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

BRIEF FOR PETITIONERS

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

Counsel for Petitoners

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 again 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?

PARTIES TO THE PROCEEDING

Petitioner District Attorney's Office[1] is part of the Alaska Department of Law; petitioner Adrienne Bachman (successor to Susan Parkes) is the Anchorage District Attorney. (This brief refers to the petitioners collectively as the "State.") The petitioners were defendants in the District Court, appellees the first time this case was before the United States Court of Appeals for the Ninth Circuit and appellants the second time. Respondent William Osborne was the plaintiff in the District Court and appellant and appellee, respectively, in the two cases before the Ninth Circuit. (In the District Court, Osborne also named as defendants the Anchorage Police Department and its chief, who have since been dismissed from the case. Pet. App. 12a.)

[1] There is no district attorney's office for the entire Third Judicial District of Alaska. The office sued by Osborne actually has jurisdiction only over the Municipality of Anchorage and some isolated rural areas outside Anchorage.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinions of the United States Court of Appeals are reported at 521 F.3d 1118 and 423 F.3d 1050 and reprinted in the appendix to the petition for certiorari ("Pet. App.") at pages 1a-45a and 51a-62a, respectively. The district court's order is reported at 445 F. Supp.2d 1079 and reprinted at Pet. App. 46a-50a. The opinions of the Alaska Court of Appeals in Osborne's postconviction relief case are reported at 163 P.3d 973 and 110 P.3d 986 and reprinted at Pet. App. 63a-90a and 91a-112a, respectively. The opinion of the Alaska Court of Appeals in Osborne's

direct appeal is unpublished and reprinted at Pet. App. 113a-130a.

JURISDICTION

The United States Court of Appeals issued its decision on April 2, 2008. The petition for certiorari was filed on June 27, 2008, and granted on November 3, 2008. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law."

The pertinent provisions of 28 U.S.C. § 2254, 42 U.S.C. § 1983, the Federal Rules of Civil Procedure, the Rules Governing Section 2254 Cases, and the Alaska Constitution and Alaska Statutes are set forth in the appendix to this brief.

STATEMENT

This case arises out of a kidnapping, rape, and brutal assault that occurred in Alaska in 1993. Osborne was convicted of those crimes based, in part, on DNA testing of biological evidence. After Osborne's conviction was affirmed on direct appeal, he initiated state postconviction proceedings, claiming that his defense lawyer had provided ineffective assistance by failing to seek a more discriminating form of DNA testing than that used by the state. He also requested permission to retest the evidence so that he could demonstrate his lawyer's mistake and establish its prejudicial effect. When that request

was denied, he asserted a due-process right under the state and federal constitutions to conduct such testing to demonstrate his innocence.

Those claims were rejected after proceedings that spanned eleven years (1997-2008) and generated two opinions of the Alaska Court of Appeals. In denying postconviction relief, the Alaska courts concluded that no federal due-process right to postconviction DNA testing exists, but such testing is potentially available under Alaska's Constitution and statutes. The courts eventually determined that Osborne could not satisfy the requirements that would entitle him to postconviction testing.

Rather than exhaust the state postconviction proceedings and then renew his claims in federal court by filing a habeas petition, Osborne filed a federal lawsuit under 42 U.S.C. § 1983. The § 1983 action was filed in 2003, after the state trial court had denied Osborne's postconviction-relief application but while his first appeal in that matter was pending. In his § 1983 action, Osborne asserted a federal constitutional right to obtain the biological evidence and subject it to new DNA testing. Osborne's § 1983 case involved two trips to the Ninth Circuit Court of Appeals, which ruled that (1) Osborne could use § 1983 essentially as a discovery device to obtain postconviction access to the state's biological evidence and (2) the Due Process Clause of the United States Constitution granted Osborne a right to obtain postconviction access to the state's biological evidence.

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. Pet. App. 113a. They took her, in Jackson's car, to a secluded site near Anchorage International Airport, robbed her

at gunpoint, ordered her to strip, and then raped her, forcing her to perform fellatio on Jackson while Osborne penetrated her vagina with his finger and penis, using a blue condom taken from K.G. *Id.* at 114a. When they had finished raping her, Osborne ordered K.G. out of the car and told her to lie facedown in the snow. *Id*. When K.G. refused and pleaded for her life, Jackson struck her on the head with the gun, and Osborne choked her. *Id*. In mortal fear, K.G. defecated inside the car; Osborne rubbed excrement on her face and clothing. *Id*.

K.G. fled a short distance before the men caught her and began to beat her on the head and chest with a wooden stick, similar to an axe handle. Pet. App. 114a. When she tried to run away, Osborne struck her on her knees, telling her to "go down, bitch, go down." *Id*. The men continued to beat and kick K.G. until she fell to the ground. *Id*. at 115a. Osborne allowed her to stand up but then hit her in the head with the axe handle. *Id*. Finally, K.G. curled into a fetal position and played dead. *Id*. She heard a gun discharge and felt a bullet graze her head. *Id*. Based on her view of the men's feet and pants, K.G. believed it was Osborne who had fired the shot at her head. *Id*. After firing the shot, the men buried K.G. in the snow, believing she was dead or dying, and left. *Id*.

When K.G. was certain that the men had left, she gathered herself and started walking toward town. Pet. App. 115a. She flagged down a passing vehicle and told the occupants what had just happened to her, providing a description of the men and their car. *Id*. She insisted on being taken home. *Id*.

The police investigation. The next day, a neighbor of one of the persons who had taken K.G. home

reported the attack to the police. Pet. App. 115a. K.G. was initially uncooperative but eventually told the police what had happened. *Id*. She gave them the clothes she had been wearing, which had remnants of feces and tested presumptively for the presence of semen. *Id.* at 115a-16a. K.G. also submitted to a physical examination. *Id*.

Six days after the attack, the police stopped Jackson's car, which matched the description K.G. had provided. Pet. App. 116a. The police found a .380-caliber semi-automatic pistol and a box of ammunition in the car. *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] *Id.* at 95a, 98a.

The police seized Jackson's car. Pet. App. 115a. DQ-alpha DNA testing of a blood spot on the door of Jackson's car matched K.G.'s profile.[2] *Id.* at 116a. Fibers matching the carpeting in the car were found on K.G.'s clothing. *Id.*

The police also canvassed the crime scene, where they found "an area of disturbed and bloody snow," two pairs of K.G.'s bloody pants, a used blue condom, and an expended round of .380 ammunition. Pet. App. 117a. Ballistics tests established that the round

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[1] Because Osborne and Jackson were tried jointly, Jackson's statements implicating Osborne were inadmissible against Osborne.

[2] The DQ-alpha method is a polymerase-chain-reaction-based (PCR) method of testing nuclear DNA. U.S. Dep't of Justice, *Postconviction DNA Testing: Recommendations for Handling Requests* 27 (1999). The general match probability using DQ-alpha "is about 0.05." U.S. Dep't of Justice, *The Future of Forensic DNA Testing* 17 (2000).

had come from Jackson's pistol. *Id*. The tire tracks at the scene matched the tires on Jackson's car. *Id*. The police found an axe handle 114 feet from the crime scene. *Id*. The handle was similar to those Osborne used in his work and also similar to an axe handle found in Osborne's room. *Id*.

Fluid inside the blue condom was submitted for DQ-alpha DNA testing. Pet. App. 117a. Sperm in the fluid matched Osborne's DQ-alpha type, which is shared by 14.7 to 16 percent of African-American males. *Id.* at 68a, 117a. This testing excluded Jackson and James Hunter, Jackson's passenger when his car was stopped. *Id.* at 5a. Microscopic examination revealed that pubic hairs found on the condom and on K.G.'s sweater had the same characteristics as Osborne's pubic hair. *Id*. at 117a.

Witnesses had seen Osborne getting into Jackson's car shortly before the attack against K.G. Pet. App. 76a. Other witnesses saw Osborne and Jackson together shortly after the attack and said that Osborne had blood on his clothing. *Id.*

Finally, K.G. identified Osborne and Jackson from photographic lineups, and she identified Osborne again at trial. Pet. App. 76a, 95a.

Osborne's trial, conviction, and direct appeal. Osborne was convicted, after a jury trial in Alaska Superior Court, of kidnapping, first-degree sexual assault, and first-degree assault. Pet. App. 117a. He was given a composite sentence of 26 years' imprisonment with 5 years suspended. *Id.* at 117a-18a. On direct appeal, the Alaska Court of Appeals affirmed Osborne's convictions and sentence. *Id.* at 118a. Among other arguments, the Alaska Court of Appeals rejected Osborne's claim that insufficient

evidence supported K.G.'s identification of him as one of the two men who kidnapped, severely beat, and sexually assaulted her. *Id.* at 128a.[3]

Osborne's state postconviction-relief application. In 1997, Osborne filed an application for post-conviction relief in state court, claiming that his defense lawyer had provided ineffective assistance by failing to seek a more discriminating form of DNA testing of the condom and pubic hairs. Pet. App. 97a. He asked to retest the evidence so that he could demonstrate his lawyer's mistake and establish its prejudicial effect. *Id*.

Osborne's defense lawyer submitted an affidavit defending her decision not to pursue independent DNA testing using the more discriminating restriction-fragment-length-polymorphism (RFLP) method.[4] Pet. App. 97a-98a. The results of the State's less

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[3] The Alaska Supreme Court denied Osborne's request for discretionary review. *Osborne v. State*, No. S-7549 (Alaska, September 3, 1996). Osborne sought no further direct review.

Osborne received mandatory parole on June 26, 2007. He was arrested on December 29, 2007, and has been charged with multiple counts of kidnapping, armed robbery, assault, burglary, and weapons misconduct, stemming from a break-in to an Anchorage home in which four victims were bound with duct tape and pistol-whipped. *See State v. Osborne*, No. 3AN-07-14638 Cr. (Alaska Super. Ct.) (information filed December 29, 2007). Those charges and a petition to revoke Osborne's probation, *see State v. Osborne*, No. 3AN-S93-2339 Cr. (Alaska Super. Ct.) (filed January 8, 2008), are pending.

[4] The RFLP testing, a non-PCR-based method that requires a relatively large and non-degraded sample, "has a high degree of discrimination." *Postconviction DNA Testing* at 26-27. Depending on the number of loci tested, RFLP testing can reduce the probability of a random match to as low as one in billions. *Future of Forensic DNA Testing* at 15-16.

discriminating DQ-alpha DNA test, Osborne's lawyer explained, were statistically "in Osborne's favor, due to a relatively high frequency in the population of the profile of the case DNA." Pet. App. 98a. She reasoned that because the State's test established that about 1-in-6 African-American males had the same DQ-alpha profile as Osborne's, those were "very good numbers" to make a case for mistaken identity, particularly given that the crimes took place at night, K.G. had poor vision, and Osborne was African-American whereas K.G. was Caucasian (thus implicating, in the lawyer's view, the difficulties inherent in "cross-racial identification cases"). *Id.* These factors, Osborne's lawyer concluded, put Osborne in a "strategically better position without [more specific] DNA testing," which the lawyer believed would only confirm Osborne as the perpetrator. *Id*.

In an unpublished order, the state court denied Osborne's application, finding that his lawyer had made a reasonable tactical decision by rejecting independent DNA testing because she disbelieved Osborne's claim of innocence and wanted to avoid creating evidence that would confirm his guilt. J.A. 19-21. Because Osborne had not asserted a prima facie case of ineffective assistance, the trial court denied his request to retest the biological evidence. *Id*. at 22.

Osborne sought reconsideration, asserting for the first time that he was entitled to perform new DNA testing as a matter of due process to establish his innocence. Pet. App. 99a. Osborne did not, however, assert a substantive claim based on his actual innocence. Based on the specific facts of Osborne's case, the trial court rejected this access-to-evidence

claim under the due-process and fairness doctrines of both the state and federal constitutions. *Id.*

Osborne appealed to the Alaska Court of Appeals, which affirmed in part and remanded. Pet. App. 92a. The record confirmed that Osborne's defense lawyer had made a reasonable tactical decision to forgo more conclusive DNA testing, which would have risked providing the State "additional evidence that would incriminate Osborne." *Id.* at 101a. Accordingly, the Court of Appeals affirmed the trial court's ruling that Osborne had failed to establish a prima facie case of ineffective assistance.

The Court of Appeals next addressed Osborne's access-to-evidence-of-actual-innocence claim. Pet. App. 102a-12a. After reviewing state and federal case law, the court concluded that "Osborne has no due process right under the federal constitution to present new evidence to establish his factual innocence." *Id*. at 109a. At the same time, the court noted that Alaska's postconviction-relief statute allows a defendant to seek postconviction relief based on newly discovered evidence that clearly and convincingly establishes his innocence, so long as (1) he has been diligent in presenting the claim and (2) the new evidence was unknown within the two years following the judgment of conviction. *Id*. at 104a (citing Alaska Stat. 12.72.020(b)(2) (2005)). The court opined that Osborne could not satisfy these two conditions. *Id*. at 109a.

But the Court of Appeals expressed its "reluctan[ce] to hold that Alaska law offers no remedy to defendants who could prove their factual innocence." Pet. App. 111a. Acknowledging that Alaska law *might* recognize such claims, the court established a procedure—similar to the procedures in other

states—whereby Osborne could obtain postconviction DNA testing if he could show: (1) that his conviction rested "primarily" on eyewitness identification; (2) that there was "demonstrable doubt" concerning his identification as the perpetrator; and (3) that "scientific testing would likely be conclusive" on his identity. *Id*. at 111a. The court remanded the case for consideration whether Osborne could meet that test. *Id*.

On remand, the state trial court found that Osborne failed to meet any of the three parts of this test. J.A. 214-22. Osborne did not meet the first and second parts because K.G.'s identification of him both before and at trial had been corroborated by physical evidence and other evidence that placed Osborne and Jackson together on the night of the crime: (1) twice before the crimes took place, Osborne had telephoned Jackson from the arcade where Jackson picked him up; (2) Osborne was seen getting into Jackson's car shortly before the crimes occurred; (3) tickets from the arcade were found in Jackson's car; (4) witnesses saw Osborne and Jackson together shortly after the crimes occurred, and some of these witnesses observed blood on Osborne's clothing; and (5) K.G.'s initial description of her attackers had been consistent with Osborne's physical characteristics. *Id.* at 215-16, 218-19.

The trial court also concluded that Osborne had failed to meet the third part of the test, which required him to demonstrate that the new DNA testing would likely be conclusive on whether he was the perpetrator. J.A. 219-22. The court based its conclusion on the possibility that new testing that excluded Osborne as the donor of the semen inside the condom might signify nothing more than that the

condom found by the police was not the condom used in K.G.'s rape. *Id*. The court found additional support in the other evidence linking Osborne to the crimes and in the fact that, following his convictions, Osborne had confessed to the crime—both in writing and orally—when he had applied for parole. Pet. App. 71a & n.11 (containing Osborne's verbatim written statement), 73a.

Osborne again appealed to the Alaska Court of Appeals, which in 2007 affirmed the trial court's findings and conclusion. Pet. App. 82a. At the same time, a majority of the court explained in a separate concurring opinion that the Alaska Constitution "might require" a court to hear a postconviction innocence claim by a defendant who presented "clear genetic evidence" of innocence. Pet. App. 89a (Mannheimer, J., concurring). But, based on the trial court's analysis of the evidence against Osborne and his confession of guilt, the Court of Appeals concluded that Osborne could not meet that threshold and "conclusively establish" his innocence, even if new test results were favorable to him.[5] Pet. App. 89a-90a.

Osborne's federal civil-rights action. In 2003, after Osborne's state postconviction-relief application had been initially denied, but while his first appeal to the Alaska Court of Appeals was still pending, he filed a civil-rights action under 42 U.S.C. § 1983 in federal district court. J.A. 23. Osborne alleged that an unopposed order issued in his state postconviction-relief case had required the State to preserve

[5] The Alaska Supreme Court denied Osborne's request for discretionary review. *Osborne v. State*, No. S-12799 (Alaska, January 22, 2008).

all evidence in his underlying criminal case. J.A. 36. He further alleged that he had directly asked the District Attorney's Office "to provide access to the biological material for the purposes of DNA testing," but that request had been refused. *Id*. at 36-37. The State did not contest these allegations.

Osborne did not, however, challenge the state court's rejection of his ineffective-assistance claim, its rejection of his due-process claim, or the findings made in connection with those two adverse rulings—all of which were then pending appeal to the Alaska Court of Appeals. Nor did he challenge the state court's application of state due-process standards or contend that the state procedures as a whole violated federal due process.

Instead, Osborne asserted that the District Attorney's refusal to produce the evidence violated: (1) his due-process right of access to evidence, citing *Brady v. Maryland*, 373 U.S. 83 (1963); (2) his due-process right to have "the opportunity to make a conclusive showing that he is actually innocent"; (3) his right against cruel and unusual punishment by denying him the opportunity to prove his innocence; (4) "his right to a fair executive clemency proceeding where he can make a showing of actual innocence"; (5) his right to confrontation and compulsory process by depriving him of his right to prove his innocence in state and federal court and before the Alaska Parole Board; and (6) his right to meaningful access to state and federal court to establish his actual innocence. J.A. 37-39. Osborne thus implied that he intended to use the evidence to prove his innocence not in the § 1983 action itself but in other federal and state proceedings. *Id*.

Osborne specifically described the evidence he sought to retest as follows: (1) the semen from the condom that was asserted to have been used in K.G.'s rape; (2) a pubic hair found inside the condom; and (3) a pubic hair found on a sweater that was under K.G. during the rape. J.A. 24. Osborne also stated that he wanted to perform DNA testing on K.G.'s clothing and on reference samples obtained from K.G., Osborne, Jackson, "and alternate [but unnamed] suspects." *Id*. Osborne stated that he wanted to submit this evidence for new DNA testing, using the short-tandem-repeat (STR) and mitochondrial (mtDNA) methods.[6] *Id*.

The district court dismissed Osborne's complaint, concluding that because his claim was "seek[ing] to set the stage" for an attack on his underlying conviction, under *Heck v. Humphrey*, 512 U.S. 477 (1994), it had to be asserted in a petition for writ of habeas corpus. J.A. 207.

Osborne appealed to the Ninth Circuit. The court reversed, holding that success on Osborne's claim would not necessarily demonstrate the invalidity of his confinement and, therefore, under *Heck*, he could proceed under § 1983. Pet. App. 58a-59a. According to the court, Osborne's success would merely afford him access to the evidence he sought and thus would

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[6] The STR method is similar to the RFLP method, except it is PCR-based, allowing the use of smaller-sized and more degraded samples. *Future of Forensic DNA Testing* at 17-18. Using the 13 loci that have become the standard, "the general match probability is about one in 6×10^{14}. *Id*. at 18. The mtDNA method is generally reserved for samples, such as hair, that are unsuitable for RFLP and PCR testing due to a lack of, or highly degraded, nuclear DNA. *Postconviction DNA Testing* at 28.

have no effect on the validity of his confinement. *Id*. The court remanded the case for consideration of whether Osborne had a federally protected right of access to the biological evidence. *Id*. at 62a. On remand, the district court granted Osborne's motion for summary judgment (and denied the State's cross-motion). Pet. App. 50a. The State then appealed.

At the oral argument before the Ninth Circuit, Osborne expanded the scope of the testing he wanted to do, stating for the first time that he wanted to test epithelial cells found on the outside of the condom.[7] Forensic examination during the original police investigation of this case had revealed epithelial cells on the outside of the condom. Pet. App. 38a. The presence of epithelial cells indicated that the condom had been used to penetrate a person's mouth, rectum, or vagina. *Id*. At no time during Osborne's state postconviction proceedings did he assert any connection between his innocence claim and the epithelial cells. Nor does there appear to be any reference to them in the federal-court record until the second Ninth Circuit argument.

The Ninth Circuit affirmed. Pet. App. 1a-2a. The court concluded that Osborne had a right to post-conviction access to biological evidence that might be material to the freestanding innocence claim he hoped to make. Pet. App. 44a. The court based this conclusion on "the due process principles that motivated *Brady*." *Id.* at 15a-19a. The court assumed that a freestanding innocence claim might be legally

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[7] *See* Recording of oral argument at time 26:35, 43:10, *District Attorney's Office v. Osborne*, No. 06-35875 (9th Cir., October 10, 2007), available at http://www.ca9.uscourts.gov/ca9/media.nsf/Media+Search?OpenForm&Seq=1 (search for "06-35875"; then download file "06.35875.wma") (last visited November 20, 2008).

cognizable in state court and was legally cognizable in federal court and then reasoned that Osborne should have access to the evidence even though he had not yet asserted such a claim. *Id.* at 19a-23a.

SUMMARY OF ARGUMENT

Through this action under the Civil Rights Act of 1871, 42 U.S.C. § 1983, Osborne improperly seeks to obtain discovery of evidence that he contends may prove that he is innocent of the crimes for which he was fairly convicted in state court. Not only is § 1983 an improper vehicle for this claim, but in the absence of a properly asserted, cognizable claim of actual innocence, there is no federal constitutional right to postconviction discovery. The Ninth Circuit's decision to the contrary should be reversed.

1. The writ of habeas corpus is the exclusive procedure for state prisoners to collaterally challenge in federal court the constitutional validity of their convictions. *See Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973). Congress built into the habeas procedure mechanisms that preserve and promote principles of federalism and comity, requiring exhaustion of state judicial remedies as a predicate to habeas review and extending substantial deference to the factual and legal determinations by state courts. *See* 28 U.S.C. § 2254(b), (d), (e).

Osborne has not filed a federal habeas action, although he makes no secret of the fact that he seeks to invalidate his state conviction based on a claim of actual innocence—a claim that falls squarely within the core of habeas corpus. Instead, Osborne filed a complaint under 42 U.S.C. § 1983, omitting his substantive claim and requesting only the discovery of evidence to support that unasserted claim. In

short, he has split the component parts of a single action into separate proceedings.

Osborne's piecemeal litigation strategy fails for two reasons. First, discovery does not exist in a vacuum. Orderly process requires the assertion of a substantive claim, which provides the necessary context for determining the materiality of discovery and assures that threshold issues, such as cognizability and jurisdiction, are resolved before discovery proceeds. Second, the federalism concerns reflected in the federal habeas statute cannot be so easily evaded. The state-federal balance established by Congress does not permit a federal court to intercede in Osborne's quest to obtain evidence in what, at the time, was a state postconviction proceeding. Only through the assertion of a federal habeas claim does a state prisoner properly engage the attention of the federal court in relation to a potential claim of actual innocence.

This conclusion is consistent with this Court's decisions interpreting and expanding on *Preiser*'s rationale for exclusive habeas jurisdiction. Those cases make clear that a prisoner may not avoid habeas through artful pleading. Omitting one's substantive claim—a claim that would indisputably fall within federal habeas—is the essence of artful pleading.

But even if Osborne could pursue discovery separately, § 1983 is still unavailable to him. Even when a claim does not directly attack the validity of a state conviction, § 1983 may not be used if proof of that claim will necessarily impugn the validity of the conviction. Here, Osborne's claim for evidence that might prove his actual innocence is not outcome neutral; it is in fact the *sine qua non* of his innocence

claim. Few things cast as much doubt on a state conviction as proof of innocence. To hold otherwise would ignore the concerns and reasoning of *Preiser* and subsequent cases.

2. Even if Osborne were able to pursue relief under § 1983, the Constitution does not recognize a stand-alone postconviction right of access to evidence. The Ninth Circuit reached a contrary result by relying on *Brady v. Maryland*, 373 U.S. 83 (1963), which created a pretrial right to exculpatory evidence to ensure a fair trial. Not surprisingly, this Court has never recognized a *Brady* right after the defendant has received a fair trial.

Such an extension of *Brady*, moreover, would be unwarranted. A right to obtain evidence of actual innocence cannot exist apart from a right to assert actual innocence as grounds for relief from a state conviction. But this Court has never recognized the existence of a freestanding actual-innocence claim. The Ninth Circuit's *assumption* that such a federal claim exists does not make it so. Likewise, speculation as to the existence of an actual-innocence claim under state law does not fill this critical void.

The Ninth Circuit's recognition of a novel due-process right in this setting is especially problematic for at least four additional reasons. First, this Court has consistently refused to impose federal constitutional requirements on state postconviction proceedings. Second, by failing to define the specific state procedure at issue, the Ninth Circuit improperly divorced procedure from procedural context. Third, the Ninth Circuit appeared to apply "meaningful access" principles outside the context of a "meaningful access claim. Fourth, basic federalism concerns preclude such federal intrusion in an area

over which this Court has extended enormous deference to the States.

The practical implications of the Ninth Circuit's stand-alone discovery right, moreover, are staggering. By establishing a one-size-fits-all solution, the Ninth Circuit has left in doubt the constitutionality not only of the Alaska Court of Appeals's approach to the issue, but also the postconviction DNA statutes adopted by 44 States, the District of Columbia, and the Federal Government. These statutes reflect a careful balancing of the government's interests in finality, comity, and conservation of scarce resources against a prisoner's interest in justice in those rare cases where the prisoner's identity as the perpetrator is truly in doubt and changes in forensic technology could establish actual innocence. At the very least, this balancing—and the limits on discovery that it suggests—must be incorporated into any federal right of access. The Ninth Circuit's "open the evidence locker" approach ignores these competing concerns and, as a result, cannot be imposed in the name of the Due Process Clause.

ARGUMENT

I. THE NINTH CIRCUIT ERRED IN ALLOWING OSBORNE TO USE § 1983 AS A DISCOVERY DEVICE IN LIEU OF FILING A FEDERAL HABEAS PETITION

Osborne is attempting to use 42 U.S.C. § 1983 as a vehicle for obtaining discovery relating to a not-yet-asserted frontal attack on his state convictions. But attacks in federal court on the validity of state convictions are the exclusive province of habeas corpus, 28 U.S.C. § 2254, and may not be brought under § 1983. *See Preiser*, 411 U.S. at 490, 500

(habeas corpus is "appropriate remedy" for state prisoners attacking the validity of confinement). The fact that Osborne has artificially severed his discovery request from his intended challenge to his conviction does not allow him to avoid this bedrock principle, any more than the principle can be avoided through the "simple expedient" of artful pleading. *Id.* at 489-90.

A. The Substantive Claim to Which the Requested Discovery Relates Falls Squarely Within the Core of Habeas

Stripped to its essence, Osborne's § 1983 action is nothing more than a request for evidence to support a hypothetical claim that he is actually innocent. Under *Preiser*, this hypothetical claim sounds at the core of habeas corpus, and Osborne therefore must submit to the rigors of habeas corpus jurisdiction.[8]

In *Preiser*, state prisoners sought injunctive relief under § 1983, claiming they were entitled to release based on the unconstitutional deprivation of good-time credits. Though § 1983 literally covered the claims, the Court reasoned that the prisoners must proceed under the habeas statute, which was "explicitly and historically designed to provide the means for a state prisoner to attack the validity of his confinement." 411 U.S. at 489. A prisoner's claim going "directly to the constitutionality of his physical

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[8] Petitioners do not, of course, concede that Osborne has a substantive federal constitutional right to the testing. *See* section II, *infra*. *Cf. Wilkinson v. Dotson*, 544 U.S. 74, 87 (2005) (Scalia, J., concurring) ("[T]he Court's opinion focuses correctly on whether the claims respondents pleaded were claims that may be pursued in habeas—not on whether respondents can be successful in obtaining habeas relief on those claims.").

confinement itself" and seeking immediate release "is just as close to the core of habeas corpus as an attack on the prisoner's conviction." *Id*. Therefore, Congress's determination that "habeas corpus is the appropriate remedy for state prisoners attacking the fact or length of their confinement . . . must override the general terms of § 1983." *Id.* at 490.

The Court's conclusion was driven, in part, by Congress's amendment to the habeas statute to require exhaustion of adequate state remedies, a requirement that would be nullified if the prisoners' claims were allowed to proceed under § 1983: "It would wholly frustrate explicit congressional intent to hold that the respondents . . . could evade this requirement by the simple expedient of putting a different label on their pleadings." *Preiser*, 411 U.S. at 489-90. And the conclusion was bolstered by the strong "considerations of federal-state comity" underlying federal habeas review of state convictions. *Id*. at 490-91. Thus if a request for relief is close to the traditional core of habeas corpus, it must be brought in habeas even when it comes within the literal terms of § 1983. *Id*. at 489-90.

Osborne's unasserted substantive claim—namely, that his conviction cannot stand in the face of hypothetical new DNA testing establishing actual innocence—lies at the core of federal habeas corpus. Both the common-law history of the writ and the language of the habeas statute establish "that the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and that the traditional function of the writ is to secure release from illegal custody." *Preiser*, 411 U.S. at 484; *accord Munaf v. Geren*, 128 S.Ct. 2207, 2221 (2008). Indeed, the early American use of the writ

"routinely allowed prisoners to introduce exculpatory evidence that was either unknown or previously unavailable to the prisoner." *Boumediene v. Bush*, 128 S.Ct. 2229, 2267 (2008). *See also* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 142 (1970) (advocating that "with a few important exceptions, convictions should be subject to collateral attack only when the prisoner supplements his constitutional plea with a colorable claim of innocence"). This perfectly describes Osborne's intended but unasserted substantive claim.

B. Osborne Cannot Avoid Habeas Jurisdiction by Severing His Discovery Request from Its Related Substantive Claim

Osborne's intended substantive claim falls squarely within the domain of federal habeas corpus. The fact that Osborne elected to split that claim between a § 1983 action, seeking only access to evidence, and an as-yet-unfiled action for substantive relief to which that evidence would relate, does not alter this conclusion. Allowing Osborne to split his claim and proceed under § 1983 would violate basic rules of orderly process and would permit Osborne to circumvent the federalism and comity-based concerns embodied in the federal habeas statute.

1. One of the most basic assumptions of the procedural rules governing most state and federal litigation is that discovery takes place in the context of a substantive claim or factual representation formally asserted in a complaint or petition. *See, e.g.*, Fed. R. Civ. P. 26(b)(1) (unless limited by court order, parties "may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim

or defense"). A substantive claim establishes what evidence will be material as well as the procedure for the orderly discovery of that evidence under judicial oversight. "The federal courts are not free-standing investigative bodies whose coercive power may be brought to bear at will in demanding documents from others." *Houston Business Journal, Inc. v. Office of the Comptroller of Currency*, 86 F.3d 1208, 1213 (D.C. Cir. 1996) (holding that federal court lacked jurisdiction to order discovery from nonparty in connection with state-court litigation). *Cf. Hickman v. Taylor*, 329 U.S. 495, 501 (1947) (federal civil discovery rules are designed to facilitate narrowing and clarifying issues and ascertaining facts relevant to those issues).

Osborne's severance of discovery from substantive claim also allows Osborne to avoid critical procedural issues that would normally precede discovery. This potential for circumvention is apparent when one considers the hypothetical substantive proceedings in which Osborne might use the requested discovery.

For example, if he were to assert a freestanding claim of actual innocence in federal court, he would first have to establish the cognizability of that claim—a question that is in serious dispute, as discussed later in this brief. *See House v. Bell*, 547 U.S. 518, 554-55 (2006) (declining to decide whether freestanding claim of actual innocence is cognizable in federal court); *Houston Business Journal*, 86 F.3d at 1213 (federal discovery rules "facilitate actions cognizable in federal court").

If, on the other hand, Osborne were to assert a new postconviction claim in state court, then he would have to satisfy the three-part standard established by the Alaska Court of Appeals for obtaining post-

conviction access to evidence. *See* Pet. App. 111a. And if he wanted federal-court review of the constitutionality of the state standard or the state courts' refusal to grant access, he would have to seek from this Court a writ of certiorari, since federal district courts lack jurisdiction to conduct appellate review of state court decisions. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923).

The detachment of Osborne's discovery request from his substantive claim represents a piecemeal strategy that has no precedent and should be disallowed. *Cf. Sanders v. United States*, 373 U.S. 1, 18 (1963) (discussing abusive use of writ and noting that "[n]othing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation"); *First Commercial Trust Co. v. Colts Mfg. Co., Inc.*, 77 F.3d 1081, 1088 n.4 (8th Cir. 1996) ("Litigants, of course, have no right to discovery in the absence of a plausible legal theory."). When Osborne's asserted procedural right—access to evidence—is properly viewed as inseparable from his unasserted substantive claim—his claim of actual innocence—it becomes clear that he is improperly using § 1983 as an indirect challenge to his state convictions. If it were otherwise, a prisoner could use a series of § 1983 actions to assemble the constituent parts of his case before formally challenging his conviction in a federal habeas petition or state post-conviction relief application. Indeed, that is exactly what Osborne is doing here.

2. In addition to upending the usual and logical course of litigation by allowing discovery before claim, the Ninth Circuit's decision circumvents criti-

cal concerns underlying the federal habeas statute and thereby has the potential to "wholly frustrate explicit congressional intent." *Preiser*, 411 U.S. at 489.

At the most obvious level, allowing Osborne to use a § 1983 action as a discovery tool conflicts with and undermines the discretionary discovery regime created by Congress for habeas cases. Unlike the mandatory regime in other types of civil cases, discovery in habeas is left to the discretion of the district court. *See Drake v. Portuondo*, 321 F.3d 338, 346 (2d Cir. 2003) (citing Rule 6(a), Rules Governing Section 2254 Cases, foll. 28 U.S.C. § 2254 (giving habeas courts discretion to permit discovery in habeas cases "for good cause shown")).

On a more fundamental level, by establishing discovery rules for what is essentially a state post-conviction-relief proceeding, the Ninth Circuit's approach upsets the delicate state-federal balance struck by both Congress and this Court for federal review of state criminal convictions. Federalism concerns animate many aspects of federal habeas corpus jurisprudence. *See Boumediene*, 128 S.Ct. at 2268 (habeas framework "respects federalism" by deferring to state courts' factual findings and requiring exhaustion of state remedies, which are "justified" by assumption that state courts normally provide fair trials to defendants); *Coleman v. Thompson*, 501 U.S. 722, 729 (1991) (habeas review unavailable when state-court decision rests on independent state-law ground that is adequate to support judgment); *McCleskey v. Zant*, 499 U.S. 467, 493 (1991) (doctrines of procedural default and abuse-of-writ both "seek to vindicate the State's interest in the finality of its criminal judgments").

These same concerns are mirrored in Congress's 1996 amendments to the habeas statute. *See* Anti-terrorism and Effective Death Penalty Act, Pub. L. No. 104-132, § 104, 110 Stat. 1214, 1219. Significant among the amendments is the requirement that federal habeas courts give substantial deference to the factual and legal determinations of state courts. *See* 28 U.S.C. § 2254(d), (e). Congress's objective was "to curb delays, to prevent 'retrials' on federal habeas, and to give effect to state convictions to the extent possible under law," *Williams (Terry) v. Taylor*, 529 U.S. 362, 386, 404 (2000), as well as "to further the principles of comity, finality, and federalism," *Williams* (*Michael Wayne) v. Taylor*, 529 U.S. 420, 436 (2000).

The faithful implementation of these federalism concerns dominates *Preiser*. That is, prisoners may not use § 1983 actions to contravene Congress's intent that challenges in federal court to state convictions be channeled only through the habeas process. Thus, the Court has been "careful to limit the scope of federal intrusion into state criminal adjudications and to safeguard the States' interest in the integrity of the criminal and collateral proceedings." *Williams* (*Michael Wayne)*, 529 U.S. at 436. Allowing the federal court to act as a state discovery master does equal violence to these federalism concerns.

In fact, this Court has cautioned that, although federal courts may be eager "to vindicate and protect federal rights and federal interests," they should do so only "in ways that will not unduly interfere with the legitimate activities of the States." *Younger v. Harris*, 401 U.S. 37, 44 (1971). Allowing a federal court to intervene while a state postconviction action

is pending and to direct the discovery of evidence in that state action smacks of that very federal intrusion that Congress sought to preclude and against which this Court has cautioned.

C. Severance of Osborne's Discovery Request from His Substantive Claim Is Inconsistent with *Heck v. Humphrey*'s Caution Against Artful Pleading

Nothing in the cases decided since *Preiser*, including this Court's decision in *Heck v. Humphrey*, 512 U.S. 477 (1994), would allow Osborne's access-to-evidence claim to proceed under § 1983. *Preiser* made clear that claims challenging the fact or duration of confinement and seeking immediate or earlier release lie at "the core of habeas corpus" and are therefore cognizable exclusively in habeas. *Preiser*, 411 U.S. at 489, 500. *Heck* addressed a slightly different situation—the assertion of a damages claim, which could not be brought in habeas, but the proof of which would necessarily imply the invalidity of the prisoner's state conviction or sentence. Drawing on the common-law principles governing claims of malicious prosecution, the Court concluded that the prisoner's damages claim could not be brought under § 1983 unless he could first prove that the underlying conviction had been invalidated in a separate proceeding (presumably a federal habeas action or appropriate state proceeding). *Heck*, 512 U.S. at 486-87.

In this case, the Ninth Circuit held that Osborne's § 1983 action was not barred by *Heck* because success in the action would not necessarily imply the invalidity of his conviction. Pet. App. 58a-59a. Success would mean only that Osborne obtained access to the evidence (the testing of which could inculpate

him or at least be inconclusive), and "even if the results exonerate Osborne, a separate action—alleging a separate constitutional violation altogether—would be required to overturn his conviction." *Id*. at 58a-59a

The Ninth Circuit's analysis overlooks this Court's repeated admonition (not only in *Preiser* but in the *Heck* line of cases) that prisoners should not be allowed to circumvent the congressional limits on habeas through artful pleading. *Preiser*, 411 U.S. at 489-90 ("It would wholly frustrate explicit congressional intent to hold that the [prisoners] . . . could evade th[e] [habeas exhaustion] requirement by the simple expedient of putting a different label on their pleadings."). Nor should prisoners be allowed to use artful pleading to avoid the boundary between habeas and § 1983. *Cf. Nelson v. Campbell*, 541 U.S. 637, 645 (2004) ("Merely labeling something as part of the execution procedure is insufficient to insulate it from a § 1983 attack."). Indeed, a central premise of *Heck* is that that the form of relief sought by a prisoner in the complaint is not necessarily dispositive of whether a claim is cognizable under § 1983. Whereas *Preiser* had suggested that prisoners who seek damages are not attacking the fact or length of their confinement, *Preiser*, 411 U.S. at 494, *Heck* pointed out that this was not true "when establishing the basis for the damages claim necessarily demonstrates the invalidity of the conviction," *Heck,* 512 U.S. at 481-82.

If a prisoner cannot avoid *Preiser* and *Heck* through artful drafting of his complaint for relief, it follows that he should not be able to avoid those precedents by omitting his real substantive claim altogether. Yet that is precisely what Osborne has

done here. It is undisputed that, if Osborne had included an actual-innocence claim in his § 1983 action, that action would be barred by *Heck*, because success on that claim would necessarily imply the invalidity of his criminal convictions. It makes no sense to permit a prisoner to avoid both the *Preiser* and *Heck* bars by deliberately omitting the substantive claim he is advancing and by instead dressing up a discovery request in service of that claim as a § 1983 action. That cannot be right.

Where, as here, a prisoner deploys a § 1983 lawsuit as a discovery device in service of an unasserted claim that is barred by both *Heck* and *Preiser*, the § 1983 suit is also barred. Any other result would allow circumvention of *Heck* and *Preiser* through the clever stroke of a pen. Because Osborne is using § 1983 as just such an ancillary discovery device, and in doing so hoping (at best) to develop evidence to support a claim of actual innocence that plainly *would* be barred by *Heck* and *Preiser*, his lawsuit is also barred by those authorities.

D. Even If Osborne Can Sever His Discovery Request from the Substantive Claim He Might Assert, His § 1983 Claim Would Still Be Barred

Even if the Court focuses (as the Ninth Circuit did) solely on the access-to-evidence claim included in Osborne's § 1983 complaint—and ignores the actual-innocence claim he left out—Osborne's claim is still barred by *Heck*. Indeed, the Ninth Circuit itself recognized the close relationship between Osborne's access-to-evidence claim and the validity of his conviction when it linked the standard for obtaining access to the likelihood that the evidence would

establish Osborne's innocence. The Ninth Circuit required Osborne to show "a reasonable probability that, if exculpatory DNA evidence were disclosed . . . , he *could prevail* in an action for post-conviction relief." Pet. App. 27a-28a (emphasis added). Osborne could meet that standard by establishing "a reasonable probability that [he] could 'affirmatively prove that he is probably innocent.'" *Id.* (quotation omitted). Thus, although the Ninth Circuit did not require Osborne to establish his innocence (i.e., whether he would "be granted habeas relief with the evidence"), it did require him to show that the evidence he sought would—if exculpatory—plausibly establish his innocence. Because *that* showing would necessarily imply the invalidity of Osborne's convictions, his access-to-evidence claim is barred by *Heck*.

Two cases decided after *Heck*—*Edwards v. Balisok*, 520 U.S. 641 (1997), and *Wilkinson v. Dotson*, 544 U.S. 74 (2005)—illustrate this point and provide a useful contrast between a claim that has a sufficiently close connection to the "core" of habeas corpus so as to preclude a § 1983 claim (*Balisok*) and one that does not and therefore may proceed under § 1983 (*Dotson*).

In *Dotson*, two prisoners sought declaratory and injunctive relief under § 1983, claiming that state parole procedures were unconstitutional on ex-post-facto and due-process grounds. Although the prisoners clearly hoped that success on their claims would result in their earlier release on parole, that result was in no way certain. The prisoners' procedural challenge did not implicate the substance of their eligibility for parole because the protections they sought were too remote to the decisions that would actually affect their parole eligibility or re-

lease. Success in the § 1983 action would provide the prisoners with, at most, opportunities for new or earlier parole hearings. *Dotson*, 544 U.S. at 82. This Court thus concluded that "the connection between the constitutionality of the prisoners' parole proceedings and release from confinement is too tenuous here to achieve Ohio's legal door-closing objective." *Id.* at 78. And because the connection between claim and release was "too tenuous," the prisoners were not required to bring their challenge in the form of a federal habeas claim.

The prisoner in *Balisok* sought damages and declaratory relief under § 1983, claiming that he was deprived of good-time credits at a hearing where he was denied the opportunity to present witness statements on his behalf after the hearing officer falsely stated that no such statements had been submitted. *Balisok*, 520 U.S. at 644-45. The prisoner argued that declaratory relief in his favor would not necessarily imply the invalidity of the decision denying the credits, since an unbiased hearing officer with the benefit of the omitted witness statements might still deny the credits.

This Court rejected the prisoner's arguments, holding that his claims were subject to the *Heck* doctrine. *Balisok*, 520 U.S. at 648. Although the prisoner was challenging only the procedure used to deny the credits, and not the substance of the decision to deny, "the nature of the challenge to the procedures" would, if successful, "necessarily . . . imply the invalidity of the judgment." *Id*. at 645. That is, proof of the hearing officer's deceit and bias would certainly entitle the prisoner to vacation of the decision denying the credits; no court would allow the decision to stand. *Id.* at 646-47. Thus, a ruling in his

favor regarding the hearing officer's actions would necessarily imply the invalidity of the deprivation of the credits by making their restoration all but a foregone conclusion. *Id*.

A comparison of *Dotson* and *Balisok* is useful in analyzing Osborne's access-to-evidence claim. Unlike the prisoners in *Dotson*, Osborne is not asserting an outcome-neutral procedural claim. Instead, like the prisoner in *Balisok*, if Osborne proves that access to the DNA evidence will allow him to conclusively prove that he is factually innocent of the offenses for which he was convicted, that determination will necessarily imply the invalidity of his convictions and, by extension, his confinement. In fact, it is this very proposition—that it is inherently unfair or invalid to incarcerate an innocent person—upon which Osborne's arguments hinge.

In this respect, Osborne's § 1983 claim also closely resembles the claims asserted in *Heck*. The prisoner in *Heck* sought damages based on purportedly wholesale and egregious due-process violations resulting in his conviction. As the Court observed, to prove his entitlement to damages would require proof of those violations, the nature of which would necessarily impugn the validity of his conviction. *Heck*, 512 U.S. at 486-87. Osborne's case follows the same trajectory. Just as the prisoner in *Heck* intended to establish his right to damages, Osborne intends to perform new DNA testing on the evidence he seeks and purportedly hopes that the testing will establish his innocence. And just as the proof of the damages claim in *Heck* necessarily impugned the validity of the prisoner's conviction, new testing of evidence in Osborne's case will impugn the validity of his convictions if the results are fully favorable to

Osborne. The only real difference in the two cases is that the "proof" that necessarily implies the invalidity of Osborne's convictions will take place extrajudicially, in a laboratory, rather than in the courtroom.

At first blush, the focus on what Osborne intends to do with the evidence might appear similar to the argument rejected in *Dotson*, where Ohio argued that the prisoners could not pursue relief under § 1983 because "they believe that victory on their claims will lead to speedier release from prison." *Dotson*, 544 U.S. at 78. The Court rejected this argument as "jump[ing] from a true premise (that in all likelihood the prisoners hope these actions will help bring about earlier release) to a faulty conclusion (that habeas is their sole avenue for relief)." *Id*. But the connection between the challenged procedures and release from confinement was "too tenuous" to satisfy the *Heck* doctrine. *Id*. The prisoners' release depended on the exercise of discretion by the parole board, which—and this is the crucial point—the challenged procedures would not affect. In sharp contrast, the connection in Osborne's case is elemental: obtaining access to the evidence is the *sine qua non* of Osborne's intended innocence claim.

The Ninth Circuit also erred in treating the inquiry set forth in *Heck* and in later cases such as *Dotson*—namely, whether success in the § 1983 action "would necessarily demonstrate the invalidity of confinement or its duration," *Dotson*, 544 U.S. at 81-82—as the *exclusive* test for whether a prisoner may proceed under § 1983. The Ninth Circuit over-read *Dotson* and misunderstood the *Heck* doctrine.

For starters, the relevant passage—an attempt to find a common denominator in a sprawling body of

cases—says only that a § 1983 action is barred *if* success in that action would necessarily imply the invalidity of confinement. It does *not* say that a § 1983 action is barred *only if* success in the action would necessarily imply the invalidity of confinement. That is, even assuming (contrary to the argument above) that courts should ignore the substantive claims omitted by prisoners in § 1983 actions, an affirmative answer to the "necessarily demonstrates invalidity" question is *sufficient* to trigger the *Heck* bar to a § 1983 action, but it is not *necessary*. And a negative answer, while informative, is not conclusive.

Beyond that, the *Heck* doctrine was developed to address a different situation than Osborne's, occurring when a prisoner's § 1983 action requests a form of relief—such as damages or a declaration—that is *not available in habeas*, but where success in the lawsuit would call into question the legality of the confinement or sentence. *See Heck*, 512 U.S. at 481; *see also Dotson*, 544 U.S. at 91 (Kennedy, J., dissenting) (noting that both *Heck* and *Balisok* involved prisoners who sought "only relief unavailable in habeas . . . and thus [sought] to do an end run around *Preiser*"). *Dotson* was also a case in which the requested relief—a new parole hearing—was *not available in habeas*. *Dotson*, 544 U.S. at 82 (respondent prisoners' claims did not lie "at the core of habeas corpus"). When the relief sought is not available in habeas, it becomes necessary to mediate the potential conflict between habeas and § 1983 to ensure that a remedy available *only* in § 1983 remains available under circumstances that do not circumvent the many limitations built into habeas corpus by Congress. The *Heck* doctrine achieves that purpose.

Osborne's case does not raise the same problem. Here, the requested relief—access to biological evidence in the hands of state officials—is in fact a remedy that at least in some circumstances is available in habeas corpus proceedings. *See* Rule 6(a), Rules Governing § 2254 Cases; *Toney v. Gammon*, 79 F.3d 693, 700 (8th Cir. 1996); *Jones v. Wood*, 114 F.3d 1002, 1009 (9th Cir. 1997). Indeed, Osborne sought to obtain this evidence in his state postconviction proceedings, arguing that he has both a federal and a state due-process right to that material so that he can conduct further DNA testing to support an actual-innocence claim. This same argument could be renewed by Osborne in federal habeas proceedings—although it would then be subject to the filters created by Congress. *See* 28 U.S.C. § 2254(d). Rather than seek such discovery through the orderly processes of a federal habeas proceeding, Osborne—without even waiting for the state postconviction proceeding to run its course—has broken off that discovery request and pressed it as an independent federal claim under § 1983.

The collision and circumvention problems raised by Osborne's § 1983 action are therefore different from the problems addressed by the *Heck* doctrine. But they are no less serious or destructive of Congress's intent as expressed in the federal habeas statute. The right to obtain evidence held by the State ordinarily arises in the context of actual litigation, whether criminal or civil. The notion that § 1983 could be employed as a freestanding federal discovery tool—disconnected from and deployed outside the context of the litigation in which the evidence sought is relevant—is deeply troubling. Where, as here, § 1983 is used in this fashion by a prisoner duly incarcerated under state law—based on a fair trial

and the assistance of a competent lawyer—the risk of undermining the orderly functioning of the state's postconviction procedures, not to mention Congress's orderly procedures for state habeas petitioners, is far from hypothetical. The potential for such problems warrants the use of the *Heck* doctrine in this setting even if success on Osborne's artfully pleaded § 1983 claim would not necessarily imply the invalidity of his conviction.

II. OSBORNE HAS NO FEDERAL CONSTITUTIONAL RIGHT TO OBTAIN POSTCONVICTION ACCESS TO THE STATE'S BIOLOGICAL EVIDENCE

The Ninth Circuit's unfounded extension of *Brady v. Maryland*, 373 U.S. 83 (1963), to the postconviction DNA context suffers from two fatal flaws. First, the *Brady* doctrine was formulated and is applied to secure the right to a fair trial by prohibiting the prosecution from withholding exculpatory evidence from defendants. Once a defendant has obtained a fair trial, the rights protected by the doctrine have been fully satisfied. Since the Constitution does not require postconviction review of state convictions by either federal or state courts, no doctrinal basis exists for extending *Brady* to the postconviction context, and no precedent of this Court supports the Ninth Circuit's having done so.

Second, even if the *Brady* doctrine were extended into the postconviction context, it should not give rise to a stand-alone right of discovery detached from a substantive claim to which the discovered evidence would relate. The Ninth Circuit created this right, wholly independent of any substantive claim, based on an erroneous assumption that the claim Osborne hopes to assert—a freestanding actual-innocence

claim—is cognizable in federal court. But this Court has never recognized the cognizability of that claim.

In addition to these flaws, the Ninth Circuit's decision infringes the substantial deference accorded the States in formulating rules and procedures for postconviction review of criminal convictions. Most of the States, as well as the Federal Government, have statutes (or case law or court rules) that provide postconviction access to DNA evidence. These statutes represent careful legislative compromises struck between the government's interest in finality and in avoiding needless administrative burdens, on the one hand, and the need to do justice in an extraordinary individual case, on the other. In striking these compromises, lawmakers have imposed reasonable limitations on postconviction access to DNA evidence. Osborne flunks the two core criteria that many of these statutes use in filtering postconviction access requests: he has confessed his guilt rather than declared his innocence; and there has never been any doubt that Osborne was the perpetrator. Osborne has received all the process he is due.

A. *Brady v. Maryland* Does Not Create a Freestanding Right to Gather Evidence in Support of a Challenge to the Accuracy of a Verdict

The Ninth Circuit extended *Brady* to create a postconviction right of access to evidence. *See* Pet. App. 16a, 23a. But *Brady* and the "due process principles that motivated" it, *id*. at 23a, have no application here. This Court has never extended *Brady* beyond conviction, and it should not do so here.

In *Brady*, this Court recognized that criminal defendants have a due-process right to receive from

the prosecution exculpatory evidence that "is material either to guilt or to punishment." 373 U.S. at 87. That doctrine now requires prosecutors to seek from those acting on their behalf evidence that would create a reasonable probability of an acquittal. *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999).

The exclusive rationale of the *Brady* doctrine is to ensure that the defendant receives a fair trial. *United States v. Bagley*, 473 U.S. 667, 675 (1985) ("[U]nless the omission deprived the defendant of a fair trial, there was no constitutional violation requiring that the verdict be set aside."); *Kyles v. Whitley*, 514 U.S. 419, 434 (1995); *Brady*, 373 U.S. at 87-88; *see also United States v. Ruiz*, 536 U.S. 622, 628 (2002) (right to receive exculpatory material is "part of [the Constitution's] basic 'fair trial' guarantee"). Accordingly, the *Brady* doctrine is limited to the trial phase of the criminal process.

This Court has never said that a State's disclosure obligation extends beyond a defendant's conviction. In fact, this Court's only mention of *Brady* in a post-conviction context appears to be in *Imbler v. Pachtman*, 424 U.S. 409 (1976). *Imbler* involved prosecutorial immunity under § 1983. The Court there recognized that a prosecutor's duty to disclose exculpatory evidence at trial was grounded in the Constitution, but noted that any duty that persisted after trial rested on non-constitutional ethical standards. *Id*. at 427 n.25.

Here, Osborne has never suggested that material evidence was suppressed at trial. Nor can he argue that his trial was unfair. Not only did the Alaska courts determine that Osborne's trial was error-free, but also that he received competent representation from his lawyer. *See* Pet. App. 102a, 118a.

The prosecution's disclosure obligation under *Brady* therefore has no bearing on this case, and the Ninth Circuit was wrong to conclude otherwise. *See Grayson v. King*, 460 F.3d 1328, 1338 (11th Cir. 2006) ("Grayson has no valid due process right of access to the biological evidence under *Brady* and its progeny in order to retest that evidence under new technology. Grayson received a fair trial, in which overwhelming evidence was presented against him."); *Harvey v. Horan*, 278 F.3d 370, 378-79 (4th Cir. 2002) ("Harvey does not state a valid *Brady* claim[.] . . . Harvey received a fair trial and was given the opportunity to test the DNA evidence during his trial using the best technology available at the time."); *id.* at 385 (King, J., concurring) (same).

B. The Ninth Circuit Incorrectly Addressed the Materiality of the Evidence Before Deciding Whether Osborne Has a Cognizable Claim to Which the Evidence Could Relate

Having created a novel *Brady* right, the Ninth Circuit next asked whether Osborne had established that the DNA evidence was sufficiently material to support a postconviction right of access. According to the Ninth Circuit, the standard of materiality "is no higher than a reasonable probability that, if exculpatory DNA evidence were disclosed to Osborne, he could prevail in an action for post-conviction relief." Pet. App. 28a. And, because Osborne intended to file a freestanding actual-innocence claim, "materiality would be established by a reasonable probability that Osborne could 'affirmatively prove that he is probably innocent.'" *Id.* (quotation omitted). Thus, the court jumped straight to the materiality of the requested discovery before resolving whether Osborne has a

cognizable claim for the substantive relief to which the purportedly material DNA evidence would relate.

This unusual leap to discovery makes some sense when viewed in light of the Ninth Circuit's incorrect reliance on *Brady*. *Brady* is a backwards-looking doctrine. It focuses the inquiry on issues that bore on the decision to convict a defendant: evidence is material under *Brady* when "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding [i.e., trial] would have been different." *Bagley*, 473 U.S. at 682 (opinion of Blackmun, J.); *id*. at 685 (White, J., concurring in part and concurring in the judgment). By looking backward in the fashion of *Brady*, however—i.e., by focusing on the DNA evidence in light of Osborne's likelihood of guilt or innocence as established at his criminal trial—the Ninth Circuit overlooked Osborne's existing convictions at an error-free trial and the obvious forward-looking nature of Osborne's claim. That is, the Ninth Circuit did not address what will happen when Osborne tries to use the requested DNA evidence to obtain postconviction relief.

But materiality is not an intrinsic quality of evidence; it is an expression of the relationship between a piece of evidence and the issues in a particular case. *See, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("[T]he substantive law will identify which facts are material."); *cf.* Fed. R. Evid. 401 advisory committee notes, para. 4 ("Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case."). Any right to discovery is, therefore, mean-

ingless without some substantive claim with which to compare and analyze the evidence.

Allowing a discovery right to stand alone, apart from a formally asserted substantive claim, is directly contrary to orderly and accepted judicial process. *See, e.g.,* Fed. R. Civ. P. 12(b), (h) (requiring certain threshold defenses to be set forth in initial responsive pleading or motion before pleading and providing for waiver of those defenses if not so set forth). *See also Harvey v. Horan*, 285 F.3d 298, 299 (4th Cir. 2002) ("*Harvey II*") (Wilkinson, C.J., concurring in denial of rehearing and rehearing en banc) ("The assertion of innocence, just as the assertion of any right, is intertwined with orderly process."). The Ninth Circuit's unprecedented reversal of accepted civil procedure compels the State to participate in discovery even though Osborne may have no legally cognizable claim to which the requested evidence may relate.

C. The Ninth Circuit Incorrectly Speculated That Osborne Would Be Able to Assert a Cognizable Claim of Actual Innocence When, in Fact, No Such Claim Has Been Recognized

The Ninth Circuit created a federal constitutional right to evidence that might establish innocence, but did so without determining whether the Constitution recognizes a substantive right to collaterally attack one's conviction based on a claim of actual innocence. If that claim is not cognizable, then Osborne can have no constitutional right to evidence whose only purpose is to support that claim. This is the flaw at the core of the Ninth Circuit's opinion in this case.

1. Before a court can extend *Brady*'s due-process principles to the postconviction context, the court must first "determine whether due process requirements apply in the first place." *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1, 7 (1979) (quotation omitted). That is, the court must determine whether there is a substantive right to assert an actual-innocence claim to which the procedural right would relate. A right protected by due process involves "more than an abstract need or desire" for the right and "more than a unilateral expectation; instead there must exist "a legitimate claim of entitlement to it." *Id*. (quotation omitted).

Indeed, Osborne must first formally assert some sort of innocence-based claim because only then will a court be able to identify the precise interest at stake, determine whether the interest is protected by the Constitution, and if so, then define the nature and contours of his procedural rights necessary to secure that interest. *Cf. Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (extending due-process protection to asserted right or liberty interest places matter outside arena of public debate and legislative action and requires Court to exercise "utmost care[,] . . . lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court"); *id.* at 721 (requiring precise definition of nature and contours of newly asserted substantive right).

Here, the Ninth Circuit identified no recognized substantive right that allows a prisoner to collaterally attack a valid state conviction on the sole basis that the prisoner is actually innocent. Instead, the court *assumed* the existence of a right that has not yet been recognized by this Court.

As an initial matter, the Ninth Circuit was mistaken—Osborne has *never* so much as proclaimed his innocence. *See* J.A. 226-27 (Osborne's affidavit declaring that he has "always *maintained*" his innocence, that he "told [his] *attorney* [he] never did the crime[s]," and that new DNA testing "will prove once and for all time *either* [his] *guilt or* innocence." (emphasis added)). Osborne, moreover, has not settled on what sort of relief he might pursue in seeking to establish his actual innocence claim; the best he has done is to state the various options he might pursue.

An even larger problem exists with the Ninth Circuit's assumption. Despite this Court's twice declining to recognize a federal right to assert a freestanding actual-innocence claim, *House*, 547 U.S. at 554-55; *Herrera v. Collins*, 506 U.S. 390, 417 (1993), the Ninth Circuit inexplicably allowed Osborne's access-to-evidence claim to "proceed on the well-established assumption that his intended free-standing innocence claim will be cognizable in federal court." Pet. App. 22a.

No such "well-established assumption" exists. In *House* and *Herrera*, the Court assumed that a freestanding claim of innocence was cognizable only *for argument's sake*; it was apparent in each case that, even if such a claim existed, the defendant would be unable to meet the "extraordinarily high" evidentiary burden that would be required to prevail on the claim. *See House*, 547 U.S. at 555; *Herrera*, 506 U.S. at 418-19; *cf. id.* at 429 (Scalia, J., concurring) ("I do not understand it to be the import of today's decision . . . [to create] a strange regime that assumes permanently, though only '*arguendo*,' that a

constitutional right exists, and expends substantial judicial resources on that assumption.").

Here, though, the Ninth Circuit's assumption was not merely *arguendo*: the conclusion that Osborne has a constitutional right to the evidence stands or falls with the correctness of this assumption. For if the assumption is wrong, meaning that there is no freestanding federal claim of actual innocence, then Osborne could *not* "prevail in an action for post-conviction relief," Pet. App. 28a,—at least not an action of the type envisioned in the Ninth Circuit's opinion.

If Osborne has no recognized substantive right to prove his actual innocence, then he has no right of access to evidence whose only purpose would be to support an innocence claim. The Ninth Circuit attempted to bridge this obvious gap in Osborne's request for evidence by relying on its decision in *Thomas v. Goldsmith*, 979 F.2d 746, 749-50 (9th Cir. 1992). Pet. App. 23a. But the prisoner in *Thomas* was seeking to test DNA evidence to support a "gateway" claim of actual innocence in a pending habeas action, *Thomas*, 979 F.2d at 749, a claim that this Court has expressly recognized as cognizable, *see Schlup v. Delo*, 513 U.S. 298, 315-16 (1995) (holding that actual-innocence claim "is . . . not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass" for court to consider merits of otherwise defaulted constitutional claim). The Ninth Circuit acknowledged that Osborne intends to make no such gateway claim. Pet. App. 19a. *But see* Br. Opp. at 31 (raising for first time possibility that Osborne would assert gateway claim).

2. This Court has also refused to require the States, under the Fourteenth Amendment's due-process guarantee, to provide their own mechanisms for convicted defendants to assert their actual innocence beyond the traditional motions for new trial and applications for executive clemency. *Herrera*, 506 U.S. at 407, 411, 416-17. Thus, the Ninth Circuit's approach cannot be rescued by its speculation that Osborne might have "at least a potentially viable opportunity of bringing a freestanding actual innocence claim" in the Alaska state courts. Pet. App. 19a-20a. The Ninth Circuit's speculation that there might be a *state* right to assert actual innocence does not lend support to the creation of a *federal* right to discover evidence relating to such a state claim. In fact, to the extent the court relied on the possible existence of a state freestanding actual-innocence claim as the basis for its newly recognized federal discovery right, the court essentially supplanted any state postconviction discovery rules with a federal constitutional standard of disclosure.

This approach is improper for four reasons: (1) it is inconsistent with this Court's refusal to impose federal constitutional requirements on state postconviction proceedings; (2) it improperly divorces procedure from procedural context; (3) it incorrectly applies "meaningful access" principles outside the context of a "meaningful access" claim; and (4) it ignores basic federalism concerns in an area over which this Court has extended enormous deference to the States.

a. The Constitution does not require States to provide postconviction remedies to defendants. *See Pennsylvania v. Finley*, 481 U.S. 551, 556-57 (1987) (holding that States are not required to provide

counsel to prisoners pursuing postconviction relief). In the realm of postconviction relief, "States have substantial discretion to develop and implement programs to aid prisoners seeking to secure postconviction review." *Id*. at 559 (rejecting premise that "when a State chooses to offer help to those seeking relief from convictions, the Federal Constitution dictates the exact form such assistance must assume"). *See also Estelle v. Dorrough*, 420 U.S. 534, 536-37 (1975) ("there is no federal constitutional right to state appellate review of state criminal convictions").

Indeed, this Court has cautioned federal courts against applying a "mother knows best" approach to constitutional adjudication in the area of postconviction relief. *Murray v. Giarratano*, 492 U.S. 1, 11 (1989) (reaffirming *Finley* and holding that States are not required to appoint counsel to represent state death-row prisoners in postconviction proceedings). Recognizing that "meaningful access [to collateral remedies] can be satisfied in various ways," Justice Kennedy, concurring, noted that the broad range of options and their complexity mandates according the States "'wide discretion' to select appropriate solutions. Indeed, judicial imposition of a categorical remedy such as that adopted by the court below might pretermit other responsible solutions being considered in Congress and state legislatures." *Id*. at 14 (Kennedy, J., concurring) (citations omitted).

The Ninth Circuit gave the Alaska courts anything but "wide discretion" in selecting an appropriate solution to the issue of postconviction DNA testing. In effect, the Ninth Circuit created a federal constitutional right to discovery even though the Constitution does not require States to provide any substantive

avenue of relief based on that discovery. The illogic of this approach is obvious.

b. The Ninth Circuit's generic reference to state postconviction remedies also ignores the simple, but apparently overlooked, principle that the process due in any given case depends in large part on the procedural context in which a petitioner asserts his right or interest. "Process is not an end in itself." *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983). The "constitutional purpose [of process] is to protect a substantive interest to which the individual has a legitimate claim of entitlement." *Id.* Thus, what process is due cannot be assessed outside a particular procedural context. *Cf. Morrissey v. Brewer*, 408 U.S. 471, 480 (1972) (holding that parole revocations are not criminal proceedings and, therefore, the full panoply of rights due a defendant in a criminal proceeding does not apply).

This simple principle can be illustrated in this case by comparing the possible forms of state postconviction relief that Osborne might pursue. In Alaska, there are at least three such forms: a civil action filed in state court under Alaska's postconviction-relief statutes, Alaska Stat. 12.72.010 *et seq.*; an administrative petition submitted to the State parole board seeking early release through discretionary parole; and an application for clemency addressed to the governor as authorized by the Alaska Constitution.

Although some basic due process protections may apply to those postconviction judicial and administrative proceedings that a State chooses to provide, *see, e.g., Wolff v. McDonnell*, 418 U.S. 539, 556-57 (1974) (prisoners entitled to due process in administrative disciplinary proceedings), no similar protections apply to clemency proceedings. A convicted

defendant has no due-process rights in relation to an executive clemency process other than the right to apply for clemency, in part because clemency decisions have traditionally remained outside the judicial purview. *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 463-65 (1981).

Indeed, Alaska's governor has unfettered discretion to grant or deny clemency. *See* Alaska Const. art. 3, sec. 21 ("Subject to procedure prescribed by law, the governor may grant pardons, commutations, and reprieves."). This Court has recognized that clemency "is simply a unilateral hope." *Dumschat*, 452 U.S. at 465. Accordingly, whatever residual liberty interest a prisoner serving a validly imposed sentence might possess, that interest will give rise to few or no due-process rights in executive clemency determinations. *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 280-83 (1998) (opinion of Rehnquist, C.J.) (prisoner cannot use residual life interest to insist on procedural safeguards in clemency proceeding); *id*. at 289 ("some *minimal* procedural safeguards apply to clemency proceedings" to guard against arbitrary or random determinations) (O'Connor, J., concurring).

Given the differences in the process due in different procedural contexts, one cannot conclude, as the Ninth Circuit apparently did, that a convicted prisoner's right to evidence is the same regardless of what the prisoner intends to do with that evidence.

c. For similar reasons, any attempt to attach the Ninth Circuit's discovery right to a claim that the State allegedly failed to provide Osborne with meaningful access to state postconviction remedies fails. This case does not challenge the Alaska courts' rejection of Osborne's state postconviction-relief ap-

plication. Rather, this case arises from Osborne's extrajudicial request directly to the District Attorney for access to the evidence.[9] *See* J.A. 36-37. Such a request cannot give rise to the one-size-fits-all federal constitutional right fashioned by the Ninth Circuit.

d. Finally, by creating a stand-alone right to obtain access to evidence separate from the alternatives available under Alaska law, the Ninth Circuit effectively removed from the State—and all other States that have formulated legislative or judicial solutions to the question of postconviction DNA testing—the ability to individually address this question. And the court did so in an area of law in which the States are entitled to enormous deference. Recognizing the States' "considerable expertise in matters of criminal procedure" and centuries-old common-law tradition underlying criminal process, this Court has "'exercis[ed] substantial deference to legislative judgments in this area.'" *Herrera*, 506 U.S. at 407 (quoting *Medina v. California*, 505 U.S. 437, 445-46 (1992)). And just as federal courts may not interfere with pending state criminal prosecutions, *see Younger*, 401 U.S. at 43-45, so too is it inappropriate for them to interfere with a State's decision whether (or not) to revive or reexamine a criminal case after a fair trial resulting in a guilty verdict.

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[9] Even if Osborne were to seek access within the context of a state postconviction-relief action, it would be for Alaska's courts, not the Ninth Circuit, to decide in the first instance what relief he may properly seek and what discovery will be available in support of that relief. The Alaska courts have adopted a procedure defendants may invoke to obtain postconviction access to biological evidence. Pet. App. 111a. Osborne has not challenged the constitutionality of that procedure in this case.

3. In sum, the right of access formulated by the Ninth Circuit is based on the assumed existence of a federal constitutional right to collaterally attack a conviction based solely on actual innocence when in fact no such right has been recognized by this Court or by the Alaska courts. And from that assumption, the Ninth Circuit created a *Brady*-like right that stands alone, disconnected from any ongoing judicial proceeding. In creating out of whole cloth a federal due-process right and allowing Osborne to proceed on such an ephemeral basis, the Ninth Circuit has effectively reopened a state criminal investigation and refused to accord the deference traditionally owed to the States in this area of the law, all of which threatens the States' ability to process postconviction challenges in an orderly fashion.

D. In Creating a Federal Constitutional Right to Reopen A Criminal Investigation, the Ninth Circuit Usurped an Area Uniquely Suited to Legislative Resolution

The Ninth Circuit's ruling potentially has enormous practical consequences for the criminal-justice systems of Alaska and other States. The decision is addressed only to DNA testing, but its rationale is not so easily confined. It may be true that the advances represented by DNA testing "are no ordinary developments, even for science." *Harvey II*, 285 F.3d at 305 (Luttig, J., respecting the denial of rehearing en banc). But DNA testing is not the first time, and no doubt will not be the last time, that forensic science has improved the accuracy of its methods by orders of magnitude. If the Ninth Circuit's reasoning is correct, then any state or federal prisoner would gain a federal constitutional right to reopen his case merely by asserting that new

forensic-science technologies might establish his innocence.

In fact, the Ninth Circuit's decision is not even limited to cases in which the requested scientific testing is materially more advanced than the previously available technology. Rather, as the Fourth Circuit has explained on facts quite similar to these: "Establishing a constitutional due process right . . . to retest evidence with each forward step in forensic science would leave perfectly valid judgments in a perpetually unsettled state." *Harvey*, 278 F.3d at 376. This is not to say that the State's interest in finality should trump all other values. But finality, though "not the sole value in the criminal justice system," should not be "subject to the kind of blunt abrogation that would occur with the recognition of a due process entitlement to post-conviction access to DNA evidence." *Id*.

The issues presented by postconviction requests for DNA involve competing policies—implicating (a) the nature of the particular scientific innovation, (b) the allocation of executive and judicial resources, (c) consideration of victims' interests, and (d) interests of justice—and are thus uniquely suited for legislative resolution. Given these interests, crafting a right by statute is often easier "than to derive [it] through the Constitution, simply because the statute can let the [right's operation] turn on any sort of practical consideration without having to subsume it under a broader principle." *Atwater v. City of Lago Vista*, 532 U.S. 318, 352 (2001).

Thus far, 44 States, the District of Columbia, and the Federal Government have enacted statutory

procedures for postconviction DNA testing.[10] These statutes reflect different but overlapping answers to what Judge Wilkinson has called the "myriad of questions," *Harvey II*, 285 F.3d at 300, raised by recognizing a postconviction right to access DNA evidence.

The Innocence Protection Act (IPA), 18 U.S.C. § 3600, serves as one paradigm. Indeed, several States have used the IPA as a model for their own statutes. *See* Brief for the States of California, Florida, Louisiana, *et al*., as *Amici Curiae* Supporting Petitioners at 7. (The IPA applies only to prisoners convicted of federal offenses and so has no effect on Osborne.) Relief under the IPA is available only from the court that rendered the judgment of conviction; that court must find that (1) the prisoner has declared his actual innocence, under penalty of perjury, and has identified a defense theory that would establish his actual innocence, (2) the identity of the perpetrator was at issue at trial, (3) the new testing is substantially more probative than earlier testing, and (4) the new testing may produce material evidence that would raise a reasonable probability that the prisoner is actually innocent. 18 U.S.C. § 3600(a). In contrast, the right created by the Ninth Circuit is virtually unrestrained and would thus render unconstitutional or irrelevant many of the statutes that have been adopted by the States (and arguably the IPA), as well as the three-part test adopted by the Alaska Court of Appeals.

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[10] *See* Brief for the States of California, Florida, Louisiana, *et al*., as *Amici Curiae* Supporting Petitioners at 3 & n.1 (to be filed December __, 2008). In addition, five of the remaining six States, including Alaska, provide similar procedures under case law or court rule. *Id*. at 4 n.2.

This is not the proper mode of constitutional adjudication of novel due-process issues raised by scientific advances. The States "are currently engaged in serious, thoughtful examinations," *Glucksberg*, 521 U.S. at 719, of the postconviction DNA testing issue. *See United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) ("[T]he theory and utility of our federalism . . . [allows States to] perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear."). The Ninth Circuit, however, has "short-circuit[ed] legislative activity," *Harvey*, 278 F.3d at 376, through "the conversation-stopping process of constitutionalization," *Harvey II*, 285 F.3d at 30 (Wilkinson, C.J.).

E. Any Federal Due-Process Requirements Applicable to Postconviction Requests for DNA Testing Are More Than Fulfilled in this Case

If this Court were to recognize for the first time a federal substantive right to collaterally assert actual innocence, then procedural due process might require that a prisoner asserting such a claim have access to evidence needed to support that claim. But the mere recognition of a procedural due process right is not the end of the inquiry. "Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstance[.]" *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (quotation omitted). In the face of claims of actual innocence, this Court has always attended to the need "to balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case." *Schlup*, 513 U.S. at 324; *see*

also Herrera, 506 U.S. at 399 ("Due process does not require that every conceivable step be taken, at whatever cost, to eliminating the possibility of convicting an innocent person.") (quotation omitted).

In the context of a due-process right of access that might be recognized by this Court, the IPA again serves as a paradigm for the imposition of reasonable limits on that right. Reasonable limitations will ensure an appropriate balance between state interests of finality, comity, and appropriate use of resources and the prisoner's interest in justice.

Foremost among these limits are requirements that a prisoner formally declare his innocence and that he establish the materiality of new DNA testing. *E.g.*, 18 U.S.C. § 3600(a)(1), (6)-(8). Even former Judge Luttig, on whose opinion the Ninth Circuit below purported to rely, would restrict any due-process right to postconviction DNA testing to only those who have "steadfastly maintain[ed]" and "persist[ed] in" their "absolute," "factual" innocence. *Harvey II*, 285 F.3d at 318, 319 (Luttig, J.). And a materiality requirement ensures against requests for postconviction testing in the absence of any reason beyond rank speculation to believe that the test might exculpate the prisoner.

In this case, Osborne cannot meet either of these limitations. Instead of declaring his actual innocence, he has confessed, in graphic detail, to the precise crimes with which he was charged and convicted. Pet. App. 71a & n.11. *See Grayson*, 460 F.3d at 1338-39 (prisoner was not entitled to postconviction DNA testing in light of his failure to declare actual innocence, his confession, and incriminating testimony at fair trial). *See also* J.A. 226-27

(Osborne's affidavit asserting that new DNA tests will "prove . . . either [his] guilt or innocence").

Osborne also cannot make the materiality showing that would be required under the IPA. Jackson said that Osborne was his passenger and participated with him in the rape and assault on K.G.[11] The DQ-alpha testing actually performed on the condom implicated Osborne to about an 83 percent confidence level. And of course, the circumstantial evidence—including Osborne's telephone calls to Jackson from the arcade, the arcade tickets found in Jackson's car, the reports of Osborne being with Jackson both before and (with blood on his clothes) after the assault, and the axe handle found in Osborne's room—all convincingly establishes his guilt. Never in this case's long history has Osborne offered a persuasive alternative explanation for these coincidences. In such circumstances, postconviction DNA testing is not material. *See Grayson*, 460 F.3d at 1339 ("[T]he DNA testing that Grayson seeks to perform could not show that he is actually innocent of the capital murder.").

Osborne, in short, fails to satisfy the two core criteria weighed by the many judges and legislators who have considered how far a right to postconviction DNA testing should extend. Meanwhile, the Alaska courts have already rejected Osborne's demand, but not before giving due consideration to those criteria.

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[11] Jackson's confession was not admissible at trial, but "the rules of admissibility that would govern at trial" do not apply to an actual-innocence inquiry. "Instead the emphasis on 'actual innocence' allows the reviewing tribunal also to consider the probative force of relevant evidence that was either excluded or unavailable at trial." *Schlup v. Delo*, 513 U.S. 298, 327-28 (1995); *see also House v. Bell*, 547 U.S. 518, 538 (2006).

If a federal constitutional right to postconviction DNA testing can ever exist, it does not in this case.

CONCLUSION

The judgment of the court of appeals should be reversed.

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

Counsel for Petitioners

APPENDIX

18 U.S.C. § 3600(a) provides:

> **In General.—** Upon a written motion by an individual under a sentence of imprisonment or death pursuant to a conviction for a Federal offense (referred to in this section as the "applicant"), the court that entered the judgment of conviction shall order DNA testing of specific evidence if the court finds that all of the following apply:
>
> (1) The applicant asserts, under penalty of perjury, that the applicant is actually innocent of—
>
> (A) the Federal offense for which the applicant is under a sentence of imprisonment or death; or
>
> (B) another Federal or State offense, if—
>
> (i) evidence of such offense was admitted during a Federal death sentencing hearing and exoneration of such offense would entitle the applicant to a reduced sentence or new sentencing hearing; and
>
> (ii) in the case of a State offense—
>
> (I) the applicant demonstrates that there is no adequate remedy under State law to permit DNA testing of the specified evidence relating to the State offense; and
>
> (II) to the extent available, the applicant has exhausted all remedies available under State law for requesting

DNA testing of specified evidence relating to the State offense.

(2) The specific evidence to be tested was secured in relation to the investigation or prosecution of the Federal or State offense referenced in the applicant's assertion under paragraph (1).

(3) The specific evidence to be tested—

(A) was not previously subjected to DNA testing and the applicant did not—

(i) knowingly and voluntarily waive the right to request DNA testing of that evidence in a court proceeding after the date of enactment of the Innocence Protection Act of 2004; or

(ii) knowingly fail to request DNA testing of that evidence in a prior motion for postconviction DNA testing; or

(B) was previously subjected to DNA testing and the applicant is requesting DNA testing using a new method or technology that is substantially more probative than the prior DNA testing.

(4) The 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.

(5) The proposed DNA testing is reasonable in scope, uses scientifically sound methods,

and is consistent with accepted forensic practices.

(6) The applicant identifies a theory of defense that—

(A) is not inconsistent with an affirmative defense presented at trial; and

(B) would establish the actual innocence of the applicant of the Federal or State offense referenced in the applicant's assertion under paragraph (1).

(7) If the applicant was convicted following a trial, the identity of the perpetrator was at issue in the trial.

(8) The proposed DNA testing of the specific evidence may produce new material evidence that would—

(A) support the theory of defense referenced in paragraph (6); and

(B) raise a reasonable probability that the applicant did not commit the offense.

(9) The applicant certifies that the applicant will provide a DNA sample for purposes of comparison.

(10) The motion is made in a timely fashion, subject to the following conditions:

(A) There shall be a rebuttable presumption of timeliness if the motion is made within 60 months of enactment of the Justice For All Act of 2004 or within 36 months of conviction, whichever comes later. Such presumption may be rebutted upon a showing—

(i) that the applicant's motion for a DNA test is based solely upon information used in a previously denied motion; or

(ii) of clear and convincing evidence that the applicant's filing is done solely to cause delay or harass.

(B) There shall be a rebuttable presumption against timeliness for any motion not satisfying subparagraph (A) above. Such presumption may be rebutted upon the court's finding—

(i) that the applicant was or is incompetent and such incompetence substantially contributed to the delay in the applicant's motion for a DNA test;

(ii) the evidence to be tested is newly discovered DNA evidence;

(iii) that the applicant's motion is not based solely upon the applicant's own assertion of innocence and, after considering all relevant facts and circumstances surrounding the motion, a denial would result in a manifest injustice; or

(iv) upon good cause shown.

(C) For purposes of this paragraph—

(i) the term "incompetence" has the meaning as defined in section 4241 of title 18, United States Code;

(ii) the term "manifest" means that which is unmistakable, clear, plain, or indisputable and requires that the opposite conclusion be clearly evident.

28 U.S.C. § 2254 provides in relevant part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> (b)
>
> (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B)
>
> (i) there is an absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
>
> (2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.
>
> (3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.
>
> . . . .

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)

(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

42 U.S.C. § 1983 provides:

> 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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Federal Rule of Civil Procedure 12 provides in part:

> (b) *How Presented*. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive plead-

ing thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

. . . .

(h) Waiver or Reservation of Certain Defenses.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or

(B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

Federal of Civil Procedure 26(b)(b) provides in part:

(b) *Discovery Scope And Limits*. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In *General*. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the

> discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii).

Rule 6(a) of the Rules Governing Section 2254, foll. 28 U.S.C. § 2254, provides in pertinent part:

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

Alaska Constitution, art. 3, sec. 21 provides:

> Subject to procedure prescribed by law, the governor may grant pardons, commutations, and reprieves, and may suspend and remit fines and forfeitures. This power shall not extend to impeachment. A parole system shall be provided by law.

Alaska Statute 12.72.010 provides:

> A person who has been convicted of, or sentenced for, a crime may institute a proceeding for post-conviction relief if the person claims
>
> (1) that the conviction or the sentence was in violation of the Constitution of the United States or the constitution or laws of this state;
>
> (2) that the court was without jurisdiction to impose sentence;
>
> (3) that a prior conviction has been set aside and the prior conviction was used as a statutorily required enhancement of the sentence imposed;
>
> (4) that there exists evidence of material facts, not previously presented and heard by the court, that requires vacation of the conviction or sentence in the interest of justice;

(5) that the person's sentence has expired, or the person's probation, parole, or conditional release has been unlawfully revoked, or the person is otherwise unlawfully held in custody or other restraint;

(6) that the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error previously available under the common law, statutory law, or other writ, motion, petition, proceeding, or remedy;

(7) that

(8) there has been a significant change in law whether substantive or procedural, applied in the process leading to the person's conviction or sentence;

(B) the change in the law was not reasonably foreseeable by a judge or competent attorney;

(C) it is appropriate to retroactively apply the change in law because the change requires observance of procedures without which the likelihood of an accurate conviction is seriously diminished;

(D) the failure to retroactively apply the chance in law would result in a fundamental miscarriage of justice, which is established by demonstration that, had the changed law been in effect at the time of the applicant's trial, a reasonable trier of fact would have a reasonable doubt as to the guilty of the applicant;

(8) that after the imposition of sentence, the applicant seeks to withdraw a plea of guilty or nolo contendere in order to correct manifest

injustice under the Alaska Rules of Criminal Procedure; or

(9) that the applicant was not afforded effective assistance of counsel at trial or on direct appeal

Alaska Statute 12.72.020 (2005) provided in part:

(a) A claim may not be brought under AS 12.72.010 or the Alaska Rules of Criminal Procedure if

. . . .

(3) the later of the following dates has passed, except that if the applicant claims that the sentence was illegal there is no time limit on the claim:

(A) if the claim relates to a conviction, two years after the entry of the judgment of the conviction or, if the conviction was appealed, one year after the court's decision is final under the Alaska Rules of Appellate Procedure[.]

. . . .

(b) Notwithstanding (a)(3) and (4) of this section, a court may hear a claim

. . . .

(2) based on newly discovered evidence if the applicant establishes due diligence in presenting the claim and sets out facts supported by evidence that is admissible and

(A) was not known within

(i) two years after entry of the judgment of conviction if the claim relates to a conviction;

(ii) two years after entry of a court order revoking probation if the claim relates to a court's revocation of probation;

. . . .

(B) is not cumulative to the evidence presented at trial;

(C) is not impeachment evidence; and

(D) establishes by clear and convincing evidence that the applicant is innocent.