No. 09-9000

IN THE SUPREME COURT OF THE UNITED STATES

HENRY W. SKINNER,
Petitioner,

-v-

LYNN SWITZER, DISTRICT ATTORNEY FOR THE 31ST JUDICIAL DISTRICT OF TEXAS
Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PETITIONER IS SCHEDULED TO BE EXECUTED ON MARCH 24, 2010

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATUTES

Petitioner Henry W. Skinner submits this reply to Respondent's Brief in Opposition to his Petition for Writ of Certiorari.

I. RESPONDENT FAILS TO ADDRESS *ANY* OF THE ARGUMENTS MADE IN THE PETITION FOR WHY CERTIORARI SHOULD BE GRANTED.

Remarkably, Respondent's Brief in Opposition fails to address in any significant way the reasons advanced in Mr. Skinner's Petition in support of granting certiorari. Respondent does not deny that a deep circuit split exists regarding the issue presented here: whether a prisoner who claims he was denied due process in the application of a State's post-conviction DNA testing statute should bring such a challenge under 42 U.S.C. § 1983 or in a petition for writ of habeas corpus.[1] (*See* Brief in Opposition ("Opp.") at 8; *cf.* Petition ("Pet.") at 16-21 (describing the extensive conflict among the Courts of Appeals).) Respondent fails to identify any development since this Court granted review on precisely this issue in 2008 (without ultimately deciding it) that would make resolving that dispute less urgent now. Respondent does not mention, much less defend, the Fifth Circuit's decision in *Kutzner v. Montgomery County*, 303 F.3d 339 (5th Cir. 2002), or the Fourth Circuit decision on which *Kutzner* relied, *see Harvey v. Horan*, 278 F.3d 370 (4th Cir. 2002). Nor does Respondent attempt to explain how *Kutzner* survives *Wilkinson v. Dotson*, 544 U.S. 74 (2005), on which four other Circuits have relied in taking the opposite view. And Respondent nowhere disputes that the issue

[1] Nor does Respondent's Brief in Opposition cite, much less discuss, a single one of the numerous federal appellate decisions that are the focus of Mr. Skinner's argument concerning the need for this Court to resolve the existing split.

presented here is one of profound and continuing importance, on which the lower courts require guidance.

The closest Respondent comes to addressing whether certiorari should be granted in this case is an *acknowledgement* halfway through her brief that "the circuit courts of appeals are split regarding the question presented," (*see* Opp. at 8), which she then shrugs off with the response that such a "disagreement among the circuits does not entitle [Mr.] Skinner to certiorari review, and is simply one factor the Court may consider."[2] *Id.* Mr. Skinner of course concedes that such a split does not *entitle* him to review that is, by its nature, discretionary. Nevertheless, the compelling reasons Mr. Skinner has shown for why certiorari is appropriate—the split among the circuits, the evident conflict with this Court's precedent, the importance of the issue to the administration of justice, and the fact this Court only recently granted certiorari on, and then failed to resolve, the same issue—provide

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[2] The Brief in Opposition at several points reflects significant confusion about the exact nature of Mr. Skinner's legal claim. For example, Respondent asserts that Mr. Skinner "could not possibly prevail . . . even if this Court were to create . . . a cause of action to obtain evidence post-conviction for DNA testing . . . ." (Opp. at 7; *see also id.* at 12 ("Skinner asks this Court to create a post-conviction constitutional right under § 1983 to access crime scene evidence in order to conduct DNA testing . . . .").) Mr. Skinner is *not* asking this Court to "create" any new "constitutional right" or "cause of action." He seeks only to pursue the cause of action that this Court has already acknowledged—that procedural due process requires a State to provide "'fundamental fairness in [the] operation'" of its state-law DNA testing scheme, even in the absence of a substantive federal right to such testing. *Dist. Att'y's Office v. Osborne*, 129 S. Ct. 2308, 2320 (2009) (citation omitted). The question presented here is only what the appropriate vehicle is for pursuing that claim.

ample reason for the Court to exercise its discretion to grant certiorari. Respondent offers not a single counter-argument directed to any of these points.

Instead, Respondent presents a mishmash of trivial contentions having little if anything to do with the Question Presented. Some introduce confusion by mischaracterizing Mr. Skinner's claim or injecting irrelevant factual issues. Others assert that the Court should turn aside the straightforward, narrow, and clearly presented legal issue in this case because the District Court might have to sort out certain complex and fact-bound disputes on remand. As we show below, nothing in the Brief in Opposition should prevent this Court from granting review, given the clear circuit split and the continuing importance of the question presented.

II. DNA TEST RESULTS COULD INDEED SHOW MR. SKINNER'S INNOCENCE.

Foremost in Respondent's attempts to divert the Court's attention to the issues the District Court would have to consider on remand is her bald assertion that DNA testing could not establish Mr. Skinner's innocence. (Opp. at 9-10, 11-12, 15.) This assertion is not germane to the Question Presented. Equally important, it is simply wrong. For example, included among the items Mr. Skinner seeks to have tested are Twila Busby's fingernail clippings and a windbreaker jacket found next to her body. If the jacket contained sweat stains of suspect Robert Donnell (it is similar in appearance to one he is known to have worn) and his DNA were found under Ms. Busby's fingernails, those results alone would provide convincing evidence that he, not Mr. Skinner, was the murderer. The presence of Donnell's

DNA on other objects, such as the knives or the cup towel, would further cement that conclusion. (*See* Pet. at 12-14.)

Respondent avoids engaging in a discussion of the actual evidence. Instead, insisting that Mr. Skinner must be guilty, she points to the jury's verdict, (Opp. at 12), the Fifth Circuit's statement that "ample evidence" showed that Mr. Skinner was the murderer, (*id.* at 10), and Respondent's own self-serving description of the evidence against Mr. Skinner as "overwhelming," (*id.* at 9). But it is, of course, *always* the case that a convicted person who is later exonerated by DNA testing has first been found guilty, often on "ample" evidence. And it is frequently the case that, before exonerating DNA results are obtained, prosecutors and courts characterize the evidence of guilt as "overwhelming[]."[3]

Respondent also argues that Mr. Skinner's failure to ask for DNA testing prior to trial should weigh against the Court granting certiorari on the unrelated legal issue presented here. (Opp. at 11.) But, as Mr. Skinner has pointed out, that purported "failure" was the very basis on which the CCA denied his second motion for DNA testing, and will be at the heart of this case on remand if the Court determines that Mr. Skinner's suit can be maintained under § 1983. (*See* Petitioner's Application for Stay of Execution, No. 09A743 ("Stay App.") at 14-15.)

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[3] *See Osborne*, 129 S. Ct. at 2337 (Stevens, J., dissenting) ("DNA evidence has led to an extraordinary series of exonerations . . . [even] in cases where the convicted parties confessed their guilt and where [the] trial evidence against them appeared overwhelming."); *see also id.* at 2337 n.9 (citing Brandon L. Garrett, *Judging Innocence,* 108 Colum. L. Rev. 55, 109 (2008), as documenting that in 50% of DNA exoneration cases courts had commented on the defendant's likely guilt and in 10% had characterized the evidence of guilt as "overwhelming").

The constitutionality of denying DNA testing on this ground is far from clear, given the sharp division between the concurring and dissenting Justices in *Dist. Att'y's Office v. Osborne*, 129 S. Ct. 2308 (2008), on this very issue. *Compare id.* at 2329-30 (Alito, J., concurring) *with id.* at 2336 n.8 (Stevens, J., dissenting). For present purposes, it suffices to say that this issue is not now before this Court, and does not block the Court's path to reaching and deciding the narrow, important, and contested legal issue framed by the Question Presented.[4]

Finally, Respondent inexplicably advances the time-honored principle that the Court should not unnecessarily "formulate a rule of constitutional law." (Opp. at 9.) Mr. Skinner's Question Presented neither asks nor requires the Court to take such a step. Instead, the Court must reconcile two congressional enactments: 42

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[4] In suggesting that a defendant's decision not to ask for DNA testing prior to trial should permanently disqualify him from obtaining such testing, Respondent's argument echoes both the CCA's opinion denying Mr. Skinner's second state motion for DNA testing and Justice Alito's concurring opinion in *Osborne*. Both warned that defendants might take their chances at trial and then seek post-conviction testing when there is nothing to lose. *See Skinner v. State,* 293 S.W.3d 196, 202 (Tex. Crim. App. 2009); *cf. Osborne,* 129 S. Ct. at 2329 (Alito, J., concurring). But this argument presumes that only a guilty defendant would deliberately forego pretrial DNA testing. The present case offers an instructive counter-example. Mr. Skinner lived in the house where the murders occurred, and does not deny he was in the same room with two of the victims when they sustained lethal wounds. His DNA would surely be found in the house, and the victims' DNA would likely be found on him. In contrast to *Osborne*, where the defendant was accused of raping a prostitute and the only DNA material to be tested was semen found in a condom, even an innocent defendant in Mr. Skinner's situation might reasonably fear that jurors would draw the wrong inference from those test results. A defendant who chooses in such circumstances to rest on his constitutionally-guaranteed presumption of innocence should not be disadvantaged as a consequence—not when the ultimate and overriding objective is to avoid punishing an innocent person. Finally, whatever the merits of holding a defendant forever to his pre-trial choice about conducting testing, in Mr. Skinner's case, forensic DNA testing was relatively new at the time of trial and Texas had no procedures for post-conviction testing, so it is idle to describe him as having "chosen" between those two options.

U.S.C. § 1983 on the one hand, and the federal habeas corpus statutes on the other. Only if the Court grants certiorari and thereafter reverses the decision below will Mr. Skinner's constitutional claims be ripe for consideration, and then only by the District Court on remand.

III. RESPONDENT'S ASSERTION THAT THE STATUTE OF LIMITATIONS BARS MR. SKINNER'S SUIT IS LIKEWISE BOTH PREMATURE AND WRONG.

Again urging the Court to focus on issues that will have to be decided by the District Court on remand, Respondent contends that Texas's two-year statute of limitations bars Mr. Skinner's § 1983 claims. This argument also need not detain the Court for long. The statute of limitations is an affirmative defense, and has not been at issue in this case because the lower courts have disposed of the suit *solely* on the basis of their conclusion that Mr. Skinner's claim sounds exclusively in habeas. In fact, Respondent never mentioned the issue in the courts below. If this Court agrees with Mr. Skinner that a § 1983 action is the appropriate vehicle for pressing his due process challenge, Respondent can attempt to raise her statute of limitations defense on remand.

Even if the issue were relevant at this juncture, Respondent's assertion that the statute of limitations bars this action is wrong because it ignores the doctrines of continuing violation and equitable tolling, under either of which Mr. Skinner's lawsuit was timely filed. First, a continuing violation "relieves a plaintiff of establishing that all of the complained-of conduct occurred within the actionable period if the plaintiff can show a series of related acts, one or more of which falls within the limitations period." *Messer v. Meno*, 130 F.3d 130, 134-35 (5th Cir. 1997)

(citation omitted). Over a period of years Mr. Skinner has made numerous requests in various forums for access to the physical evidence for DNA testing, all of which requests Respondent has denied, by either directly refusing to provide the evidence or opposing Mr. Skinner's attempts to gain access through the courts. (*See* Stay App. at 18-21 (describing Mr. Skinner's persistent efforts to obtain DNA testing).) This series of injurious acts by Respondent has continually revived the accrual date of the applicable statute of limitations.[5]

Apart from the continuing violations, Mr. Skinner's diligent pursuit of his rights over more than a decade would give him a powerful claim for equitable tolling. *See Young v. United States*, 535 U.S. 43, 49 (2002) (limitations periods are customarily subject to equitable tolling); *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990) (federal courts have allowed equitable tolling in situations where claimants exercised due diligence in preserving their legal rights (citation omitted)). While Respondent is correct that ten years have elapsed since Mr. Skinner was first refused DNA testing, her implication that Mr. Skinner sat mute about that refusal the whole time is false. Almost continuously thereafter, Mr. Skinner had pending in some forum an effort to obtain that testing, and every one of those efforts was actively resisted by the State.

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[5] *See, e.g., Perez v. Laredo Junior College*, 706 F.2d 731, 733-34 (5th Cir. 1983) (continuing violations may dictate when the statute of limitations commences in § 1983 actions); *Jackson v. Galan*, 868 F.2d 165, 168 (5th Cir. 1989) (because sheriff's repeated garnishment of wages created a continuing due process violation, plaintiff could recover damages for garnishments more than one year prior to filing of the § 1983 suit).

In short, whether Mr. Skinner's claim is barred by the statute of limitations is not an issue here. Moreover, the Court can be confident that, if it grants certiorari, reverses, and remands for further proceedings, the statute of limitations will not automatically bar further consideration of the case.

IV. WHILE TEXAS HAS PROCEDURES FOR POST-CONVICTION DNA TESTING, A DUE PROCESS CHALLENGE CAN BE MADE REGARDING THEIR APPLICATION IN A PARTICULAR CASE.

Respondent points out that the States have wide latitude in establishing trial and post-conviction procedures, and that Texas has adopted post-conviction procedures for obtaining evidence for DNA testing. (Opp. at 13, 15.) As Respondent has it, the Court should deny certiorari here because "there is nothing fundamentally inadequate about [those] procedures," (Opp. At 16), which reflect some of the "'key elements'" encouraged by, e.g., The Innocence Project, (*id.*). This defense, too, is more appropriately reserved for presentation on remand. As with Respondent's other arguments, it too is wrong.

While States undoubtedly have wide latitude in establishing the procedures for vindicating liberty interests, such procedures must comport with fundamental fairness. *See, e.g., Osborne,* 129 S. Ct. at 2320. And Respondent does not mention, much less challenge, Mr. Skinner's account of how Texas's procedures failed to meet that standard in this case. (*See* Petition at 5-7; Stay App. at 13-15.) Thus, Respondent's generic argument fails to offer any reason the Court should not grant certiorari to decide the narrow legal question actually presented by this case, much

less any reason to assume Mr. Skinner would not prevail on his challenge to Texas's procedures on remand.[6]

Respondent goes on to assert that Mr. Skinner's as-applied challenge to Texas's procedures, once properly before the District Court on remand, would "likely be barred by the *Rooker-Feldman* doctrine . . . ." (Opp. at 17; *see also id.* at 18.) Respondent thus intimates that simply by virtue of having attempted to invoke Texas's available post-conviction DNA testing procedures in state court, Mr. Skinner would be foreclosed from ever alleging in federal court that those provisions were unconstitutionally applied to him.

That argument, however, is impossible to square with *Osborne*. This Court specifically faulted Osborne for having brought his § 1983 action without ever having invoked Alaska's "newly developing procedures for obtaining postconviction access to DNA." *Osborne*, 129 S. Ct. at 2321. Having never "tried to use the process provided to him by the State" or "attempted to vindicate the liberty interest that [later became] the centerpiece of his claim," Osborne could not "demonstrate the inadequacy of the state-law procedures available to him . . . ." *Id.* Simply put, "without trying [these procedures]," Osborne could "hardly complain that they d[id] not work in practice." *Id.*

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[6] Even on its own terms, Respondent's argument misapprehends the specifics of Mr. Skinner's due process claim as framed in his complaint. Respondent's point appears to be that Texas's post-conviction DNA testing provisions are adequate *on their face*, while Mr. Skinner's complaint alleges that they were *applied to him* in a manner that violated due process—not that they are "fundamentally inadequate" in the abstract. Thus, the features of Texas's post-conviction DNA testing statute that Respondent extols are irrelevant to the underlying issues in this case. (Opp. at 16-17.)

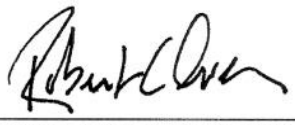
The evident implication of *Osborne* is that this Court reasonably expects that a state prisoner seeking post-conviction DNA testing should avail himself of existing state procedures for doing so. If those procedures are applied arbitrarily to deny such testing, *Osborne* suggests, the federal due process clause might provide a remedy. But, by Respondent's reasoning, the very act of attempting to invoke existing state procedures would automatically result in the dismissal on *Rooker-Feldman* grounds of any subsequent federal due process lawsuit. Because Respondent's view is impossible to reconcile with *Osborne*, it proves too much.

In sum, this Court in *Osborne* left the federal courthouse door open for cases exactly like this one—questioning whether a state has applied its DNA testing statute in so arbitrary a fashion as to deny due process. Given that such cases will continue to arise with some frequency, this Court should resolve the undisputed split among the circuits concerning whether such claims may be advanced under § 1983 or must be relegated exclusively to habeas corpus proceedings. Mr. Skinner's case is the ideal vehicle for resolving that narrow but important issue.

CONCLUSION

For the reasons stated above and in his Petition, Mr. Skinner respectfully urges the Court to grant a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,



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