No. 20-48

# In the Supreme Court of the United States

STACEY JOHNSON,
*Petitioner,*

v.

STATE OF ARKANSAS,
*Respondent.*

**On Petition for Writ of Certiorari To the Supreme Court of Arkansas**

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

(1) Whether the exclusively state-law matters decided by the Arkansas Supreme Court are properly before this Court as a jurisdictional and prudential matter, where Petitioner's federal constitutional claims were raised for the first time in a petition for rehearing and essentially amount to an argument that the State court misinterpreted State law.

(2) Whether the Arkansas Supreme Court's application of Arkansas's post-conviction DNA-testing statute, which is in accord with the courts of appeals' application of the materially identical federal statute, violates procedural due process by requiring prisoners to show that favorable DNA testing results would raise a reasonable probability of their innocence.

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## INTRODUCTION

Immediately upon being released from a stint in jail, Stacey Eugene Johnson brutally murdered Carol Heath in her home. The evidence tying Johnson to Heath's murder was, and remains, overwhelming. Apart from the eyewitness testimony of Heath's daughter, who was home when Johnson beat and tortured Heath before slicing her throat open, Johnson's own confession and numerous pieces of physical evidence supported his guilt. DNA testing also underscored that Johnson murdered Heath, and subsequent re-testing only further illustrated Johnson's indisputable guilt.

To delay his then-impending execution, Johnson filed a petition for State post-conviction DNA testing and still more re-testing. The Arkansas Supreme Court stayed his execution but later held that he did not qualify for further testing under the statute. Under Arkansas law, and the materially identical federal DNA-testing statute, a prisoner is not entitled to DNA testing unless he shows that a favorable test result would raise a reasonable probability of his innocence. The State courts held Johnson could not meet that standard where the evidence against him was overwhelming and would not be undermined by the DNA testing sought.

Johnson now claims that this straightforward application of Arkansas law violated the federal constitution. To make that argument, Johnson disingenuously claims that the Arkansas Supreme Court held that, under State law, to qualify for additional testing, he had to first demonstrate his innocence. And while that claim lacks even a shred of merit, this Court need not even reach that issue to deny the petition because Johnson's petition amounts to little more than an assertion that the

Arkansas Supreme Court erred in construing State law and a request that this Court consider federal claims that Johnson did not raise until he sought rehearing below. But even if Johnson could overcome those jurisdictional and prudential hurdles, review would likewise not be warranted because Johnson's claims fail on the merits. The petition should be denied.

## STATEMENT

1. Sometime during the evening of April 1 or the morning of April 2, 1993, Johnson murdered Carol Health. Johnson strangled Heath, caused blunt force head injuries, and "sliced [Heath's] throat through one-quarter inch into her spine, completely severing her windpipe, strap muscles, and the major arteries and veins in her neck." Pet. App. 12a. "[D]efensive wounds scattered across her arms and legs" evidenced Heath's attempts to resist Johnson, and the "[b]ite marks found on each breast" and "contusion . . . near the vaginal area" suggested sexual assault. Pet. App. 12a. Johnson left Heath "dead on the living room floor" of her apartment, "lying in a pool of blood, dressed only in a white shirt that had been wadded up around her neck." Pet. App. 12a.

Heath's two-year-old son and six-year-old daughter Ashley were home when Johnson murdered her. Pet. App. 12a. When Heath's body was found, her children were in the bedroom. Pet. App. 12a. Police removed them from the apartment through the bedroom window so Heath's children would not see their mother's body on the floor. Pet. App. 12a.

Heath's daughter Ashley witnessed the murder and was able to tell police what she saw. According to Ashley, an African American man with a "girl sounding name"

came to their house on the night of April 1, 1993, wearing a "'black hat with something hanging down the back,' a green shirt, and a sweater." Pet. App. 12a. He told Ashley's mother that "he had just been released from jail and was mad at [her] for dating Branson Ramsey." Pet. App. 12a. Ashley described her mother and the man "fighting" and told police that she saw her mother "lying on the floor bleeding, while the man stood next to [her mother] with a knife in hand." Pet. App. 13a. Ashley twice identified Johnson as her mother's murderer in a photo lineup. Pet. App. 13a.

Johnson had met Heath in January 1993 in Sevier County, Arkansas through Ramsey, whom Heath was dating at the time. Pet. App. 13a. Witnesses testified that Johnson was angry at Heath and one of her friends because they repeatedly refused to date him and transport drugs for him. Pet. App. 13a. Johnson was incarcerated from February 1, 1993, until April 1, the night of the murder. Pet. App. 13a. Johnson spoke with two other inmates about Heath and his plans to have sex with her when he was released from jail. Pet. App. 13a. One of those conversations took place the day before Johnson was released. Pet. App. 13a.

Johnson was released the afternoon of April 1 and swiftly proceeded to carry out his plans. He went to his stepmother's home and donned a white t-shirt she gave him along with a "black 'do rag,' a green shirt, and a jacket." Pet. App. 14a. Johnson "told her that he planned to stay the night with a white girl who had two young children." Pet. App. 14a. Johnson went to Heath's apartment that evening and murdered her.

The evidence implicating Johnson as Heath's murderer was, and remains, damning. Foremost is Ashley's horrifying eyewitness account of Johnson's murder of

Heath, including Ashley's spot-on description of the outfit Johnson wore that night. Ashley's account is corroborated by the fact that no other African American males were released from the Sevier County jail between March 14 and April 2, 1993. Pet. App. 14a. Moreover, three days after Heath's murder, her purse was found near a green pullover shirt, a white T-shirt, and a towel. Pet. App. 14a. Johnson's stepmother testified that the T-shirt looked like the one she gave him the night of the murder, and blood on the shirts and towel matched Heath's DNA. Pet. App. 14a. A partially smoked cigarette was also found in the pocket of the green pullover, and DNA on it was consistent with Johnson's. *Id.* So was the DNA from several African American hairs found on and around Heath's body. Pet. App. 14a. Finally, when Johnson was later arrested, after his attempt to bribe the arresting officers into releasing him failed, he admitted to police that "he killed someone in Arkansas and had a warrant out for his arrest." Pet. App 15a.

2. Johnson was first convicted of Heath's murder and sentenced to death in 1994. That conviction was reversed on appeal for evidentiary errors. *Johnson v. Arkansas*, 326 Ark. 420 (Ark. 1996) ("*Johnson I*"). Johnson was re-tried in 1997, with new STR-DNA testing having been conducted on the cigarette, green shirt, and African American hairs. Pet. App. 15a. These further DNA tests only strengthened the case against Johnson. The results of the re-testing put the odds of the saliva on the cigarette belonging to anyone but Johnson at one in 28 million African Americans, and the hairs at one in 720 million. Pet. App. 15a. A second jury reached the same verdict

after the second trial, and that conviction was affirmed on appeal. *Johnson v. Arkansas*, 342 Ark. 186 (Ark. 2000) ("*Johnson II*").

3. Johnson then filed an unsuccessful petition for post-conviction relief under Arkansas Rule of Criminal Procedure 37, alleging ineffective assistance of counsel. *Johnson v. State*, 356 Ark. 534 (Ark. 2004) ("*Johnson III*"). At the same time, he filed a State habeas corpus petition seeking DNA testing under the version of Act 1780 of 2001 then in place. He sought DNA testing of Caucasian hairs found in Heath's apartment and on the green shirt, and he sought re-testing of the cigarette and African American hairs. *Johnson III*, 356 Ark. at 543.

The Arkansas Supreme Court denied Johnson's request as to the Caucasian hairs—which Johnson at that time speculated might belong to a serial killer—because Johnson could have had them tested prior to trial and chose not to, and the prosecution stipulated that these hairs belonged to someone other than Johnson. *Id.* at 548. Thus, "the jury knew there were hairs that belonged to someone other than Johnson and it still convicted him." *Id.* The court held that the hairs were not "'materially relevant to [Johnson's] assertion of actual innocence' as required by" that version Act 1780. *Id.* (quoting the prior version of Ark. Code Ann. 16-112-202(c)(1)(B)).

The court also denied further re-testing of the cigarette. Between the first and second DNA tests, the odds of the saliva belonging to someone other than Johnson decreased from one in 250 to one in 28 million. *Id.* at 549. Johnson claimed that new testing had been developed that could test for "new genetic markers," but the court noted that it was "extremely unlikely" that Johnson "and someone else had the exact

same DNA genetic profile—down to a certainty of 1 in 28 million—and yet differed in other genetic markers." *Id.* Given those odds, Johnson was merely "seeking an endless succession of retesting of old evidence," and further testing of the cigarette was "unlikely to 'significantly advance'" his "'claim of innocence.'" *Id.* at 549-50.

As to the African American hairs, the court was under the mistaken impression that those hairs had not been re-tested since the first trial and remanded for further testing of those hairs to be conducted. *Johnson v. State*, 366 Ark. 390, 392 (Ark. 2006) ("*Johnson IV*"). After the trial court found that the hairs *had* in fact been re-tested prior to the second trial—decreasing the odds that the hairs belonged to anyone other than Johnson from one in 250 to one in 720 million—the Arkansas Supreme Court recognized its mistake and denied further re-testing. *Id.* at 395.

5. Johnson then unsuccessfully pursued relief in federal court. *Johnson v. Norris*, 537 F.3d 840 (8th Cir. 2008), *cert. denied* 555 U.S. 1182 (2009).

6. In 2005, the Arkansas General Assembly amended Act 1780 so that its provisions are substantially similar to the federal Justice for All Act of 2004, codified at 18 U.S.C. 3600. The requirements for obtaining DNA testing contained in Ark. Code Ann. 16-112-202(6) and -202(8) are worded identically to those at 18 U.S.C. 3600(a)(6) and 3600(a)(8). As relevant here, Act 1780 requires a prisoner proposing DNA testing to identify a theory of defense that would "establish [his] actual innocence . . . ." Ark. Code Ann. 16-112-202(6)(b). The proposed testing must "[s]upport" the prisoner's "theory of defense" and "[r]aise a reasonable probability that [the prisoner] "did not commit the offense." *Id.* 16-112-202(8).

The Arkansas Supreme Court has repeatedly made clear that Act 1780 "was 'not meant to do away with finality in judgments.'" *Martin v. State*, 2018 Ark. 176, at *3 (Ark. 2018) (quoting *Johnson III*, 356 Ark. at 549)). Thus, the statute "does not permit testing of evidence based on a mere assertion of innocence or the theoretical possibility that additional testing might alter the outcome of a trial." *Id.* Rather, the testing must "provide materially relevant evidence that will significantly advance the defendant's claim of innocence in light of all the evidence presented to the jury." *McClinton v. State*, 2017 Ark. 360, at *5 (Ark. 2017).

7. Arkansas scheduled Johnson's execution for April 20, 2017. As this Court has repeatedly recognized, capital murders have every incentive to delay pursuing claims until the last minute in order to delay their execution. *See Dunn v. Price*, 139 S. Ct. 1312, 1312 (2019) (citing *Gomez v. United States Dist. Ct. for N. Dist. of Cal.*, 503 U.S. 653, 654 (1992) (per curiam)). In that spirit, in the weeks leading up to his execution, Johnson filed a slew of petitions seeking to recall the mandate or for a writ of error coram nobis in his State-court cases, a stay of his execution, and DNA testing of the same Caucasian hairs. Pet. App. 16a-17a. Johnson's previous speculation that a serial killer was actually Heath's murderer had by this point changed to his current focus on Branson Ramsey, who by this point was deceased. Pet. App. 17a. The Arkansas Supreme Court rejected his petitions. Pet. App. 17a.

Yet days later, Johnson filed in the trial court a petition for post-conviction DNA testing of twenty-six pieces of evidence. The Arkansas Supreme Court categorized

the evidence as: "(1) evidence of an alleged sexual assault; (2) evidence from the roadside park; and (3) evidence on and around Heath's body." Pet. App. 17a (footnotes omitted).[1] The trial court denied Johnson's request, but the Arkansas Supreme Court granted a last-minute stay of his execution and remanded for an evidentiary hearing on Johnson's petition for DNA testing. Pet. App. 17a. At that hearing, Johnson presented evidence on three supposedly "new" methods of DNA testing that had actually been used for years—*to wit*, touch DNA, mitochondrial DNA, and Y-STR DNA. Pet. App. 18a. The trial court again denied Johnson's petition, concluding that he did not meet the requirements of Act 1780. Pet. App. 18a.

The Arkansas Supreme Court affirmed on appeal. It held that Johnson's proposed testing "could not raise a reasonable probability that Johnson did not commit the offense." Pet. App. 21a. In explaining the "reasonable probability" standard, the court echoed the approach taken by federal courts. That standard "may be met when favorable testing results would cause a 'strong case' against the petitioner to 'evaporate.'" Pet. App. 21a (quoting *United States v. Fasano*, 577 F.3d 572, 578 (5th Cir. 2009)). But where "the 'presence or absence of the [petitioner's] DNA would not show actual innocence, there is no reason to test for it.'" Pet. App. 21a (quoting *United States v. Watson*, 792 F.3d 1174, 1180 (9th Cir. 2015)).

Johnson's theory of defense was that "another man, possibly Branson Ramsey, murdered Carol Heath." Pet. App. 20a. He asserted that the presence of another male's DNA on any of the evidence at issue would support that theory. The court

[1] The full description of those items can be found at footnotes 2-4 accompanying the cited text.

disagreed, holding that it "fail[ed] to see how the presence of another male's DNA on the evidence would raise a reasonable probability of Johnson's innocence." Pet. App. 22a. It echoed its holding in *Johnson III*, where it had "previously determined that the Caucasian hairs were not materially relevant to Johnson's claim of actual innocence" because the jury was "aware that hairs belonging to someone else other than Johnson had been found" and "still convicted him." Pet. App. 22a. That same analysis was "applicable to other evidence" including "the DNA found on the breast swabs and the white shirt from the roadside park," of which the jury was also aware. Pet. App. 22a-23a.

The court went on to explain that, even if Branson Ramsey's DNA turned to be present on the evidence, there was a "logical explanation," given that many of the pieces of evidence Johnson proposed to test "would have been in Heath's home at some point prior to the crime," and "Ramsey had seen Heath the day before she was murdered and visited her home multiple times in the months before her death." Pet. App. 23a. Moreover, testimony established that Heath and Ramsey "were dating at the time of the murder . . . ." Pet. App. 23a.

Finally, the court concluded that "the presence of another male's DNA could not significantly advance Johnson's claim of innocence in light of the remaining evidence." Pet. App. 23a. It recounted the testimony and DNA evidence tying Johnson to Heath's murder, which the trial court found "overwhelmingly pointed to Johnson's guilt." Pet. App. 21a (internal quotation marks omitted). Because "any results from

the proposed testing cannot erase" that evidence, Johnson's petition failed. Pet. App. 24a.

8. Following the Arkansas Supreme Court's decision, Johnson filed a petition for rehearing. In that petition, Johnson suggested for the *first time* that the Arkansas Supreme Court's application of Act 1780 violates the federal constitution. Pet. App. 5a. He argued that the court "violated the[] principles of fundamental fairness" by concluding that Johnson's proposed DNA testing would not significantly advance his claim of innocence, and by interpreting Act 1780 to require courts to consider the weight of the evidence against a prisoner in determining whether DNA testing would advance a claim of innocence. Pet. for Rehearing at 2.

The Arkansas Supreme Court denied rehearing, declining to revisit its prior holdings. It further noted that "for the first time in this case, Johnson contend[ed] that his claims implicate a right to due process and access to the courts under the United States Constitution." Pet. App. 5a. Because that court's procedural rules prohibit raising new arguments in a petition for rehearing, *see* Ark. Sup. Ct. R. 2-3(g), the Arkansas Supreme Court declined to consider Johnson's "novel constitutional arguments that were raised for the first time in" his rehearing petition. Pet. App. 5a.

Johnson then filed his petition for a writ of certiorari.

## REASONS FOR DENYING THE PETITION

### I. This Court has neither jurisdiction nor a prudential basis to review the state-law matters decided below.

This Court sits in review of decisions resting on federal law. Its jurisdiction does not extend to decisions like the one below, which rested entirely on the interpretation and application of State law. And even if Johnson's federal due-process challenge could provide a jurisdictional basis for this Court's review, longstanding prudential considerations counsel against granting Johnson's petition.

A. This Court lacks jurisdiction to review the state-law matters decided below.

This Court has "no supervisory power over state judicial proceedings and may intervene only to correct wrongs of a constitutional dimension." *Smith v. Phillips*, 455 U.S. 209, 221 (1982). Thus, the Court will not review decisions of State courts that "rest[] on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991).

Johnson's petition rests entirely on his argument that the Arkansas Supreme Court misinterpreted and/or misapplied State law in affirming the trial court's denial of post-conviction DNA testing. *See, e.g.*, Pet. 3 (claiming that the "Arkansas Supreme Court has a history of unreasonably narrow interpretations of Act 1780"); *id.* (arguing that "the court also wrongly rejected the argument that DNA testing could exculpate" Johnson); Pet. 18 (casting the court's interpretation of Act 1780 as "unreasonably restrictive"); Pet. 20 (arguing that the court's "unreasonable construction" of Act 1780 "is not required" by the statute). Of course, it did no such thing, but it matters not for purposes of this Court's review. The State courts did not pass upon

any question of federal law. Instead, they interpreted and applied a State statute governing post-conviction proceedings in State courts.

This Court's jurisdiction does not extend to telling the Arkansas Supreme Court how to interpret or apply Arkansas law. *See, e.g.*, *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983) ("Suffice it to say that the weight to be given to the legislative history of an Alabama statute is a matter of Alabama law to be determined by the Supreme Court of Alabama."); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938) ("[T]he voice adopted by the State as its own . . . should utter the last word.") (quoting *Kuhn v. Fairmont Coal Co.,* 215 U.S. 349, 370-72 (1910)). Yet that is exactly what Johnson asks this Court to do. Indeed, an entire section of Johnson's petition simply invites this Court to accept what he views to be the "[p]roper[] construc[tion]" of Act 1780, Pet. 24, and to review whether Johnson met the statute's requirements for post-conviction DNA testing, Pet. 24-28. That alone warrants denial of Johnson's petition.

B. Even if there were jurisdiction over Johnson's claims, this Court's case law demands his petition be denied as a prudential matter.

Johnson argues that in deciding (wrongly, in his view) that he does not meet the requirements of Arkansas law to be entitled to post-conviction DNA testing, the Arkansas Supreme Court violated his federal due-process rights. Yet even if the Court thought that Johnson's case implicates matters of a constitutional dimension, his case does not present an appropriate vehicle to consider those matters.

*First*, Johnson's argument that the Arkansas Supreme Court's longstanding interpretation of Act 1780 violates due process because it allegedly requires prisoners

to "prove [their] innocence as a condition of obtaining DNA testing" was never presented to the trial court or the Arkansas Supreme Court. Thus, the State courts never had the opportunity to pass upon the issue. And "this Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim 'was either addressed by or properly presented to the state court that rendered the decision we have been asked to review.'" *Howell v. Mississippi*, 543 U.S. 440, 443 (2005) (per curiam) (quoting *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (per curiam)). Even if that rule were "purely prudential, the circumstances here justify no exception." *Id.* at 445-46 (quoting *Adams*, 520 U.S. at 90). Indeed, Johnson's deliberate decision not to raise those claims until rehearing—in an attempt to further delay his just sentence of death—is a prime example of the kind of deliberately dilatory strategy often pursued by capital murderers to avoid justice. *See Dunn*, 139 S. Ct. at 1312. And granting further review would only incentivize other prisoners to do the same.

Granted, Johnson collects stray sentences here and there in his State-court filings in an attempt to claim that his federal due-process challenge was raised below, but it was not. The first is the closing sentence of his trial-court petition requesting DNA testing, where he requested "[a]ny other Order that the [trial court] deem[ed] necessary to adequately protect [his] state and federal constitutional rights." Pet. App. 152a. No citation to—or mention of—the federal constitution or any federal case law concerning his arguments in his Petition appear in that document. Nor did his reply

brief in the trial court raise the issue. *See* Pet. 14. And Johnson does not even attempt to argue that he raised the issue in his briefing in the Arkansas Supreme Court.

Indeed, that court noted that Johnson's federal constitutional arguments were raised "for the first time" in his petition for rehearing. Pet. App. 5a. The Arkansas Supreme Court's rules governing rehearing bar consideration of issues raised for the first time in a petition for rehearing, so the court did not consider Johnson's federal constitutional claims. Pet. App. 5a (citing Ark. Sup. Ct. R. 2-3(g)); *see Street v. New York*, 394 U.S. 576, 582 (1969) ("[T]his Court has stated that when . . . the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts . . . ."). And for good reason, "[i]t has been the traditional practice of this Court . . . to decline to review claims raised for the first time on rehearing in the court below." *Wills v. Texas*, 511 U.S. 1097, 1097 (1994) (O'Connor, J., concurring in denial of certiorari); *see Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 128 (1945) ("Questions first presented to the highest State court on a petition for rehearing come too late for consideration here, unless the State court exerted its jurisdiction [over them on rehearing.]"). There is no reason to depart from that norm here.

*Second*, even if Johnson's claims were properly before this Court, he essentially asks the Court to reweigh the evidentiary determinations made by the State courts. Johnson spills much ink disputing the probative value of the eyewitness testimony

against him, Pet. 26, his own confession, Pet. 27, and the profusion of physical evidence against him, Pet. 27-28. However, this Court "do[es] not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925); *see* this Court's Rule 10. Yet Johnson's due-process claim rests on his assertion that his showing was so strong and the evidence against him so shaky that, for the Arkansas Supreme Court to conclude that he did not meet the requirements of Act 1780, it must be all but impossible for any prisoner to do so. Pet. 21. A ruling in Johnson's favor on his theory would require this Court to overturn the trial court's finding that "the scientific and testimonial evidence presented at trial overwhelmingly pointed to Johnson's guilt." Pet. App. 21a (internal quotation marks omitted). That is not a task this Court undertakes when reviewing a State court's judgment, and Johnson's petition must therefore be denied.

* * *

This Court's jurisdictional and prudential rules counsel against issuing a writ of certiorari. Johnson asks the Court to substitute its view of State law in place of the Arkansas Supreme Court and its view of the facts in place of that of the trial court and jury. The petition should be denied.

## II. The Arkansas Supreme Court's decision did not violate the federal constitution.

Johnson's federal constitutional claims attack a decision the Arkansas Supreme Court never rendered. He claims that court misinterpreted State law so as to create an insurmountable barrier to prisoners seeking DNA testing under Act 1780. However, the court actually held that the results of Johnson's proposed DNA testing would

be immaterial to his claim of innocence, given the overwhelming evidence against him that even favorable test results would not undermine. That conclusion is a straightforward application of the statutory language in line with the courts of appeals' uniform approach in applying the materially identical federal statute. There is no federal constitutional issue, and Johnson's petition should therefore be denied.

A. The Arkansas Supreme Court's construction and application of Act 1780 satisfies due process.

Prisoners have no constitutional right to post-conviction DNA testing, but if a State chooses to provide such a right, the attendant procedures must satisfy due process. *Dist. Att'y's Off. for the Third Jud. Dist. v. Osborne*, 557 U.S. 52, 69, 72-74 (2009). However, a "criminal defendant proved guilty after a fair trial does not have the same liberty interests as a free man." *Id.* at 68. Thus, a State "has more flexibility in deciding what procedures are needed in the context of postconviction relief." *Id.* at 69. In order to demonstrate constitutional infirmity, a prisoner must show that the post-conviction procedures "are fundamentally inadequate to vindicate the substantive rights provided," such that the procedures "offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 69-71. *Osborne* "left slim room for the prisoner to show that the governing state law denies him procedural due process." *Skinner v. Switzer*, 562 U.S. 521, 525 (2011).

As Johnson concedes, the statutory provisions at issue here are materially identical to those of several other States and the federal Justice for All Act. Pet. 17. Like the framework at issue in *Osborne*, Act 1780's provision of DNA testing for certain prisoners in certain circumstances is "not without limits." 557 U.S. at 70. As relevant

here, a prisoner must identify a "theory of defense" that "establish[es]" the prisoner's "actual innocence" of the crime, Ark. Code Ann. 16-112-202(6)(B), and the evidence produced by any "proposed testing" must "[r]aise a reasonable probability" that the prisoner is innocent of the crime, *Id.* -202(8). *Cf.* 18 U.S.C. 3600(a)(6), (a)(8) (identical federal provisions).

In *Osborne*, this Court cited the federal statute with approval, describing it as "a model for how States ought to handle the issue." 557 U.S. at 63. And it further noted that the requirements for post-conviction DNA testing then in place in Alaska—similar to Arkansas's in that the evidence must be "newly available," "diligently pursued," and "sufficiently material," *id.* at 70—"are similar to those provided for DNA evidence by federal law and the law of other States" and "are not inconsistent with the 'traditions and conscience of our people' or with 'any recognized principle of fundamental fairness.'" *Id.* (quoting *Medina v. California*, 505 U.S. 437, 448 (1992)). Johnson presents no reason for this Court to view Act 1780 differently than its (as relevant here) materially identical federal counterpart. Indeed, Johnson does not challenge Act 1780's text as being facially unconstitutional, and no court has sustained such a challenge as to the federal statute or any State counterpart. *See, e.g.*, *Cromartie v. Shealy*, 941 F.3d 1244, 1257 (11th Cir. 2019) (upholding against a due-process challenge Georgia's substantially similar DNA testing statute).

Instead, Johnson claims that the Arkansas Supreme Court read Ark. Code Ann. 16-112-202(8) to impose an insurmountable burden: requiring Johnson to "prove his

innocence as a condition of obtaining DNA testing." Pet. 19. But, of course, the Arkansas Supreme Court did no such thing, and in arguing the contrary, Johnson is merely swinging at a strawman of his own creation. In reality, the court interpreted and applied the "reasonable probability" requirement in a straightforward manner, and its approach is consistent with how federal courts have interpreted the federal statute of which this Court has already approved. That interpretation satisfies due process.

1. The Arkansas Supreme Court explained below that Act 1780 "does not permit testing of evidence based on a mere assertion of innocence or a theoretical possibility that additional testing might alter the outcome of a trial." Pet. App. 20a. Instead, "testing is authorized only if it can provide materially relevant evidence that will significantly advance the petitioner's claim of innocence in light of all evidence presented to the jury." Pet. App. 20a. It is the last portion of the court's explication that Johnson deliberately misconstrues and argues poses due-process concerns: that in determining whether a prisoner's proposed testing would raise a "reasonable probability" of his innocence, a court must consider the evidence against him. Where, as here, the evidence against a prisoner is overwhelming, Pet. App. 21a, and the results of the proposed testing would not serve to undermine that evidence, that testing cannot possibly raise a reasonable probability of innocence.

Johnson misconstrues the court's conclusion, bemoaning that "[w]ithout access to DNA testing, it is nearly impossible for any petitioner who has articulated a theory of innocence and a reasonable probability that DNA testing could prove his innocence

to cast any doubt on the evidence used to convict." Pet. 21. But that's just not what the court required. It is because the results of Johnson's proposed DNA testing would not "cast any doubt on the evidence used to convict" him that he *did not* show a "reasonable probability that DNA testing could prove his innocence." Pet. 21. Indeed, the Arkansas Supreme Court explained that even if "another male's DNA" was found on the evidence at issue—the very result Johnson hopes to obtain—it would not "raise a reasonable probability of Johnson's innocence" in light of the evidence against him. Pet. App. 22a.

Similarly, Johnson's claim that a prisoner "must prove his innocence as a condition of obtaining DNA testing" overstates the burden imposed by Act 1780. Pet. 19. The results of the proposed DNA testing need not be known in advance. Rather, the results, if they turn out to fit the prisoner's theory of defense, must raise a reasonable probability of his innocence. In its analysis, the court proceeded on the assumption that testing would show "the presence of another male's DNA on the evidence" Johnson wished to test. Pet. App. 22a. But given the mountain of evidence tying Johnson to Heath's murder, none of which would be undermined by the addition of another male's DNA, the results of Johnson's proposed testing would not be "materially relevant." Pet. App. 22a. That requirement is not "an insurmountable hurdle for any petitioner to overcome," Pet. 20; it is simply insurmountable on the facts of Johnson's case.

2. The Arkansas Supreme Court's application of the reasonable probability requirement is in accord with the courts of appeals' treatment of the federal statute.

Those courts uniformly consider the evidence against a prisoner in determining whether he has demonstrated that proposed DNA testing would raise a reasonable probability of his innocence. *See, e.g.*, *United States v. Cowley*, 814 F.3d 691, 700 (4th Cir. 2016) (denying testing where there was "significant evidence tying [the prisoner] to the robbery," which would not be undermined by a favorable DNA test result); *United States v. Thomas*, 597 Fed. App'x 882, 885 (7th Cir. 2015) (denying testing where proposed DNA results would "not call into question the strength of the evidence against" the prisoner); *United States. v. Watson*, 792 F.3d 1174, 1180 (9th Cir. 2015) (granting testing where DNA belonging to someone other than the prisoner found in a vaginal swab could have exonerated him of a sex crime); *United States v. Fields*, 761 F.3d 443, 480 (5th Cir. 2014) (denying testing where "there was compelling evidence of guilt presented at the trial"); *United States v. Pitera*, 675 F.3d 112, 129 (2d Cir. 2012) (denying testing where DNA results might only include an accomplice and the victims because other evidence corroborated the prisoner's participation in the murders); *United States v. Jordan*, 594 F.3d 1265, 1268 (10th Cir. 2010) (denying testing where proposed DNA test result was "not at all inconsistent with the government's theory of the case such that it [would] call[] into question the strength of the evidence against" the prisoner); *United States v. Fasano*, 577 F.3d 572, 578 (5th Cir. 2009) (granting testing where favorable results would cause a "strong case" against the prisoner to "evaporate[]").

Were Johnson a federal prisoner applying for relief under that statute, the outcome would be the same as below. The uniform approach to resolving the question of

whether a prisoner's proposed DNA testing would raise a "reasonable probability" of innocence does not, as Johnson contends, require a prisoner to prove his innocence in order to qualify for testing.

3. The Arkansas Supreme Court's decision poses no due-process issues. This Court's decision in *Osborne* says all that need be said on the topic. There the Court noted that a "requirement of demonstrating materiality is common" in State DNA-testing statutes. 557 U.S. at 63. And the requirement that DNA-testing evidence be "sufficiently material" was not "inconsistent with the 'traditions and conscience of our people' or with 'any recognized principle of fundamental fairness.'" *Id.* at 70 (quoting *Medina*, 505 U.S. at 446, 448). There is no difference between the materiality standard approved in *Osborne* and the one applied by the Arkansas Supreme Court.

Further, "reasonable probability" standards akin to Act 1780's are common in numerous federal-law contexts and pose no procedural due-process concerns. *See, e.g.*, *Kyles v. Whitley*, 514 U.S. 419, 433 (1995) ("[F]avorable evidence is material, and constitutional error results from its suppression by the government, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.") (quotation marks omitted); *United States v. Olano*, 507 U.S. 725, 734 (1993) (stating that for a court to correct unpreserved error, "the error must have been prejudicial: It must have affected the outcome of the district court proceedings"); *Strickland v. Washington*, 466 U.S. 668, 695 (1984) ("When a defendant challenges a conviction [based on ineffective assistance of counsel], the question is whether there is a reasonable probability that, absent the errors,

the factfinder would have had a reasonable doubt respecting guilt."). All of these tests require the weighing of potential changes in the trial evidence or proceedings on the one hand, and the strength of the evidence against the defendant on the other. Doing the same in the post-conviction DNA-testing context makes perfect sense and is perfectly constitutional.

Finally, this Court recognized that *Osborne* left "slim room" for the type of procedural-due-process claim Johnson brings here. *Skinner*, 562 U.S. at 525. The provisions of Ark. Code Ann. 16-112-202(8) of which Johnson complains are not fairly categorized as procedural requirements at all. The "reasonable probability" requirement is not merely a procedural hurdle the State has erected. Rather, it limits the circumstances in which DNA testing is available under Act 1780. Prisoners have no substantive right under the statute to pursue DNA testing where the results would be immaterial to their claim of innocence. While the attendant procedures otherwise qualifying prisoners must meet in order to pursue testing (such as subsection 202(10)'s timeliness requirement) must satisfy procedural due process, the prerequisite of seeking materially relevant DNA testing is a substantive requirement. Johnson's due-process challenge therefore misses the mark.

B. The Arkansas Supreme Court did not impede Johnson's right of access to the courts.

Johnson's First Amendment argument rests on the same misconstruction of the Arkansas Supreme Court's decision as above. He claims that, by making it impossible to obtain DNA testing under Act 1780, the Arkansas Supreme Court "created an unreasonable barrier to court access." Pet. 23. As explained above, the "reasonable

probability" requirement does not render DNA testing impossible to secure, and Johnson's argument fails for that reason alone.

Yet Johnson's right-of-access claim is not even legally cognizable in this context. This Court has held that "the point of recognizing an access claim is to provide some effective vindication for a separate and distinct right to seek judicial relief for some wrong." *Christopher v. Harbury*, 536 U.S. 403, 415 (2002). A right-of-access claim is thus "ancillary to the underlying claim, without which a plaintiff cannot have suffered injury by being shut out of court." *Id.* That underlying claim is "an element" of the right-of-access claim. *Id.* But this Court refused to recognize a substantive right to DNA testing in *Osborne*. 557 U.S. at 72. Thus, if there is any underlying claim at all, it is Johnson's procedural-due-process challenge that fails for the reasons stated above. Johnson's petition should therefore be denied.

* * *

Johnson's claim that the Arkansas Supreme Court violated the federal constitution in rejecting his request for DNA testing under Act 1780 is meritless. That court's decision merely recognized that, due to the overwhelming evidence implicating Johnson in Carol Heath's murder, the testing he sought would be fruitless. That same approach has been taken by every court of appeals to consider the issue, and it presents no procedural due-process issues. Johnson's petition should be denied.

## CONCLUSION

This Court should deny the petition for certiorari.

Respectfully submitted,

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