

**COURT CONSTRUES INNOCENCE PROTECTION ACT  
BROADLY TO PERMIT DNA TESTING: *UNITED STATES V.  
FASONO*, NO. 08-60750, 2009 WL 2341990, AT \*1 (5TH CIR. JULY  
31, 2009).**

Highlight

*Jason Jordan*

“Robbery. All 100s.”<sup>1</sup> A lone man, dressed in a white hardhat, sunglasses, and a work shirt handed this message, written on a piece of notepaper, to a teller at the Citizens State Bank in Morton, Mississippi.<sup>2</sup> After receiving \$6,600 from the teller, the man quickly fled the bank, discarding his outfit nearby in an attempt to ensure the success of his caper.<sup>3</sup> The Morton police recovered the clothing within minutes, however, and three days later turned it over to the FBI.<sup>4</sup> Soon, law enforcement had a suspect in custody: Steve Fasono, the petitioner in this case.<sup>5</sup>

The Government, respondent in this case, presented the following evidence implicating the petitioner as the culprit: video footage from the bank showing a man of similar stature to the petitioner; four eyewitnesses identifying the petitioner as the robber; records revealing the petitioner not only owned, but also had access to another vehicle matching eyewitness descriptions of the get-away car; the petitioner’s fingerprints on the demand note; and, finally, evidence tending to show motive as the petitioner had lost approximately \$1,800 gambling only a short time before the robbery.<sup>6</sup> Based upon this evidence, a Mississippi jury found the petitioner guilty.<sup>7</sup> Prior to sentencing, counsel for the petitioner obtained permission from the court to reenact the robbery using the actual evidence; however, the Government could not locate the clothing items.<sup>8</sup> The district court sentenced the petitioner despite the apparently missing evidence, and the Court of Appeals for the Fifth Circuit affirmed the conviction, concluding there was substantial evidence to support the jury’s verdict.<sup>9</sup> The Government later found the clothing in a

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<sup>1</sup> United States v. Fasono, No. 08-60750, 2009 WL 2341990, at \*1 (5th Cir. July 31, 2009).

<sup>2</sup> *Id.*

<sup>3</sup> *See id.*

<sup>4</sup> *Id.*

<sup>5</sup> *See id.*

<sup>6</sup> *Id.*

<sup>7</sup> United States v. Fasono, No. 08-60750, 2009 WL 2341990, at \*1 (5th Cir. July 31, 2009).

<sup>8</sup> *See id.* at \*2.

<sup>9</sup> *See id.* at \*1; *see also* United States v. Fasono, 217 Fed. App’x 373, 374 (5th Cir. 2007) (affirming the jury’s conviction of the petitioner).

paper bag in the office closet of a government prosecutor who had retired during the trial.<sup>10</sup>

In this case, the petitioner sought a district court order for DNA testing of the hardhat, sunglasses, and shirt under the Innocence Protection Act of 2004, which enables a convicted individual to secure a court order for DNA testing of evidence used at trial if each of ten enumerated prerequisites are met.<sup>11</sup> The district court denied the petitioner’s application, holding the petitioner failed to meet two of the ten statutory prerequisites because the integrity of the chain of custody was deficient and there were insufficient measures taken to preserve DNA evidence on the clothing.<sup>12</sup> The petitioner’s appeal raised two issues for the court.<sup>13</sup> First, whether the district court erred in holding the chain of custody standard under the Innocence Protection Act is narrower than that for the admission of evidence at trial.<sup>14</sup> Secondly, whether the district court erred in concluding that DNA testing would not produce new material evidence supporting the petitioner’s theory of defense and raising a reasonable probability that he did not commit the crime.<sup>15</sup> The court viewed both issues as questions of law, and as such, reviewed them *de novo*.<sup>16</sup>

The standard for showing the chain of custody in a case under the Innocence Protection Act is no higher than the standard for admissibility at trial.<sup>17</sup> In reaching this initial conclusion, the court first recognized that even the standard for showing the chain of custody at trial may be “too exacting.”<sup>18</sup> The court noted, especially within the context of the Innocence Protection Act, which Congress established to respond to the “sobering impact of DNA upon criminal convictions,” that requiring a defendant to prove the history of evidence while it was in government hands would “create an entrance gate so difficult to enter as to frustrate the core objective of the statute.”<sup>19</sup> Therefore, in this case, where there was nothing in the record to refute the petitioner’s assertion that the clothing never left the custody of the Government, the

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<sup>10</sup> United States v. Fasono, No. 08-60750, 2009 WL 2341990, at \*2 (5th Cir. July 31, 2009).

<sup>11</sup> See 18 U.S.C. § 3600 (2006).

<sup>12</sup> See United States v. Fasono, No. 08-60750, 2009 WL 2341990, at \*1-2 (5th Cir. July 31, 2009).

<sup>13</sup> See *id.* at \*1-3.

<sup>14</sup> See 18 U.S.C. § 3600(a)(4) (requiring that “[t]he specific evidence to be tested is in the possession of the Government and has been subject to a chain of custody and retained under conditions sufficient to ensure that such evidence has not been substituted, contaminated, tampered with, replaced, or altered in any respect material to the proposed DNA testing.”).

<sup>15</sup> See 18 U.S.C. § 3600(a)(8) (requiring an applicant to demonstrate that “[t]he proposed DNA testing may produce new material evidence that would support the theory of defense [presented at trial] . . . and raise a reasonable probability that the applicant did not commit the offense.”).

<sup>16</sup> See United States v. Fasono, No. 08-60750, 2009 WL 2341990, at \*1 (5th Cir. July 31, 2009).

<sup>17</sup> See *id.*

<sup>18</sup> See *id.*

<sup>19</sup> *Id.* at \*1-2.

district court erred in holding there was a break in the chain of custody.<sup>20</sup>

Additionally, the court held the district court erroneously emphasized the lack of specific measures to protect the clothing from DNA contamination.<sup>21</sup> While accepting the validity of concerns regarding the spoliation of DNA when there have been multiple handlers of evidence, the court also gave credence to expert testimony indicating, “[DNA] mixtures have made interpretation impossible in only a narrow set of cases.”<sup>22</sup> Thus, the court concluded, DNA testing could be performed in this case within the limits of the Innocence Protection Act.<sup>23</sup>

Finally, DNA testing may raise a “reasonable probability” of innocence even when other physical evidence and eyewitness testimony support a conviction.<sup>24</sup> Consistent with its earlier decision affirming the jury’s conviction of the petitioner, the court recognized the strength of the case against him.<sup>25</sup> Nevertheless, the court reasoned, DNA testing has served to highlight the weaknesses of eyewitness testimony, and the other physical evidence implicating the petitioner – his fingerprints on the note – could be explained in a manner both consistent with his innocence and theory of defense at trial.<sup>26</sup> Consequently, it was not “fanciful” to conclude DNA evidence may exonerate the petitioner, and the court ordered approval of his application for DNA testing.<sup>27</sup>

Three portions of this case are particularly relevant to future applications for DNA testing under the Innocence Protection Act. First, this opinion indicates trial courts should allow some measure of flexibility to defendants in meeting the chain of custody requirement under section (a)(4). Even when evidence goes temporarily missing, a court should not deny a defendant’s application for DNA testing, absent evidence sufficient to overcome a claim that the chain of custody remained intact. Secondly, courts should give considerable weight to expert testimony regarding the potential for spoliation of DNA evidence. Thirdly, and possibly of the most import to many defendants, courts are likely to read the “reasonable probability” requirement of section (a)(8) broadly, denying DNA testing on this basis only when it would be “fanciful” to envision a situation where it may exonerate the defendant.

In conclusion, it appears courts will allow some flexibility in applying sections (a)(4) and (a)(8) of the Innocence Protection Act in order to ensure that its objective of validating convictions is carried out. For Steve Fasono, whose first piece of good news stemmed from prosecutors cleaning out the

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<sup>20</sup> *See id.* at \*2.

<sup>21</sup> *See id.*

<sup>22</sup> *See* United States v. Fasono, No. 08-60750, 2009 WL 2341990, at \*2 (5th Cir. July 31, 2009).

<sup>23</sup> *See id.*

<sup>24</sup> *See id.* at \*3.

<sup>25</sup> *See id.*

<sup>26</sup> *See id.*

<sup>27</sup> *Id.* at \*3.

closet of a former co-worker, this is an especially welcome result.