No. 08-6

In the Supreme Court of the United States

DISTRICT ATTORNEY'S OFFICE FOR THE THIRD JUDICIAL DISTRICT, et al.,

Petitioners,

v.

WILLIAM G. OSBORNE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE STATES OF CALIFORNIA, ARIZONA, ARKANSAS, COLORADO, DELAWARE, FLORIDA, IDAHO, IOWA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEBRASKA, NEW HAMPSHIRE, NEW MEXICO, NORTH DAKOTA, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH DAKOTA, TENNESSEE, UTAH, VIRGINIA, WASHINGTON, WISCONSIN, WYOMING AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

Does the Due Process Clause confer a broad federal right to postconviction DNA testing, cognizable under 42 U.S.C. § 1983, that overrides comprehensive and meaningful state and federal postconviction DNA testing statutes nationwide?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES (continued)

Page

TABLE OF AUTHORITIES (continued)

Page

STATUTES

TABLE OF AUTHORITIES (continued)

Page

TABLE OF AUTHORITIES (continued)

Page

COURT RULES

OTHER AUTHORITIES

INTEREST OF AMICI CURIAE

Forty-four states, in addition to the Federal Government, have enacted postconviction DNA testing statutes. Other states provide alternative rules and procedures for pursuing such testing. The Ninth Circuit's broad right to postconviction DNA testing enforceable in 42 U.S.C. § 1983 actions undermines these effective and carefully-crafted state procedures, improperly overrides legislative judgments, and unnecessarily encourages federal bypass of state-law remedies. It also interferes with the finality of state criminal judgments and misallocates judicial resources by transforming federal district courts into routine arbiters of fact-specific DNA discovery disputes better entrusted to state trial courts.

SUMMARY OF ARGUMENT

Recognizing the importance of postconviction DNA testing, most state legislatures and the United States Congress have enacted comprehensive statutes that provide convicted offenders a meaningful opportunity to seek such testing in appropriate cases. Many of these state laws are modeled on the federal procedure set forth in 18 U.S.C. § 3600. Alaska and several other states provide reasonable non-statutory opportunities for testing. These state procedures allow convicted felons a fair opportunity for postconviction DNA testing while prudently enforcing limiting criteria that minimize wasteful and irrelevant testing. There is no legal foundation for the Ninth Circuit's reading of the Due Process Clause to require a less discriminate procedure, enforceable in § 1983 actions, that would supersede this national body of legislation.

The availability of DNA technology does not justify federal override of state postconviction discovery procedures. DNA testing is not a crystal

ball of guilt or innocence. It is, instead, a form of discovery the probative value of which depends upon the facts of any given case. In many cases, DNA testing after conviction would be a meaningless exercise. Even in seemingly meritorious cases, as the Ninth Circuit acknowledged, "there is a significant chance that the results [of DNA testing] will either confirm or have no effect on the validity of [a defendant's] confinement." *Osborne* v. *District Attorney's Office*, 423 F.3d 1050, 1054 (9th Cir. 2005) (*Osborne I*).

The Ninth Circuit's decision also misinterprets the Constitution's limited application to state postconviction procedures and violates principles of federalism and judicial restraint. Legislatures, not the federal judiciary, should take the lead in evaluating the proper role for identification technology in facilitating collateral attack on otherwise final state judgments. Accordingly, a claim for postconviction DNA testing under § 1983 should not be cognizable where a state itself already provides a meaningful opportunity for such testing.

ARGUMENT

I. STATE AND FEDERAL POSTCONVICTION DNA TESTING LAWS PROVIDE MEANINGFUL OPPORTUNITIES TO GENERATE EVIDENCE OF INNOCENCE

In accord with legislatures across the country, this Court observed in *House* v. *Bell*, 547 U.S. 518, 540 (2006), that DNA evidence can be of "central importance" to postconviction litigation concerning actual innocence. The necessity for a meaningful opportunity to obtain postconviction DNA testing in appropriate cases is not in dispute. However, most convicted offenders who would seek DNA testing in a § 1983 action would be pursuing a "second bite at the apple" with a different judge after being denied testing under applicable state or federal laws. The

Ninth Circuit's ruling in *District Attorney's Office* v. *Osborne,* 521 F.3d 1118 (9th Cir. 2008) (*Osborne II*), encouraging such challenges notwithstanding state process, ignored proper constitutional limits on judicial prerogatives and prudential limits on appropriate postconviction DNA testing.

A. The states have enacted carefully-crafted and effective DNA testing procedures

1. As of January 1, 2009, forty-four states, as well as the Federal Government, will have enacted statutory postconviction DNA testing procedures.[1] Of

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[1] 18 U.S.C. § 3600; Ariz. Rev. Stat. Ann. § 13-4240 (LexisNexis 2008); Ark. Code Ann. §§ 16-112-202 to -208 (2008); Cal. Penal Code § 1405 (Deering 2008); Colo. Rev. Stat. §§ 18-1-411 to -416 (2008); Conn. Gen. Stat. § 54-102kk (2008); Del. Code. Ann. tit. 11, § 4504 (2008); D.C. Code Ann. § 22-4133 (LexisNexis 2008); Fla. Stat. Ann. §§ 925.11 to 925.12, 943.3251 (LexisNexis 2008); Ga. Code Ann. § 5-5-41(c) (2008); Haw. Rev. Stat. Ann. §§ 844D-121 to -133 (LexisNexis 2008); Idaho Code Ann. § 19-4902(b)-(f) (2008); 725 Ill. Comp. Stat. Ann. 5/116-3 (LexisNexis 2008); Ind. Code Ann. §§ 35-38-7-1 to -19 (LexisNexis 2008); Iowa Code § 81.10 (2008); Kan. Stat. Ann. § 21-2512 (2006); Ky. Rev. Stat. Ann. § 422.285 (LexisNexis 2008); La. Code Crim. Proc. Ann. art. 926.1 (2008); Me. Rev. Stat. Ann. tit. 15, §§ 2137-2138 (2008); Md. Code Ann., Crim. Proc. § 8-201 (LexisNexis 2008); Mich. Comp. Laws Serv. § 770.16 (LexisNexis 2008); Minn. Stat. § 590.01(1a) (2008); Mo. Rev. Stat. §§ 547.035, .037 (2008); Mont. Code Ann. § 46-21-110 (2008); Neb. Rev. Stat. Ann. §§ 29-4116 to -4125 (LexisNexis 2008); Nev. Rev. Stat. Ann. § 176.0918 (LexisNexis 2008); N.H. Rev. Stat. Ann. § 651-D:2 (LexisNexis 2008); N.J. Stat. Ann. § 2A:84A-32a; N.M. Stat. Ann. § 31-1A-2 (LexisNexis 2008); N.Y. Crim. Proc. Law § 440.30(1-a) (Consol. 2008); N.C. Gen. Stat. §§ 15A-269 to -270.1 (2008); N.D. Cent. Code § 29-32.1-15 (2008); Ohio Rev. Code Ann. §§ 2953.71-2953.82 (LexisNexis 2008); Or. Rev. Stat. §§ 138.690 to .696 (2007); 42 Pa. Cons. Stat. Ann. §

(continued…)

the remaining six states—Alabama, Alaska, Massachusetts, Mississippi, Oklahoma, and South Dakota—most have set forth analogous procedures and standards in case law and other postconviction discovery rules.[2] DNA testing is available in federal habeas corpus proceedings as well upon a showing of good cause. See, *e.g.*, *In re Braxton*, 258 F.3d 250, 255 (4th Cir. 2001).

Postconviction DNA testing laws nationwide recognize that the opportunity to generate accurate and objective identification evidence enhances the integrity of the criminal justice system. At the same time, legislatures have taken care to construct effective statutory filters to ensure that testing will

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(…continued)
9543.1 (2008); R.I. Gen. Laws § 10-9.1-12 (2008); 2008 S.C. Acts 413 (to be codified at S.C. Code Ann. §§ 17-28-10 to -120 (effective Jan. 1, 2009)); Tenn. Code Ann. §§ 40-30-301 to 313 (2008); Tex. Code Crim. Proc. Ann. arts. 64.01-.05 (2007); Utah Code Ann. §§ 78B-9-301 to -304 (2008); Vt. Stat. Ann. tit. 13, §§ 5561-5570 (2007); Va. Code Ann. § 19.2-327.1 (2008); Wash. Rev. Code Ann. § 10-73-170 (LexisNexis 2008); W. Va. Code Ann. § 15-2B-14 (LexisNexis 2008); Wis. Stat. § 974.07 (2007); Wyo. Stat. Ann. §§ 7-12-303 to -315 (2008).

[2] See, *e.g.*, *Fagan* v. *State*, 957 So. 2d 1159, 1159 (Ala. Ct. Crim. App. 2007) ("the need for postconviction DNA testing may be presented in a Rule 32 [postconviction discovery] petition"); *Osborne* v. *State*, 110 P.3d 986, 995 (Alaska Ct. App. 1995) ("[A] defendant who seeks postconviction DNA testing must, at a minimum, meet the three-part test endorsed by the state courts . . . ."); *Grayson* v. *State*, 879 So. 2d 1008, 1017 n.4 (Miss. 2004) (leaving open the possibility of a valid non-statutory request for postconviction DNA testing); *Jenner* v. *Dooley*, 590 N.W. 2d 463, 472 (S.D. 1999) (setting forth specific guidelines governing requests for postconviction DNA testing); Mass. R. Crim. P. 30(c)(4) (2008) (authorizing discovery attendant to claim for postconviction relief and encompassing DNA testing per 2001 revision Reporter's Notes).

occur in truly meritorious cases but not in the many others where DNA testing would be a pointless and wasteful exercise. See, *e.g., State* v. *Reldan*, 861 A.2d 860, 865 (N.J. Super Ct. 2004) (postconviction DNA testing of hairs in defendant's car not warranted because "at best it might indicate that those particular hairs were not those of either or both of the victims, something that would not change the jury's verdict"). The Ninth Circuit's federal cause of action for postconviction DNA testing incorporates no such balance.

California's experience is illustrative. In the year following enactment of California's postconviction DNA testing statute, the California Innocence Project reviewed more than 1,400 inmate cases. Daniel Medwed, *Actual Innocents: Considerations in Selecting Cases for a New Innocence Project*, 81 Neb. L. Rev. 1097, 1116, n.71 (2003). This number does not include the unknown but possibly significant number of prisoner inquiries to public defenders and private defense attorneys throughout the State. In contrast to the Ninth Circuit's broad pronouncement, had California's law not established reasonable criteria designed to filter out cases inappropriate for DNA testing there likely would have been an unmerited and onerous degree of litigation in response to inmate motions.

Nationally, there are more than one million felony convictions every year. William Stuntz, *Unequal Justice*, 121 Harv. L. Rev. 1969, 2028 n.275 (2008). The Innocence Project reports receiving "about 3,000 requests now a year for post-conviction DNA testing . . . ." Hearing on DNA Forensics Initiatives Before the Subcomm. On Crime, Terrorism and Homeland Security of the H. Comm. On the Judiciary, 110th Cong. (April 10, 2008) (testimony of Peter Neufeld, Co-Founder and Co-Director, Innocence Project). There thus exists an enormous population of convicted felons, many of whom may perceive DNA testing as a means of improperly prolonging litigation and injecting a degree of

unfounded doubt into final judgments. Without effective filtering criteria, meritorious cases would have to stand in line behind cases unsuitable for testing, delaying the administration of justice.

Legislators have long recognized the importance of a measured, balanced approach to postconviction DNA testing. In 2000, for example, the United States Congress discussed the need for federal legislation authorizing postconviction DNA testing "only in cases in which testing has the potential to prove the prisoner's innocence[, because t]his standard will allow testing in potentially meritorious cases without wasting scarce prosecutorial and judicial resources on frivolous cases." 146 Cong. Rec. S9467 (daily ed. Sept. 28, 2000) (statement of Sen. Hatch). The Director of the National Institute of Justice echoed the need for calibrated legislation:

> [E]xperience also points to the need to ensure that postconviction DNA testing is appropriately designed so as to benefit actually innocent persons, rather than actually guilty criminals who wish to game the system or retaliate against the victims of their crimes. Frequently, the results of postconviction DNA testing sought by prisoners confirm guilt, rather than establishing innocence. In such cases, justice system resources are squandered and the system has been misused to inflict further harm on the crime victim.

149 Cong. Rec. S14046 (daily ed. Nov. 5, 2003) (statement of Sen. Kyl, quoting Sarah Hart, Director, NIJ); see, *e.g.*, *Cooper* v. *Brown*, 510 F.3d 870 (9th Cir. 2007) (detailing how extensive postconviction DNA testing confirmed that the convicted defendant was indeed the perpetrator). Jurisdictions nationwide have enacted effective DNA testing laws that address and achieve this balance.

2. The ultimate product of congressional deliberation on this issue, the Innocence Protection

Act of 2004 (IPA), was enacted after "years of work." 150 Cong. Rec. S11610 (daily ed. Nov. 19, 2004) (statement of Sen. Leahy); Pub. L. No. 108-405, §§ 413-432, 118 Stat. 2260, 2278-2293 (2004) (tit. IV of the Justice For All Act of 2004). Codified at 18 U.S.C. § 3600, the federal postconviction DNA testing statute requires a threshold showing that "was the subject of intense negotiations, as members recognized that setting the standard too low could invite frivolous applications, while setting it too high could defeat the purpose of the legislation and result in grave injustice." 150 Cong. Rec. S11611 (daily ed. Nov. 19, 2004) (statement of Sen. Leahy). Further, § 3600 provides "additional disincentives to filing false claims or trying to 'game the system.'" *Id*.

Section 3600, is, by design, the substantive and procedural model for its state counterparts. IPA § 413 (note to 42 U.S.C. § 14136 (2008), "Incentive Grants To States To Ensure Consideration Of Claims Of Actual Innocence"). Section 413 of the IPA provides federal grant funding—for law enforcement education and training, DNA research and development, missing-persons DNA programs, and postconviction DNA testing—only to those states affording convicted felons the opportunity to pursue postconviction DNA testing. *Id*. State postconviction DNA testing statutes enacted before the IPA took effect must provide such testing "to persons convicted after trial and under a sentence of imprisonment or death for a State felony offense, in a manner that ensures a reasonable process for resolving claims of actual innocence." *Id*. § 413(2)(A)(i). States lacking a postconviction DNA testing statute as of October 30, 2004, must develop a postconviction DNA testing procedure "comparable to section 3600(a)" in order to receive the specified grant funding. *Id*. § 413(2)(A)(ii). In addition, qualifying state laws must "permit[] the applicant to apply for postconviction relief, notwithstanding any provision of law that would otherwise bar such application as

untimely" if the DNA test results exclude the applicant. *Id*.

The IPA grants states "some flexibility in crafting their DNA laws. State procedures for providing postconviction DNA testing and preserving biological evidence need only be 'comparable,' not identical, to the federal procedures in sections 3600 and 3600A . . . ." 150 Cong. Rec. S11612 (daily ed. Nov. 19, 2004) (statement of Sen. Leahy). As the general template for postconviction DNA testing legislation nationwide enacted in the last four years, § 3600 incorporates the basic features of its state law analogues. See also Brandon Garrett, *Claiming Innocence*, 92 Minn. L. Rev. 1629 app. (2008) (state-by-state listing of core provisions of postconviction testing laws). The following are key elements of § 3600 and, by extension, many state statutes:

First, only currently incarcerated felons, including those sentenced to death, may request DNA testing. 18 U.S.C. § 3600(a); but see, *e.g.*, *People* v. *Schultz*, 799 N.E. 2d 930 (Ill. App. Ct. 2003) (Illinois statute affords postconviction DNA testing also to those who have completed their sentences). This avoids expenditure of judicial resources on testing for those who have served their sentences and thus lack an interest in release from custody. It also prevents those convicted of misdemeanors from placing an undue burden on courts, attorneys, and laboratories.

Second, if the applicant asserts under penalty of perjury that he is actually innocent, DNA testing may be sought in the case forming the basis for the current conviction, or another state or federal conviction used to enhance the current sentence. § 3600(a)(1).

Third, the motion for testing is made to the trial court "that entered the judgment of conviction." § 3600(a). These judges, having presided over the trial proceedings, are in the best position to assess the value of DNA testing in light of the facts of the case and evidence of guilt. Cf. *Watts* v. *United States*, 841 F.2d 275 (9th Cir. 1988) (trial judge who presided over the plea hearing was in the best position to evaluate a

motion to set aside the plea); see also Cal. Penal Code § 1405(f)(5) (permitting court to assess the DNA testing motion "in light of all the evidence . . . whether or not it was introduced at trial"). Subsequent review by a federal district court based on a cold or partial record would lack the same familiarity with the facts and knowledge of the entire case.

Fourth, the chain of custody attributable to the biological evidence at issue must be intact, "to ensure that [the evidence to be tested] has not been substituted, contaminated, tampered with, replaced, or altered in any [material] respect . . . ." § 3600(a)(4). DNA test results excluding the defendant as a source would be meaningless if there is indication that the evidence collected from the crime scene is not the same evidence, or in the same condition, as the evidence submitted for postconviction testing. See, *e.g.*, *Middlebrook* v. *State*, 918 A.2d 1170, 1170 (Del. 2007) (pointing to evidence item's "contamination by multiple handlings of several police officers, prosecutors, court personnel and the jury" in affirming denial of postconviction testing); accord, *United States* v. *Ivory*, 396 F. Supp. 2d 1253, 1258 (D. Kan. 2005) (citing expert witness testimony that "studies have shown that 'the major contributor [of DNA on an object] is generally the last person that handled' the object"). Especially in old cases where items may have been collected, handled, or stored without regard to the preservation of biological evidence, it is prudent for these issues to be taken into account.

Fifth, testing is precluded where the identity of the perpetrator was not an issue at trial. § 3600(a)(7). An Illinois appellate court explained:

> [O]ur legislature wanted postconviction forensic testing to occur only in those cases where such testing could discover new evidence at sharp odds with a previously rendered guilty verdict *based upon criminal acts that the defendant*

> *denied having engaged in*. Our legislature did not want convicted defendants who admitted at their trial to the commission of the acts charged, and did not contest the question of who committed those acts, to make a mockery of the criminal justice system and the statute's grace. It did not want defendants who tendered unsuccessful affirmative defenses at their trial to later disavow the commission of the acts charged, just so they could obtain postconviction testing of evidence meaningless to how they contested their guilt.
>
> Where a defendant contests guilt based upon self-defense, compulsion, entrapment, necessity, or a plea of insanity, identity ceases to be the issue.

People v. *Urioste*, 736 N.E. 2d 706, 714 (Ill. App. Ct. 2000) (emphasis in original).

Sixth, the physical evidence to be tested must be material to the issue of the perpetrator's identity. § 3600(a)(8); see *Richardson* v. *Superior Court*, 183 P.2d 1199, 1204 (Cal. 2008) (interpreting the California postconviction DNA testing law's "materiality" requirement to mean evidence that is "relevant to the issue of identity"). Where the absence of the defendant's DNA on an evidence item would have been unsurprising or insignificant at trial, testing is not merited. See, *e.g.*, *People* v. *Savoy*, 756 N.E. 2d 804, 811 (Ill. 2001) (bloodstain was not materially relevant to innocence claim because it was only minor collateral evidence at trial). For example, under this criterion cigarette butts found on the ground near a homicide scene in a public park generally would not be subjected to postconviction testing absent a showing that they had been smoked by the killer.

Seventh, the court must find that DNA test results may "raise a reasonable probability" that the

applicant is innocent of the charged offense. § 3600(a)(8)(B), 3600(a)(6)(B); see *Richardson* v. *Superior Court*, 183 P.2d at 1205 (citing *Strickland* v. *Washington*, 466 U.S. 668, 694 (1984), and holding that "reasonable probability" in this context refers to "a reasonable chance and not merely an abstract possibility . . . that the defendant would have obtained a more favorable result [at trial]"); but see *Anderson* v. *State*, 831 A.2d 858, 866-67 & nn.17 & 21 (Del. 2003) (noting that some states have adopted more lenient standards than "reasonable probability"). This criterion ensures that access to evidence after trial is no greater than access to evidence before trial. Cf. *Kyles* v. *Whitley*, 514 U.S. 419, 434 (1995).

This standard also appropriately forecloses DNA testing in cases where there is no reasonable probability that the absence of the convicted felon's DNA, or the victim's, would constitute proof that the convicted felon was not a perpetrator. See, *e.g.*, *Rivera* v. *State*, 89 S.W. 3d 55, 60 (Tex. Ct. Crim. App. 2002) (affirming the denial of postconviction DNA testing in part because, 18 hours after the crime, the presence of the victim's DNA under the defendant's fingernails could indicate guilt, but its absence would not indicate innocence). The purpose of postconviction DNA testing "is to establish the innocence of the petitioner and not to create conjecture or speculation that the act may have possibly been perpetrated by a phantom defendant." *Alley* v. *State*, No. W2004-01204-CCA-R3-PD, 2004 Tenn. Crim. App. Lexis 471, at *25 (Tenn. Ct. Crim. App. May 26, 2004), cert. den., *Alley* v. *Tennessee*, 544 U.S. 950 (2005).

For example, in a multiple-perpetrator sexual assault case, a vaginal swab collected from the victim during a post-event examination would not necessarily meet the "reasonable probability" threshold. The absence of any one perpetrator's DNA on the swab would not exculpate him. It would demonstrate only that his cellular material was not on that particular swab. See, *e.g.*, *Galloway* v. *State*, 802

So. 2d 1173, 1174 (Fla. Ct. App. 2001) ("The fact that only appellant's co-defendants may have deposited DNA at the crime scene or on the body of the victim does not mean that appellant was not there."); *People* v. *Gholston*, 697 N.E. 2d 375, 421 (Ill. App. Ct. 1998) (denying postconviction DNA testing because the absence of the applicant's DNA on a swab would not be exculpatory where "there were multiple defendants who participated in the sexual assault, one or more of whom may have ejaculated").

A theory of innocence based on exclusionary DNA test results should not be fueled by "what if's," assumptions, and possibilities. A testing standard that invites such creative speculation is no standard at all. In another context, this Court rejected a "conceivable benefit" test used by a lower court to evaluate whether the deportation of potential defense witnesses violated a defendant's right to compulsory process guarantees by the Sixth Amendment: "Given the vagaries of a typical jury trial, it would be a bold statement indeed to say that the testimony of any missing witness could not have 'conceivably benefited' the defense. To us, the number of situations which will satisfy this test is limited only by the imaginations of judges or defense counsel." *United States* v. *Valenzuela-Bernal*, 458 U.S. 858, 866-67 (1982). Rather, a defendant denied access to potential witnesses would have to make "at least" a "plausible showing of how their testimony would have been both material and favorable to his defense." *Id*. at 867.

Eighth, DNA testing may occur only if no testing was conducted previously, or if improved testing procedures have become available. § 3600(a)(3). If no DNA testing was conducted previously, that opportunity must not have been waived or declined knowingly. § 3600(a)(3)(A)(i)-(ii). This requirement avoids redundant and repetitive motions for testing.[3]

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[3] This requirement also likely would preclude testing in Respondent Osborne's case because Osborne knowingly and for (continued…)

In addition, the federal statute resolves questions of notice, § 3600(b), selection of laboratory, § 3600(c)(1)-(2), testing technology employed, § 3600(a)(5), payment of costs, § 3600(c)(3), and disclosure of results, § 3600(e).[4] It also provides for sanctions should the applicant's claim of innocence prove false in light of inculpatory DNA test results. § 3600(f)(2). In short, § 3600 is comprehensive and fair. It is designed to facilitate DNA testing in appropriate cases and filter out requests which, if pursued, would only delay justice and prevent closure for victims. And, in part due to the strong financial incentives built into the Innocence Protection Act of 2004, it has become a national model for this type of legislation.

B. The Ninth Circuit's holding is not a reasonable balancing of the interests implicated by postconviction DNA testing

Beyond its constitutional flaws discussed in Section II, below, the postconviction right to DNA testing created by the Ninth Circuit fails because it lacks the reasonable parameters and limitations integrated into federal and state laws. Most significantly, the Ninth Circuit placed a ceiling, but no floor, on the showing a convicted offender must make to obtain DNA testing: "[T]he standard of materiality applicable to Osborne's claim for postconviction access

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(…continued)
strategic reasons refused a highly discriminating DNA test available at the time of his trial. *Osborne II*, 521 F.3d 1118, 1123 & n.2.

[4] Unlike the federal statute, some state laws provide also for appointment of counsel to indigent defendants for investigation and preparation of a motion for postconviction DNA testing. See, *e.g.*, Cal. Penal Code § 1405(b); Conn. Gen. Stat. § 54-102kk(e).

to evidence is no higher than a reasonable probability that, if exculpatory DNA evidence were disclosed . . . , he could prevail in an action for postconviction relief." *Osborne II*, 521 F.3d 1118, 1134. Because the Ninth Circuit left open the possibility of a more lenient standard, effective state or federal postconviction DNA testing laws may be stricken as violating constitutional protections if they require a predicate showing of "reasonable probability."

As a practical matter, specious requests for wasteful postconviction DNA testing filtered out under existing federal and state laws would reappear as § 1983 actions under the Ninth Circuit's expansive reading of the Due Process Clause.[5] This already has occurred in other circuits. In *McKithen* v. *Brown*, 565 F. Supp. 2d 440 (E.D.N.Y. 2008), for example, McKithen was convicted of stabbing his wife. 565 F. Supp. 2d at 445. At trial, he did not contest that his wife had been stabbed, but argued that a third party committed the act. *Id*. Following his conviction, McKithen sought DNA testing of the knife under New York's postconviction testing statute to determine if the victim's blood was on the knife. *Id*. at 445-46. The state trial court denied the request because, given the defense at trial, "the presence or absence of [the victim's] blood on the knife would have little or no probative value in determining whether her wounds

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[5] Whether such suits brought under § 1983 would violate principles of issue preclusion or claim preclusion would depend upon a number of factors, including the precise contours of a constitutional right to postconviction DNA testing, should one exist, relative to the standards applied by state trial courts. *See Taylor* v. *Sturgell*, 128 S. Ct. 2161, 2171 (2008) (describing issue preclusion and claim preclusion). The Ninth Circuit's rule also may invite violation of the *Rooker-Feldman* doctrine by turning district courts into de facto courts of review following state court denials of requests for DNA testing. See *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals* v. *Feldman*, 460 U.S. 462 (1983).

were inflicted by McKithen." *Id.* at 446. McKithen then filed a § 1983 action seeking the DNA testing. *Id.* at 446. Holding his claim to be constitutionally cognizable, the district court granted relief and ordered testing of the knife. *Id.* at 495.

As *McKithen* demonstrates, the needless litigation and associated squandering of fiscal and human resources feared by legislators is a foreseeable consequence of affirming the Ninth Circuit. State prosecutors would be forced to spend considerable time defending federal civil rights lawsuits, and federal trial courts would see their dockets expand accordingly. Most of those lawsuits would lack merit, because viable requests for DNA testing would have been granted or stipulated to under measured state law guidelines.

Finally, it is not clear that the Ninth Circuit's holding is limited to postconviction DNA testing requests. While *Osborne II* ostensibly addressed the constitutionality of postconviction DNA testing, the principles underlying the holding apply, potentially, to an unlimited range of other postconviction discovery. As the Ninth Circuit noted without qualification, "[t]he more novel question presented in this case is whether, and the extent to which, the Due Process Clause of the Fourteenth Amendment extends the government's duty to disclose (or the defendant's right of access) to *post-conviction* proceedings." *Osborne II*, 521 F.3d 1118, 1128 (emphasis in original). Consequently, affirming *Osborne II* would serve as an invitation to state prisoners to file postconviction discovery motions seeking a virtually unlimited range of materials and evidence, including unproven or unreliable scientific techniques that state and federal courts would then have to assess in the first instance.

Thus the Ninth Circuit's creation of a new constitutional requirement was unnecessary and, in any event, ineffective. Most states already have balanced relevant interests and conferred fair and meaningful process for postconviction access to

biological evidence. In those states, only convicted felons dissatisfied with the outcome of that process would potentially benefit from the Ninth Circuit's less structured rule. The interests of other stakeholders in the criminal justice system would be correspondingly devalued.

II. THE CONSTITUTION DOES NOT GUARANTEE A FREESTANDING RIGHT TO POSTCONVICTION DNA TESTING BEYOND THAT AVAILABLE THROUGH MEANINGFUL STATE PROCESS

Postconviction DNA testing does not qualify for special constitutional status. Where meaningful State process exists for incarcerated felons to pursue postconviction DNA testing, the Due Process Clause does not mandate any right to such testing cognizable under § 1983. The Ninth Circuit's error in perceiving such a right threatens to nullify the effective and balanced state postconviction procedures discussed above.

A. Any due process-based interest in postconviction access to biological evidence is exceptionally limited

The Fourteenth Amendment's Due Process Clause exerts minimal influence over state criminal discovery practices, particularly in a postconviction context. "[T]he Due Process Clause," this Court observed, "has little to say regarding the amount of discovery which the parties must be afforded." *Wardius* v. *Oregon*, 412 U.S. 470, 474 (1973). "'[T]here is no general constitutional right to discovery in a criminal case.'" *Gray* v. *Netherland*, 518 U.S. 152, 168 169 (1996) (quoting *Weatherford* v. *Bursey*, 429 U.S. 545 (1977)). As this Court stated in *Pennsylvania* v. *Ritchie*, 480 U.S. 39, 59 (1987), "[d]efense counsel has no constitutional right to conduct his own search of the State's files to argue relevance."

Of course, criminal defendants can and should have reasonable pretrial access to potentially exculpatory biological evidence for testing purposes. See *Brady* v. *Maryland*, 373 U.S. 83, 87-88 (1963). Such access is consistent with "the central function of the trial, which is to discover the truth." *Portuondo* v. *Agard*, 529 U.S. 61, 73 (2000). But the Ninth Circuit engaged in an unprecedented expansion of due process guarantees to provide convicted felons with a constitutional right of post-trial access to biological evidence equivalent to or greater than any discovery right possessed before trial, while conceding that "there is a significant chance that the results [of DNA testing] will either confirm or have no effect on the validity of [a defendant's] confinement." *Osborne I*, 423 F.3d 1050, 1054.

Osborne II failed to acknowledge that, after the "decisive and portentous event" of a guilty verdict, the context for considering discovery requests is strikingly different from that before the "main event" of trial. *Wainwright* v. *Sykes,* 433 U.S. 72, 90 (1977). The states' strong interest in the finality of their judgments necessitates reasonable restrictions on collateral attacks. See, *e.g.*, 28 U.S.C. § 2254(d) (2008); *Coleman* v. *Thompson*, 501 U.S. 722, 750 (1991) (constitutional claims barred by state-law procedural default); *Teague* v. *Lane*, 488 U.S. 288, 309-10 (1988) (new constitutional rules of criminal procedure will not be announced or applied on collateral review out of respect for final judgments); *McCleskey* v. *Zant*, 499 U.S. 467, 492 (1991) ("Perpetual disrespect for the finality of convictions disparages the entire criminal justice system."); see also *Heck* v. *Humphrey*, 512 U.S. 477, 485 (1994) (expressing "concerns for finality and consistency" and recognizing that the Court "has generally declined to expand opportunities for collateral attack").

Consequently, postconviction due process rights and remedies in state proceedings are very limited. *E.g.*, *Ohio Adult Parole Auth.* v. *Woodard*, 523 U.S.

272, 282-84 (1998) (no due process right to specific state clemency procedures); *Murray* v. *Giarratano*, 492 U.S. 1, 10 (1989) (plurality opinion) (due process does not require states to provide counsel to capital defendants seeking postconviction relief). In *Pennsylvania* v. *Finley*, 481 U.S. 551, 559 (1987), this Court rejected the premise that "where a State chooses to offer help to those seeking relief from convictions, the Federal Constitution dictates the exact form such assistance must assume." It is legally suspect to claim that postconviction DNA testing, intended to facilitate collateral attack on a conviction already tested and upheld in trial and appellate proceedings, is a matter of unconditional constitutional entitlement.

B. The Due Process Clause is not violated where the state provides a meaningful opportunity for convicted felons to obtain postconviction DNA testing

Because access to DNA evidence after conviction is discovery linked to a claim of innocence, the Constitution should require access to potential evidence of actual innocence only to the same degree that it requires states to provide an avenue to process a claim of actual innocence. Were it otherwise, a "right" to DNA testing after trial could end up as an illogical orphan of constitutional jurisprudence, disconnected from any corresponding "right" to relief based on the DNA testing.

In *Herrera* v. *Collins*, 506 U.S. 390 (1993), this Court addressed whether and the extent to which the Constitution would recognize a freestanding actual innocence claim. That analysis is equally applicable to DNA testing attendant to such claims. Nothing in *Herrera* supports the existence of a separate constitutional right to postconviction DNA testing where there is a meaningful state avenue available to process a testing claim. In *Herrera*, the Court noted that under some circumstances a "truly persuasive

demonstration of 'actual innocence'" might be cognizable as a freestanding claim in a federal habeas proceeding "if there were no state avenue open to process such a claim." 506 U.S. at 417; accord, *House* v. *Bell*, 547 U.S. 518, 554. The Constitution, therefore, should not compel consideration of a postconviction DNA testing request where a meaningful state procedure exists to process that request.

Section 1983 "is not itself a source of substantive rights," but rather provides "a method for vindicating federal rights elsewhere conferred . . . ." *Baker* v. *McCollan*, 443 U.S. 137, 144 n.3 (1979). Any § 1983 remedy, therefore, is available only to the same limited extent that the Due Process Clause affords postconviction DNA testing rights to prisoners. Accordingly, a § 1983 complaint alleging the unconstitutional denial of access to evidence for postconviction DNA testing should not be cognizable absent a valid allegation that state-law process is so arbitrary, discriminatory, or ineffective as to amount to a pretextual means of denying testing in meritorious cases.

C. Principles of federalism and judicial restraint preclude recognition of a constitutional right to postconviction DNA testing in competition with existing state laws

Principles of federalism and judicial restraint also counsel against a constitutional mandate that would displace carefully calibrated state legislative approaches to postconviction DNA testing. The codification of postconviction DNA testing procedures exemplifies federalism, in which states "'serve as laboratories for testing solutions to novel legal problems.'" *Smith* v. *Robbins*, 528 U.S. 259, 275 (2000).

Contrary to the Ninth Circuit's approach in this case, courts should avoid "imposing a single solution

on the States from the top down" in the realm of criminal procedure. *Smith* v. *Robbins*, 528 U.S. at 274-75 (citing examples of deference to state pre-trial and postconviction procedures). Particularly when considering the integration of technological advances into postconviction proceedings, legislators and other state policymakers are presented with a complex and intricate range of options. "[J]udicial imposition of a categorical remedy . . . might pretermit other responsible solutions being considered in Congress and state legislatures." *Murray* v. *Giarratano*, 492 U.S. at 14 (Kennedy, J., concurring); see also *Spencer* v. *Texas*, 385 U.S. 554, 564 (1967) (the Constitution "has never been thought [to] establish this Court as a rule making organ for the promulgation of state rules of criminal procedure"); *Medina* v. *California*, 505 U.S. 437, 445-46 (1992) (the Due Process Clause grants "substantial deference to legislative judgments" given the states' "considerable expertise in matters of criminal procedure and the criminal process"). Legislative innovation should be encouraged, particularly in response to new developments in technology that may aid the truth-finding function of the criminal process.

The precise parameters of postconviction procedures require careful legislative balancing of interests in light of available technology: "There are often trade-offs to be faced when science advances. Scientific progress frequently presents questions of resource allocation, interpretation, application, privacy, and ethics. Balances must be struck between societal risks and benefits, between alternative ways of understanding and employing new techniques, and between permissible and impermissible uses." *Harvey* v. *Horan*, 285 F.3d 298, 301 (4th Cir. 2002) (Wilkinson, C.J., concurring). Affirming the Ninth Circuit by constitutionalizing this application of DNA science would, "in the face of all this legislative activity and variation, . . . evince nothing less than a loss of faith in democracy." *Id*. at 303.

As components of postconviction criminal procedure, DNA testing laws are not subject to a re-balancing of competing interests by the judiciary such as may be undertaken in reviewing procedural due-process claims under *Matthews* v. *Eldridge*, 424 U.S. 319 (1976). As this Court held in *Medina* v. *California*, 505 U.S. 437, 443, "the *Mathews* balancing test does not provide the appropriate framework for assessing the validity of state procedural rules which . . . are part of the criminal process." See also *Herrera* v. *Collins*, 506 U.S. at 407-08. Instead, federalism demands a narrow and deferential inquiry: the Due Process Clause will not proscribe the authority of a state to regulate procedures under its criminal laws unless the state practice "'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Medina*, 505 U.S. at 445 (quoting *Patterson* v. *New York*, 432 U.S. 197, 201-02). In other words, "because the States have considerable expertise in matters of criminal procedure and the criminal process is grounded in centuries of common law tradition, it is appropriate to exercise substantial deference to legislative judgments in this area." *Id*. at 445-46. The class of criminal law due process violations is thus defined "'very narrowly'" based on the "'limited operation'" of the Due Process Clause in state criminal law systems. *Id*. at 443 (quoting *Dowling* v. *United States*, 493 U.S. 342, 352 (1990)).

The decision of state legislators to enact postconviction DNA testing laws cannot be said to implicate, let alone offend, some fundamental principle of justice rooted in society's traditions and conscience. To the contrary, the fundamental principle is that legislatures should be accorded the latitude to do so. As Justice Frankfurter observed,

> there is reason for judicial restraint in matters of policy deeper than the value of experiment: it is founded on a recognition of the gulf of difference between sustaining and nullifying

> legislation. This difference is theoretical in that the function of legislating is for legislatures who have also taken oaths to support the Constitution, while the function of courts, when legislation is challenged, is merely to make sure that the legislature has exercised an allowable judgment, and not to exercise their own judgment, whether a policy is within or without "the vague contours" of due process.

American Fed'n of Labor v. *American Sash & Door Co*., 335 U.S. 538, 555 (1949) (Frankfurter, J., concurring). This case calls for judicial restraint in view of comprehensive state and federal legislation addressing the topic of postconviction DNA testing.

When innocence claims are said to hinge upon scientific evidence, the canons of federalism and judicial restraint necessitate deference to state policymakers' evaluation of the best use of that science in the criminal justice system. To endow any scientific technique with special constitutional status risks the counterproductive consequence that scientific testing will be sought and granted indiscriminately as an end unto itself, rather than being used selectively as a calibrated tool for determining the truth.

CONCLUSION

The judgment of the court of appeals should be reversed.

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Respectfully submitted,

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