No. 08-6

IN THE

Supreme Court of the United States

DISTRICT ATTORNEY'S OFFICE FOR THE THIRD JUDICIAL DISTRICT AND ADRIENNE BACHMAN, DISTRICT ATTORNEY,
Petitioners,

v.

WILLIAM G. OSBORNE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

I. THE NINTH CIRCUIT'S DECISION CALLS INTO QUESTION THE VALIDITY OF STATE LAWS AUTHORIZING POSTCONVICTION DNA TESTING

Osborne points with evident satisfaction to the "broad national consensus" reflected in the laws of 43 states that allow some opportunity for postconviction DNA testing. [Opp. 7-8 & n.4] The Ninth Circuit's decision places many of those laws in jeopardy. By creating a broad, virtually unlimited federal due process right, the Ninth Circuit's decision effectively

removes the issue of postconviction DNA testing from the realm of state control and experimentation.

Some states limit the postconviction procedure to defendants convicted of felonies or certain specific felonies or those given a sentence of death.[1] One state bars postconviction DNA testing when a defendant, for tactical reasons, did not seek testing that was available at the time of trial.[2] Those laws now conflict with the constitutional right created by the Ninth Circuit, which applies to all defendants regardless of offense or defense tactics.

And some states have adopted standards more stringent than the Ninth Circuit's standard, which requires a defendant to show only a "reasonable probability that [he] could 'affirmatively prove that he is probably innocent'" if the test result were exculpatory. Pet. App. 24a (quoting *Carriger v. Stewart*, 132 F.3d 463, 476 (9th Cir. 1997)). This "reasonable probability" standard is more generous than state laws requiring proof by at least a preponderance of evidence.[3] And some state laws re-

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[1] *See* Ariz. Rev. Stat. § 13-4240(A); Cal. Penal Code § 1405(a); Colo. Rev. Stat. §§ 18-1-411(4), 18-1-412(1); D.C. Code § 22-4133(a); Fla. Stat. § 925.11(a); Ga. Code § 5-5-41(c)(1); Ind. Code § 35-38-7-1; Iowa Code § 81.10(1); Kan. Stat. §21-2512(a); Ky. Rev. Stat. § 422.285(1); La. Code Crim. Proc. art. 926.1(A)(1); Me. Rev. Stat. § 2137(1); Md. Code, Crim. Proc. § 8-201(b); Mich. Comp. Laws § 770.16(1); Mont. Code § 46-21-110(1); Nev. Rev. Stat. § 176.0918(1); N.M. Stat. § 31-1A-2(A); Ohio Rev. Code § 2953.72(C)(1)(a); Or. Rev. Stat. § 138.690; Tenn. Code § 40-30-303; Utah Code § 78B-9-301(2); Vt. Code § 5561(a), (b)(2); Va. Code § 19.2-327.1(A); Wash. Rev. Code § 10.73.170(1); W. Va. Code § 15-2B-14(a); Wyo. Stat. § 7-12-303(c).

[2] *See* Utah Code § 78B-9-301(4).

[3] *See* Colo. Rev. Stat. §§ 18-1-413(1) (preponderance); Del. Code § 4504(b) (clear and convincing evidence); Idaho Code

quire a defendant to prove that the new evidence would likely establish *actual* innocence.[4] That requirement is more stringent than the Ninth Circuit's standard that the evidence merely establish probable innocence.

As the statutes cited by Osborne demonstrate, states have taken an active interest in the question of postconviction DNA testing. And, like the variations in state laws relating to postconviction relief in general, different states have taken different approaches on this question. The Ninth Circuit has removed this issue from the states through the creation of an entirely new area of federal constitutional law – a broad and as yet unlimited postconviction due process right.

II. THE COURT'S DECISION IN *WILKINSON V. DOTSON* DID NOT RESOLVE THE CIRCUIT SPLIT OVER THE USE OF § 1983 AS A DISCOVERY DEVICE FOR AN INNOCENCE CLAIM

The federal courts of appeals are split on whether a postconviction access-to-evidence claim can be brought under § 1983. [*See* Pet. 12-13] Osborne

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§ 19-4902(d)(1) (preponderance); Mont. Code § 46-21-110(1) (same); N.M. Stat. § 31-1A-2(C) (same); Tex. Code Crim. Proc. art. 64.03(a)(2) (same); Wash. Rev. Stat. § 10.73.170(3) (same).

[4] *See* Colo. Rev. Stat. §§ 18-1-411(1), 18-1-413(1)(a) (actual innocence, i.e., clear and convincing evidence that no reasonable trier of fact would have convicted); Del. Code § 4504(b) (no reasonable trier of fact would have convicted); Ohio Rev. Code §§ 2953.71(L), 2953.74(C)(5) ("strong probability" that no reasonable factfinder would have convicted); Or. Rev. Stat. § 138.692(2)(d) (actual innocence); Pa. Cons. Stat. § 9543.1(c)(3)(ii), (d) (same); Wyo. Stat. § 7-12-303(c)(ix) (same).

asserts that *Wilkinson v. Dotson*, 544 U.S. 74 (2005), resolves that split. He posits a simple syllogism: (1) pre-*Dotson* cases rejecting a § 1983 access-to-evidence claim focused primarily on the prisoner's motive rather than the relief sought; (2) *Dotson* rejected motive as a basis for determining whether a claim can be asserted under § 1983; and (3) the cases based on motive are no longer good law post-*Dotson*, thereby eliminating the pre-*Dotson* split. [Opp. 17-22] But Osborne's assertion hinges, first, on a mischaracterization of the reasoning in cases rejecting a § 1983 access-to-evidence claim and, second, on a mischaracterization of *Dotson*.

Osborne's argument depends first on his mischaracterization of *Harvey v. Horan*, 278 F.3d 370 (4th Cir. 2002), and similar cases refusing to recognize a § 1983 access-to-evidence claim. Osborne alleges that those cases focus solely on the prisoner's underlying intent to use the evidence sought to challenge a conviction. [Opp. 18] The crucial fact in *Harvey* was not the prisoner's motive in seeking access to the DNA evidence, i.e., to challenge his conviction. Rather, the key point was that completely exonerative results from retesting that evidence would "necessarily impl[y] the invalidity of his conviction." *Id*. at 375 (citing *Edwards v. Balisok*, 520 U.S. 641, 648-49 (1997)). The *Harvey* court noted the inconsistency between the prisoner's stated intent and his attempt to downplay the exonerating potential of new DNA testing. *Harvey*, 278 F.3d at 375. But the court's reasoning and the end result would have been the same regardless of the prisoner's intent because new test results had the potential effect of invalidating his conviction.

Osborne's second proposition – that *Dotson* changed existing law by rejecting motive as a consideration – also fails. *Dotson* traced the development of the distinction between habeas claims and § 1983 claims from its roots in *Preiser v. Rodriguez*, 411 U.S. 475 (1973), though its application in *Wolff v. McDonnell*, 418 U.S. 539 (1974), *Heck v. Humphrey*, 512 U.S. 477 (1994), and *Edwards*, 520 U.S. 641 (1997). The Court concluded that "these cases, taken together," establish principles that bar a state prisoner's § 1983 action "*if* success in that action would necessarily demonstrate the invalidity of confinement or its duration." *Dotson*, 544 U.S. at 81-82. The Court then stated that it was "[a]pplying these principles," to a new factual context – prisoners' challenges to parole procedures. *Id*. at 82. Nothing in *Dotson* indicates that the Court applied new or different principles or moved the line established by those principles that separates § 1983 claims from habeas claims.

Osborne's focus on the *Dotson* Court's rejection of Ohio's motive-based argument all but ignores the context and thereby the point of the Court's discussion of motive. [Opp. 19-20] *Dotson* focused on the tenuous connection between (1) the prisoners' claims that the state parole procedures were unconstitutional and (2) the possibility of the prisoners' release. The Court explained that its focus was and has always been "on the need to ensure that state prisoners use only habeas corpus (or similar state) remedies when they seek to invalidate the duration of their confinement" even when they seek to do so "*indirectly* through a judicial determination that necessarily implies the unlawfulness of the State's custody." *Dotson*, 544 U.S. at 81. The *Dotson* prisoners could proceed under § 1983 because a judgment

favoring the prisoners would not necessarily imply the unlawfulness of the state's custody; the state could still reject their parole applications even if new parole hearings were required as a result of their § 1983 actions. *Id*. at 82.

The *Dotson* Court thus concluded that the relationship between the prisoners' claims and release from confinement was "too tenuous" to require that the claims be brought only through habeas. *Dotson*, 544 U.S. at 78. In reaching this conclusion, the Court rejected the use of motive or intent to provide the missing link. But while Osborne may be correct that motive is irrelevant, this is not a startling proposition, nor does *Dotson*'s statement of that proposition signal a departure from prior case law. Most important, it has no relevance to the state's argument in this case. The state's argument hinges not on Osborne's motive but on the close connection between his claim – access to potentially exculpatory evidence – and the validity of his conviction.

In fact, Osborne's access-to-evidence claim harkens back to the § 1983 damages claim rejected in *Heck*, 512 U.S. 477. The prisoner in *Heck* sought only damages for what was essentially a claim for malicious prosecution. Proof of the invalidity of his conviction was, however, a necessary element of his damages claim even though he did not ask that the conviction be overturned. Thus, if the prisoner successfully proved his damages claim under § 1983, the resulting judgment "would necessarily imply the invalidity of his conviction or sentence." *Heck*, 512 U.S. at 487. A § 1983 claim seeking access to DNA evidence carries a similar implication.

The Ninth Circuit confirmed the close, significant, and direct relationship between the evidence Osborne

seeks and the potential impact of that evidence on the validity of his conviction. The court concluded that the DNA evidence is material because, with that evidence, "Osborne could 'affirmatively prove that he is probably innocent,'" and without it, he would likely be unable to "receive a fair habeas hearing." Pet. App. 28a (quoting *Carriger*, 132 F.3d at 476). In fact, from the Ninth Circuit's perspective, the possibility that the DNA evidence would exonerate Osborne – and thus impliedly invalidate his conviction – was an element of Osborne's proof in establishing his right to access to that evidence. Pet. App. 28a.

Osborne's purpose (to use the DNA test results to challenge his conviction) merely highlights the close connection between his current claim and the potential invalidation of his conviction. That close connection precludes Osborne's reliance on a § 1983 action regardless of what he ultimately does with those results.

III. OSBORNE'S DEFENSE OF THE NINTH CIRCUIT'S DECISION IS NOT FULLY RESPONSIVE TO THE STATE'S ARGUMENT

Part III of Osborne's opposition, titled "The Decision Below Was Correct," initially argues that the Ninth Circuit correctly found a due process right to post-conviction access to the DNA evidence under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. [*See* Opp. 27-28] But this does not fully respond to the state's argument that the recognition of this right for the express purpose of proving actual innocence amounts to a recognition of a federal due process right to seek invalidation of a state conviction on actual-innocence grounds. [*See* Pet. 19 ff.] The Ninth Circuit implicitly acknowledged this by relying on

"the well-established assumption that [Osborne's] freestanding innocence claim will be cognizable in federal court." Pet. App. 22a. That assumption has been rejected in nine other circuits and has not yet been accepted by this Court. [Pet. 21-22]

Little legal justification exists for granting post-conviction access to evidence *independent* of an postconviction actual innocence claim. Recognizing that access-to-evidence claims like Osborne's are nothing more than discovery requests and requiring that they be asserted within the procedural confines of a pending substantive claim results in the application of established parameters on the scope and manner of disclosure and avoids collateral issues, such as preservation-of-evidence requirements or who pays for testing. Requiring that access claims be asserted in the context of a substantive claim for relief is actually more consistent with *Brady* and its progeny, which apply in the context of a pending prosecution, than the creation of a right of access independent of any substantive claim.

Osborne also uses this last section of his opposition to make other points unrelated to the correctness of the Ninth Circuit's decision. One of those is his suggestion that the state now concedes the exculpatory potential of the DNA evidence he seeks. [*See* Opp. 28 & n.22] Further explanation of this concession is necessary. Only one of the possible results from retesting would conclusively establish Osborne's innocence: a retest of the semen inside the condom would have to overwhelmingly exclude Osborne as the donor *and* testing of the epithelial cells on the outside of the condom would have to overwhelmingly include K.G. as the donor; *only then* could Osborne

say that the results conclusively establish his innocence.

But if the epithelial cells cannot be linked to K.G., then the exclusion of Osborne as the source of the semen would not establish his innocence. Unless some third person were identified who then confessed to the rape, this result would raise the distinct possibility that the blue condom found by the police was not the one actually used in the rape.

The Ninth Circuit disparaged this possibility as fantastic in light of the state's trial theory based on the condom. Pet. App. 34a (noting that state's "newly imagined alternative theories" rebut its trial evidence). The court ignored that new test results that excluded (but did not exonerate) Osborne would compel the state to argue that the found condom was not the rape condom; the police simply stopped looking through the snow, assuming that the condom they found was used in the rape. Apart from the DQ-alpha test, which established a 1-in-6 chance that Osborne had used the condom, only its color and location tied the condom to the rape. Osborne might not have disposed of the condom at the scene or the epithelial cells on the outside might not be K.G.'s; in either case that would mean that the evidence condom could not be the rape condom. Thus, absent evidence linking the epithelial cells to K.G., new testing excluding Osborne as the source of the semen would not establish his innocence. And if Osborne were entitled to a new trial based on a new test result that excluded him, the fact-finder would have to determine whether the found condom was indeed used in the rape. And that same fact-finder would also be able to consider Osborne's written and oral confessions to the parole board.

Osborne also mentions the state's brief description of his lawyer's pretrial strategic decision to forgo RFLP DNA testing, a more discriminating method than the DQ-alpha test done by the state.[5] [*See* Opp. 28 & n.22 (citing Pet. 4-5)] Osborne asserts that this pretrial decision "further complicates the legal issues raised [in the petition], and would make this particularly inappropriate for *certiorari*," but he does not explain how this would be so. [Opp. 28 (citing Pet. 4-5)] Osborne's pretrial decision played no role in the Ninth Circuit's decision and is not relied on by the state in support of its petition. Thus the pretrial decision should not be viewed as having any effect on the Court's consideration of this case.

Osborne also emphasizes his willingness to bear the cost of retesting, but that is legally immaterial. [Opp. 1, 27, 30] The ability or willingness to pay is irrelevant in the context of rights under the Due Process Clause, particularly those that relate to the criminal justice process. *See, e.g., Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (holding that criminal defendant may not be denied lawyer on account of indigency).

Osborne also challenges as "faulty" the state's assertion that the Ninth Circuit's decision rested on the incorrect assumption that freestanding innocence claims were cognizable, noting that this Court has not yet resolved the cognizability of those claims. [Opp. 30 ff. (referring to Pet. 19)] Osborne ignores

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[5] The state included this description for its historical relevance: the Alaska Court of Appeals affirmed the denial of Osborne's postconviction relief application based on the decision by Osborne's lawyer to forgo RFLP testing. *See* Pet. App. 97a-102a.

the plain language of the Ninth Circuit's decision: "In this circuit *we . . . have assumed that freestanding innocence claims are possible*." Pet. App. 20a (citing *Carriger*, 132 F.3d at 476) (emphasis added). Though acknowledging the unresolved status of freestanding innocence claims, the court reiterated, "[W]e assume for the sake of argument that such claims are cognizable in federal habeas proceedings in both capital and non-capital cases." *Id*. at 21a. Osborne cannot escape this explicit assumption or its central role in the Ninth Circuit's holding by relying on the unsettled status of freestanding innocence claims.

In addition, Osborne takes issue with the state's argument that the Ninth Circuit's assumption of the cognizability in federal courts of freestanding innocence claims is at odds with decisions by the courts of appeals of nine other circuits. [Opp. 31-32 (referring to Pet. 21-22)] Osborne claims that the state's reliance on those decisions is "disingenuous" because they were (1) based on *Herrera v. Collins*, 506 U.S. 390 (1993), which left open the cognizability issue, and (2) decided before *House v. Bell*, 547 U.S. 518 (2006), which expressly refused to decide the issue. [*Id*. at 31 & n.24] Osborne ignores the state's acknowledgement that the Court had not resolved the cognizability issue. [*See* Pet. 20-21]

More important, the fact that this Court has not decided the issue does not preclude the circuit courts from doing so or dilute the precedential value of the decisions by the circuits that have done so. The fact remains that, irrespective of the Court's refusal to decide the issue, the law in nine circuits is that freestanding innocence claims are not cognizable in federal court, while the Ninth Circuit has not only assumed that they are cognizable but has also

created a new, independent postconviction right of access to evidence based on that assumption.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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