No. 08-6

In The Supreme Court of the United States

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

Petitioners,

v.

WILLIAM G. OSBORNE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

The Petition should be denied for three reasons. First, the legal issues it concerns – whether certain convicted persons may conduct previously-unavailable DNA testing, at no cost to the State, in order to establish their actual innocence – is one that in 2008 is almost exclusively addressed by state statute, rather than federal constitutional law. Second, the rare occasions that the federal courts have been asked to consider applications for DNA testing under 42 U.S.C. §1983 have not yielded an active circuit split on either of the questions petitioners ask the Court to address. Instead, the federal courts' consideration of such suits has proceeded cautiously, and the shallow split that briefly existed concerning the propriety of using 42 U.S.C. §1983 as a vehicle was put to rest by this Court's decision in *Wilkinson v. Dotson*, 544 U.S. 74 (2005). Finally, the decision below was correct, constituting an appropriate and narrowly tailored application of the Due Process Clause to the facts of respondent Osborne's compelling case.

STATEMENT

In March 1993, two men drove a woman named K.G. to a secluded, wooded area in Anchorage, Alaska and brutally assaulted her. Pet. App. 2a-3a. Only one of the men – the passenger in the vehicle, later alleged by the State to be Osborne – vaginally raped K.G. *Id.* 3a.

The passenger-rapist used a blue condom that K.G. had in her possession. *Id.* Upon canvassing the crime scene with K.G. the day after the assault, police recovered a blue condom containing semen. *Id.* 4a. The condom was located in close proximity to tire tracks that investigators concluded (based on the track pattern and the light layer of snow that had fallen the previous evening) had been made by the assailants' vehicle; it was also near a shell casing and the disturbed, bloody berm of snow where the assailants had shot K.G. and left her for dead. *Id.* Investigators also recovered two pubic hairs for analysis: one from the used condom, and one from K.G.'s sweater. The pubic hairs had "negroid features"; both assailants were black, while K.G. is white. *Id.* 6a.

After K.G. identified Osborne in a photo array as the man who looked "most like" the passenger-rapist, he was convicted by a jury of sexual assault, assault, and kidnapping in 1994. *Id.* 2a, 4a. Osborne maintained his innocence of the crime, asserting a misidentification and alibi defense. In particular, his counsel noted that Osborne was at least 40 pounds lighter and 5-10 years younger than the rapist described by K.G.; that she had reported the rapist was clean-shaven, yet Osborne had a moustache; and that K.G. was not wearing her glasses that night, with this highly traumatic event taking place in a dark area. *Id.* 7a.

The testimony of two forensic experts was crucial to the State's case against Osborne. First, a DNA analyst from the State's crime laboratory described

how he had subjected the semen from the condom to an early-generation form of DNA testing ("DQ Alpha"), which analyzes the alleles (genetic markers) present at a single location. He testified that Osborne's DQ-Alpha profile was consistent with the sperm on the condom. Yet the expert also conceded that the same DQ-Alpha profile was shared by as many as 14.7 to 16 percent of African Americans, *i.e.,* 1 in every 6 or 7 black men. *Id.* 5a. As such, the discrimination power provided by this form of testing, at a time when forensic DNA typing was in its infancy, was no greater than that of conventional serology, in that the genetic markers typed could be as common as standard ABO blood types.[1]

Both parties considered sending the semen evidence for more discriminating RFLP-DNA analysis (which, like DQ-Alpha, is no longer utilized by forensic DNA laboratories). However, RFLP testing required a larger, better-quality semen sample than the State's expert determined was present in the condom. *Id.* 5a-6a. For her part, defense counsel made what she later characterized as a "strategic" decision to forgo any further attempts at DNA testing, out of concern that the results could inculpate Osborne; she could not recall, however, whether (as Osborne maintained in

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[1] *See, e.g.*, George Garraty et al., *ABO and Rh(D) phenotype frequencies of different racial/ethnic groups in the United States*, 44 TRANSFUSION 703, 704 (May 2004) (reporting that Type AB antigens are found in 4.3%, and Type B antigens found in 19.7%, of African Americans).

post-conviction proceedings) he affirmatively requested that she pursue more discriminating DNA testing pretrial, stating only that she "would have disagreed with him" had he done so. *Id.* 6a, 99a.

A state criminalist also analyzed the "Negroid" pubic hairs found in the condom and on K.G.'s sweater, and told the jury that they each "exhibited the same microscopic features" as Osborne's hair. *Id.* 6a. Based upon the DQ-Alpha test results and the microscopic hair analysis, the prosecutor argued to the jury that both the pubic hair and semen evidence "matched" Osborne. *Id.* 32a; C.A. App. 48, 139, 144, 147, 150. For its part, the defense did not dispute that the pubic hair and semen were deposited by the passenger-rapist – only whether the State's witnesses had established that Osborne was in fact that man.

All three items of forensic evidence remain in the State's possession. It is also undisputed that after trial, two advanced forms of forensic DNA testing became widely available, both of which have the capacity to determine to a virtual scientific certainty whether or not the State correctly alleged that Osborne was the source of this semen and pubic hair evidence. Pet. App. 16a-17a. These methods – STR and mitochondrial DNA testing – are now routinely utilized by crime laboratories nationwide to obtain highly discriminating DNA profiles from small, degraded samples of semen and hair evidence. *Id.* 5a, 11a, 47a.

Osborne first sought leave of the Alaska Superior Court to release this evidence for advanced DNA testing. *Id.* 8a. His petition, filed pursuant to Alaska's general post-conviction relief statute (Alaska, unlike most other states, has no statutory vehicle for post-conviction DNA testing) asserted both state and federal constitutional grounds. *Id.* He next filed suit in federal court pursuant to 42 U.S.C. §1983, alleging that petitioners' refusal to allow him to test the evidence using newly-available DNA techniques, at no cost to the State, violated several of his federally protected rights. *Id.*

In 2003, petitioners moved to dismiss, arguing, *inter alia*, that under *Heck v. Humphrey*, 512 U.S. 477 (1994), Osborne's DNA access suit was not cognizable under §1983. The district court granted the motion, but the Ninth Circuit reversed (*see* Pet. App. 51a) ("*Osborne I*"). The court concluded that because Osborne sought only DNA access, and would need to file an entirely separate action to obtain relief from his conviction and release from custody – one that would never be brought if the results were inconclusive or inculpatory – the *Heck* rule, which bars only those §1983 actions that "necessarily imply" the invalidity of a conviction or sentence, was inapplicable. *See* Pet. App. 58a-59a (quoting *Heck*). Petitioners did not seek *certiorari* after *Osborne I*.

After the merits of his constitutional claims were remanded to the district court, Osborne prevailed, *see* Pet. App. 46a, and the Ninth Circuit affirmed. Writing for a unanimous panel, Judge Brunetti concluded

that petitioners' refusal to permit Osborne access to the DNA evidence violated his Fourteenth Amendment right to due process of law, under the principles of *Brady v. Maryland,* 373 U.S. 83 (1963), and its progeny. Pet. App. 15a-26a. The court rested its due process analysis on no fewer than six factors present in Osborne's case, including that the DNA testing sought (1) involves evidence used to secure the conviction; (2) uses methods unavailable at trial that (3) are far more precise than the methods then available; (4) can conclusively determine whether Osborne is the source of the evidence; (5) can be conducted at no cost or prejudice to the State; and (6) is material to other forms of post-conviction relief still available to Osborne. *Id.* 44a.

Judge Brunetti carefully traced the myriad ways that DNA testing could prove dispositive in this regard. In particular, he reasoned, STR-DNA tests on the condom could not only exclude Osborne as the source of the sperm therein, but *also* confirm that the epithelial cells identified on the outside of the condom are from the victim, K.G.; similarly, the tests could show a common male profile among the sperm in the condom and the pubic hair recovered from K.G.'s sweater. *Id.* 37a-38a. This would decisively put to rest petitioners' "newly imagined" theory (advanced for the first time in post-conviction DNA proceedings, and in direct contradiction to their own arguments to the jury at trial) that the semen might not be connected to the crime after all. *Id.* 38a-39a. Further, entering any exclusionary STR-DNA profile into the

state and national DNA databank could "solidify Osborne's case for innocence" by yielding a "hit" to a known offender. *Id.* 39a; *see also infra* note 26 and accompanying text.

This petition followed. Notably, in the wake of Judge Brunetti's detailed opinion in *Osborne II,* the State appears to have abandoned its former contention that the DNA testing Osborne seeks could not prove his actual innocence or yield viable grounds for post-conviction relief (whether through the courts or clemency), but challenge only whether §1983 is an appropriate vehicle for obtaining access to that evidence.

REASONS FOR DENYING THE PETITION

I. The Issue of Access to Post-Conviction DNA Testing, While Fundamental, is Almost Exclusively Addressed Under State Law

Having spent more than six years in litigation over a simple request to conduct DNA testing, at his own expense, on the forensic evidence that was used to convict him, Osborne naturally does not quarrel with petitioners' characterization of the issue of post-conviction DNA access as one of great "importance," nor with its recognition of the power of this new technology to conclusively identify the perpetrators of crime and exonerate the wrongfully convicted. *See* Pet. 9, 24. As former Attorney General John Ashcroft

has observed, DNA testing is "nothing less than the 'truth machine' of law enforcement, ensuring justice by identifying the guilty and exonerating the innocent."[2] Yet it is precisely this broad national consensus about the probative value of DNA evidence that has led the states (and Congress) to address the issue – enacting, in little more than a decade, a broad array of legislation to afford DNA testing to convicted persons, and largely obviating the need for the federal courts to hear such claims.

The rapid pace of legislation also reflects this consensus. At the time of Osborne's March 1994 conviction, when forensic DNA testing was in its infancy, not a single state had a statute providing a vehicle for convicted persons to obtain DNA testing.[3] Today, forty-three states and the District of Columbia have such laws, the vast majority of which were enacted this decade.[4] And in 2004, Congress passed

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[2] *See* Naftali Bendavid, *U.S. Targets DNA Backlog*, CHI. TRIB., Aug. 2, 2001, at 10 (comments made at DOJ news conference to announce new funding for president's DNA initiatives).

[3] The first state to do so, New York, enacted a post-conviction DNA testing law in August 1994. The next state, Illinois, did not act until four years later. *See infra* n.4.

[4] *See* Ariz. Rev. Stat. §13-4240; Ark. Code Ann. §16-112-201; Cal. Penal Code §1405; Colo. Rev. Stat. §18-1-411; Conn. Gen. Stat. Ann. §52-582 (2003); Del. Code. tit. 11, §4504; D.C. Code Ann. §22-4133; Fla. Stat. Ann. §925.11; Ga. Code Ann. §5-5-41(c); Haw. Rev. Stat. §§844D-121-133; Idaho Code §19-4902; 725 Ill. Comp. Stat. Ann. 5/116-3; Ind. Code Ann. §35-38-7; Iowa Code §81.10; Kan. Stat. Ann. §21-2512; Ky. Rev. Stat. §422.285; La. Code Crim. Proc. Ann. art. 926.1; Me. Rev. Stat. Ann. tit. 15,

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(by overwhelming bipartisan vote) and President Bush signed similar legislation into law; the Justice for All Act ("JFAA") gives the nation's more than 200,000 federal prisoners a statutory right to petition for post-conviction DNA testing, where such testing could produce new, material evidence in support of a claim of actual innocence. *See* 18 U.S.C. §3600.

The states' recognition of the importance of meaningful access to post-conviction DNA testing has further been reflected in statutory amendments. A number of state legislatures have, for example, revised their original DNA testing statutes to account for subsequent advances in DNA technology;[5] to expand the class of eligible petitioners;[6] to eliminate

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§2137; Md. Code Ann., Crim. Proc. §8-201; Mich. Comp. Laws §770.16; Minn. Stat. §590.01; Mo. Rev. Stat. §547.035; Mont. Code Ann. §§46-21-110, 53-1-214; Neb. Rev. Stat. §29-4120; Nev. Rev. Stat. §176.0918; N.H. Rev. Stat. Ann. §651-D:1-D:4; N.J. Stat. Ann. §2A:84A-32a; N.M. Stat. Ann. §31-1a-2; N.Y. Crim. Proc. Law §440.30(1-a); N.C. Gen. Stat. §15A-269; N.D. Cent. Code Ann. §29-32.1-15; Ohio Rev. Code Ann. §2953.71; Or. Rev. Stat. §138.510 *et seq*.; Pa. Stat. Ann. 42 §9541 *et seq*.; R.I. Gen. Laws §10-9.1-11; Tenn. Code Ann. §40-30-403; Tex. Code Crim. Proc. Ann. art. 64.01 *et seq.*; Utah Code Ann. §78-35a-301; Vt. Stat. Ann. tit. 13, §5561 *et seq.*; Va. Code Ann. §19.2-327.1; Wash. Rev. Code §10.73.170; W. Va. Code Ann. §15-2B-14; Wi. Stat. Ann. §974.07; Wyo. Stat. Ann. §7-12-302-315.

[5] *See, e.g.*, Ark. Code Ann. §16-112-202(2) (2005); 725 Ill. Comp. Stat. Ann. 5/116-3 (a)(2) (2007).

[6] *See, e.g.*, Fla. Stat. Ann. §925.11(1)(a)(2) (2006) (amended to permit motions by persons convicted by plea of guilty or *nolo contedere*); N.Y. C.P.L. §440.30(1-a) (2004) (amended to permit motions to be filed by persons convicted after January 1, 1996).

statutes of limitation or expand the time in which testing applications may be filed;[7] and to relax the burden of proof required of petitioners who seek testing that may exculpate them.[8]

Access to post-conviction DNA testing in state court has also been facilitated by the executive and legislative branches of the federal government. In September 1999, the United States Department of Justice's National Commission on the Future of DNA Evidence ("the DOJ Commission") – a bipartisan group of law enforcement officials, attorneys, forensic scientists, and other criminal justice professionals – issued a comprehensive report surveying the legal landscape and proposing a framework to apply when convicted persons sought access to DNA testing.[9] Among other things, the DOJ Commission noted the disconnect between the states' traditional laws on post-conviction relief and the new capabilities of DNA

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[7] *See, e.g.*, Fla. Stat. Ann. §925.11(1)(b) (2006); La. Code Crim. Proc. Ann. art. 926.1(3) (2003).

[8] *See, e.g.*, Tex. Code Crim. Proc. Ann. §64.03(a)(2)(a) (2003); *Smith v. State*, 165 S.W.3d 351, 363-64 (Tex. Crim. App. 2005) (discussing legislative history of 2003 amendments to statute, requiring defendant seeking DNA testing to demonstrate only that "had [exculpatory] DNA results been available at trial, there is a 51% chance that the defendant would not have been convicted," rather than prove actual innocence.

[9] *See* Nat'l Instit. of Just., U.S. Dep't of Just., *Postconviction DNA Testing: Recommendations for Handling Requests*, Pub. No. NCJ 177626, Sept. 1999 (available at http://www.ncjrs.gov/pdffiles1/nij/177626.pdf) (last visited August 28, 2008).

technology, and identified certain categories of cases in which reasonable parties should readily concur on the propriety of allowing DNA testing without litigation.[10]

The DOJ Commission's call to action was answered by a spate of legislative activity: while only two states (New York and Illinois) had post-conviction DNA testing laws at the time the report was issued, an additional forty-one and the District of Columbia soon followed suit. Congress and the President have also sought to assist the states' efforts, appropriating $5 million for each of five fiscal years to fund laboratory services for indigent prisoners who successfully petition a state court for DNA testing.[11]

Osborne's §1983 action was necessitated by the fact that his home state – Alaska – is an outlier, one of just seven yet to enact a post-conviction DNA testing law. Alaska is also the only state in the Ninth Circuit without such a law.[12] Yet that may not remain

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[10] *See id.* at 3-5, 9-10. Furthermore, Respondent's case is precisely the kind of fact pattern (a rape committed by two assailants, in which semen from the crime was identified and preserved) that was identified by the DOJ Commission as a "Category 1" case, in which the exonerative potential of DNA testing is so evident that the state should concur on the propriety of testing without litigation. *See id.* at 4.

[11] *See* Kirk Bloodsworth Post-Conviction DNA Testing Grant Program, 42 U.S.C. §14136e (West 2004).

[12] *See supra* n.4. The Ninth Circuit also includes Guam (an unincorporated territory) and the Northern Mariana Islands (a

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true for long. In the 2006 legislative session, a post-conviction DNA testing bill, H.B.325, was approved by both the Judiciary and Finance Committees of Alaska's House of Representatives. *See* 2005 A.K. HB 325 (NS). Although agreement as to the bill's final language was not achieved by the time session ended, leading the bill's sponsor to withdraw it from consideration before a vote, proponents of the law have recently renewed their calls for legislative action.[13]

The prospect that a statutory vehicle may soon become available to afford the DNA testing Osborne seeks in this action thus raises a real possibility that, even if this Court were inclined to resolve the issues petitioners claim warrant its attention, state legislative action may moot the case before the Court issues a decision. Indeed, since petitioners apparently no longer deny that DNA testing has the scientific potential to establish Osborne's actual innocence of the crimes for which he was convicted, the State presumably would not contest his entitlement to relief were he to file a DNA testing motion pursuant to a duly-enacted Alaska statute. That is essentially what transpired in *Harvey v. Horan,* 285 F.3d 298

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commonwealth), neither of which have post-conviction DNA testing statutes.

[13] *See* Bill Oberly, *Evidence Preservation Should be a Priority*, ANCHORAGE DAILY NEWS, April 8, 2008 (noting Alaska's lack of statutes regarding post-conviction DNA preservation and testing).

(4th Cir. 2002), the first §1983 DNA access case to reach the federal circuit courts.[14]

Given this large and still-growing body of state statutory law, then, it should be unsurprising that in 2008, the federal courts are rarely the forum through which post-conviction DNA testing is sought or obtained. Indeed, out of the 220 convicted persons in the U.S. who have been exonerated by DNA testing to date, only one obtained his exculpatory DNA tests through a §1983 action.[15]

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[14] In *Harvey*, the plaintiff's suit for DNA access was denied by a three-judge panel, which held that the suit was barred by *Heck* and further opined that his underlying constitutional claims were without merit. While his petition for rehearing *en banc* was pending, however, Harvey obtained an order for DNA testing pursuant to a recently-enacted state DNA testing statute, thereby mooting the underlying controversy. *See id.* at 298. While two judges of the Fourth Circuit (one who was a member of the panel and one who was not) wrote separately to set forth their disparate views on the merits of the constitutional claims raised, they agreed that the intervening state court action deprived the *en banc* court of the power to rehear the case. *Id.* at 298; *id.* at 304, 325 (Luttig, J., respecting the denial of rehearing *en banc*).

[15] That petitioner, Bruce Godschalk of Pennsylvania, was convicted in 1986 of two rapes, after giving a detailed confession to the crimes, which he recanted at trial; at that time, however, DNA was unavailable to test the truth or falsity of his claims. He sought DNA testing post-conviction in the mid-1990s, when Pennsylvania had no post-conviction DNA testing statute; he was denied on the ground that his case did not fit the limited criteria under which the state courts had previously granted testing, with the court commenting that evidence of Godschalk's guilt appeared "overwhelming." *See Comm. v. Godschalk*, 679

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And there are still other factors that account for the relative rarity of post-conviction DNA access cases in federal court. One is the inherently limited class of would-be petitioners who bring such claims. Forensic experts estimate that only 5-10% of felony crimes involve biological evidence from the perpetrator that would be suitable for DNA testing.[16] More fundamentally, the class of persons who require *post-conviction* DNA testing to substantiate a claim of innocence is effectively unique to this historical moment, given (1) the now-widespread availability of DNA testing at the trial level, and (2) the extraordinary power and precision of the Short Tandem Repeat ("STR") DNA testing method that is now used by every local, state, and national DNA laboratory in the

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A.2d 1295, 1296-97 (Pa. Super. 1996). Finally, in a case of first impression, he secured DNA testing after filing suit under §1983. *See Godschalk v. Montgomery County Dist. Att'y's Office*, 177 F. Supp. 2d 366 (E.D. Pa. 2001). The DNA test results conclusively established Godschalk's actual innocence of both crimes and led to his release from prison and dismissal of all charges. *See* David Rudovsky & Seth F. Kramer, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, 151 U. PA. L. REV. 547, 550-51 (2002). Four months after Godschalk's release (which received considerable attention statewide), the Pennsylvania General Assembly unanimously enacted a post-conviction DNA testing statute, 42 Pa. C.S.A. §9543.1.

[16] *See, e.g.*, Testimony of Michael M. Baden, M.D., director of the Medicolegal Investigations Unit of the New York State Police, before the United States Senate Committee on the Judiciary, July 31, 2003, available at http://judiciary.senate.gov/hearings/testimony.cfm?id=886&wit_id=2494 (last visited Sept. 14, 2008).

United States. STR-DNA testing, though not validated for forensic use until 1999, has rapidly become the "gold standard" of DNA analysis – both because of its ability to obtain DNA profiles from small and degraded samples, and of its power to generate profiles that are, as a statistical matter, "effectively unique" in the world's population.[17] Thus, the limited class of persons with viable claims for post-conviction DNA access – whether in state or federal court – is confined not only to those for whom biological evidence was actually collected and preserved, but also to those convicted at a time when DNA was either wholly unavailable or (as at Osborne's trial) still at a rudimentary stage of development.

II. There is No Active Circuit Split on Either Question Presented

According to petitioners, the federal circuit cases that have addressed post-conviction DNA access claims since the advent of STR-DNA testing have divided on two issues: (1) whether such claims are cognizable under §1983 or are, instead, barred under *Heck v. Humphrey*, 512 U.S. 477 (1994), and (2) whether the State's refusal to permit access to

[17] *See, e.g.*, *Harvey II* (Luttig, J., respecting the denial of rehearing *en banc*), 285 F.3d at 305; John M. Butler, FORENSIC DNA TYPING: BIOLOGY, TECHNOLOGY, AND GENETICS OF STR MARKERS 146 (2d ed. 2005); Nat'l Instit. of Just., U.S. Dep't of Just., *The Future of Forensic DNA Testing* 39-40 (Nov. 2000); *Banks v. United States*, 490 F.3d 1178, 1188 (10th Cir. 2007).

potentially exculpatory DNA evidence violates a convicted person's rights under the Due Process clause of the Fourteenth Amendment.[18]

Both of petitioners' contentions are incorrect. A short-lived split among the first three circuits to consider the *Heck* issue in this context was vitiated two years ago by this Court's decision in *Wilkinson v. Dotson,* 544 U.S. 74 (2005) – with all three circuits to weigh in since *Dotson* expressly recognizing that it allows suits like Osborne's to proceed. As for the substantive constitutional questions in these cases,

[18] Although the petition frames the right-of-DNA-access issue raised in the Circuits to date as one exclusively grounded in *Brady* and its progeny, in both the instant case and the three others cited by petitioner as evidencing the alleged split (from the Fourth, Sixth, and Eleventh Circuits), the courts were also asked to consider alternative, equally compelling grounds for relief – including that denial of access to potentially exculpatory DNA evidence violates the petitioners' First and Fourteenth Amendment right of access to courts, and due process rights to effectively pursue parole and executive clemency. As discussed in Part II.B *infra*, each of these decisions clearly leaves open the door for litigants within these same Circuits to obtain DNA testing on one or more of these grounds, including, but not limited to, the *Brady* claim upon which the Ninth Circuit granted relief to Osborne. Moreover, in this case, as the grant of relief on *Brady* grounds obviated the need to address Osborne's alternative claims, *see* Pet. App. 44a n.4, meaning that a reversal by this Court would result in at most a remand. And if the lower courts on remand grant relief on an alternative ground – such as the one proposed by Judge Luttig in his *Harvey II* concurrence – that would almost certainly lead petitioners, who are so firm in their refusal to permit Osborne to conduct DNA testing, to seek review by this Court yet again.

the various Circuits have, in the handful of decisions issued to date, adopted an understandably cautious approach – primarily disposing of the cases on their facts, and reserving the constitutional questions for another day – a course of action that has yielded, at most, a shallow split among them. The fact-bound nature of these decisions, and the substantial areas of doctrinal agreement that is actually reflected within the various opinions, further establish that this "split," such as it is, does not warrant this Court's intervention at this time.

A. Post-*Dotson*, the Circuits are in Agreement that DNA Access Claims are Cognizable Under Section 1983

Puzzlingly, petitioners cite this Court's 2005 opinion in *Dotson* for the general, undisputed proposition that state prisoners may not use §1983 as a vehicle to directly challenge the fact or duration of imprisonment, *see* Pet. 11 – yet fail to acknowledge that the courts of appeals have uniformly read that very decision to require a result adverse to the State's position on the very access-to-DNA-evidence issue upon which *certiorari* is sought. Petitioners' claim of a circuit split boldly disregards the widely-recognized and decisive impact of *Dotson*.

In 2002, three circuits considered the *Heck* issue in the DNA-access context. The Eleventh Circuit, applying the plain terms of *Heck*, concluded that success in a prisoner's suit seeking only DNA *testing*

of evidence was cognizable under §1983, since "[n]othing in that result necessarily demonstrates or even implies that his conviction is invalid." *Bradley v. Pryor*, 305 F.3d 1287, 1290 (11th Cir. 2002). This was so, the *Bradley* Court reasoned, because the testing could well prove inculpatory or inconclusive (thus providing no grounds to challenge the conviction), and even exculpatory results would require the convicted person to file an entirely separate action to initiate such a challenge. *Id.*

Two other circuits reached a different result. The Fourth Circuit, divided 2-1 on this issue, focused on the plaintiff's underlying motives for the suit. Because the plaintiff sought DNA testing "as a first step in undermining his conviction," and "believes that the DNA test results will be favorable and will allow him to bring a subsequent motion to invalidate his conviction[,]" the court reasoned, the *Heck* bar applies. *Harvey v. Horan*, 278 F.3d 370, 375 (4th Cir. 2002) ("*Harvey I*").[19] The Fifth Circuit adopted *Harvey I's* reasoning in a brief per curiam decision. *See Kutzner v. Montgomery County*, 303 F.3d 339, 340-41 (5th Cir. 2002).[20]

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[19] As previously noted, however, the underlying controversy in *Harvey I* was mooted while a petition for rehearing *en banc* was pending, by a state court's grant of relief under a newly enacted statute. *See supra note 15* and accompanying text.

[20] Petitioners also cite an unpublished decision of the Sixth Circuit, *Boyle v. Mayer*, 46 F. App'x 340 (6th Cir. 2002) (unpub.). Yet *Boyle* is not properly part of the pre-*Dotson* circuit split, as

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Three years later, however, this Court rejected the states' efforts to extend *Heck's* exception to a prisoner's "underlying motives" for bringing suit. A circuit split had emerged over whether *Heck* barred a §1983 suit that challenged the constitutionality of parole procedures and sought new, properly-conducted proceedings, but did not ask that the result of the parole hearing, *i.e.,* the denial of parole, be overturned. After granting *certiorari* in one such case, the Court concluded that the prisoner-respondents' §1983 suits were allowable because "a favorable judgment [would] not 'necessarily imply the invalidity of [their] conviction[s] or sentence[s].'" *Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005) (quoting *Heck*, 512 U.S. at 487 (alteration in *Dotson*)). Rather, success for these prisoners would mean, at most, reconsideration of their parole eligibility or a new parole hearing. *See id.* Accordingly, because these procedural changes would not "necessarily spell speedier release" from prison, the prisoners' §1983 suits were not barred by *Heck*. *Id.*

Notably, the *Dotson* Court specifically considered and rejected the State's contention that the suits were barred "because [the prisoners] believe[d] that victory

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the Sixth Circuit has recently made clear that the case "has no binding precedential value" and that the *Heck* issue remains open. *In re Smith*, No. 07-1502 (6th Cir. Dec. 10, 2007) (available at http://pacer.psc.uscourts.gov) (citing post-*Dotson* circuit cases, and appointing counsel to brief the *Heck* issue anew on behalf of *pro se* petitioner).

on their claims will lead to speedier release from prison," 544 U.S. at 78, explaining that the prisoners' underlying motive for seeking reform to the parole procedures was irrelevant under the functional analysis required by *Heck*. *See id.*

Every Circuit to consider the issue since *Dotson* has concluded that *Heck* is no bar to a prisoner's §1983 action in which the relief sought is limited to DNA access, and has recognized *Dotson* as controlling on this point. Most recently, in *McKithen v. Brown*, 481 F.3d 89, 103 n.15 (2d Cir. 2007), *cert. denied*, 128 S. Ct. 1218 (2008), the Second Circuit joined this "emerging consensus" among the post-*Dotson* courts, and noted that the state's central *Preiser-Heck* objection based (as here) on a petitioner's ultimate purpose in bringing suit was decisively "laid to rest by the Supreme Court in *Dotson*." (Troublingly, petitioners do not even mention – much less distinguish – *McKithen*.) *See also Osborne I,* Pet. App. 59a (citing and adopting the reasoning of Eleventh Circuit in *Bradley* and Judge Luttig's opinion in *Harvey II*, and finding that "[a]ny remaining doubt about the propriety of this approach is removed . . . by the Court's recent opinion in *Dotson*"); *Savory v. Lyons*, 469 F.3d 667, 671-72 (7th Cir. 2006) (applying *Dotson's* "narrow" interpretation of *Preiser-Heck* bar to find DNA-access suit cognizable).

This post-*Dotson* unanimity is unsurprising, not only because of *Dotson's* analogous context, plain language, and reasoning, but also because in the *Dotson* proceedings, the State defendants and their

amici expressly recognized that the Court's resolution of that case would likely also settle the split that had emerged in the circuits' three DNA-access cases to date.[21]

The Fourth and Fifth Circuits have not yet considered the impact of *Dotson* on their earlier decisions in *Harvey I* or *Kutzner*. But in light of *Dotson*'s express rejection of the "underlying motives" rationale upon which those cases were based, there is no reason to suspect that they will adhere to their prior decisions, if and when they are asked to do so.

The instant petition makes only cursory mention of *Dotson,* and fails to acknowledge its impact on the DNA access cases to date (asserting only, and with no external support, that *Dotson* "does not conflict" with the prior rulings of the Fourth and Fifth Circuits).

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[21] In seeking certiorari, the petitioners in *Dotson* argued that, by clarifying the scope of *Heck*, the Court would not only resolve the parole-hearing split at issue but also provide guidance on the DNA-evidence split in the circuits. *See* Pet. 27-28, *Wilkinson v. Dotson*, No. 03-287 (Aug. 18, 2003). A group of sixteen state *amici* also urged the Court to grant certiorari to resolve "lingering questions" regarding the scope of *Heck*, including the split between *Bradley* and the Fourth Circuit's decision in *Harvey I*. States of Alabama, et al., Amicus in Support of Certiorari Pet. 2, 4-7, 11, *Wilkinson v. Dotson*, No. 03-287 (Sept. 22, 2003). At the merits stage, *amici* also cited the overlap between the *Dotson* question and the DNA question. States of Alabama, et al., Amicus Br. 7-8 n.1, *Wilkinson v. Dotson*, No. 03-287 (July 19, 2004) (urging Court to adopt *Harvey I*'s reasoning and find that any suit is barred by *Heck* if brought "as the first step toward" gaining earlier release).

See Pet. 16. Clearly, petitioners' attempt to reanimate a no-longer-active split is unworthy of *certiorari*.

B. There Is No Active Circuit Split as to Whether the Due Process Clause May Require Access to DNA Evidence

Petitioners similarly overstate their claim of a circuit split on the substantive constitutional issue, *i.e.,* whether it may ever be appropriate to apply the Due Process Clause to overcome a State's refusal to permit a convicted person access to DNA testing, at his own expense, for the purpose of establishing his innocence of the crime for which he is incarcerated. It is true that Judge Brunetti's opinion here marks the first in which a circuit court has held that an individual plaintiff has met the demanding showing required in such cases and ordered the evidence be released for DNA testing. But the other three circuits to consider similar applications thus far (the Fourth, Sixth, and Eleventh) have by no means foreclosed that same result in their own jurisdictions. Indeed, their fact-bound, expressly limited decisions belie petitioners' claim of an active circuit split, much less one that requires immediate resolution by this Court.

In the first of these cases, *Harvey v. Horan*, a panel of the Fourth Circuit reversed a Virginia district court's finding that the Due Process clause prevented the State from denying post-conviction DNA testing to the plaintiff (a prisoner convicted of rape at a time when DNA analysis was unavailable),

where such testing could be conducted at no cost to the State and had the scientific potential to yield material, exculpatory evidence in his favor. *See Harvey I,* 278 F.3d at 378-79. In a section of the opinion that was arguably *dicta* (the *Harvey I* panel had already found the entire §1983 action was barred under *Heck*, *see id.* at 375), the panel pronounced itself "not persuaded" by the claim on which Harvey had prevailed in the district court – namely, that *Brady* and its progeny precluded a State from denying access to potentially exculpatory DNA testing after conviction. *Id.* at 378-79.

Harvey sought rehearing *en banc* on both issues. While his *en banc* petition was pending, however, he secured – under Virginia's then newly-enacted post-conviction DNA testing statute – the very relief he sought in his §1983 action (an order for DNA testing), thereby mooting the underlying controversy. *See Harvey II* at 298. The intervening state court action rendered the panel's decision unreviewable by the full Fourth Circuit. *Id.* at 298, 325. Notably, however, Judge Luttig, who had not been a member of the original panel, wrote separately and at length to express the view that, were it not for the intervening state court resolution, he would have urged the full court to rehear the case and to recognize, "at least in limited circumstances," a fundamental constitutional right of access to post-conviction DNA testing:

> [A]t least where the government holds previously-produced forensic evidence, the testing of which concededly could prove beyond any

> doubt that the defendant did not commit the crime for which he was convicted, the very same principle of elemental fairness that dictates pre-trial production of all potentially exculpatory evidence dictates post-trial production of this infinitely narrower category of evidence. And it does so out of recognition of the same systemic interests in fairness and ultimate truth.

Id. at 315, 317 (Luttig, J., respecting the denial of rehearing *en banc*).

Judge Luttig's opinion in *Harvey II* has proved influential outside the Fourth Circuit, further belying petitioners' claim that the Circuits have meaningfully split on the fundamental legal questions presented. For example, in the second of the three cases cited by petitioners as evincing this alleged split, *Grayson v. King*, 460 F.3d 1328 (11th Cir. 2006), *cert. denied*, 474 U.S. 865 (2007), the Eleventh Circuit denied a request by the petitioner, a death-sentenced inmate facing impending execution, to conduct DNA testing on evidence from his 1982 capital murder conviction. The Court rested its denial, however, on two fact-bound conclusions specific to Grayson's individual bid for DNA testing: first, that his claim of actual innocence was newly-asserted and inconsistent with his own trial testimony (in which he admitted being present at and participating in the crime, but offered an intoxication defense), and second, that even if the hypothesized DNA test results were exclusionary, Grayson would still be guilty of capital murder as a

co-participant. *See id.* at 1339, 1342. The Eleventh Circuit expressly left open the legal question of whether the Due Process Clause might, in an appropriate case, be applied to require the state to provide a petitioner with access to post-conviction DNA testing:

> Today we need not and do not decide whether there can *ever* be a post-conviction right of access to the type of biological evidence Grayson seeks for DNA testing. Rather, we simply conclude that under the particular circumstances of this case, Grayson cannot show such an entitlement. . . .
>
> Our decision here in no way demeans the value of DNA testing or suggests that it should not be made available post-conviction; it simply holds that Grayson has asserted no constitutional right to it under the factual circumstances of the case.

Id. at 1342-43 (emphasis in original). Indeed, the Eleventh Circuit favorably cited Judge Luttig's *Harvey II* analysis as to when the Due Process Clause should be read to require post-conviction DNA access, noting that "Grayson's case does not fall into the limited class of cases described" in that opinion. *Id.* at 1342. Finally, were there any doubt that *Grayson* left the issue open, two subsequent Eleventh Circuit §1983 DNA-access cases since *Grayson* have made that clear. *See Arthur v. King*, 500 F.3d 1335, 1339 (11th Cir. 2007) (emphasizing that "[i]n *Grayson,* we [denied DNA testing] under the factual circumstances

of the case, but left open the possibility that another §1983 plaintiff might prevail," and proceeding to deny plaintiff Arthur's claim for testing without reaching constitutional issue); *Thompson v. McCullum*, 253 F. App'x 11, 2007 WL 3171330 (11th Cir. Oct. 31, 2007) (same, in *pro se* prisoner's §1983 suit).

Nor does the third and final case cited by petitioners on this issue establish the professed split. *See* Pet. 19 (citing *Alley v. Key,* 2006 WL 1313364 (6th Cir. May 14, 2006), *cert. denied*, 548 U.S. 921 (2006)). *Alley* was not only an unpublished, two-page decision by the Sixth Circuit denying relief to a death row inmate on the eve of his execution, but one in which the panel took pains to emphasize its limited precedential effect. *See id.* at *1 ("Though this case and its expedited briefing schedule *do not encourage a definitive resolution on all aspects of the matter*, we agree, *for purposes of the dispute now before us*, with the district court's ruling that there exists no general constitutional right to post-judgment DNA testing."); *id.* at *2 ("*Brady* cannot be said to reach post-conviction access for DNA testing *in the circumstances presented by the case before us.*") (emphasis supplied). *Alley*'s limited scope has further been evidenced by the fact that it has been cited in only one such ruling by its sister circuits, and only in a two-sentence footnote. *See Grayson*, 460 F.3d at 1339 n.7.

In sum, then, petitioners' alleged "split in the circuits" on the due process issue consists of one case in the Fourth Circuit whose underlying dispute was

mooted while the *en banc* petition was pending; a case in the Eleventh Circuit that was denied on its facts and expressly left open the underlying constitutional issue; and an unpublished Sixth Circuit ruling that emphasized its fact-bound, limited scope.

III. The Decision Below Was Correct

The Ninth Circuit appropriately applied the basic protections of the Due Process Clause to permit Osborne one simple form of injunctive relief: release of the very items of forensic evidence used by the State to secure his conviction for previously-unavailable DNA testing. The court's determination that where, as here, such testing will be performed at no cost to the State, and can provide scientifically-unassailable evidence that might not only be material to a convicted person's claim of innocence, but may conclusively establish his actual innocence beyond any doubt, falls within the core of this Court's long-standing recognition of the Due Process Clause's guarantees. *See, e.g.*, *California v. Trombetta*, 467 U.S. 479, 485 (1984) (discussing line of cases regarding "constitutionally guaranteed access to evidence," which derive from the twin constitutional imperatives of "protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system"); *Harvey II*, *supra*, 285 F.3d at 315, 320 (Luttig, J.) ("A right of access to evidence for tests which, given the particular crime for which the individual was convicted and the evidence that was offered by the government at trial in support of the

defendant's guilt, could prove beyond any doubt that the individual in fact did not commit the crime, is constitutionally required, I believe, as a matter of basic fairness. . . . That the Constitution should recognize a limited right of access to previously-produced forensic evidence should be unsurprising.") (internal citations omitted).

Indeed, Judge Brunetti's opinion was apparently so persuasive in its application of these principles to the facts of Osborne's case as to lead petitioners to now abandon their earlier contention that the requested DNA testing does not have the potential to conclusively prove Osborne's actual innocence – other than to note (in an aside that further complicates the legal issues raised, and would make this case particularly inappropriate for *certiorari*) that his request to conduct STR-DNA testing differs from the "strategic" choice made by his appointed attorney at trial to forgo an earlier form of DNA re-testing.[22]

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[22] *See* Pet. 4-5 (noting that in post-conviction proceedings, Osborne's trial attorney attested that after the state's testing indicated that Osborne was among one out of six persons in the general population who shared the DQ-Alpha DNA profile in the semen from the condom, she decided not to pursue potentially more discriminating RFLP-DNA testing for fear that the results might inculpate him). To the extent petitioners believe this fact is important, it would seem to make this case a poor vehicle for resolving the broader constitutional questions at issue – inasmuch as this Court would not only need to consider whether the Due Process Clause may preclude the state from barring access to potentially exculpatory DNA testing after conviction, but also whether a convicted person may be said to waive that right by

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Nor is there any merit to petitioners' claim that the decision has created "a litigation-style discovery right" with a "potentially enormous impact on the states." Pet. 10, 25. The court carefully limited its holding to a narrow and highly specific class of post-conviction cases, like Osborne's, in which the nexus between the DNA evidence to be tested, the petitioner's trial, and his ultimate claim for post-conviction relief are plain. *See* Pet. App. 44a. More fundamentally, the simple, ministerial act that a State is required to perform when a plaintiff prevails – transferring the forensic evidence in its possession to a DNA laboratory – is hardly akin to the burdens of civil "discovery." As Judge Brunetti aptly noted, "[t]he evidence can be produced easily and without cost to

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reason of his trial attorney's claim that she made a strategic decision to forgo an earlier form of DNA re-testing (one which, moreover, is no longer in use, and which the state concedes is less advanced than the current STR-DNA methods, *see* Pet. App. 5a n.2). Small as the class of persons who were convicted before the advent of DNA testing and now seek it through Section 1983 actions may be, even smaller still is the sub-class of persons who, like Osborne, were convicted in this small historical window amidst the technology's evolution. Moreover, if his STR-DNA testing does prove exculpatory, Osborne will not be the first convicted person to be exonerated after an attorney did not pursue DNA testing for "strategic" reasons that were based on incorrect assumptions about a client's probable guilt. *See Toney v. Gammon*, 79 F.3d 693 (8th Cir. 1996) (granting DNA testing for purpose of establishing habeas petitioner's claim that trial counsel was ineffective for failing to pursue DNA testing at his rape trial); Samuel R. Gross et al., *Exonerations in the United States*, *1989-2003*, 95 J. Crim. L. & Criminology 523, 558 (Winter 2005) (Toney exonerated by DNA testing).

the state," and it is only petitioners' "simple refusal to open the evidence locker" that has occasioned these last six years of litigation. Pet. App. 42a-43a. Indeed, that this ruling will not unduly burden the states is made clear by the fact that nearly every state in the nation has already undertaken to impose a similar obligation *on itself* – recognizing, in enacting their post-conviction DNA testing statutes, that the profound benefits to the justice system far outweigh the minimal "burdens" these laws may require to be implemented. And as noted *supra*, many of these states' own laws (in original or amended form) go well beyond the no-cost relief Osborne seeks here, providing, *inter alia*, for the appointment of counsel and state-funded DNA tests for indigent petitioners.

Petitioners' claim that the decision below rests on a faulty premise – that "freestanding" actual innocence claims are cognizable under the United States Constitution, *see Herrera v. Collins*, 506 U.S. 390 (1993) – also cannot withstand scrutiny. First, the Ninth Circuit was careful to note that this Court expressly declined to resolve the issue in *Herrera* and, most recently, in *House v. Bell*, 547 U.S. 518, 554-55 (2006) – and its own decision in no way purported to step into the breach. *See* Pet. App. 21a ("In resolving the instant appeal, we need not decide the open questions surrounding freestanding innocence claims."). For even if such claims were not cognizable, if the post-conviction DNA tests Osborne seeks do in fact provide conclusive proof of his innocence, he has numerous other routes to obtain relief. These

include, among others, a post-conviction relief petition based on newly discovered evidence under Alaska law; a federal habeas petition asserting a "gateway" claim of actual innocence, to permit the consideration of otherwise-barred constitutional claims (such as ineffective assistance of trial counsel); and/or a petition for executive clemency.[23] Accordingly, petitioners' assertion that the panel opinion constitutes a "split" with as many as nine of its sister circuits on the *Herrera* issue (*see* Pet. 21-22) not only badly mischaracterizes the opinion itself, but is, post-*House*, also a highly disingenuous citation to these other courts' opinions.[24]

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[23] *See* Pet. App. 19a, 42a, 44a n.4. Indeed, as DNA test results of the sort outlined by Judge Brunetti would constitute new evidence of actual innocence, Osborne's claim would fall squarely within Alaska's existing statutory vehicles for post-conviction relief. *See* Alaska Stat. §12.72.010(4) (petitions authorized where there exists "evidence of material facts, not previously present and heard by the court, that requires vacation of the conviction or sentence in the interest of justice"); *see also* Alaska Stat. §12.72.020 (excusing procedural bars where due diligence yields new evidence that "establishes by clear and convincing evidence that the applicant is innocent"); Alaska Stat. §33.20.070 (giving governor broad authority to grant "pardons, commutations of sentence, and reprieves").

[24] Prior to *House*, which made clear that *Herrera* did not decide whether a freestanding actual innocence claim can ever be cognizable, *see House*, 547 U.S. at 554-55 ("*House* urges the Court to answer the question left open in *Herrera* and hold not only that freestanding innocence claims are possible but also that he has established one. We decline to resolve this issue."), some state and federal courts had read *Herrera* to foreclose that possibility. Eight of the nine cases cited by

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As members of this Court have noted, given the extraordinarily high factual showing that would necessarily be required for a petitioner to prevail on a *Herrera*-type claim, this Court may never have cause to address the underlying legal question of whether such claims are cognizable.[25] Were this Court so inclined, however, this case's current posture makes it a singularly poor vehicle for doing so. The question whether such claims are cognizable on habeas is surely one that is properly resolved on habeas, *i.e.,* when a habeas petitioner asserts that he has sufficient proof of innocence to warrant a federal court to overturn his conviction on that basis alone. Osborne has filed no such petition, and makes no such claim; he readily concedes that doing so (whether in state or federal court, or in a clemency petition) without benefit of exculpatory DNA test results would be futile. But as the court below observed, by refusing to allow DNA testing yet asking the federal courts to peremptorily deny his hypothetical, not-yet-ripe

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petitioners as concluding "that a freestanding innocence claim is not cognizable" pursuant to *Herrera* predates *House*'s plain statement to the contrary; the ninth, *Foster v. Quarterman*, 466 F.3d 359 (5th Cir. 2006) acknowledges *House*'s impact, but determines that under Fifth Circuit rules it must consider itself bound by the opinion of a pre-*House* decision by another panel within the Circuit.

[25] *See Herrera*, 506 U.S. at 428 (Scalia and Thomas, JJ., concurring) ("With any luck, we shall avoid ever having to face this embarrassing question again, since it is improbable that evidence of innocence as convincing as today's opinion requires would fail to produce an executive pardon.").

innocence claim, it is *petitioners* who are asking the federal courts to prematurely reach this constitutional issue, rather than simply "allow[ing] the objective facts to come to light so that Osborne can actually file his actual innocence claim and support it with hard evidence." Pet. App. 27a. Indeed, given the myriad ways that DNA testing could establish Osborne's innocence beyond any doubt (including, *inter alia*, providing scientific proof not only that Osborne was not the rapist, but identifying the actual assailant through the convicted-offender DNA databank), once the DNA results are in hand, the State could well consent to relief, thereby obviating the need for Osborne to file a habeas petition at all.[26] Similarly, no grounds for further litigation would exist if the results prove inculpatory or inconclusive. Thus, it is only if and when (a) DNA testing is conducted, with exculpatory results, (b) despite exculpatory DNA

[26] This result is not uncommon in the post-DNA era – even in cases where, as here, the State had previously opposed the DNA testing that it later conceded was exculpatory. *See*, *e.g.*, *Warney v. City of Rochester*, 536 F. Supp. 2d 285, 289-90 (W.D.N.Y. 2008) (describing DNA testing that led to prosecutors' application to vacate murder conviction of Douglas Warney, after tests yielded on blood stains from crime scene led to databank hit on real perpetrator, a man with history of similar offenses who confessed that he committed the murder alone and had no connection to Warney). As of June 2008, there were over 6 million convicted-offender DNA profiles in the CODIS database, and the system had produced over 71,500 DNA "hits" in criminal investigations nationally. *See* Federal Bureau of Investigation, *CODIS/NDIS Statistics*, available at http://www.fbi.gov/hq/lab/codis/clickmap.htm (last visited September 17, 2008).

results, Osborne fails to obtain relief in state court or through clemency, *and* (c) he files a federal habeas petition asserting a freestanding innocence claim, that the State's *Herrera* objection will conceivably be ripe for review.

Lastly, it bears noting that the decision below was narrowly tailored to limit the scope of its due process ruling only to cases that are at least as compelling on their facts as Osborne's. *See* Pet. App. 44a-45a. Conversely, reversal of that holding would not even resolve the instant action with respect to this one individual. The panel's ruling in Osborne's favor made it unnecessary for the court to consider whether DNA access may, in the alternative, be required pursuant to any of the other federal constitutional claims Osborne pled in his complaint (including, *inter alia*, his First and Fourteenth Amendment rights of meaningful access to courts, and his due process right to pursue executive clemency). *See* Pet. App. 44a n.4. Thus, were this Court to reverse the decision below, the case would thereafter be remanded for consideration of Osborne's remaining, substantial constitutional claims.

CONCLUSION

This Court should deny the petition for certiorari.

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