CAPITAL CASE
No. 20-48

In the Supreme Court of the United States

STACEY EUGENE JOHNSON,
Petitioner,

v.

ARKANSAS,
Respondent.

REPLY BRIEF FOR PETITIONER

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Contrary to the arguments in Respondent's Brief in Opposition ("Opp."), this Petition presents an important federal question: when a litigant seeks post-conviction relief under a state statute, what procedures are necessary to ensure fundamental fairness and satisfy due process under the federal constitution?

This Petition does not, as Respondent argues, ask this Court simply to correct an error in the Arkansas Supreme Court's interpretation or application of Act 1780 (codified at Ark. Code Ann. §§ 16-112-201, et seq.) (the "Statute"). Rather, this Petition concerns that court's historical construction of the Statute in this and other cases. By imposing a showing not required under the Statute—a violation unquestionably of a constitutional dimension—the Arkansas Supreme Court renders the Statute virtually meaningless. *See generally Skinner v. Switzer*, 562 U.S. 521 (2011); *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52 (2009); *Bounds v. Smith*, 430 U.S. 817 (1977).

The Court should grant the Petition in this capital case—an appropriate vehicle for determining whether the construction of Arkansas' DNA testing law violates fundamental fairness.

I. PETITIONER PROPERLY RAISED THE FEDERAL QUESTIONS BELOW.

Respondent seeks to avoid this Court's review by arguing that Petitioner Stacey Eugene Johnson ("Petitioner") first raised the constitutional questions presented here in his Petition for Rehearing, thus

depriving Arkansas courts the opportunity to "pass upon the issue." Opp.-10, 12-14. Respondent is incorrect. Indeed, Respondent's disingenuous characterization of Petitioner's constitutional claims as a "deliberate[] dilatory strategy," raised only to delay his pending execution, ignores the record below, in which the constitutional issue was plainly "pressed or passed upon" by Arkansas courts. *See Illinois v. Gates*, 462 U.S. 213, 219 (1983).

Petitioner raised his constitutional claims in *all* prior filings related to his request for DNA testing, including his initial motion for DNA testing (which requested relief "necessary to adequately protect the Petitioner's . . . federal constitutional rights"[1]) and reply (which noted "the processes employed by the State" related to the state-created statutory procedure for convicted persons to seek DNA testing "must remain fundamental[ly] fair," and asserted that the court's failure to grant the requested testing would be a "flagrant and irreversible violation of [Petitioner's] right to due process"[2]), and his appeal from the circuit court's order denying that motion (which noted that if the Arkansas Supreme Court affirmed the lower court's denial of his motion for DNA testing "Appellant's [Fifth] and [Fourteenth] Amendment

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1 Pet. App.-152a.

2 Reply to State's Response in Opposition to Petition for Post-Conviction DNA Testing and Request for Hearing (filed Apr. 17, 2017 in *Johnson v. State*, No. CR-93-54, Sevier County Circuit Court, Arkansas) at 9-10.

rights . . . would [be] compromised"[3]). Arkansas courts had ample opportunity to consider these constitutional issues.

Even if this Court were to find constitutional questions were not properly raised below, this Court nonetheless should exercise its discretion to hear this case. When determining whether to hear a federal issue not properly raised below, this Court considers "first, comity to the States, and second, a constellation of practical considerations, chief among which is [the Court's] own need for a properly developed record on appeal." *See Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 79 (1988) (citing *Webb v. Webb*, 451 U.S. 493, 500–501 (1981)). As to the first consideration, granting this Petition would accord with the principle of comity to state courts, which requires they be given the first opportunity to consider whether state statutes comport with the Constitution. *See, e.g.*, *Gates*, 462 U.S. at 221-22. Granting the Petition would not, as Respondent asserts, "require this Court to overturn the trial court's" factual findings, but only to review the Arkansas Supreme Court's imposition of an extra-statutory condition to a constitutionally protected remedy. Opp.-15.

As to the second consideration, the record on appeal has been fully developed with respect to Petitioner's constitutional claims. First, the trial court held a hearing to determine whether to grant Petitioner's request for DNA testing. The Arkansas Supreme Court issued an opinion explaining that

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[3] Appeal From the Order Denying Appellant's Motion for Post-Conviction DNA Testing (filed Nov. 8, 2018 in *Johnson v. State*, No. CR-18-700, Arkansas Supreme Court) at xvii.

lower court's statutory construction—a construction that Petitioner submits violates his constitutional rights. The Arkansas Supreme Court declined to further address those issues by denying the Petition for Rehearing. ("[T]he constitutional implications of denying Johnson's request have always been known." *See Johnson v. State*, No. CR-18-700, at *3 (Feb. 20, 2020) (Hart, J., dissenting)).

The Court should also consider that this case involves the constitutional right of access to post-conviction remedies that could exculpate a death row petitioner. *See Hormel v. Helvering*, 312 U.S. 552, 557 (1941) (there may always be "particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court" below). Where, as here, a criminal case raises issues of constitutional import, this Court has granted certiorari even if those issues were not properly raised below. *See, e.g.*, *Vachon v. New Hampshire*, 414 U.S. 478, 479-80 (1974) (reversing state criminal conviction on a Fourteenth Amendment issue not raised in state court or this Court); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (same, involving a First and Fourteenth Amendment issue). Moreover, this Court has recognized that capital cases raise particularly serious concerns. *See generally*, *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (noting that "death . . . is unique in its severity and irrevocability," and that in such cases, "this Court has been particularly sensitive to insure that every safeguard is observed," citing *Furman v. Georgia*, 408 U.S. 238, 286-291 (1972), *Powell v. Alabama*, 287 U.S. 45, 71 (1932)). Here, the denial of Petitioner's due

process rights in this capital case calls for this Court's intervention.

II. THE ARKANSAS SUPREME COURT'S STATUTORY CONSTRUCTION VIOLATES FEDERAL DUE PROCESS.

The Arkansas Supreme Court has a history of violating the federal constitutional rights of state prisoners by depriving their access to statutorily-afforded DNA testing and contingent post-conviction remedies. Respondent's attempt to characterize the state court's ruling as a straightforward application of statutory language that presents no federal constitutional question ignores this Court's clear precedent. Under Arkansas law, litigants have a liberty interest in obtaining post-conviction relief by demonstrating their innocence with new evidence, including DNA, and the procedures provided to access such relief must be fundamentally fair in their operation and must not violate constitutional rights. *See generally Skinner v. Switzer*, 562 U.S. 521 (2011); *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52 (2009); *Bounds v. Smith*, 430 U.S. 817 (1977); *see also Wilkinson v. Austin*, 545 U.S. 209, 221 (2005) (liberty interest "may arise from an expectation or interest created by state laws"). Petitioner seeks this Court's review to correct a grave constitutional error: the Arkansas Supreme Court has read into the Statute a near-impossible requirement that a litigant prove his innocence as a condition of obtaining the very DNA testing that he hopes will exonerate him. This construction of the Statute has and will continue to deprive Arkansas litigants of their protected liberty interest in obtaining state-

afforded post-conviction remedies, in violation of their First, Fifth and Fourteenth Amendment rights. Indeed, this is not an issue of the Arkansas Supreme Court's application of the Statute to Petitioner's case only: of the 88 reported appellate decisions in which individuals sought testing under the Statute, the Arkansas Supreme Court denied any relief in all but five instances. Pet. -18.

Affirming the circuit court's denial of Petitioner's DNA testing motion, the Arkansas Supreme Court held "[b]ecause the presence or absence of Johnson's or another male's DNA would not *show actual innocence*, there is no reason to test." Pet. App.-25a (emphasis added). Requiring a litigant to prove that new DNA evidence would completely exonerate him in order to obtain that testing is an insurmountable hurdle. It also is plainly not what the Statute requires. As Associate Justice Hart's dissent noted, "this process cannot function if the petitioner is required to exonerate himself on the front end before he is permitted to receive the testing." Pet. App.-70a (Hart, J., dissenting). In fact, all that the Statute requires is that a petitioner identifies a theory of defense that would *support* his actual innocence and demonstrate how DNA testing *may* produce new evidence to support that theory and show a reasonable probability he did not commit the offense. Ark. Code Ann. § § 16-112-202(6) and 202(8).

Petitioner has done exactly that. His theory of defense is that someone else committed the rape and murder. The State's prosecution theory was that Petitioner alone committed the offenses. Thus, the presence of another male's DNA in the rape kit, douche fluid, or victim's underwear would provide

proof of an alternate perpetrator. R3 T. 1581-1584. Such evidence shows a "reasonable probability" that Petitioner did not commit this crime. Alternatively, the discovery of third-party DNA on a single item of highly probative evidence—like the red beard hair recovered from the victim's hands or the tissue found near her genitals, believed to have been used to clean up after the assault—would also exculpate Petitioner. *See* Pet. -24-25; Pet. App.-73a ("[T]his investigation revealed far more biological evidence suggesting a white perpetrator than a black one, yet investigators only sought to develop a black . . . suspect and did not pursue the evidence suggesting a white perpetrator in any respect.").

Based on the Arkansas Supreme Court's unconstitutional construction of the Statute, the court erroneously determined that, in light of existing evidence, DNA testing could not advance Petitioner's innocence claim. Pet. App.-23a-25a. The evidence presented by the State at trial, however, is far from "overwhelming." The State relied heavily on the identification by the victim's six-year-old daughter, yet "the weakness of eyewitness testimony [is] a reality that DNA testing has [revealed]." *United States v. Fasano*, 577 F.3d 572, 578 (5th Cir. 2009). While the State emphasizes that the child "twice identified [Petitioner] . . . in a photo lineup," (Opp.-3), the lineup itself was suggestive[4] (Pet. App-46-48a) and the child in fact identified Petitioner only as "the

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[4] Her "identification" was fraught with influence from adults who suggested she had to identify Petitioner to keep him imprisoned. (*See* Hart, J. dissenting, 15-17). Petitioner's request for DNA testing must be reviewed within this larger context.

person that was in her apartment last night," not as her mother's killer. R3 T. 1453. Upon later viewing the same lineup, the child twice stated that "[t]he creep that killed my mother is not there." R3 T. 1470. Second, Petitioner's alleged "confession" was undocumented and uncorroborated.[5] R3 T. 1233-37, 1264-65. Finally, none of the DNA evidence recovered from the victim's apartment was ever connected to Petitioner, except four hairs found on the floor by the victim. Any suggested strength of this evidence fades when considered that Petitioner had previously been to the apartment. *See* R3 T. 1393; R4 T. 20. The only DNA evidence linking Petitioner to the second crime scene—the cigarette butt—is fraught.[6] In contrast, the DNA testing results of the Caucasian hairs recovered from the victim's hand and swabs from bite marks on the victim's breasts (from which Petitioner was excluded as the source) would be highly probative of the perpetrator's identity. Respondent argues that even if Ramsey's DNA was present on such evidence, there would be a "logical explanation" because he was "dating [the victim] at the time of the murder." (Opp.-9). Ramsey plainly testified, however, that he and the victim were *not* dating at that time and had not been for months. R4. T. 2979. Thus, there would be no plausible explanation for the presence of his biology in the victim's intimate areas or his hair in her hands.

Every incarcerated person was convicted because the evidence presented against them at trial

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[5] "What the majority characterizes as Johnson's 'confession' (without any further explanation) is not borne out by the record." (Hart, J. dissenting, 9).

[6] *See* Hart, J. dissent pp. 18-29.

was sufficient to convince a jury of their guilt beyond a reasonable doubt. The Statute was enacted because the legislature recognized the significance of DNA testing and its ability to cause a "strong case" to "evaporate[]." *Fasano*, 577 F.3d at 578; 2001 Ark. Act 1780. By denying Petitioner's request for DNA testing based on its finding that the existing evidence against Petitioner was strong and by refusing to acknowledge that the results from DNA testing sought by Petitioner could be exculpatory, the Arkansas Supreme Court created an unconstitutional hurdle and rendered the Statute fundamentally unfair in its operation. This denial of meaningful access to DNA testing violated Petitioner's due process rights.

The decision is also clearly at odds with other courts' interpretations of nearly identical statutes. Respondent argues that the Statute comports with due process because it is "materially identical" to the statutory provisions of "several other states and the federal Justice for All Act," and this Court "cited the federal statute with approval" in *Osborne*. Opp.-16-17. Petitioner does not dispute the similarity between the statutes, however, it is imperative to look beyond the four corners of the Statute and consider its impact on fundamental fairness in operation. Regardless of the language of the Statute, the liberty interest it creates cannot be vindicated if Respondent has rendered the Statute virtually toothless by building insurmountable barriers to its access.

The failure of the Statute to provide meaningful access to post-conviction DNA testing, in accordance with the requirements of the Constitution, is evident when considering that courts applying similar standards, faced with similar facts, have in fact

granted testing and have not added an "actual innocence" requirement not found in the statutory language. In *Fasano*, the Fifth Circuit noted that the petitioner's robbery conviction was "well supported by evidence," including eyewitness testimony from four eyewitnesses, video surveillance, vehicle records and fingerprint evidence connecting him to the crime. 577 F.3d at 578. The court held, however, that, under the Innocence Protection Act, he was entitled to DNA testing of clothing and glasses thought to be worn by the perpetrator, reasoning that while "[t]here is *no question but that the conviction is well supported by evidence*," if DNA results matched an alternative perpetrator, "the strong case evaporates; here the *strength of the evidence by no means makes fanciful a conclusion that there is a reasonable probability that Fasano was not the robber*." *Id.* (emphasis added). Similarly, the court in *United States v. Sherrod* granted testing under the federal DNA testing statute notwithstanding that the petitioner was identified by multiple eyewitnesses, his fingerprints were found in the victim's car, and DNA evidence tied him to the jacket worn by the perpetrator. *Sherrod*, 446 F. Supp. 3d 385, 388-89 (C.D. Ill. Mar. 3, 2020). Both the *Fasano* and *Sherrod* courts understood that irrespective of the strength of the evidence against a petitioner, the relevant statute required them to consider whether DNA testing *may* produce new evidence to support the petitioner's theory of defense. See *Fasano*, 577 F.3d. at 578; *Sherrod*, 446 F. Supp. 3d at 393. The Arkansas Supreme Court's failure to do so here, in line with nearly every such case it has considered, violates Petitioner's due process rights.

Citing to a series of cases, Respondent claims that courts of appeals "uniformly consider the

evidence against a prisoner in determining whether he has demonstrated that proposed DNA would raise a reasonable probability of his innocence." Opp.-20. Respondent, however, improperly characterizes the decisions in these seven cases. In each case, the court considered the evidence as a whole and evaluated the probative value of the best-case DNA result. *See United States v. Cowley*, 814 F.3d 691, 700 (4th Cir. 2016); *United States v. Thomas*, 597 Fed. App'x 882, 885 (7th Cir. 2015); *United States. v. Watson*, 792 F.3d 1174, 1180 (9th Cir. 2015); *United States v. Fields*, 761 F.3d 443, 480-81 (5th Cir. 2014); *United States v. Pitera*, 675 F.3d 122, 129 (2d Cir. 2012); *United States v. Jordan*, 594 F.3d 1265, 1268-69 (10th Cir. 2010); *Fasano*, 577 F.3d at 578. Here, the Arkansas Supreme Court did not contemplate the probative value of DNA testing results that showed Ramsey or another male's DNA on the evidence proposed to be tested, including the rape kit, the foreign hairs on the victim's body, and the clothing found at the roadside park. Rather, the court summarily concluded, without analyzing the implications of the potential results, that the evidence against Petitioner was too "overwhelming" to render DNA testing valuable. This deprived Petitioner of his constitutionally protected liberty interest and right to due process of law.

III. RIGHT OF ACCESS TO COURTS IS A COGNIZABLE CLAIM.

Finally, Respondent attempts to avoid this Court's review by arguing that Petitioner does not have a legally cognizable right to access courts. Opp.-22-23. Respondent cites *Christopher v. Harbury*, which held that a right of access claim cannot succeed

if there is not a well-pleaded and valid underlying substantive or procedural due process right. 536 U.S. 403, 415 (2002). It is settled law that procedures for obtaining state-created liberty interests must comport with due process and that access to state-created judicial remedies must be fairly afforded. *See Evitts v. Lucey*, 469 U.S. 387, 401 (1985); *Bounds*, 430 U.S. at 822. Arkansas created a constitutionally protected liberty interest in post-conviction relief; therefore, the procedures for obtaining DNA testing needed to unlock such remedies must be fundamentally fair in their operation. *See supra* 5. By denying such testing to Petitioner based on a systemically narrow reading of the Statute, the Arkansas Supreme Court has violated Petitioner's due process rights protected by the Fifth and Fourteenth Amendments and prevented Petitioner from accessing DNA testing and, consequently, all remedies stemming from that testing. *See supra* 5-6; Pet.-21-22. Petitioner has thus identified a "non-frivolous," "arguable" underlying claim, and properly pleads a violation of his access to courts. *Lewis v. Casey*, 518 U.S. 343, 352-53 (1996).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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