEY COUNTY OF FAIRFAX, Defendant.

CIVIL ACTION NO. 00-1123-A

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA
DIVISION

2001 U.S. Dist. LEXIS 9587

April 16, 2001, Decided
April 16, 2001, Filed

DISPOSITION: [*1] Defendant's motion for summary judgment DENIED; plaintiff's motion for summary judgment GRANTED; Defendant's motion to quash, or, in the alternative, in limine DISMISSED as moot.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff was convicted of rape and forcible sodomy. Plaintiff sued defendant county attorney, pursuant to 42 U.S.C.S. § 1983, alleging violation of his constitutional rights.

OVERVIEW: Plaintiff argued, inter alia, that his Fourteenth, Fifth, and First Amendment rights were violated by defendant's refusal to search for and provide evidence for DNA testing. Plaintiff sought equitable relief, including a search for and release of biological evidence including the rape kit, reference samples of a co-defendant, and other evidence. Plaintiff sought to have the evidence transferred to another individual for DNA testing. The court denied defendant's motion and granted plaintiff's motion. Plaintiff had a due process right of access to the DNA evidence and to conduct DNA testing upon the biological evidence, as such evidence could constitute material exculpatory evidence. Denying plaintiff access to potentially powerful exculpatory evidence would have resulted in a miscarriage of justice. With the lack of a positive identification of plaintiff as one of the perpetrators, and after examining the victim's trial testimony and considering the credibility of the state's witnesses the court concluded that the factors all pointed to conducting an examination of the additional, potentially exculpatory evidence through STR DNA testing.

OUTCOME: Plaintiff's motion was granted; defendant's motion was denied.

CORE TERMS: testing, summary judgment, post-conviction, assailant, rape, biological, innocence, perpetrator, ejaculate, deprived, guilt, co-defendant, exculpatory evidence, shirt, kit, non-moving, innocent, spermatazoa, maroon, mouth, smear, Fourteenth Amendment, reasonable probability, constitutional rights, deposition testimony, motion to dismiss, genuine issue, material fact, body of law, recommendations

CORE CONCEPTS - ♦ [Hide Concepts](#)

 Civil Procedure : Summary Judgment : Summary Judgment Standard

⚡ Summary judgment is appropriate where there is no genuine issue as to any material fact. Fed. R. Civ. P. 56 (c).

 Civil Procedure : Summary Judgment : Burdens of Production & Proof

✚ Once a motion for summary judgment is properly made and supported, the opposing party has the burden of showing that a genuine dispute exists. A material fact in dispute appears when its existence or non-existence could lead a jury to different outcomes. A genuine issue exists when there is sufficient evidence on which a reasonable jury could return a verdict in favor of the non-moving party. Mere speculation by the non-moving party cannot create a genuine issue of material fact. Summary judgment is appropriate when, after discovery, a party has failed to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

 Civil Procedure : Summary Judgment : Burdens of Production & Proof

✚ When a motion for summary judgment is made, the evidence presented must always be taken in the light most favorable to the non-moving party.

 Civil Procedure : Pleading & Practice : Defenses, Objections & Demurrers : Failure to State a Cause of Action

✚ A Fed. R. Civ. P. 12(b)(6) motion to dismiss tests the legal sufficiency of the complaint and should be granted only if it appears beyond doubt that a plaintiff can prove no set of facts in support of its claim which would entitle it to relief.

 Criminal Law & Procedure : Discovery & Inspection : Brady Materials

✚ Where evidence has been preserved which has high exculpatory potential, that evidence should be discoverable after conviction. Due process is not a technical conception with a fixed content unrelated to time, place and circumstances. It is flexible and calls for such procedural protections as the particular situation demands.

 Criminal Law & Procedure : Evidence : Scientific Evidence : DNA

✚ A criminal defendant has a due process right of access to DNA evidence and to conduct DNA testing upon the biological evidence, as such evidence could constitute material exculpatory evidence. Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

 Criminal Law & Procedure : Discovery & Inspection : Brady Materials

✚ Under the Brady doctrine, a defendant must prove three elements to establish a due process violation. These are: (1) the prosecution withheld or suppressed evidence; (2) the evidence is favorable; and (3) the evidence is material to the defense. The Brady doctrine applies to evidence discovered post-conviction.

COUNSEL: For JAMES HARVEY, plaintiff: Lisa Bondareff Kemler, Zwerling & Kemler, Alexandria, VA.

For ROBERT F. HORAN, defendant: Jack Lewis Gould, Fairfax, VA.

JUDGES: Albert V. Bryan, Jr., United States District Judge.

OPINIONBY: Albert V. Bryan, Jr.

OPINION: Memorandum Opinion

Background

The plaintiff, James Harvey, was convicted of rape and forcible sodomy on April 30, 1990 after a second jury trial in the Fairfax County Circuit Court. Mr. Harvey's first trial concluded with a hung jury. Conventional serology testing on the items recovered from the rape kit revealed the presence of spermatazoa on the victim's mouth smear, vaginal smear, thigh smear and in the extracts of the vaginal and vulvar swab samples. Spermatazoa was also detected on the victim's pantyhose. Neither plaintiff nor his co-defendant, who was also convicted, could be excluded as a result of the serology testing. The victim was never able to identify the plaintiff as one of her attackers. The first assailant raped and orally sodomized her. The victim [*2] was not sure, when testifying at trial, if the first assailant ejaculated. The second assailant raped the victim and the victim testified that the second assailant, identified as the co-defendant, Steve Lawrence, did not ejaculate. The victim also testified that one perpetrator called the other perpetrator "Harv". Prosecution witness Curtis Ivy told the police, shortly before his [Ivy's] preliminary hearing on a cocaine charge, that the plaintiff had confessed to Ivy both the plaintiff's and Lawrence's involvement in the attack. Ivy testified at trial that the maroon shirt identified by the victim as belonging to one of her assailants belonged to Harvey and that he was wearing the shirt on the date of the rape and sodomy.

The plaintiff was sentenced to twenty-five years for the rape and fifteen years for forcible sodomy. Although the court granted the plaintiff an extension of time until January 24, 1991 to file a petition for appeal, he did not do so.

Alleging that a failure to order DNA testing on the biological evidence constituted a deprivation of due process, the plaintiff filed a 42 U.S.C. § 1983 action against the Governor of Virginia in this court [*3] on February 25, 1994. Upon the court's ruling that the plaintiff should refile his § 1983 claims as a petition for a writ of habeas corpus, plaintiff did so, alleging that the Governor had refused to order the DNA test which could prove plaintiff's innocence. The court dismissed plaintiff's petition on July 25, 1995, pursuant to Va. Code § 8.01-654(B)(2), finding that plaintiff had failed to fully exhaust state remedies, as required by the Virginia code.

Starting in 1996, in an effort to locate the biological evidence, the Innocence Project, on plaintiff's behalf, contacted the Virginia Division of Forensic Science. In response to the request, director Dr. Paul Ferrara recommended that the evidence be requested from the Fairfax County Commonwealth's Attorney's office. In February 1998, the Innocence Project contacted Ray Morrogh, a Commonwealth's Attorney for Fairfax County, with a request for assistance in locating the biological evidence. The Innocence Project alleges that Mr. Morrogh never responded to the request for assistance. In July 1999, the Innocence Project made another request to Todd Sanders, Assistant Commonwealth's Attorney for Fairfax County. Mr. Sanders stated in [*4] an October 1999 letter that in his opinion, that if one of the perpetrators of the rape did not ejaculate, as plaintiff contends happened, and plaintiff was excluded as the contributor of the genetic material, this in itself would not prove the plaintiff's innocence and, therefore, his case did not warrant post-conviction DNA testing. However, plaintiff insists that the victim identified him at trial as the first assailant. He contends that the victim testified that she was not sure whether the first assailant did ejaculate and that the second assailant did not ejaculate.

The plaintiff asserts that he is a perfect candidate for post-conviction DNA testing, contending that the results could provide exculpatory results, which could be a basis for proving innocence. The plaintiff concedes that the results could also be inconclusive or could demonstrate his guilt. The plaintiff argues that the remedy he seeks, performing the DNA tests, does not require his release nor does it invalidate his outstanding criminal judgment.

Plaintiff alleges in his first amended complaint, brought pursuant to 42 U.S.C. § 1983, that the defendant, Commonwealth's Attorney Horan, acting [*5] under color of state law, has deprived him of his constitutional rights. Plaintiff's claims for relief are: (1) that the

defendant has deprived plaintiff of due process under the Fourteenth Amendment by refusing to search for and provide the evidence for DNA testing; (2) that by refusing to provide the evidence for DNA testing, defendant has deprived plaintiff the opportunity to show he is innocent, in violation of the Fourteenth and Fifth Amendments; (3) that by refusing to search for and provide the evidence for DNA testing plaintiff cannot make a truly persuasive showing of innocence, in violation of the Cruel and Unusual Punishment Clause of the Eighth Amendment; (4) that by refusing to search for and provide the evidence for DNA testing, the plaintiff is deprived of his right to present evidence of innocence before a court or pardon board in violation of the Confrontation and Compulsory Process Clauses of the Sixth Amendment; (5) that by refusing to search for and provide the evidence for DNA testing, defendant has deprived plaintiff of the opportunity to litigate his claim that he is innocent, effectively denying him access to the courts in violation of the Fourteenth and First [*6] Amendments; and (6) that defendant has deprived plaintiff of availing himself of the opportunity to seek clemency, which violates the constitutional rights articulated in Herrera v. Collins, 506 U.S. 390, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993).

The plaintiff is seeking equitable relief including a search for and release of the biological evidence including the rape kit, reference samples of the co-defendant, as well as the panty hose and maroon shirt found at the rape scene, and that this evidence be transferred to Dr. Paul Ferrara for DNA testing.

Discussion

Summary judgment is appropriate where there is no genuine issue as to any material fact. See Fed. R. Civ. P. 56 (c). Once a motion for summary judgment is properly made and supported, the opposing party has the burden of showing that a genuine dispute exists. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). A material fact in dispute appears when its existence or non-existence could lead a jury to different outcomes. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). A genuine issue [*7] exists when there is sufficient evidence on which a reasonable jury could return a verdict in favor of the non-moving party. See *id.* Mere speculation by the non-moving party "cannot create a genuine issue of material fact." Beale v. Hardy, 769 F.2d 213, 214 (4th Cir. 1985); See also Ash v. United Parcel Serv., Inc., 800 F.2d 409, 411-12 (4th Cir. 1986). Summary judgment is appropriate when, after discovery, a party has failed to make a "showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). When a motion for summary judgment is made, the evidence presented must always be taken in the light most favorable to the non-moving party. See Smith v. Virginia Commonwealth Univ., 84 F.3d 672, 675 (4th Cir. 1996) (en banc).

The court found when the court denied the defendant's motion to dismiss, pursuant to Fed. R. Civ. P. 12(b)(6), that the refusal by the Commonwealth's Attorney to turn over the evidence for DNA testing constitutes a denial [*8] of due process under the Fourteenth Amendment to the United States Constitution. See Harvey v. Horan, 119 F. Supp. 2d 581, 584 (E.D. Va. 2000). Because of the procedural posture of a Rule 12(b)(6) motion, i.e., a Rule 12(b)(6) motion to dismiss tests the legal sufficiency of the complaint and should be granted only if it appears beyond doubt that a plaintiff can prove no set of facts in support of its claim which would entitle it to relief, See De Sole v. United States, 947 F.2d 1169, 1177 (4th Cir. 1991); Rogers v. Jefferson-Pilot Life Ins. Co., 883 F.2d 324, 325 (4th Cir. 1989), the court did not elaborate on its findings. The court is not persuaded by the defendant's argument in support of his motion for summary judgment any more than it was on defendant's 12(b)(6) motion, in which the court found that the plaintiff had stated a cause of action for denial of due process. At this time, the court finds it appropriate to elaborate on its findings.

Defendant's Motion for Summary Judgment

The defendant, in his motion for summary judgment, disputes that the plaintiff is the perfect candidate for post-conviction DNA testing, arguing [*9] instead, that allowing such testing would make a "mockery" of the system. Def. Memo. at 2. The defendant bases this argument on deposition testimony from the co-defendant, Steve Lawrence, and Curtis Ivy. In his deposition, Mr. Lawrence testified that Harvey instigated the attack and that the plaintiff admitted he was unable to ejaculate while raping the victim, which is why he proceeded to sodomize her. Lawrence claims that the plaintiff did not appear to ejaculate even then. Curtis Ivy's deposition testimony is that the plaintiff threatened Ivy shortly before the criminal trial. The defendant argues this is further evidence of the plaintiff's guilt. United States v. Van Metre, 150 F.3d 339, 352 (4th Cir. 1998), United States v. Hayden, 85 F.3d 153, 158-159 (4th Cir. 1996). The defendant also notes that the only reason the victim was unable to identify the plaintiff as one of her assailants is because the plaintiff beat and choked her. Next, the defendant argues that the gravamen of this case is whether DNA testing of biological evidence is more likely than not to produce evidence that if it had been considered by a reasonable juror would have [*10] resulted in the plaintiff's acquittal. O'Dell v. Netherland, 95 F.3d 1214, 1249 (4th Cir. 1996)(en banc), affirmed 521 U.S. 151, 138 L. Ed. 2d 351, 117 S. Ct. 1969. The defendant argues that the answer is no. However, O'Dell is a habeas corpus case and, therefore, distinguishable. It is also a premature argument. Assuming arguendo that O'Dell applies, the victim identified the plaintiff as the first assailant. The first perpetrator was the one who orally sodomized the victim. Spermatozoa was recovered from the victim's mouth. The court concludes that if this is what occurred, and if the mouth sample's DNA does not match the plaintiff's DNA, this would constitute powerful exculpatory evidence. Thus, plaintiff probably satisfies O'Dell were it to apply.

The defendant also looks to Mebane v. State, 21 Kan. App. 2d 533, 902 P.2d 494 (Kan. App. 1995)(affirming the denial of post-conviction DNA testing because, inter alia, more than one perpetrator was involved) and People v. Gholston, 297 Ill. App. 3d 415, 697 N.E.2d 375 (Ill. App. 1 Dist. 1998, 231 Ill. Dec. 821)(holding that the strength [*11] of the evidence connecting the defendant to the crime is a factor to be considered) for support of his position. The defendant also argues that it is plaintiff's burden to prove that the alleged unapprehended rapist for whom he claims he has been mistaken did, in fact, ejaculate. People v. Savory, 309 Ill. App. 3d 408, 722 N.E.2d 220, 224-226, 242 Ill. Dec. 731 (Ill. App. 3 Dist. 1999). However, the cases cited by the defendant involve numerous perpetrators, not merely two, one of whom allegedly did not ejaculate.

In Jenner v. Dooley, 1999 SD 20, 590 N.W.2d 463 (S.D. 1999) the South Dakota Supreme Court stated that "only in extraordinary circumstances should a court allow post-conviction testing." Id. at 472. However, the court finds the analysis in Matter of Dabbs v. Vergari, 149 Misc. 2d 844, 570 N.Y.S.2d 765 (1990) applicable. The court stated that, "by a parity of reasoning, where evidence has been preserved which has high exculpatory potential, that evidence should be discoverable after conviction. Due process is not a technical conception with a fixed content unrelated to time, place and circumstances (Cafeteria Workers v. McElroy, 367 U.S. 886, 6 L. Ed. 2d 1230, 81 S. Ct. 1743). [*12] It is flexible and calls for such procedural protections as the particular situation demands. (Morrissey v. Brewer, 408 U.S. 471, 481, 33 L. Ed. 2d 484, 92 S. Ct. 2593)."

The defendant also cites Spencer v. Murray, 5 F.3d 758, 766 (4th Cir. 1993), cert. denied, 510 U.S. 1171, 127 L. Ed. 2d 555, 114 S. Ct. 1208 (quoting Herrera v. Collins, 506 U.S. 390, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993)), arguing that the plaintiff has not met the extraordinarily high standard of proof required to establish that denial of post-conviction DNA testing in this case is a constitutional violation. However, Spencer is readily distinguishable, as it was a capital habeas case, whereas the instant case is brought pursuant to 42 U.S.C. § 1983. The defendant also argues that this is not a Brady case, see infra, but, rather a United States v. Custis, 988 F.2d 1355 (4th Cir. 1993) case. However, it is also premature to consider the Custis criteria. See id. at 1359. The defendant also dismisses plaintiff's argument based on the report entitled POSTCONVICTION DNA TESTING:

RECOMMENDATIONS FOR HANDLING REQUESTS, [*13] at 4-5 (NIJ 1999) ["1999 REPORT"] available at <<http://www.ncjrs.org/pdffiles1/nij/177626.pdf>> as non-admissible hearsay. The 1999 REPORT categorizes requests for post-conviction DNA testing into five categories and provides a sound framework for analysis of requests. Id. According to the Report, the plaintiff's case falls into Category 2. n1 In Category 2 a number of factors are to be considered. Plaintiff also suggests that Harvey could fall into Category 1, if, for example, the DNA testing confirmed DNA from two perpetrators, neither of which match the plaintiff's DNA. Therefore, the court rejects the defendant's arguments.

-----Footnotes-----

n1 "These are cases in which biological evidence was collected and still exists. If the evidence is subjected to DNA testing or retesting, exclusionary results would support the petitioner's claim of innocence, but reasonable persons might disagree as to whether the results rule out the possibility of guilt or raise a reasonable doubt about guilt. This category also includes cases in which, for policy and/or economic reasons, there may be disagreement as to whether DNA testing should be permitted at all or, for indigent inmates, at State expense. As the recommendations below indicate, the decision on whether this is a case for testing may have to be made by a judicial officer, who may also wish to ensure the defense counsel is available. These cases may raise difficult policy issues about how far post-conviction relief should reach. Bearing on the decision to test will be factors such as:

- . The other evidence in the case.
- . Whether the conviction was based on a guilty plea, a no contest plea, or a trial.
- . The availability of DNA testing at the time of trial.
- . The type of DNA technology available at the time of trial.
- . The petitioner's current status." Id. at 5.

-----End Footnotes----- [*14]

Interestingly, the defendant asserts that his policy is to authorize post-conviction DNA testing where there is a reasonable likelihood that it will establish the innocence of the convicted person. Horan aff. P 3. However, the defendant has not noted even one actual case where he implemented this policy.

Plaintiff's Motion for Summary Judgment

A constitutional basis for access to biological evidence was recently noted by Judge Berrigan in the Eastern District of Louisiana. "The court previously held that the plaintiff's request for the rape kit was not subject to dismissal for frivolousness." Charles v. Greenberg, 2000 U.S. Dist. LEXIS 18349, 2000 WL 1838713, *3 (E.D. La. 2000)(The evidence was eventually turned over voluntarily, not pursuant to a court order and ultimately exonerated the plaintiff). The District Judge also noted that the plaintiff "... is riding the crest of a new body of law using the latest science to free innocent men and women." Id. Likewise, the plaintiff is also riding the crest of this new body of law.

The court finds that, pursuant to Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194(1963), the plaintiff has a due process [*15] right of access to the DNA evidence and to conduct DNA testing upon the biological evidence, as such evidence could constitute material exculpatory evidence. "Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667, 682, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985). Under Brady, a defendant must prove three elements to establish a due process violation. These are: (1) the prosecution withheld or suppressed evidence; (2) the evidence is favorable; and (3) the evidence is material to the defense. Moore v. Illinois, 408 U.S. 786, 794-95, 33 L. Ed. 2d 706, 92 S. Ct. 2562 (1972). Brady applies to evidence discovered post-conviction. Royal v. Taylor, 188 F.3d 239, 245-46(4th Cir. 1999). One purpose of Brady is to

ensure that a miscarriage of justice does not occur. United States v. Bagley, 473 U.S. at 675.

Here, denying the plaintiff access to potentially powerful exculpatory [*16] evidence would result in such a miscarriage of justice. What is at issue at this juncture, is not, as the Commonwealth's Attorney suggests, the plaintiff's actual guilt or innocence. What is at issue is whether the plaintiff has made a sufficient showing that access to the new evidence is necessary for the plaintiff to ultimately raise an argument pursuant to, inter alia, O'Dell or Custis. Whether or not the evidence will ultimately be more likely than not to produce an acquittal, neither the plaintiff nor anyone else knows at this time. Whether the DNA evidence is sufficiently persuasive to warrant an acquittal is for the state trial court to decide ultimately. At that time, the standard articulated in Custis would most likely apply, but that is not for this court to decide.

The proffers by Commonwealth's Attorney Horan of the additional evidence of the plaintiff's guilt misses the point, and may well, should there be a retrial, produce another conviction. In this case, with the lack of a positive identification of the plaintiff as one of the perpetrators, and after examining the victim's trial testimony and considering the credibility of the state's witnesses the court [*17] concludes that these factors all point to conducting an examination of the additional, potentially exculpatory evidence through STR DNA testing.

The court also finds that it need not decide defendant's motion to quash the testimony of Dr. Ferrara, on the basis that it is moot.

Conclusion

For the foregoing reasons, the plaintiff's motion for summary judgment is granted and the defendant's motion for summary judgment is denied.

Albert V. Bryan, Jr.

United States District Judge

Alexandria, Virginia

April 16th, 2001

ORDER

This matter is before the court on the defendant's motion for summary judgment and the plaintiff's motion for summary judgment, pursuant to Fed. R. Civ. P. 56. Upon consideration of the parties' submissions and for the reasons states in the memorandum opinion filed today, it is hereby

ORDERED that:

1. Defendant's motion for summary judgment is DENIED;
2. Plaintiff's motion for summary judgment is GRANTED; therefore the defendant shall release the biological evidence including the rape kit, reference samples of the co-defendant, as well as the panty hose and maroon shirt found at the rape scene, and transfer this evidence to Dr. Paul [*18] Ferrara for STR DNA testing.
3. Defendant's motion to quash, or, in the alternative, in limine is DISMISSED as moot.

Albert V. Bryan, Jr.

United States District Judge

Alexandria, Virginia

April 16th, 2001

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Citation: **278 F3d 370**

*278 F.3d 370, *; 2002 U.S. App. LEXIS 923, ***

JAMES HARVEY, Plaintiff-Appellee, v. ROBERT F. HORAN, JR., Commonwealth's Attorney,
County of Fairfax, Defendant-Appellant. JENNIFER THOMPSON; KAREN R. POMER; JERI
ELSTER, Amici Curiae.

No. 01-6703

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

278 F.3d 370; 2002 U.S. App. LEXIS 923

September 26, 2001, Argued
January 23, 2002, Decided

PRIOR HISTORY: **[**1]** Harvey v. Horan, 2001 U.S. Dist. LEXIS 9587 (E.D. Va., Apr. 16, 2001).

DISPOSITION: The judgment of the district court was reversed and remanded with directions to dismiss.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff state prisoner sued defendant state attorney, seeking a constitutional right of access to DNA evidence under 42 U.S.C.S. § 1983. The United States District Court for the Eastern District of Virginia, at Alexandria, found that the prisoner had a due process right of access and that the claim was not in effect a petition for a writ of habeas corpus. The state attorney appealed.

OVERVIEW: The appellate court concluded that the state prisoner had failed to state a claim under 42 U.S.C.S. § 1983 because he was seeking to invalidate his final state conviction by seeking biological evidence to challenge the fact or duration of his confinement. Since the lawfulness of his state conviction had not been impugned, the state prisoner had failed to state a claim under 42 U.S.C.S. § 1983. The state prisoner's claim was more properly pressed as a habeas corpus petition because he was challenging the validity of his conviction, even though he was not seeking immediate release. However, the appellate court concluded that the claim was to be dismissed as a successive petition brought without leave of the court because he failed to show cause for his procedural default in not bringing a state habeas petition and failed to show that he had been prejudiced from the denial of post-conviction DNA testing.

OUTCOME: The judgment was reversed and the case was remanded with direction to dismiss it.

CORE TERMS: testing, biological, prisoner, post-conviction, denial of access, habeas corpus, writ of habeas corpus, successive, invalidity, finality, process right, confinement, sentence, innocence, constitutional right, rape conviction, habeas petition, state prisoner, evidence relating, court system, federally, convicted, guilt, exhaustion requirement, cause of action, deprivation, challenging, technology, cognizable, colleague

CORE CONCEPTS - ♦ Hide Concepts

 Constitutional Law : Civil Rights Enforcement : Civil Rights Act of 1871

✚ A convicted criminal defendant cannot bring a 42 U.S.C.S. § 1983 action that would necessarily imply the invalidity of his conviction or sentence unless he proves that his conviction or sentence has already been invalidated.

📄 Constitutional Law : Civil Rights Enforcement : Civil Rights Act of 1871

✚ There is not an exhaustion requirement engrafted upon 42 U.S.C.S. § 1983, but rather there is no cause of action for a criminal defendant. Even a prisoner who has fully exhausted available state remedies has no cause of action under § 1983 unless and until the conviction or sentence is reversed, expunged, invalidated, or impugned by the grant of a writ of habeas corpus.

📄 Criminal Law & Procedure : Appeals : Right to Appeal

✚ The finality of convictions cannot be brought into question by every change in the law. For example, a new rule cannot be applied retroactively to cases on collateral review unless the rule falls within one of two narrow exceptions to the general rule of non-retroactivity. Similarly, the United States Court of Appeals for the Fourth Circuit believes that finality cannot be sacrificed to every change in technology. 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.

📄 Criminal Law & Procedure : Postconviction Proceedings : Motions for New Trial

✚ The United States Court of Appeals for the Fourth Circuit acknowledges that finality of criminal judgments is not a value that trumps all others. In some circumstances, newly discovered evidence may warrant a new trial.

📄 Constitutional Law : Civil Rights Enforcement : Civil Rights Act of 1871

✚ 42 U.S.C.S. § 1983 does not exist to provide an open-ended assault on the finality of criminal judgments. Instead, § 1983 exists for the more limited purpose of redressing violations of the United States Constitution and federal statutes.

📄 Criminal Law & Procedure : Habeas Corpus : Cognizable Issues

✚ When a state prisoner challenges the fact or duration of his confinement and the relief he seeks is immediate or speedier release from imprisonment, his sole federal remedy is a writ of habeas corpus.

📄 Constitutional Law : Civil Rights Enforcement : Civil Rights Act of 1871

✚ In contrast to habeas corpus claims, 42 U.S.C.S. § 1983 claims can come immediately to federal court, without any need for the exhaustion of state remedies.

📄 Criminal Law & Procedure : Habeas Corpus : Cognizable Issues

📄 Constitutional Law : Civil Rights Enforcement : Civil Rights Act of 1871

✚ A state prisoner's label for his claim cannot be controlling for purposes of determining whether the claim is more properly pressed as a habeas corpus petition, even when the prisoner does not request immediate release. A prisoner's 42 U.S.C.S. § 1983 claim has to proceed under the habeas framework when he is seeking to establish every predicate for a subsequent request for release. When a complaint calls into question the validity of a state court conviction and has all the earmarks of a deliberate attempt to subvert the exhaustion requirement of 28 U.S.C.S. § 2254(b), the petitioner must observe the habeas requirements, notwithstanding the absence of any request for release. To hold otherwise would sanction an end run around the exhaustion requirement by anyone who could state a viable civil rights claim. Therefore, the court must examine whether a state prisoner's claim falls within the federal habeas corpus statute. If it does, the claim cannot proceed under § 1983.

📄 Criminal Law & Procedure : Habeas Corpus : Cognizable Issues

See Va. Code Ann. § 8.01-654(B)(2).

 Criminal Law & Procedure : Habeas Corpus : Procedural Default

A state procedural bar provides an independent and adequate state-law ground for a conviction and sentence, and thus prevents federal habeas corpus review of the defaulted claim, unless the petitioner can demonstrate cause and prejudice for the default.

 Criminal Law & Procedure : Habeas Corpus : Successive Petitions

Pursuant to 28 U.S.C.S. § 2244(b)(3), successive habeas petitions may only be filed with leave of court. In order to qualify as a successive petition, the dismissal of the first habeas petition must be on the merits.

 Criminal Law & Procedure : Habeas Corpus : Successive Petitions

The United States Court of Appeals for the Fourth Circuit concludes that the requirements in 28 U.S.C.S. § 2244(b) for a successive petition apply based on when the second petition was filed, not the first.

 Criminal Law & Procedure : Habeas Corpus : Procedural Default

According to the United States Court of Appeals for the Fourth Circuit, dismissal of a habeas petition for procedural default is a dismissal on the merits for purposes of determining whether a habeas petition is successive. By every reckoning, a dismissal for procedural default is a dismissal on the merits. It is critically different from a dismissal for failure to exhaust which does not prevent federal habeas review at a later date.

 Criminal Law & Procedure : Habeas Corpus : Successive Petitions

See 28 U.S.C.S. § 2244(b)(1).

 Criminal Law & Procedure : Habeas Corpus : Successive Petitions

See R. 9(b) of the Rules Governing 28 U.S.C.S. § 2254 Cases.

COUNSEL: ARGUED: Jack L. Gould, Fairfax, Virginia, for Appellant.

Peter J. Neufeld, THE INNOCENCE PROJECT, New York, New York, for Appellee.

ON BRIEF: Barry C. Scheck, THE INNOCENCE PROJECT, New York, New York; Lisa B. Kemler, ZWERLING & KEMLER, P.C., Alexandria, Virginia, for Appellee.

John D. Cline, FREEDMAN, BOYD, DANIELS, HOLLANDER, GOLDBERG & CLINE, P.A., Albuquerque, New Mexico, for Amici Curiae.

JUDGES: Before WILKINSON, Chief Judge, and NIEMEYER and KING, Circuit Judges. Chief Judge Wilkinson wrote the opinion, in which Judge Niemeyer joined. Judge King wrote an opinion concurring in part and concurring in the judgment.

OPINIONBY: WILKINSON

OPINION: [*372]

WILKINSON, Chief Judge:

James Harvey, a Virginia prisoner, seeks a constitutional right of access to DNA evidence under 42 U.S.C. § 1983. The district court found that Harvey had a due process right of

access to the DNA evidence and a right to conduct testing upon the evidence using technology that was unavailable at the time of his trial and at the **[**2]** time his conviction became final. The district court also concluded that Harvey's claim was not in effect a petition for a writ of habeas corpus. We disagree. Because substantively Harvey fails to state a claim under § 1983, and because procedurally his claim amounts to a successive petition for a writ of habeas corpus **[*373]** brought without leave of court, we reverse the judgment of the district court and remand the case with directions to dismiss it.

I.

On April 30, 1990, James Harvey was convicted of rape and forcible sodomy by a jury in Fairfax County Circuit Court. He was sentenced to consecutive terms of twenty-five years for the rape and fifteen years for the forcible sodomy. Harvey did not appeal his conviction but did file a state petition for a writ of habeas corpus which was rejected by the Virginia Supreme Court in 1993.

Conventional serology testing on the items recovered from the rape kit revealed the presence of spermatozoa on the victim's mouth smear, vaginal smear, and thigh smear, as well as in two swab samples and on the victim's panty-hose. Neither Harvey nor his codefendant, who was also convicted, could be excluded as a result of the Restriction Fragment Length Polymorphism **[**3]** ("RFLP") DNA testing available at the time of the trial. And there was other substantial evidence of Harvey's guilt. For example, Harvey's co-defendant testified that Harvey instigated the attack and that Harvey admitted he did not ejaculate while raping the victim. The victim heard one perpetrator call the other "Harv." Another prosecution witness, Curtis Ivy, told the police that Harvey confessed his involvement in the attack. Ivy testified that Harvey owned the maroon shirt identified as belonging to one of the assailants and that Harvey wore the shirt on the date of the attack. Harvey also threatened Ivy shortly before his trial, further suggesting Harvey's guilt.

On February 25, 1994, Harvey filed an action in federal district court against the Governor of Virginia pursuant to 42 U.S.C. § 1983. Harvey alleged that the state's failure to retest the biological evidence in his case violated his rights under the Due Process Clause. The district court ruled that Harvey's claim for additional DNA testing had to be refiled as a petition for a writ of habeas corpus under 28 U.S.C. § 2254. On July 25, 1995, the district court dismissed Harvey's **[**4]** petition. The court found that Harvey had failed to exhaust state remedies and had failed to raise his claim for DNA testing in his state petition for habeas corpus. Therefore, the district court concluded that any attempt by Harvey to raise his claim would be barred by Va. Code § 8.01-654(B)(2) and that Harvey's claim was procedurally defaulted. Because Harvey had not shown cause for his default in the state courts or prejudice resulting therefrom, the district court concluded that Harvey's claim had to be dismissed. Harvey did not appeal the district court's ruling.

In 1996, the Innocence Project contacted the Virginia Division of Forensic Science on Harvey's behalf in an attempt to obtain the biological evidence at issue for Short Term Repeat ("STR") DNA testing. STR DNA testing was unavailable at Harvey's trial and at the time his conviction became final. The Division of Forensic Science recommended that the evidence be requested from the Fairfax County Commonwealth's Attorney's office. In February 1998 and July 1999, the Innocence Project requested the biological evidence from the Commonwealth's Attorney.

In October 1999, an Assistant Commonwealth's Attorney denied Harvey's **[**5]** request for access to the evidence. The attorney stated that even if Harvey was excluded as a contributor of the genetic material, it would not prove his innocence because the victim had stated that only one perpetrator had ejaculated. The attorney concluded that postconviction DNA testing was not warranted because there was no reasonable **[*374]** likelihood that it would establish Harvey's innocence.

Harvey then filed this action in the district court pursuant to 42 U.S.C. § 1983. Harvey alleged, *inter alia*, that Commonwealth's Attorney Robert Horan had deprived him of a due process right of access to the DNA evidence. Harvey stated that at trial, the prosecution identified him as the first assailant. The victim testified that the first assailant was the only one who orally sodomized her. And the victim was unsure whether the first assailant had ejaculated. Therefore, Harvey argued that if the STR DNA test showed that he was not the source of sperm on the victim's mouth smear, or if it showed two genetic profiles other than his on the victim's vaginal swabs or panty-hose, the test would provide a basis for Harvey to prove his innocence.

The district court found **[**6]** Harvey's arguments persuasive, holding that he had a due process right of access to the DNA evidence under *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963), and a right to conduct DNA testing on the biological evidence using the new STR technology. The court also concluded that Harvey's claim was not in effect a petition for a writ of habeas corpus because Harvey was not seeking immediate release from prison or challenging his conviction. See *Harvey v. Horan*, 119 F. Supp. 2d 581 (E.D. Va. 2000); *Harvey v. Horan*, 2001 U.S. Dist. LEXIS 9587, 2001 WL 419142 (E.D. Va. Apr. 16, 2001). Commonwealth's Attorney Horan appeals.

II.

Commonwealth's Attorney Horan contends both that § 1983 is not an appropriate vehicle for Harvey's action and that procedural flaws require dismissal of Harvey's claim because it is in reality a successive petition for a writ of habeas corpus brought without leave of court. Harvey responds that his fundamental right to prove his innocence by retesting the DNA evidence in his case is protected by the Due Process Clause and that § 1983 is an appropriate avenue to vindicate his claim. *

While we agree **[**7]** with Harvey that the question of guilt or innocence lies at the heart of the criminal justice system, we also believe that the proper process for raising violations of constitutional rights in criminal proceedings cannot be abandoned. Because the substance of a claim cannot be severed from the proper manner of presenting it, we find Harvey's § 1983 action to be deficient.

A.

Substantively, Supreme Court precedent makes clear that Harvey has failed to state a claim under § 1983. In *Heck v. Humphrey*, 512 U.S. 477, 129 L. Ed. 2d 383, 114 S. Ct. 2364 (1994), the Supreme Court held that "a convicted criminal defendant cannot bring a § 1983 action that would 'necessarily imply the invalidity of his conviction or sentence' unless he proves that his 'conviction or sentence has already been invalidated.'" *Heck*, 512 U.S. at 486-87.

In *Heck*, the Supreme Court concluded that bringing a § 1983 action for damages arising from a still valid state conviction would be jumping the gun. In reaching its conclusion, the Court analogized a § 1983 claim that challenges the legality of a state conviction to the common law cause of action for malicious prosecution. **[**8]** The Court stated that "one element that must be alleged and proved in a malicious prosecution action is termination of the prior criminal proceeding in favor of the accused." *Heck*, 512 U.S. at 484. The Court emphasized that civil tort actions are simply "not appropriate **[*375]** vehicles for challenging the validity of outstanding criminal judgments." 512 U.S. at 486. Allowing them to be used for that purpose would undercut the long-standing concern not to undermine the finality of criminal convictions through civil suits. 512 U.S. at 484-86. The Court noted in conclusion:



We do not engraft an exhaustion requirement upon § 1983, but rather deny the existence of a cause of action. Even a prisoner who has fully exhausted available state remedies has no cause of action under § 1983 unless and until the conviction or sentence is reversed, expunged, invalidated, or impugned by the grant of a writ of habeas corpus.

512 U.S. at 489.

While *Heck* dealt with a § 1983 claim for damages, the Court did not limit its holding to such claims. And we see no reason why its rationale would not apply in a situation where a criminal defendant **[**9]** seeks injunctive relief that necessarily implies the invalidity of his conviction. See *Edwards v. Balisok*, 520 U.S. 641, 648-49, 137 L. Ed. 2d 906, 117 S. Ct. 1584 (1997) (leaving issue open). Harvey's § 1983 claim does just that. He seeks access to biological evidence to challenge the fact or duration of his confinement. Harvey claims that he is innocent and that further DNA testing will lead to his exoneration. Because he seeks to use § 1983 to invalidate a final state conviction whose lawfulness has in no way been impugned, his suit fails under *Heck*. It must be dismissed for failure to state a claim. n1

-----Footnotes-----

n1 Our good concurring colleague suggests that *Heck* might permit a state prisoner to come into federal court when the state prisoner sought the release of any available evidence. If that were the case, *Heck* would allow a broad-ranging post-conviction discovery right on the part of state prisoners proceeding in the first instance in federal court. Our concurring colleague recognizes that this cannot be the case. The whole point of *Heck* was to protect the finality of state judgments of conviction from challenge via unexhausted § 1983 actions. As the second section of our concurring colleague's opinion ably demonstrates, the utilization of § 1983 by state prisoners to obtain evidence in the first instance in federal court meets with a variety of obstacles. In sum, the second section of our concurring brother's opinion underscores why the broad-ranging right intimated in the first section cannot exist.

-----End Footnotes----- **[**10]**

Harvey relies on the fact that DNA testing may also conclusively prove his guilt in arguing that his claim does not necessarily imply the invalidity of his conviction. However, this attempt to avoid *Heck* fails. Harvey is seeking access to DNA evidence for one reason and one reason only -- as the first step in undermining his conviction. He believes that the DNA test results will be favorable and will allow him to bring a subsequent motion to invalidate his conviction. As such, an action under 42 U.S.C. § 1983 cannot lie.

The implications of circumventing *Heck* are no small matter. Harvey would have this court fashion a substantive right to postconviction DNA testing out of whole cloth or the vague contours of the Due Process Clause. We 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.

The Supreme Court has made clear that the finality of convictions cannot be brought into question by every change in the law. For example, under *Teague v. Lane*, a new rule cannot be applied retroactively to cases **[**11]** on collateral review unless the rule "falls within one of two narrow exceptions to the general rule of nonretroactivity." *Tyler v. Cain*, 150 L. Ed. 2d 632, 121 S. Ct. 2478, 2483 **[*376]** (2001) (discussing *Teague v. Lane*, 489 U.S. 288, 310-13, 103 L. Ed. 2d 334, 109 S. Ct. 1060 (1989)). Similarly, we believe that finality cannot be sacrificed to every change in technology. 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.

In so holding, ¶ we acknowledge that finality is not a value that trumps all others. In some circumstances newly discovered evidence may warrant a new trial. See, e.g., *United States v. Christy*, 3 F.3d 765, 768 (4th Cir. 1993). But there is no newly discovered evidence in this case. Instead, Harvey seeks to subject existing biological evidence to new DNA testing. This evidence was already subjected to DNA testing using the best technology available at the time Harvey's conviction became final. Establishing a constitutional due process right under § 1983 to retest evidence with each forward [**12] step in forensic science would leave perfectly valid judgments in a perpetually unsettled state. This we cannot do. In *Teague*, the Court stressed that finality "is essential to the operation of our criminal justice system," and that "without finality, the criminal law is deprived of much of its deterrent effect." 489 U.S. at 309 (plurality opinion). See also *McCleskey v. Zant*, 499 U.S. 467, 491-92, 113 L. Ed. 2d 517, 111 S. Ct. 1454 (1991). While finality is not the sole value in the criminal justice system, neither is it subject to the kind of blunt abrogation that would occur with the recognition of a due process entitlement to post-conviction access to DNA evidence.

Furthermore, ¶ *Heck* teaches that § 1983 does not exist to provide an open-ended assault on the finality of criminal judgments. See *Heck*, 512 U.S. at 486-87. Instead, § 1983 exists for the more limited purpose of redressing violations of the Constitution and federal statutes. Harvey has made no argument that his conviction violates the Constitution or any federal law. In fact, at oral argument Harvey conceded that he received due process under the law and under the [**13] science in existence when he was convicted in 1990. To confer upon Harvey a wide-ranging constitutional right in the absence of any argument that his underlying conviction violated the Constitution or a federal statute is simply beyond judicial competence.

In holding that Harvey has failed to state a claim under § 1983, we do not declare that criminal defendants should not be allowed to avail themselves of advances in technology. Rather, our decision reflects the core democratic ideal that if this entitlement is to be conferred, it should be accomplished by legislative action rather than by a federal court as a matter of constitutional right. Permitting Harvey's § 1983 claim to proceed would improperly short-circuit legislative activity by allowing judges, rather than legislatures, to determine the contours of the right.

This is not an area in which legislatures have been inactive. For example, the Innocence Protection Act of 2001 has been introduced in both houses of Congress. See S. 486, 107th Cong. (2001), 147 Cong. Rec. S1999 (Mar. 7, 2001); H.R. 912, 107th Cong. (2001). The Act would increase the availability of post-conviction DNA testing for a person convicted of a federal [**14] crime. The Act would also condition the grant of federal funds for state DNA-related programs on an assurance that the state will make post-conviction DNA testing available in specified types of cases. And the Act would require states to increase the availability of post-conviction DNA testing for death row inmates. See S. 486 §§ 101-104, [**377] 147 Cong. Rec. at S2001-03; H.R. 912 §§ 101-104.

Virginia has also passed legislation that increases the availability of post-conviction DNA testing. Currently, Va. Code § 19.2-327.1 (Michie Supp. 2001) allows a convicted felon to apply to the circuit court for DNA testing if, *inter alia*, the biological evidence was not previously subjected to the current DNA testing method and the testing is "materially relevant, noncumulative, and necessary and may prove the convicted person's actual innocence." *Id.* Additional statutory sections, scheduled to become effective on November 15, 2002, would allow the Supreme Court of Virginia to issue writs of actual innocence based on the results of post conviction DNA testing. See Va. Code §§ 19.2-327.2 to -327.6 (Michie Supp. 2001).

Allowing Harvey's action to proceed under § 1983 would judicially [**15] preempt legislative initiatives in this area. At oral argument, Harvey urged us to use the balancing test of *Mathews v. Eldridge* to fashion a broad constitutional due process right of access to DNA

testing. See *Mathews v. Eldridge*, 424 U.S. 319, 334-35, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976). When identifying the specific dictates of due process, *Mathews* states that a court should balance three factors: (1) "the private interest that will be affected by the official action," (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards," and (3) "the Government's interest, including the . . . administrative burdens that the additional or substitute procedural requirement would entail." *Id.* Harvey urges us to balance, under *Mathews*, an inmate's need for post-conviction DNA testing against the administrative burden to the state of providing it. However, this very balance is the one that legislative bodies are currently trying to strike. Establishing a federally supervised right of access via *Mathews* would cut off this on-going process and place the federal courts in a distinctly legislative posture. **[**16]**

B.

We thus hold that Harvey fails to state a claim under § 1983. We now explain why his claim is more properly pressed as a habeas corpus petition -- and as such, why his claim fails. Recognition of the courts' obligation to the habeas corpus process reinforces the substantive point that the district court should have dismissed Harvey's § 1983 claim.

In *Preiser v. Rodriguez*, 411 U.S. 475, 36 L. Ed. 2d 439, 93 S. Ct. 1827 (1973), the Supreme Court held that ^{§ 1983} when a state prisoner challenges the fact or duration of his confinement and the relief he seeks is immediate or speedier release from imprisonment, "his sole federal remedy is a writ of habeas corpus." 411 U.S. at 500. The Court emphasized that despite the literal applicability of § 1983's broad, general terms, the federal habeas corpus statute is "explicitly and historically designed to provide the means for a state prisoner to attack the validity of his confinement." 411 U.S. at 489-90. The Supreme Court was especially concerned that the habeas corpus exhaustion requirement not be circumvented. *Id.* See also 28 U.S.C. § 2254(b) (requiring exhaustion of **[**17]** state remedies before a federal habeas action challenging a state conviction can proceed). The Court stressed that the exhaustion requirement "is rooted in considerations of federal-state comity," and that Congress has decided that exhaustion of state remedies in cases where a state prisoner challenges the fact or duration of his confinement "will best serve the policies of federalism." *Preiser*, 411 U.S. at 491-92 & n.10. **[*378]**

^{§ 1983} In contrast to habeas corpus claims, § 1983 claims can come immediately to federal court, without any need for the exhaustion of state remedies. See *Patsy v. Bd. of Regents of Fla.*, 457 U.S. 496, 500-01, 516, 73 L. Ed. 2d 172, 102 S. Ct. 2557 (1982). The *Preiser* Court stressed that "it would wholly frustrate explicit congressional intent" to allow state prisoners to evade the exhaustion requirement "by the simple expedient" of putting a § 1983 label on their pleadings. 411 U.S. at 489-90. Harvey was convicted by the Commonwealth of Virginia. If remedial steps are to be taken, the courts of the Commonwealth must have the first shot at them. Allowing Harvey to bypass the exhaustion requirement of § 2254(b) would, **[**18]** by contrast, give federal courts the right to initial review of innumerable state judgments.

Harvey argues, however, that he is not bound by *Preiser* because he is not presently challenging the fact or duration of his confinement. He claims that he is seeking access to DNA evidence that will hopefully allow him to challenge his conviction at a later date. This claim is unavailing. We have squarely held that ^{§ 1983} a state prisoner's label for his claim cannot be controlling, even when the prisoner does not request immediate release. See *Hamlin v. Warren*, 664 F.2d 29, 30, 32 (4th Cir. 1981). In *Hamlin*, we held that a prisoner's § 1983 claim had to proceed under the habeas framework because he was seeking to establish "every predicate" for a subsequent request for release. *Id.* We concluded that when a complaint calls into question the validity of a state court conviction and "has all the earmarks of a deliberate attempt to subvert the [exhaustion] requirement of § 2254(b)," the petitioner must observe the habeas requirements, "notwithstanding the absence of any request for release." 664 F.2d at 32. To hold otherwise would sanction an end run around **[**19]** the

exhaustion requirement by "anyone who could state a viable civil rights claim." *Id.* See also *Pressly v. Gregory*, 831 F.2d 514, 518 (4th Cir. 1987). Therefore, we must examine whether a state prisoner's claim falls within the federal habeas corpus statute. If it does, the claim cannot proceed under § 1983.

Under *Preiser* and *Hamlin*, Harvey's sole federal remedy is a writ of habeas corpus. Like the prisoner in *Hamlin*, Harvey is challenging the validity of his conviction even though he is not seeking immediate release. Harvey seeks access to DNA evidence to attempt to prove that he is innocent. He is trying to use a § 1983 action as a discovery device to overturn his state conviction. The Supreme Court has made clear that habeas corpus relief is available "to attack future confinement and obtain future releases." *Preiser*, 411 U.S. at 487. This is precisely what Harvey is attempting to do -- use his claim for access to evidence to set the stage for a future attack on his confinement. Therefore, his claim is effectively a petition for a writ of habeas corpus.

The district court found that under *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963), **[**20]** Harvey had a due process right of access to the DNA evidence and a right to conduct new testing on the evidence. The district court concluded that Harvey had a valid *Brady* claim because the DNA testing "could constitute material exculpatory evidence." *Harvey v. Horan*, 119 F. Supp. 2d 581, 2001 WL 419142, at *5 (E.D. Va. Apr. 16, 2001). We are not persuaded. Harvey does not state a valid *Brady* claim because he is not challenging a prosecutor's failure to turn over material, exculpatory evidence that, if suppressed, would deprive the defendant of a fair trial. See *United States [*379] v. Bagley*, 473 U.S. 667, 675-76, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985). Harvey received a fair trial and was given the opportunity to test the DNA evidence during his trial using the best technology available at the time. However, even were we to accept Harvey's analogy to *Brady*, it would only reinforce the conclusion that Harvey is bringing a habeas action rather than a § 1983 claim because *Brady* claims are typically raised in habeas petitions. See, e.g., *Williams v. Taylor*, 529 U.S. 420, 437-40, 146 L. Ed. 2d 435, 120 S. Ct. 1479 (2000) **[**21]** (addressing state prisoner's *Brady* claim brought in a federal habeas proceeding); *Strickler v. Greene*, 527 U.S. 263, 144 L. Ed. 2d 286, 119 S. Ct. 1936 (1999) (same); *Gray v. Netherland*, 518 U.S. 152, 161-62, 135 L. Ed. 2d 457, 116 S. Ct. 2074 (1996) (same); *Wood v. Bartholomew*, 516 U.S. 1, 133 L. Ed. 2d 1, 116 S. Ct. 7 (1995) (same).

We thus proceed to consider Harvey's claim as one brought in habeas corpus. As a habeas petition, Harvey's action must be dismissed as a successive petition brought without leave of court. In 1994, Harvey brought his claim for access to DNA evidence as a federal petition for a writ of habeas corpus in the district court. The district court dismissed Harvey's claim as procedurally defaulted. The court found that, even though Harvey had knowledge of the factual basis for his claim at the time he filed a state habeas petition, he failed to raise his claim in state court. Therefore, pursuant to Va. Code § 8.01-654(B)(2), which states that "no writ [of habeas corpus] shall be granted on the basis of any allegation the facts of which the petitioner had knowledge at the time of filing any previous petition, **[**22]**" Virginia would bar Harvey's claim. Because Harvey failed to show cause for his default or prejudice resulting therefrom, the district court dismissed Harvey's claim.

The Supreme Court in another case subsequently reinforced the district court's approach by stating that "a state procedural bar 'provides an independent and adequate state-law ground for [a] conviction and sentence, and thus prevents federal habeas corpus review of the defaulted claim, unless the petitioner can demonstrate cause and prejudice for the default.'" *Gray*, 518 U.S. at 161-62 (addressing application of Va. Code § 8.01-654(B)(2)). Harvey had the opportunity to show cause for his default and demonstrate prejudice. But he never appealed the district court's decision.

Harvey has now brought the same claim for access to DNA evidence in this action. Pursuant to 28 U.S.C. § 2244(b)(3), successive habeas petitions may only be filed with leave of court. In order to qualify as a successive petition, the dismissal of the first habeas petition must

be on the merits. See *Slack v. McDaniel*, 529 U.S. 473, 485-89, 146 L. Ed. 2d 542, 120 S. Ct. 1595 (2000).

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n2 Even though Harvey's first federal habeas petition was filed in 1994, before the 1996 effective date of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), his current petition was filed in July 2000, after AEDPA's effective date. ¶ We conclude that AEDPA's requirements in 28 U.S.C. § 2244(b) for a successive petition apply based on when the second petition was filed, not the first. See, e.g., *Tyler v. Cain*, 121 S. Ct. 2478 (2001) (requiring compliance with § 2244(b) when the original habeas petition was filed pre-AEDPA but the successive one was filed after AEDPA's effective date); *Daniels v. United States*, 254 F.3d 1180, 1184-88 (10th Cir. 2001) (same). Therefore, § 2244(b) applies to Harvey.

-----End Footnotes----- **[**23]**

Our sister circuits have held that ¶ dismissal of a habeas petition for procedural default is a dismissal on the merits for purposes of determining whether a habeas petition is successive. See, e.g., *In re* **[*380]** *Cook*, 215 F.3d 606, 608 (6th Cir. 2000); *Carter v. United States*, 150 F.3d 202, 205-06 (2d Cir. 1998); *Hawkins v. Evans*, 64 F.3d 543, 547 (10th Cir. 1995); *Bates v. Whitley*, 19 F.3d 1066, 1067 (5th Cir. 1994); *Howard v. Lewis*, 905 F.2d 1318, 1322-23 (9th Cir. 1990). We agree. By every reckoning, a dismissal for procedural default is a dismissal on the merits. It is critically different from a dismissal for failure to exhaust which does not prevent federal habeas review at a later date.

In light of this, the district court's dismissal of Harvey's original habeas petition for procedural default was a dismissal on the merits. Harvey's current petition is accordingly a successive petition for a writ of habeas corpus. And because Harvey did not obtain leave to file this petition, his claim must be dismissed pursuant to 28 U.S.C. § 2244(b)(3). In addition, even if Harvey had **[**24]** sought leave of court, it could not have been granted in view of the unambiguous language of 28 U.S.C. § 2244(b)(1), which states: ¶ "A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." This is reinforced by the language of Rule 9(b) of the Rules Governing § 2254 Cases, which states that ¶ "[a] second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits." See also *Clanton v. Muncy*, 845 F.2d 1238, 1241 (4th Cir. 1988); *Turner v. Artuz*, 262 F.3d 118, 122-24 (2d Cir. 2001).

Appellant Horan points to strong evidence of Harvey's guilt in arguing that there is no prejudice from the denial of post-conviction DNA testing in this case. But in Harvey's case, the issue of prejudice has already been adjudicated by the district court's dismissal of Harvey's first habeas petition as procedurally defaulted. Harvey has never appealed this. This does not mean that there can be no relief for Harvey. What it does mean, however, is that **[**25]** any such relief must be conferred by either state or federal legislation or by the state courts acting under their own constitutions. Federal and state legislatures and state courts are free in ways that we are not to set the ground rules by which further collateral attacks on state convictions such as Harvey's may be entertained. For example, the proposed Innocence Protection Act of 2001 contains a provision explicitly stating that an application by a state death-row inmate for post-conviction DNA testing under the Act "shall not be considered an application for a writ of habeas corpus under [28 U.S.C. § 2254] for purposes of determining whether it or any other application is a second or successive application under section 2254." S. 486 § 104(d), 147 Cong. Rec. at S2003; H.R. 912 § 104(d). But under the current rules, a successive petition in habeas corpus will not lie in Harvey's case.

However strong the evidence of Harvey's guilt may be, Virginia can reopen his case if it so chooses. But what is open to Virginia is presently foreclosed in federal court. Fashioning a new federal constitutional right that would govern all prisoners in all states is not **[**26]** a

permissible way of addressing the question of post-conviction DNA testing. It is not merely that solutions which rely on the democratic process and on the experimental possibilities inherent in our federal system are practically superior. Those solutions alone are constitutionally sound. n3

-----Footnotes-----

n3 The opinion of our concurring colleague likewise underscores the limitations of a § 1983 action by a state prisoner to secure evidence in federal courts. In Section II of that opinion, Judge King addresses and rejects a variety of theories under which a § 1983 action may lie. He dismisses *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963), *Bounds v. Smith*, 430 U.S. 817, 52 L. Ed. 2d 72, 97 S. Ct. 1491 (1977), and *Mathews v. Eldridge*, 424 U.S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976), as bases for bringing a § 1983 action of this type. We appreciate our colleague's thoughtful analysis of these cases and the insights he has provided with respect to them. As to *Arizona v. Youngblood*, 488 U.S. 51, 102 L. Ed. 2d 281, 109 S. Ct. 333 (1988), there has, as our concurring colleague recognizes, never been any suggestion that the Commonwealth has concealed, destroyed, or otherwise manipulated potentially exculpatory evidence in this case. Further, neither *Arizona v. Youngblood* nor *Jean v. Collins*, 221 F.3d 656 (4th Cir. 2000), involved a § 1983 suit over evidence in a state conviction that had yet to be invalidated.

After oral argument in this case, Harvey's counsel submitted to the panel a copy of Appellee's Motion For Scientific Analysis of Previously Untested Scientific Evidence, which was filed in the Fairfax Circuit Court pursuant to Va. Code § 19.2-327.1. The filing of this motion reinforces our view that the state courts are the proper forum for the resolution of this controversy and why this federal suit must be dismissed.

-----End Footnotes----- **[**27] [*381]**

III.

For the foregoing reasons, we reverse the judgment of the district court and remand the case with directions to dismiss it.

REVERSED AND REMANDED

CONCURBY: KING (In Part)

CONCUR: KING, Circuit Judge, concurring in part and concurring in the judgment:

The issue of how or whether our criminal justice system should utilize technological and scientific improvements in the post-conviction context implicates the balancing of finality -- a necessity in our judicial process -- with our hallmark commitment to fair and impartial justice. I find myself in agreement with Chief Judge Wilkinson and the panel majority that, except for the broad parameters mandated by the Due Process Clause, such issues are more properly resolved by the legislative process. I also agree that the district court erred in concluding that Harvey's denial of post-conviction access to the biological evidence relating to his rape conviction contravened the requirements of *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963), and that Harvey's due process rights were violated by the conduct of the Commonwealth's Attorney.

I part company, however, with the majority's conclusion that **[**28]** Harvey's complaint must be construed as a petition for habeas corpus. To the contrary, under the Supreme Court's mandate in *Heck v. Humphrey*, 512 U.S. 477, 129 L. Ed. 2d 383, 114 S. Ct. 2364 (1994), his complaint should be analyzed as it is framed, that is, as a civil action initiated under 42 U.S.C. § 1983. Thus, the failing of this proceeding is not that it represents a successive petition for habeas corpus on a claim previously adjudicated, but that Harvey is

unable to demonstrate that a state actor somehow deprived him of a federally protected right. Therefore, although I agree with our good Chief Judge that the award of relief to Harvey should be reversed, I write separately to explain my rationale.

I.

The proper approach to analyzing Harvey's claim is to first determine whether it is cognizable under § 1983 or whether, in the alternative, it may only be brought in habeas corpus. If that determination is made in favor of § 1983, we must then decide whether Harvey has sufficiently alleged and demonstrated the requirements of a § 1983 action. Having undertaken this analysis, I view Harvey's complaint as cognizable under § 1983, but **[**29]** I conclude that he has failed to demonstrate that any **[*382]** of his federally protected rights were violated.

The majority, relying on *Heck v. Humphrey*, has decided that Harvey fails to state a claim under § 1983, and that his action is only cognizable, if at all, as a petition for habeas corpus. It observes that proceedings which, if successful, would necessarily imply the invalidity of a defendant's conviction or sentence must be brought, pursuant to *Heck*, in habeas corpus. *Ante* at 5. The majority therefore concludes that, because Harvey seeks access to the biological evidence to challenge his underlying rape conviction, his claim is not cognizable under § 1983. *Ante* at 6.

Although the relevant inquiry is whether a § 1983 proceeding explicitly or implicitly attacks the fact or length of a prisoner's confinement, the *Heck* decision does not compel the majority's conclusion. In *Heck*, the Court affirmed the principle that "habeas corpus is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement and seeks immediate or speedier release, even though such a claim may come within the literal terms of § 1983." *Heck*, 512 U.S. at 481. **[**30]** In furtherance of this principle, the Court held that, in any § 1983 action in which a state prisoner seeks damages, "the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence." 512 U.S. at 487 (emphasis added). n1 If such a necessary implication exists, then the complaint, according to Justice Scalia's opinion for the Court, "must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." *Id.* By the same token, Justice Scalia observed that "if the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit." *Id.*

-----Footnotes-----

n1 As the majority observes, *Heck* only dealt with a § 1983 suit for damages. *Ante* at 6. There is no reason, however, to believe that the principles of *Heck* are so limited, and I agree with the majority that the *Heck* rationale is also applicable to § 1983 proceedings by a prisoner seeking injunctive relief that would necessarily imply the invalidity of his conviction or sentence. *Ante* at 6. See also *Edwards v. Balisok*, 520 U.S. 641, 648-49, 137 L. Ed. 2d 906, 117 S. Ct. 1584 (1997) (leaving question unresolved).

-----End Footnotes----- **[**31]**

In this proceeding, Harvey seeks access to the biological evidence held by the Commonwealth's Attorney, and his suit, if successful, would merely result in the Commonwealth's Attorney making the evidence available to him. n2 That act alone -- providing Harvey with access to the biological evidence relating to his rape conviction -- does not, in the words of Justice Scalia, "necessarily imply" the invalidity of Harvey's conviction or sentence. 512 U.S. at 487. n3 Although Harvey might **[*383]** use the evidence, at some future date, to initiate a separate action challenging his conviction, future exculpation is not a necessary implication of Harvey's claim in this case. Indeed, Harvey's capable counsel

acknowledged at oral argument that state-of-the-art DNA testing often inculpatates rather than exculpates, and at other times it simply is inconclusive. n4 Thus, it is also possible -- and the Commonwealth would say likely -- that such testing will provide more conclusive evidence of Harvey's guilt. Put simply, we do not know whether providing Harvey with access to the evidence would assist or hinder his attempts at exculpation; therefore, his civil action requesting access to the biological evidence **[**32]** does not "necessarily imply" the invalidity of his conviction.

-----Footnotes-----

n2 The specific relief requested by Harvey in his complaint is:

Equitable relief, in the form of the search for and release of all biological evidence, including the rape kit and reference samples of [Harvey's co-defendant] Steve Lawrence as well as the panty hose and the maroon shirt collected in connection with the rape for which [Harvey] was convicted

Complaint at P A.

n3 Examining conventional dictionary definitions clarifies the stringent nature of the *Heck* test. "Necessarily" means "of necessity" or "inevitably"; thus, a successful lawsuit by Harvey will "necessarily imply" the invalidity of his conviction only if it "inevitably" mandates such a conclusion. See *Webster's II New College Dictionary* 731 (Houghton Mifflin Co. 1995). Put simply, if there is any conceivable way in which Harvey can succeed in this lawsuit and not impair the validity of his conviction, then a successful prosecution of Harvey's claim does not "necessarily imply" the invalidity of his conviction.

n4 This point, i.e., that STR DNA testing of biological evidence does not always result in future exculpation, is amply demonstrated by results obtained pursuant to the new Virginia statute, cited approvingly by the majority, that provides prisoners post-conviction access to DNA testing. See Va. Code Ann. §§ 19.2-327.1 to -327.6 (Michie Supp. 2001). Reportedly, the first post-conviction DNA testing accomplished under the statute, performed for a prisoner serving 42 years for rape, was inconclusive, and it failed to assist the prisoner in establishing his innocence. Brooke A. Masters, *DNA Test Fails to Vindicate Virginia Inmate*, Wash. Post, November 28, 2001, at B08.

-----End Footnotes----- **[**33]**

Our good Chief Judge, writing for the majority, maintains that, because Harvey is seeking access to the biological evidence in order to challenge his confinement, his complaint must in fact be considered as an effort to seek habeas corpus relief. *Ante* at 6. A prisoner's underlying rationale, however, for bringing his § 1983 suit is not relevant under *Heck*. The applicable standard is an objective one, and the only relevant question is whether the prisoner's legal proceeding, if successful, would "necessarily imply" the invalidity of his conviction or sentence." *Heck*, 512 U.S. at 487 (emphasis added). Therefore, even assuming Harvey's lawsuit is part of a long-term strategy to vacate his conviction, that fact has no bearing on whether his proceeding is cognizable under § 1983, or whether it may only be brought in habeas corpus. The issue, rather, is simply whether the claim made by Harvey would "necessarily imply" that his conviction should be reversed. In this situation, that is plainly not the case, and Harvey may therefore properly proceed under § 1983.

II.

Having concluded that Harvey's claim is cognizable under § 1983, I must address whether it

[34]** passes muster as such an action. Under § 1983, a plaintiff must demonstrate the deprivation of "rights, privileges, or immunities secured by the Constitution and laws" by a state actor. It is indisputable that the Commonwealth's Attorney is a state actor within the meaning of § 1983; therefore, in order for Harvey to prevail, he must demonstrate that his denial of access to the biological evidence relating to his rape conviction deprived him of a federally protected right. Harvey seeks to satisfy this requirement by contending that the denial of access constitutes a violation of his rights under the Due Process Clause of the Fourteenth Amendment. n5

-----Footnotes-----

n5 In his complaint, Harvey also alleged violations of his Sixth Amendment rights under the Compulsory Process Clause and the Confrontation Clause and his Eighth Amendment rights under the Cruel and Unusual Punishment Clause. The district court, however, in denying the Commonwealth's Attorney's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), implicitly found these claims to be without merit. The Commonwealth's Attorney moved to dismiss Harvey's claim pursuant to Rule 12(b)(6), asserting that Harvey had failed to allege a deprivation of a federally protected right. The district court denied that motion solely on the ground that Harvey's allegation that he had been denied access to the biological evidence "states a claim of denial of due process." *Harvey v. Horan*, 119 F. Supp. 2d 581, 584 (E.D. Va. 2000). The district court therefore implicitly determined that Harvey failed to state a claim with respect to his other allegations of constitutional deprivation. Harvey has not appealed that ruling, and we need not further address his alternative theories.

-----End Footnotes----- **[**35]** **[*384]**

A.

Before addressing the merits of Harvey's allegation that his due process rights have been violated, we must determine whether his § 1983 action is time-barred. The statute of limitations for § 1983 proceedings is borrowed from a state's general personal injury statute of limitations. *Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 187 (4th Cir. 1999). In Virginia, the applicable limitations period is two years from the time the cause of action accrues. Va. Code Ann. § 8.01-243(A) (Michie 2000). The determination of when a cause of action accrues, however, is a federal question and, under federal law, a cause of action accrues when "the plaintiff possesses sufficient facts about the harm done to him that reasonable inquiry will reveal his cause of action." *Jersey Heights*, 174 F.3d at 187 (quoting *Nasim v. Warden, Md. House of Correction*, 64 F.3d 951, 955 (4th Cir. 1995) (en banc)).

We must therefore examine the allegations and the record to assess when Harvey suffered the alleged deprivation of his due process rights, and when Harvey possessed sufficient facts about such deprivation that reasonable inquiry would **[**36]** have revealed his cause of action. Harvey asserts multiple theories for how his denial of access to the biological evidence relating to his rape conviction violated due process. Under several of those theories, he contends that due process requires that he have access to the biological evidence, and, as such, the relevant constitutional harm occurred when Harvey was first denied access by the Commonwealth's Attorney.

If the mere denial of access is the relevant constitutional harm, then Harvey's § 1983 claim is likely time-barred. The record reveals that Harvey first began seeking the biological evidence from the Commonwealth's Attorney between November 1996 and February 1998, and he asserts in his complaint that he was "repeatedly unsuccessful" in his efforts to obtain access prior to making a formal request in February 1998. Complaint at P 34. Harvey also alleged that he had never received a response to his February 1998 request. *Id.* Therefore, according to Harvey, by the middle of 1998, he had been pursuing access to the biological evidence for well over a year, and he had received no access to the evidence and had met with uncooperative silence from the Commonwealth's Attorney. **[**37]** If, standing alone, the

denial of access to evidence violates due process, then it is likely that, by the middle of 1998, (1) a "constructive" denial had occurred, and (2) Harvey possessed sufficient facts to know that his rights were being violated. Yet Harvey failed to initiate this § 1983 proceeding until July 7, 2000, well over three years after he began seeking the evidence and more than two years after he failed to receive a response to his formal request to the Commonwealth's Attorney for access. Thus, if the mere denial of access by the Commonwealth's Attorney is sufficient to violate Harvey's due process rights, then Harvey's § 1983 suit is probably time-barred. **[*385]**

For one of Harvey's theories of due process violations, however, the relevant harm is a denial of access to the biological evidence in bad faith, i.e., with the purpose and effect of frustrating Harvey's exercise of his constitutional rights. Under that theory, before Harvey's cause of action under § 1983 would accrue, he would need to possess sufficient facts to trigger a reasonable inquiry into whether the denial had been in bad faith. It is unclear from this record whether, assuming that the Commonwealth's Attorney **[**38]** denied Harvey's request in bad faith, Harvey possessed sufficient information by July 7, 1998, for his cause of action to accrue. Given that ambiguity, and given the sparseness of the record generally with respect to Harvey's knowledge of the status of his requests for access, his § 1983 claim cannot be disposed of solely on limitations grounds. I therefore turn to the merits of Harvey's § 1983 proceeding.

B.

In contending that he had been deprived of his due process rights, Harvey offered multiple theories on how the Commonwealth's Attorney's denial of access violated due process. Specifically, Harvey asserted that the denial of access violated the rule of *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963), and interfered with his right of meaningful access to the court system. In addition, he contended in a more general fashion that the denial of access contravened the requirements of *Arizona v. Youngblood*, 488 U.S. 51, 102 L. Ed. 2d 281, 109 S. Ct. 333 (1988), and that it abridged substantive due process. Although the district court granted summary judgment in Harvey's favor solely on the basis of his *Brady* claim, this **[**39]** Court has "consistently recognized that, even [if] we disagree with the reasoning of the district court, we may affirm the result on different grounds if fully supported by the record." *Brewster of Lynchburg, Inc. v. Dial Corp.*, 33 F.3d 355, 361 n.3 (4th Cir. 1994). Therefore, I will address each of these theories in turn.

1.

The district court identified and found a due process deprivation under *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963). *Harvey v. Horan*, 2001 U.S. Dist. LEXIS 9587, 2001 WL 419142 at *5 (E.D. Va. Apr. 16, 2001) ("The court finds that, pursuant to *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963), the plaintiff has a due process right of access to the DNA evidence and to conduct DNA testing upon the biological evidence, as such evidence could constitute material exculpatory evidence."). On this point, I agree with Judge Wilkinson: Harvey's denial of access to the biological evidence after his conviction and sentencing, standing alone, fails to contravene *Brady*. *Ante* at 11. As the majority points out, there is no allegation that Harvey did not **[**40]** receive a fair trial in the courts of Virginia in 1990. *Id.* There is also no contention that the Commonwealth denied Harvey access to *Brady* material during his prosecution. As such, the *Brady* rule has no application to Harvey's claim in this case. n6

-----Footnotes-----

n6 Moreover, under the second prong of the *Brady* rule, the prosecution is only required to disclose evidence that is favorable to the defendant. *Brady*, 373 U.S. at 87. It is not now known whether the biological evidence being sought by Harvey would be favorable or unfavorable to him. As such, even if Harvey had been denied access to the evidence during

his trial, the *Brady* rule would not have applied.

----- -End Footnotes- -----

2.

Given that the *Brady* rule is not applicable, I next evaluate Harvey's contention that his denial of access to the biological **[*386]** evidence relating to his rape conviction violates his right of access to the courts. Harvey asserts that the denial of access by the Commonwealth's Attorney prevented him from bringing future actions **[**41]** to challenge his conviction, such as a clemency application or another petition for habeas corpus relief, and thereby blocked him from obtaining any relief in the court system; therefore, Harvey maintains that the denial of access contravened his constitutional right of access to the court system under the Due Process Clause.

It is well established that due process requires government officials to permit prisoners "adequate, effective, and meaningful" access to the court system to litigate post-conviction legal issues, such as habeas corpus and civil rights actions. *Bounds v. Smith*, 430 U.S. 817, 822, 52 L. Ed. 2d 72, 97 S. Ct. 1491 (1977); see also *Wolff v. McDonnell*, 418 U.S. 539, 579, 41 L. Ed. 2d 935, 94 S. Ct. 2963 (1974); *Johnson v. Avery*, 393 U.S. 483, 485-86, 21 L. Ed. 2d 718, 89 S. Ct. 747 (1969). As such, the government must ensure that prisoners have the substantive ability to take advantage of post-conviction legal options, i.e., the ability to file the requisite legal papers is insufficient. The Court has also observed, however, that a state has no affirmative duty to "enable the prisoner to *discover* grievances, and **[**42]** to *litigate effectively* once in court." *Lewis v. Casey*, 518 U.S. 343, 354, 135 L. Ed. 2d 606, 116 S. Ct. 2174 (1996). Thus, although a state must provide prisoners with meaningful access to the legal system, it is not obligated to maximize the prisoner's chances of prevailing in his postconviction action.

Under *Lewis*, the mere fact that the Commonwealth's Attorney denied Harvey access to the biological evidence is insufficient to abridge Harvey's right of access to the courts. Even without access to the evidence, Harvey is fully capable of taking advantage of postconviction legal options such as habeas corpus and clemency. He has made no allegation that he lacks an adequate library or other legal resources such that he is unable to effectively initiate a postconviction proceeding. Harvey's contention is essentially that he needs access to the biological evidence to increase his chance of success in any future clemency application or habeas corpus proceeding he might initiate; however, under *Lewis*, the Commonwealth's Attorney has no obligation to help Harvey bolster any such future legal efforts. 518 U.S. at 354. Thus, the Commonwealth's Attorney's **[**43]** denial of access to Harvey did not infringe upon Harvey's constitutional right of access to the court system.

3.

Harvey also generally contends that his denial of access to the biological evidence violated due process because it contravened the requirements of *Arizona v. Youngblood*, 488 U.S. 51, 102 L. Ed. 2d 281, 109 S. Ct. 333 (1988). The Supreme Court held in *Youngblood* that the prosecution violates the Due Process Clause if it fails to preserve potentially exculpatory evidence in bad faith, even though such material is outside the scope of *Brady v. Maryland*. 488 U.S. at 58. Harvey contends that "under *Youngblood*, blocking access to existing evidence whose potential exculpatory value is self-evident is no different than, in bad faith, destroying it," and therefore the denial of access violated his due process rights. Appellee's Br. at 9.

As an initial matter, *Youngblood*, like *Brady*, addresses the prosecution's constitutional duty prior to conviction, and thus fundamentally concerns a criminal defendant's due process right to a fair trial. Harvey's reliance on *Youngblood*, however, is not entirely misplaced, because *Youngblood* **[**44]** **[*387]** also implicates a broader due process concern. Government

agents should not actively impede an attempt to exercise a constitutional right in bad faith, i.e., with the intended purpose of preventing an individual from exercising the right. In fact, Judge Wilkinson explained this point with clarity in his opinion in

Jean v. Collins, 221 F.3d 656 (4th Cir. 2000).

Of course the bad faith manipulation of evidence on the part of the police cannot be countenanced. Constitutional absolution for the concealment, doctoring, or destruction of evidence would fail to protect the innocent, fail to assist the apprehension of the guilty, and fail to safeguard the judicial process as one ultimately committed to the ascertainment of truth.

221 F.3d at 663. In essence, the concept of due process requires that the government treat its citizens in an evenhanded and neutral manner; thus the targeting of specific individuals with the purpose of frustrating the exercise of their lawful rights contradicts the basic premise of the constitutional guarantee.

Thus, given that prisoners possess a right of effective access to the court system, a governmental decision **[**45]** to deny access to evidence with the intent -- and with the effect -- of preventing a prisoner from exercising his right of effective access to the court system would violate due process. Cf. Swekel v. City of River Rouge, 119 F.3d 1259, 1262 (6th Cir. 1997)(concluding that police cover-up of evidence which prevented plaintiff from filing § 1983 suit against government officials violated plaintiff's constitutional right of access to court system); Bell v. City of Milwaukee, 746 F.2d 1205, 1261 (7th Cir. 1984)(holding that constitutional right of access is violated when police deny plaintiffs information necessary for them to seek redress). To permit a state official to target a particular prisoner and to deliberately frustrate that prisoner's ability to take advantage of post-conviction legal options contravenes the essence of fair and impartial procedural justice.

Therefore, in order for Harvey to prevail on his § 1983 claim, he must demonstrate that the Commonwealth's Attorney denied him access to the biological evidence in bad faith, i.e., it deliberately blocked his access to the evidence in order to impede his ability to take advantage of **[**46]** available post-conviction legal procedures. In the circumstances presented, Harvey cannot prevail on this claim. He has made no allegation of bad faith on the part of the Commonwealth or its representatives, and he has presented no evidence of any bad faith. As such, Harvey has failed to demonstrate that the Commonwealth's Attorney's conduct violated his due process rights.

4.

Finally, Harvey contends that the conduct of the Commonwealth's Attorney violated his due process rights because the denial of access to the biological evidence contravened substantive due process. As the majority observes, Harvey indicated at oral argument that this Court should employ the three-part balancing test of Mathews v. Eldridge, 424 U.S. 319, 334-35, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976), to craft a due process right of access to biological evidence for the purpose of DNA testing. *Ante* at 9. Harvey asserts that, given a prisoner's substantial interest in proving his innocence and the minor administrative burden to the state in providing access, we should find such a due process right.

Harvey's reliance on Mathews is misplaced. The Court in Mathews promulgated the three-part **[**47]** test as a means of evaluating the constitutional adequacy of administrative procedures used to deprive **[*388]** an individual of a "liberty" or "property" interest. Mathews, 424 U.S. at 331-35. Justice Powell, writing for the Court, observed that "procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." 424 U.S. at 331. He also noted, however, that "'due process,' unlike

some legal rules, is not a technical conception with a fixed content unrelated to time, place, and circumstances," and he consequently recognized that different administrative proceedings could use very different procedures and nonetheless be constitutionally sufficient. 424 U.S. at 334 (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, 6 L. Ed. 2d 1230, 81 S. Ct. 1743 (1961)). Justice Powell therefore established the three-part test as a procedure for analyzing whether a governmental decisionmaking process complied with constitutional constraints. 424 U.S. at 334-35.

Thus the balancing test of *Mathews* **[**48]** is only relevant when the government is depriving an individual of a "liberty" or "property" interest. Harvey must therefore possess such an interest in accessing or possessing the biological evidence relating to his rape conviction before the principles of *Mathews* come into play. Harvey, however, has no such interest. He has no post-conviction legal right to access or discover the evidence relating to his rape conviction, and he certainly has no property interest in such evidence. As such, the *Mathews* test is not applicable to Harvey's situation. n7

-----Footnotes-----

n7 As for Harvey's more general contention that denying him access to the biological evidence violates substantive due process, it may be that the significant interest of our constitutional system in ensuring justice requires, under the Due Process Clause, that prisoners enjoy access to evidence for the purpose of DNA testing. That, however, in my view, is not an issue within our bailiwick; if any such right exists, it must be recognized by judges of a higher pay grade than those of this Court.

-----End Footnotes----- **[**49]**

C.

Harvey therefore is unable to demonstrate that the Commonwealth's Attorney's denial of access, under any of his theories, violated his due process rights. As such, Harvey has failed to demonstrate that his federally protected rights were violated, and his § 1983 proceeding must fail.

III.

Our criminal justice system is not infallible, and it has occasionally convicted an innocent person. Although technological and scientific advances may well enable our legal system to make more precise judgments of guilt or innocence, the blanket application of such developments to previously concluded proceedings raises difficult questions concerning finality. An appropriate balance must therefore be struck between accuracy and finality, and the integrity and efficiency of our judicial system must be preserved.

Regardless of where I would strike such a balance, it is not, as I have stated, our role to decide the issue here. Our task is to ensure that the Commonwealth's Attorney has not, in this case, violated Harvey's federally protected rights -- and he has not done so.

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