No. 07-___ 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**

## PETITION FOR WRIT OF CERTIORARI

TALIS J. COLBERG
*Attorney General*
KENNETH M. ROSENSTEIN *
DIANE L. WENDLANDT
*Assistant Attorneys General*
STATE OF ALASKA
Department of Law
Office of Special Prosec. & Appeals
310 K Street, Suite 308
Anchorage, Alaska 99501
(907) 269-6250

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

## QUESTIONS PRESENTED

William Osborne was charged with kidnapping, sexual assault, and physical assault. He had the assistance of a competent lawyer who made a reasonable strategic decision to forgo independent DNA testing of the state's biological evidence. He was convicted after an error-free trial. Now, years later, Osborne has filed an action under 42 U.S.C. § 1983, seeking access to the biological evidence for purposes of new DNA testing. The questions presented are:

1. May Osborne use § 1983 as a discovery device for obtaining postconviction access to the state's biological evidence when he has no pending substantive claim for which that evidence would be material?

2. Does Osborne have a right under the Fourteenth Amendment's Due Process Clause to obtain postconviction access to the state's biological evidence when the claim he intends to assert – a freestanding claim of innocence – is not legally cognizable?

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

# TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—Continued



STATUTES



OTHER AUTHORITIES

IN THE

# Supreme Court of the United States

No. 07-__

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**

## PETITION FOR WRIT OF CERTIORARI

## OPINIONS BELOW

The opinions of the United States Court of Appeals (App. 1a, 51a) are reported at 521 F.3d 1118 and 423 F.3d 1050. The district court's order (App. 46a) is reported at 445 F. Supp.2d 1079. The opinions of the Alaska Court of Appeals in Osborne's postconviction relief case (App. 63a, 91a) are reported at 163 P.3d 973 and 110 P.3d 986. The opinion of the Alaska Court of Appeals in Osborne's direct appeal (App. 113a) is unpublished and available at 1996 WL 3368444.

## JURISDICTION

The United States Court of Appeals issued its decision on April 2, 2008. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## *CONSTITUTIONAL AND STATUTORY* PROVISIONS INVOLVED

Amendment XIV, section 1, of the United States Constitution provides in part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law[.]

42 United States Code § 1983 provides in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]

Rule 6(a), Rules Governing Section 2254 Cases in the United States District Courts, provides in part:

> A judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure and may limit the extent of discovery.

## STATEMENT OF THE CASE

1. *The attack on K.G.* On March 22, 1993, Osborne and his friend Dexter Jackson solicited K.G. to perform fellatio in exchange for $100. App. 112a.

They took her, in Jackson's car, to a secluded site near Anchorage International Airport, raped her at gunpoint inside the car, beat her with an axe handle, shot her, and left her for dead in the snow. App. 113a-115a.

2. *The police investigation.* Five days after the attack, the police stopped Jackson's car, which matched the description K.G. had provided. App. 116a. The police found a .380-caliber semi-automatic pistol in the car and a box of ammunition under the seat. *Id.* In Jackson's pocket was K.G.'s Swiss Army knife, which Jackson and Osborne had taken from her. *Id.* Jackson was arrested, confessed, and implicated Osborne.[1] App. 4a, 98a, 115a.

The police seized Jackson's car. App. 115a. Forensic examination revealed blood spots in the car. *Id.* DQ-alpha (DQA) DNA testing of a blood spot on the door matched K.G.'s profile, which is found in 4.4 to 4.8 percent of Caucasian females. App. 67a, 95a, 116a. Fibers matching the carpeting in the car were found on K.G.'s clothing. App. 116a.

The police also canvassed the crime scene, finding "an area of disturbed and bloody snow." App. 117a. They found two pairs of K.G.'s bloody pants, a used blue condom, and an expended round of .380 ammunition. *Id.* Testing revealed that the round had come from Jackson's pistol. *Id.* The police were able to match tire tracks at the scene with Jackson's car. *Id.* Located 114 feet away from the crime scene, the police found an axe handle similar to those Osborne

---

[1] Osborne and Jackson were tried jointly, thus rendering Jackson's implication of Osborne inadmissible against Osborne at trial.

used in his work. *Id.* The police also found a similar axe handle in Osborne's room. *Id.*

Seminal fluid inside the blue condom was submitted for DQA DNA testing. App. 117a. The semen matched Osborne's DQA type, which has a frequency of 14.7 to 16 percent among African-Americans. App. 68a, 96a, 117a. The testing excluded Jackson and James Hunter, Jackson's passenger at the time his car was stopped. App. 5a. Pubic hairs found on the condom and on K.G.'s sweater had the same microscopic characteristics as Osborne's pubic hair. App. 117a.

Osborne was seen getting into Jackson's car shortly before the attack against K.G. App. 76a. And Osborne and Jackson were seen together shortly after the attack. *Id.* When seen after the attack, Osborne had blood on his clothing. *Id.*

Finally, K.G. identified both Osborne and Jackson from photographic lineups. App. 4a, 116a-117a. She also identified Osborne at trial. App. 7a.

3. *Osborne's trial and conviction.* Osborne was convicted, after a jury trial in Alaska Superior Court, of kidnapping, first-degree sexual assault, and first-degree assault. App. 117a. He was given a composite sentence of 26 years with 5 years suspended. App. 117a-118a. The Alaska Court of Appeals affirmed Osborne's convictions and sentence. App. 118a.

4. *Osborne's state application for postconviction relief.* In 1997, Osborne filed a postconviction relief application in Alaska Superior Court, claiming that his lawyer had incompetently failed to submit the blue condom for independent DNA testing using a more discriminating method than the DQA method used by the state. App. 97a. (At the time of Osborne's

trial, testing using the more discriminating restriction-fragment-length-polymorphism (RFLP) method was available. App. 5a, 69a, 97a.) He also asked the court to order retesting of the state's biological evidence using a more discriminating DNA test method. App. 97a. He claimed that the results of that retesting would establish the prejudice necessary for his ineffective assistance and would also prove his innocence. *Id.*

Osborne's lawyer submitted an affidavit defending her decision not to submit the condom for independent RFLP testing, explaining that "the statistics were in Osborne's favor, due to a relatively high frequency in the population of the profile of the case DNA." App. 97a-98a. She reasoned that because the state's test established a 1-in-6 chance that a random person would have the same profile as Osborne, those were "very good numbers" to make a case for mistaken identity, particularly in light of the facts that Osborne was African-American and K.G. was Caucasian, the crimes took place at night, and K.G. had poor vision. App. 98a. This, the lawyer concluded, put Osborne in a "strategically better position" than he would be in if the condom were submitted for RFLP testing, which the lawyer believed would only confirm Osborne as the perpetrator. *Id.*, *see also* App. 70a. The state superior court denied Osborne's application, finding that his lawyer had reasonably rejected independent testing because she disbelieved Osborne's claim of innocence and wanted to avoid confirming his culpability. App. 99a. The Alaska Court of Appeals affirmed the superior court's denial of Osborne's ineffective assistance of counsel claim. App. 100a-102a.

The superior court also denied Osborne's request for retesting of the biological evidence by more dis-

criminating methods. App. 99a. Osborne sought reconsideration, arguing that he had a due process right to additional testing so that he could prove his innocence. *Id.* Denying reconsideration, the court ruled that neither state nor federal due process gave Osborne a right to postconviction testing under the facts of his case. *Id.* The Alaska Court of Appeals discussed this newly raised due process claim at length. App. 102a-112a

The Alaska court held that, "at least under federal law, a defendant who has received a fair trial apparently has no due process right to present new postconviction evidence, even when that evidence would demonstrate the defendant's innocence." App. 106a (citing *Herrera v. Collins*, 506 U.S. 390, 400 (1993); *id.* at 427-28 (Scalia, J., concurring)), 109a ("It appears, therefore, that Osborne has no due process right under the federal constitution to present new evidence to establish his factual innocence.").

After rejecting the claim under federal law, the Alaska Court of Appeals considered whether Alaska's constitution would afford Osborne relief. App. 109a-111a. The court remanded Osborne's case for consideration of (1) whether the evidence against Osborne would satisfy the standard developed from out-of-state cases that had recognized a state constitutional right to pursue an innocence claim and (2) whether the Alaska Constitution provided a similar right. App. 111a-112a.

On remand, the superior court concluded that Osborne could not meet the standard that would afford him a right to postconviction testing. App. 72a. In addition to reviewing the evidence presented at Osborne's trial, the court considered the fact that Osborne had applied for parole and had confessed,

both in writing and orally, to his role in the attack on K.G. App. 71a & n.11. The court listed the evidence, in addition to the blue condom, linking Osborne to the crime scene: (1) Osborne had twice prior to the crime telephoned Jackson from the arcade where Jackson had picked him up; (2) Osborne was seen getting into Jackson's car shortly before the crime occurred; (3) tickets from the arcade were found in Jackson's car; (4) witnesses saw Osborne and Jackson together shortly after the crime occurred, and some of these witnesses observed blood on Osborne's clothing; and (5) K.G. told the driver who picked her up immediately after the attack that her attackers were "two black guys with military . . . haircuts," a description consistent with Osborne's physical characteristics. App. 76a. Thus, even if new testing were to exclude Osborne as the donor of the DNA in the condom, the superior court found that (1) the condom "might have been coincidentally left in the vicinity by other people before the police arrived," (2) "'extensive other evidence'" linked Osborne to the attack, and (3) Osborne had confessed. App. 72a-73a (quoting superior court), 78a-79a.

The case then returned to the Alaska Court of Appeals, which agreed with the superior court's conclusion that new testing that excluded Osborne "would not conclusively establish [his] innocence." App. 79a. A majority of the court of appeals concluded that the Alaska Constitution might require a court to hear a postconviction innocence claim by a defendant who presented "clear genetic evidence" of innocence. App. 89a (Mannheimer, J., with Coats, C.J., concurring). But, based on the superior court's analysis of the evidence against Osborne, Osborne could not meet that threshold, even if new test results were favorable to him. App. 89a-90a.

The Alaska Supreme Court denied Osborne's request for discretionary review. App. 10a (citing *Osborne v. State*, No. S-12799 (Alaska, January 22, 2008)).

5. *Osborne's federal civil rights action.* After Osborne's state postconviction relief application was initially denied by the superior court, and almost ten years after his conviction, he filed a civil rights action under 42 U.S.C. § 1983 in federal district court. App. 10a, 51a. He sought to compel the state to provide him access to the biological evidence used to convict him, alleging that withholding access violated his constitutional rights.[2] App. 51a, 54a. Osborne wanted to submit the evidence for DNA testing, using the short-tandem-repeat and mitochondrial methods. App. 11a, 54a. And if the results were favorable to him, then he would use them to support a free-standing claim of innocence that he intended to file in state or federal court. App. 58a. The district court dismissed Osborne's complaint, concluding that his claim had to be asserted in a petition for writ of habeas corpus. App. 54a.

The Ninth Circuit reversed, concluding that Osborne was entitled to pursue his claim under § 1983 because his success on that claim would not necessarily demonstrate the invalidity of his confinement. App. 58a-59a. According to the court, Osborne's success would only afford him access to the evidence he sought and would have no effect on the validity of his

---

[2] Osborne sued the Anchorage District Attorney's Office for the Third Judicial District, the Anchorage District Attorney, the Anchorage Police Department, and the police chief. The police department and its chief have since been dismissed from the case. App. 12a.

confinement. *Id.* The Ninth Circuit remanded the case to the district court for consideration of whether Osborne had a federally protected right of access to the biological evidence. App. 62a.

On remand, the district court granted Osborne's motion for summary judgment (and denied the state's cross-motion). App. 50a. The state appealed, and the Ninth Circuit affirmed the district court's order. App. 1a-2a.

The Ninth Circuit concluded that Osborne had a due process right under the Fourteenth Amendment that barred the state from denying him postconviction access to biological evidence that might be material to the freestanding innocence claim he hoped to make. App. 44a. The court based this conclusion on *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. App. 15a-19a. The court assumed that a freestanding innocence claim was legally cognizable in federal court and reasoned that Osborne should have access to the evidence even though he had not yet actually asserted his innocence claim. App. 20a-23a.

## REASONS FOR GRANTING THE PETITION

Over the past 25 years, DNA technology has become a crucial component in the investigation and prosecution of criminal offenses. Advances in this technology have changed how criminal cases are prosecuted. Moreover, the same technology has played a pivotal role in the exoneration of convicted defendants. In the present case, the Ninth Circuit has attempted to create a mechanism by which a criminal defendant can take advantage of these technological advances years after the defendant was convicted following an error-free trial.

The Ninth Circuit erred not in its recognition of the technological advances but in its willingness to step far beyond existing constitutional norms to address the issue. In essence, the court created from whole cloth a Constitution-based, litigation-style discovery right. And the court chose to allow this right to be asserted outside the boundaries of any ongoing post-conviction litigation. As formulated by the Ninth Circuit, this new right, constitutional in dimension, is essentially freestanding and has few, if any, limits. In fact, the court said that "testing of potentially exculpatory evidence may be given precedence over the consideration of even jurisdictional questions involving pure issues of law." App. 21a. The Ninth Circuit's decision gives rise to two important issues that merit this Court's review:

1. The court allowed a convicted defendant to bring a claim under 42 U.S.C. § 1983 for the purpose of conducting discovery in connection with a yet-to-be-asserted actual innocence claim. App. 58a-59a. In allowing Osborne to do this, the Ninth Circuit unhitched the right of access from its mooring to ongoing litigation, instead creating an independent right. App. 20a-22a. Three circuits – the Fourth, Fifth, and Sixth – have rejected this use of § 1983, concluding that the access-to-evidence claim is ultimately part and parcel of a challenge to the validity of a defendant's conviction.

2. The court created a postconviction right of access to evidence under the Due Process Clause by extending the doctrine of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. App. 15a-16a, 23a. Three circuits – the Fourth, Sixth, and Eleventh – have refused to apply the *Brady* doctrine in a post-conviction context. The basis for the Ninth Circuit's

extension of *Brady* is that the evidence Osborne seeks is potentially material to his yet-to-be-asserted actual innocence claim. But the court assumed away the fact that a freestanding innocence claim is not cognizable. App. 20a-22a. This assumption conflicts with decisions by nine other circuits, all of which have concluded that a freestanding innocence claim is not cognizable in federal court.

## I. CERTIORARI IS WARRANTED TO REVIEW THE NINTH CIRCUIT'S HOLDING THAT A DEFENDANT'S POSTCONVICTION ACCESS-TO-EVIDENCE CLAIM IS COGNIZABLE IN § 1983 ACTIONS

A prisoner in state custody may not use a § 1983 action to challenge the fact or duration of imprisonment, but rather must seek habeas corpus relief. *Wilkinson v. Dotson*, 544 U.S. 74, 78 (2005). The cognizability of a claim under § 1983 depends on the effect of a favorable judgment on the prisoner's claim. An action under § 1983 is barred if success on a claim "would necessarily demonstrate the invalidity of confinement or its duration." *Id.* at 81-82. The claim must then be asserted in a habeas petition. *Id.*

The Ninth Circuit concluded that Osborne could bring his access-to-evidence claim in a § 1983 action because a judgment in his favor would have no effect on his confinement. App. 58a-59a. That is, if Osborne were to succeed, he would merely obtain access to the evidence he seeks for the purpose of conducting new DNA testing. App. 59a. The results of that testing would not necessarily invalidate his confinement. *Id.* Rather than exculpating Osborne, the results might inculpate him or be inconclusive, which would either confirm or have no effect on the

validity of his confinement. *Id.* And to challenge his conviction, Osborne would have to file a separate action. *Id.*

### A. The courts of appeal are divided on this issue

The Ninth Circuit's conclusion conflicts with decisions of the Fourth, Fifth, and Sixth Circuits. On the other hand, the Seventh and Eleventh Circuits, like the Ninth Circuit, have allowed access-to-evidence claims to be brought under § 1983. *See Savory v. Lyons*, 469 F.3d 667, 672 (7th Cir. 2006); *Bradley v. Pryor*, 305 F.3d 1287, 1290-91 (11th Cir. 2002).

The Fourth Circuit rejected a claim substantially identical to Osborne's in *Harvey v. Horan*, 278 F.3d 370 (4th Cir. 2002). The court correctly concluded that the claim was not cognizable under § 1983 because the access-to-evidence claim was the "first step" in challenging the validity of the defendant's conviction. *Id.* at 375. In other words, the defendant "[wa]s trying to use a § 1983 action as a discovery device to overturn his state conviction, . . . set[ting] the stage for a future attack on his confinement." *Id.* at 378. The Ninth Circuit rejected *Harvey*'s conclusion as having "strayed" from the principle that § 1983 can be used for claims that would not necessarily imply the invalidity of confinement or its duration. App. 61a.

The Fifth Circuit, relying on *Harvey*, reached the same conclusion in *Kutzner v. Montgomery County*, 303 F.3d 339, 340-41 (5th Cir. 2002) (per curiam). The defendant in *Kutzner*, like Osborne, sought access to biological evidence for the purpose of conducting new DNA testing. The court recognized that the defendant's access claim was "so intertwined" with an

attack on his confinement that its "success would necessarily imply revocation or modification of confinement." *Id.* at 341 (internal quotations omitted).

The Sixth Circuit reached substantially the same conclusion in *Boyle v. Mayer*, 46 Fed. Appx. 340 (6th Cir. 2002) (unpublished). The defendant there sought access to biological evidence for new DNA testing so that he could prove his innocence. The court equated this with a challenge to the validity of his conviction. *Id.*

### B. Issues relating to the discovery of evidence relevant to an actual-innocence claim should be resolved by a habeas court

This case involves the timing and scope of discovery. The Ninth Circuit created what can only be described as a right to discovery that exists independently of any substantive claim to which the evidence sought might be material. But the conduct and scope of discovery are issues that must be resolved in the context of the underlying substantive claim to which the evidence sought might be material. There is a good reason for this.

Materiality is not an intrinsic quality of evidence, but rather exists only in the context of some discrete substantive claim: "the substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1989); *Hernandez v. Johnston*, 833 F.2d 1316, 1318 (9th Cir. 1987) ("The 'materiality' of a fact is determined by the substantive law governing the claim or defense."). Evidence is material when it relates to "a fact that is of consequence to the determination of the action." 1 Weinstein, *Weinstein's Evidence* ¶ 401[03] n.1 (1982) (internal

quotation omitted), *quoted in United States v. Bagley*, 473 U.S. 667, 703 n.5 (1985) (Marshall, J., dissenting). *See also* Cleary, et al., *McCormick on Evidence* § 185 at 541 (3d ed. 1984) (evidence is immaterial when offered in support of "proposition which is not a matter in issue"), *quoted in Bagley*, 473 U.S. at 703 n.5 (Marshall, J., dissenting).

Materiality is therefore rooted in the substantive law that establishes a substantive right, claim, or defense at issue in pending litigation. It is on this point that the Ninth Circuit's decision founders. The right of access created by the Ninth Circuit lacks a point of reference to an underlying substantive claim. Instead, the court concluded:

> [U]ntil Osborne has actually brought an actual innocence claim and has been given the opportunity to develop the facts supporting it, Osborne's access-to-evidence claim may proceed on the well-established assumption that his intended freestanding innocence claim will be cognizable in federal court.

App. 22a. With this conclusion, the Ninth Circuit severed the right of access to evidence from any pending action or procedure, creating a standalone postconviction discovery right unrelated to any substantive claim.

The Ninth Circuit thus chose to measure materiality in the abstract. The tool adopted by the court for this purpose was doctrine of *Brady v. Maryland*, 373 U.S. 83 (1963), which obligates the government to disclose to a defendant favorable evidence that "is material to guilt or punishment." App. 15a-16a (quoting *Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987)). But applied in a postconviction context, the *Brady* doctrine is ill-suited for this purpose.

As discussed more fully in part II, *infra*, the *Brady* doctrine secures a defendant's right to a fair trial. When a defendant alleges a *Brady* violation in the context of a trial, relief is appropriate only if the undisclosed evidence is "material." The "touchstone of [this] materiality is a 'reasonable probability' of a different result" – that is, an acquittal. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). Materiality in this context considers the undisclosed evidence against the background of the trial evidence and requires a backward-looking assessment of the potential effect the evidence would have had on the outcome of the trial. In contrast, materiality in the postconviction context of Osborne's case requires a forward-looking assessment that considers the connection between the evidence and the substantive claim to which it relates. And it is this element – an actual substantive claim – that is missing in Osborne's case.

Osborne has no ongoing substantive claim that would trigger the discovery concerns he has raised. And while Osborne has declared his intention to file a freestanding innocence claim, nothing binds him to that declaration. Within this void, the Ninth Circuit has failed to identify any valid basis for allowing Osborne to conduct discovery that is untethered to any pending substantive claim.

If Osborne wants to assert a freestanding claim of innocence, he must file a habeas petition (or whatever other form of postconviction relief that might be available to him). And if the legal cognizability of that claim is established, he would then be able to seek access to the state's biological evidence, which the district court has the authority to allow under Habeas Rule 6(a). But his claim of access to that evidence is not independently cognizable outside the context of the substantive claim he hopes to assert.

The state's argument here does not conflict with the Court's decision in *Dotson*. The defendants in *Dotson* used § 1983 to challenge the constitutionality of parole eligibility procedures. *See Dotson*, 544 U.S. at 82. Success on their claims would have entitled them only to new reviews of their parole eligibility and would carry no implication that they would ultimately be entitled to release. *Id.* The purely legal issue of the constitutionality of the parole procedures at issue had no logical link to the defendants' actual parole eligibility.

In contrast, Osborne's access-to-evidence claim is inextricably entwined with the actual-innocence claim he hopes to bring. It matters little that new testing might confirm his guilt and thus would not support his innocence claim. That possibility does not sever the logical link between successful access to the evidence and his ultimate, but yet-to-be-made, claim of innocence. Osborne's *only* reason for seeking access to the state's biological evidence is so that he can later prove up the freestanding claim of innocence he hopes to make. An action under § 1983 was never intended as a mechanism to obtain discovery of evidence material to a claim not yet asserted.

## II. CERTIORARI IS WARRANTED TO REVIEW THE NINTH CIRCUIT'S HOLDING THAT THE GOVERNMENT'S DUTY TO DISCLOSE EXCULPATORY EVIDENCE UNDER *BRADY V. MARYLAND* REQUIRES THE STATES TO PROVIDE ACCESS TO EVIDENCE FOR NEW DNA TESTING

The sole legal basis for the Ninth Circuit's decision in Osborne's case is *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. *See* App. 15a-17a, 23a-28a.

*Brady* recognized that a defendant has a due process right to production of "evidence favorable to an accused . . . where the evidence is material either to guilt or to punishment." *Brady*, 373 U.S. at 87. *Brady* has since evolved into a broader doctrine, requiring the prosecution to affirmatively seek out from those acting on its behalf exculpatory and impeachment evidence that has a reasonable probability of resulting in an acquittal. *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999).

The exclusive rationale of the *Brady* doctrine is to ensure that a defendant receives a fair trial.[3] *Bagley*, 473 U.S. at 675 (prosecutor's "only" duty under *Brady* is "to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial"). *See also United States v. Ruiz*, 536 U.S. 622, 628 (2002); *Kyles*, 514 U.S. at 434; *United States v. Agurs*, 427 U.S. 97, 108 (1976); *Brady*, 373 U.S. at 87-88. Osborne received a fair trial and had the assistance of a competent lawyer. App. 99a-102a, 113a ff. He also had pretrial access to the biological evidence he now seeks, and he made a strategic decision not to seek independent pretrial RFLP testing, believing instead that the lower discriminating power of the state's DQA testing gave him a better chance to

---

[3] This Court's only mention of the *Brady* doctrine in a post-conviction context came in *Imbler v. Pachtman*, 424 U.S. 409 (1976). Addressing the issue of prosecutorial immunity under § 1983, the *Imbler* Court recognized that due process principles govern a prosecutor's duty to disclose exculpatory evidence at trial, but after trial, non-constitutional ethical standards govern any continuing duty to disclose. *Id.* at 427 n.25. This is fully consistent with the *Brady* doctrine's due process roots of ensuring that a defendant receives a fair trial. *Grayson v. King*, 460 F.3d 1328, 1337 (11th Cir. 2006) (rejecting that *Imbler* created a postconviction *Brady* right).

raise reasonable doubt.[4] App. 97a-99a. Osborne was therefore denied no rights under *Brady*, in its traditional and established pretrial application.

### A. The courts of appeal are divided on this issue

The Ninth Circuit converted *Brady*'s right of access from a purely pretrial right to a postconviction right. This conversion conflicts with the law of three other circuits. The Fourth Circuit held in *Harvey v. Horan* that a defendant had no right under *Brady* to subject biological evidence to postconviction testing because he was not challenging a prosecutor's failure to produce material, exculpatory evidence that would have denied him a fair trial. *Harvey*, 278 F.3d at 378-79 (citing *Bagley*, 473 U.S. at 675-76). The court specifically noted that the defendant had received a fair trial and had been given a pretrial opportunity to test the evidence he was then seeking. *Id.* at 379.

The Eleventh Circuit reached the same conclusion in *Grayson v. King*, 460 F.3d 1328 (11th Cir. 2006). The court viewed *Brady* and its progeny as creating a duty of disclosure that applied before and during trial

---

[4] The Ninth Circuit appears to have heavily discounted Osborne's decision to forgo pretrial testing because the state's criminalist "'felt that the sample was degraded.'" App. 5a-6a (quoting trial transcript), 9a. But the criminalist's opinion was offered at trial for the sole purpose of explaining why the state had not subjected the evidence to more discriminating testing. Nothing in the record suggests that this was a factor in Osborne's decision not to pursue the testing before trial, and neither Osborne nor the state made any effort to determine if the evidence was in fact too degraded for more discriminating testing. In light of Osborne's failure to make that effort, no inference favorable to him should be drawn based on the criminalist's opinion.

but not postconviction. *Id.* at 1337-38. The court concluded that the defendant, having received a fair trial, "has no valid due process right of post-conviction access to the biological evidence under *Brady*" to retest evidence, using new technology. *Id.* at 1338.

The Sixth Circuit, in an unpublished opinion, reached a similar conclusion for the same reasons: the defendant had received a fair trial and did not claim that he had been denied access to the evidence before trial. *Alley v. Key*, 2006 WL 1313364, *2 (6th Cir., May 14, 2006) (unpublished) ("*Brady* cannot be said to reach post-conviction access for DNA testing in the circumstances presented by the case before us.").

The Ninth Circuit acknowledged the conflict between its decision and *Harvey* and *Grayson*. App. 22a-23a. The court dismissed *Harvey* as "tend[ing] to conflate the right of access to evidence with the ultimate right to habeas relief" and in conflict with the court's first decision in Osborne's case, which upheld Osborne's right to use § 1983 to assert his access-to-evidence claim. *Id.* (citing App. 58a-59a). And the court dismissed both *Harvey* and *Grayson* as ignoring "the due process principles that motivated *Brady*." *Id.*

### B. Because freestanding innocence claims are not legally cognizable, the Due Process Clause does not require the states to provide postconviction access to evidence for the purpose of assisting that claim

The Ninth Circuit readily acknowledged that it was placing the right of access to evidence before all other

considerations, including those preliminary issues that could immediately dispose of a substantive claim: "the testing of potentially exculpatory evidence may be given precedence over the consideration of even jurisdictional questions involving pure issues of law." App. 21a. This priority – allowing discovery before deciding dispositive preliminary issues, such as jurisdiction and the legal cognizability of a claim – is directly contrary to the policy of the rules of procedure (*see* Rule 12(b), Federal R. Civ. P.) and creates the very inefficiencies the rules are designed to avoid.

The Ninth Circuit's decision conflicts with this policy by compelling a state to give a defendant access to evidence before the state has the opportunity to test the legality of the underlying substantive claim to which the evidence would be material. The court held that Osborne's access-to-evidence claim could proceed "on the well-established assumption that his intended freestanding innocence claim will be cognizable in federal court." App. 22a. But this assumption is anything but well-established. Moreover, this assumption begs the question.

In *Herrera v. Collins* and *House v. Bell*, the Court assumed, but did not decide, that a freestanding innocence claim would be cognizable. *Herrera v. Collins*, 506 U.S. 390, 404, 417 (1993); *House v. Bell*, 547 U.S. 518, 555 (2006). The Court made the assumption in *Herrera* and *House* as a means to avoid deciding an unnecessary constitutional issue, enabling the Court to bypass the cognizability issue and reject the defendants' claims because neither defendant could meet the extraordinarily high threshold standard that would apply if a freestanding innocence claim were cognizable. *Id.* Thus, the assumption allowed the Court to *dismiss* the free-

standing innocence claims in *Herrera* and *House* without deciding whether the claims were legally cognizable.

In contrast, in Osborne's case, the Ninth Circuit assumed the existence of a freestanding innocence claim to *avoid dismissing* his access claim. The court assumed that the claim would be cognizable for the sole purpose of supporting its conclusion that the evidence Osborne seeks would be material to that claim. App. 20a-21a. This reasoning begs the question because if a freestanding innocence claim (the only claim for which the evidence Osborne seeks would be material) is not legally cognizable, then his case is subject to dismissal without even addressing his access-to-evidence claim.

The Ninth Circuit's decision to assume that a freestanding innocence claim is cognizable, rather than resolve that question on the merits, has a second and more troubling flaw: namely, the court's assumption is unsupported by existing case law. The existence of the assumed freestanding innocence claim has not been recognized by this Court, and it has been rejected by nine circuits.

The Court's "habeas jurisprudence makes clear that a claim of 'actual innocence' is not itself a constitutional claim." *Herrera*, 506 U.S. at 404. The Court has, however, assumed that a "truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a [capital] defendant unconstitutional" but at the same time declined to decide the issue. *Id.* at 417. *See also House*, 547 U.S. at 554-55 (making same assumption and again declining to decide).

Nine circuits have addressed the merits of the cognizability issue and concluded that a freestanding

claim of innocence is not cognizable: *David v. Hall*, 318 F.3d 843, 847-48 (1st Cir. 2003) ("The actual innocence rubric . . . has been firmly disallowed by the Supreme Court as an independent ground of habeas relief, save (possibly) in extraordinary circumstances in a capital case."); *Fielder v. Varner*, 379 F.3d 113, 122 (3d Cir. 2004) (non-capital defendant's habeas claim asserting only freestanding innocence claim was properly dismissed as not cognizable); *Rouse v. Lee*, 379 F.3d 238, 255 (4th Cir. 2003) (en banc) (freestanding "claims of actual innocence are not grounds for habeas relief even in a capital case"); *Foster v. Quarterman*, 466 F.3d 359, 367 (5th Cir. 2006) ("actual-innocence is *not* an independently cognizable federal-habeas claim" in capital case); *Zuern v. Tate*, 336 F.3d 478, 482 n.1 (6th Cir. 2003) (capital defendant's freestanding innocence claim not cognizable in federal habeas); *Johnson v. Bett*, 349 F.3d 1030, 1038 (7th Cir. 2003) (non-capital defendant's habeas claim based on newly discovered evidence "must relate to constitutional violation independent of any claim of innocence"); *Burton v. Dormire*, 295 F.3d 839, 848 (8th Cir. 2002) (rejecting claim for habeas relief "simply because [capital defendant] claims he is innocent"); *LaFevers v. Gibson*, 238 F.3d 1263, 1265 n.4 (10th Cir. 2001) ("assertion of actual innocence [by capital defendant] . . . does not, standing alone, support the granting of the writ of habeas corpus"); *Brownlee v. Haley*, 306 F.3d 1043, 1065 (11th Cir. 2002) (rejecting capital defendant's innocence claim absent claim of independent constitutional violation). *See also Coley v. Gonzales*, 55 F.3d 1385, 1387 (9th Cir. 1995) (non-capital defendant's apparent factual innocence claim "is not reviewable on habeas" absent independent constitutional claim).

The Ninth Circuit did not acknowledge the existence of this conflict with its sister circuits. Rather, the court simply relied on *Carriger v. Stewart*, 132 F.3d 463 (9th Cir. 1997) (en banc). App. 20a-21a. But in *Carriger*, the court, like this Court in *Herrera* and *House*, assumed that a freestanding innocence claim was cognizable for the purpose of *dismissing* the claim.

The Ninth Circuit's decision also conflicts with the decision of the Alaska Court of Appeals. The Alaska court, reviewing the dismissal of Osborne's state postconviction relief application, held that "at least under federal law, a defendant who has received a fair trial apparently has no due process right to present new post-conviction evidence, even when that evidence would demonstrate the defendant's innocence."[5] App. 106a (citing *Herrera*, 506 U.S. at 400; *id.* at 427-28 (Scalia, J., concurring)), 109a ("It appears, therefore, that Osborne has no due process right under the federal constitution to present new evidence to establish his factual innocence."). The Ninth Circuit did not view this as a conflict, noting only that the Alaska Court of Appeals had "observed that a prisoner 'apparently' has no federal due process right" to assert a freestanding innocence claim. App. 9a (quoting App. 105a). But read in context, the Alaska court clearly rejected a federal right; otherwise, there would have been no reason for it to consider whether the Alaska Constitution afforded Osborne the right to assert a freestanding claim. *See* App. 109a-112a.

---

[5] But see *Ex parte Elizondo*, 947 S.W.2d 202, 205 (Tex. Crim. App. 1996), holding that the imprisonment of an innocent person violates the Due Process Clause.

## III. THE QUESTION PRESENTED IS A RECURRING ISSUE OF NATIONWIDE IMPORTANCE

This case presents important issues of federal law: (1) may a defendant use § 1983 to conduct postconviction discovery relating to a substantive claim not yet asserted and (2) does the Due Process Clause require the state to provide postconviction access to evidence relating to a claim that is not legally cognizable. Not only has the Ninth Circuit created a new constitutional right, it has created a standalone right to evidence that is fundamentally at odds with the traditional principle of materiality that links evidence to a pending substantive claim.

In addition, and more important, the Ninth Circuit's decision paid little more than lip service to the states' interest in finality of criminal judgments, observing that the "writ of habeas corpus overrides [finality] considerations, essential as they are to the rule of law, when a petitioner raises a meritorious constitutional claim in a proper manner," *McCleskey v. Zant*, 499 U.S. 467, 492-93, 495 (1991),[6] *quoted in* App. 42a., and concluding that the "State's conception of finality would reverse these priorities." App. 42a.

But federal habeas review will trump finality *only* in the context of a well-pleaded constitutional claim, which is absent in this case. Thus the structural and procedural limitations inherent in the invocation of federal habeas jurisdiction, absent here, operate to secure some measure of finality on behalf of the

---

[6] *McCleskey* recognized that actual innocence may establish a miscarriage of justice that would satisfy the cause-and-prejudice requirement and warrant consideration of a successive habeas petition. *McCleskey*, 499 U.S. at 494-96.

states. Moreover, the Court has acknowledged the "very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases." *Herrera*, 506 U.S. at 417. And in recognition of the "enormous burden" that would result if freestanding claims were successful, "the threshold showing for such an assumed right [to assert a freestanding innocence claim] would necessarily be extraordinarily high." *Id.* The states' interest in finality would receive due consideration by requiring that access-to-evidence issues be resolved only in the context of ongoing litigation that raises a cognizable substantive claim.

The Ninth Circuit's decision will have a potentially enormous impact on the states, particularly in view of the fact that this is a non-capital case. *Cf. Herrera*, 506 U.S. at 417 (assuming that actual innocence would render execution of capital defendant unconstitutional). In light of the progress in forensic DNA technology and potential probative force of DNA evidence, it is doubtful that a state can now ever dispose of DNA evidence in good faith. *Cf. Arizona v. Youngblood*, 488 U.S. 51, 58 (1989) (state's disposal of evidence will not violate Due Process Clause unless defendant can show bad faith). Thus the creation of a broad, freestanding *constitutional right* of postconviction access to evidence appears to impose a concomitant duty on the states to retain evidence in anticipation of the next technological breakthrough. For example, if new testing were to include Osborne as the donor of the DNA inside the condom, the state would arguably have a duty to retain the condom so it would be accessible to Osborne in the event that some new test method would later become available that would be even more discriminating than what is presently available. Linking the right of access to a

cognizable substantive claim would circumscribe the state's good faith duty to retain evidence as a result of limitation statutes and other procedural bars.

And as discussed above, there is a circuit split regarding three important aspects of the Ninth Circuit's decision in this case. First, three circuits have rejected the use of § 1983 to obtain postconviction access to evidence for the purpose of conducting discovery for a future attack on the defendant's conviction. Second, no other circuit has recognized a *Brady*-like right in a postconviction context, and three circuits have specifically rejected such a right in that context. And third, the circuit courts, including the Ninth Circuit, have unanimously held that freestanding innocence claims, the only claim for which the evidence Osborne seeks would be material, are not cognizable.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

TALIS J. COLBERG
*Attorney General*
KENNETH M. ROSENSTEIN *
DIANE L. WENDLANDT
*Assistant Attorneys General*
STATE OF ALASKA
Department of Law
Office of Special Prosec. & Appeals
310 K Street, Suite 308
Anchorage, Alaska 99501
(907) 269-6250

* Counsel of Record

June 27, 2008