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.

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

BRIEF OF AMICUS CURIAE CITY OF NEW YORK IN SUPPORT OF PETITIONERS

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BRIEF OF AMICUS CURIAE THE CITY OF NEW YORK

This brief is submitted on behalf of the City of New York as amicus curiae in support of the Petitioners.

INTEREST OF THE AMICUS CURIAE

Amicus, the City of New York, is a municipal corporation. The New York City Law Department – Office of the Corporation Counsel, represents the Office of the District Attorney - Bronx County (Bronx, New York), the Office of the District Attorney - Kings County (Brooklyn, New York), the Office of the District Attorney - Queens County (Queens, New York), and the Office of the District Attorney - Richmond County (Staten Island, New York).

The District Attorney of Queens County, Richard Brown, is a party in a matter presently before the United States Court of Appeals for the Second Circuit: *McKithen v. Brown*, 08-4002-pr, which involves the question of whether there is a constitutional right to post-conviction DNA testing and, if so, what are the contours of such a right. Because of the importance to amicus of the issues before this Court, amicus submits this brief to assist the Court in its resolution of this case.

SUMMARY OF THE ARGUMENT

This brief *amicus curiae* will show that respondent has not been denied any constitutional protection secured by the Fifth and Fourteenth Amendments. The post-conviction relief sought by plaintiff would require an unwarranted expansion of both procedural and substantive protections. Accordingly, the scope of federal review

should not be extended to post-conviction claims of actual innocence based on newly asserted evidence.

We submit that the § 1983 complaint seeking post-conviction DNA testing must be dismissed because it effectively challenges or necessarily implies the invalidity of his conviction and confinement and, therefore, must be challenged by a petition for a writ of habeas corpus.

ARGUMENT

I. The Fourteenth Amendment Residual Liberty Interest Retained By Prisoners Lawfully Deprived Of Their Freedom Does Not Encompass An Interest In Accessing Or Possessing Biological Evidence Post-Conviction.

A. No Fundamental Right Of Access To DNA Is Deeply Rooted In History And Tradition.

The Due Process Clause provides protection in the form of both procedural due process and substantive due process.[1] Substantive due process prohibits the government from infringing on a fundamental interest unless the government has a compelling interest and the infringement is narrowly tailored. *See*, *e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). Fundamental interests are identified by a determination of whether the interest is "deeply rooted in this Nation's history and tradition . . . and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed (citations omitted)." *Id*. at 720-21.

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[1] *See, e.g.*, *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

This Court, noting its reluctance to expand the concept of substantive due process, warns that "where a particular amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *Albright v. Oliver*, 510 U.S. 266, 273 (1994). On considering governmental behavior to determine whether an action violates a fundamental, substantive due process right, a court begins with a careful description of the asserted right, *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997), before determinating whether the conduct shocks the conscience. *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998).

It is long established that criminal defendants have no constitutional right to have the constitutionality of their conviction reviewed on direct appeal. *McCane v. Durston*, 153 U.S. 684 (1894); *Abney v. United States*, 431 U.S. 651, 656 (1977). The Court, holding that a "state need not provide any appeal at all," observed that the Constitution typically does not require a state to provide post-conviction avenues for attacking criminal convictions, and noted

> "[p]ostconviction relief is even further removed from the criminal trial than is discretionary direct review. It is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature . . . States have no obligation to provide this avenue of relief."

Pennsylvania v. Finley, 481 U.S. 551 (1987). The only constitutional provision relevant in the present case is the Due Process Clause and, accordingly, the issue before the Court is whether the Due Process Clause guarantees relief on the claim asserted herein.

Due Process does not require that judicial review be available for a claim of newly presented evidence. In *Herrera v. Collins*, 506 U.S. 390 (1993), the Court observed that "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." *Id*. at 400. Concurring, Justice Scalia further expressed the view in *Herrera* that "[t]here is no basis in text, tradition, or even in contemporary practice (if that were enough) for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction." *Id*. at 427-428.

Claims of newly presented evidence do not, alone, entitle a prisoner to relief unless the prisoner can link that evidence to a constitutional violation. *Townsend v. Sain*, 372 U.S. 293 (1963). That newly presented evidence "must bear upon the constitutionality of the applicant's detention" explains why 42 U.S.C. § 1983 is an inappropriate vehicle for the introduction of such evidence, since § 1983 may not be used to challenge the fact or duration of the prisoner's conviction. *Wilkinson v. Dotson*, 544 U.S. 74 (2005). In *Townsend*, Chief Justice Earl Warren noted that

> "Where newly discovered evidence is alleged in a habeas application, evidence which could not reasonably have been presented to the state trier of facts, the federal court must grant an evidentiary hearing. Of course, such evidence must bear upon the constitutionality of the applicant's detention; the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus. Also, the district judge is under no obligation to grant a

> hearing upon a frivolous or incredible allegation of newly discovered evidence."

Id. at 317.

The Ninth Circuit notes that the DNA testing methods now requested by Mr. Osborne were not accessible to him pre-trial, and notes further that the methods of testing sought "are far more discriminating than the testing methods that were available pre-trial." 521 F.3d, at 1129. Nonetheless, unavailability of the post-conviction constitutional right does not turn on the nature or form of the newly presented evidence. *See Herrera*, *supra*, 506 U.S., at 400. For purposes of constitutional analysis, there is no difference between newly presented evidence resulting from scientific testing of biological evidence, and the newly presented evidence contained in the affidavits sought to be introduced post-conviction by the petitioner in *Herrera*, or, indeed, the new discovery of any other type of evidence after conviction.

The creation of an unrestricted constitutional right to post-conviction DNA testing impacts on the finality of a state criminal conviction because a new constitutional violation could potentially be asserted with each new technological advance in evidence gathering techniques. In *Teague v. Lane*, 489 U.S. 288 (1989), the Court observed that finality "is essential to the operation of our criminal justice system," and that "without finality, the criminal law is deprived of much of its deterrent effect." 489 U.S., at 309 (plurality opinion). As the Fourth Circuit noted in *Harvey v. Horan*, 278 F.3d 370 (4th Cir. 2002)("*Harvey I*"),

> [t]he Supreme Court has made clear that the finality of convictions cannot be brought into question by every change in the law . . . Similarly, we believe that finality cannot be sacrificed to every change in technology. The

> possibility of post-conviction developments, whether in law or science, is simply too great to justify judicially sanctioned constitutional attacks upon final criminal judgments . . . Establishing a constitutional due process right under § 1983 to retest evidence with each forward step in forensic science would leave perfectly valid judgments in a perpetually unsettled state. This we cannot do . . . While finality is not the sole value in the criminal justice system, neither is it subject to the kind of blunt abrogation that would occur with the recognition of a due process entitlement to post-conviction access to DNA evidence.

Id. at 376 (citations omitted).

Creation of an unrestricted constitutional right to post-conviction DNA testing has potential for abuse, since a criminal defendant could elect to forgo the introduction at trial of DNA evidence testing which could have inculpatory, exculpatory or neutral results and, upon conviction, seek such testing on constitutional grounds.

B. The Court Should Not Create A New Constitutional Right To Post-Conviction DNA Testing Where None Presently Exists.

1. Post-Conviction Review Would Require An Unwarranted Expansion Of Both Substantive And Procedural Protections.

Although the Court has not determined the existence of a Fourteenth Amendment residual liberty interest in demanding judicial consideration of newly presented evidence of innocence brought forward after

conviction, this has not left convicted prisoners without remedy. Such prisoners have obtained post-conviction DNA testing under appropriate circumstances and have actually established their innocence in several cases. Given the demonstrated availability of post-conviction relief, there is no need to create a constitutional right to such evidence where none presently exists.

Absent demonstration of a constitutional violation, the Constitution makes no provision for the post-conviction introduction of newly discovered or newly asserted evidence. The Ninth Circuit acknowledges that it "expressly applied" *Brady v. Maryland*, 373 U.S. 83 (1963), "as a post-trial right and specifically disclaimed reliance on a pre-trial Brady violation or any other pre-trial violation." 521 F.3d, at 1128-1129. *Brady*, however, ensures that a defendant receives a fair trial. *United States v. Bagley*, 473 U.S. 667, 675 (1985). The Ninth Circuit's reliance upon *Brady* fails because the right to a fair trial ends when the trial is completed.

Brady, of course, concerns the suppression, prior to and during trial, of evidence material to the proceedings, the suppression of which denied the defendant a fair trial. In *Imbler v. Pachtman*, 424 U.S. 409, 427 n.25, this Court recognized that due process obligates a prosecutor to disclose exculpatory evidence at trial, and explained that, after trial, a prosecutor maintains a non-constitutional ethical obligation to inform the appropriate authority of after-acquired evidence or other information that might cast doubt upon the correctness of the conviction. Thus *Imbler* does not suggest that the prosecution maintains an ongoing due process obligation pursuant to *Brady* after the trial has ended.

Mr. Osborne, for his part, essentially seeks to extend *Brady* to discovery which is unconnected to a pending substantive claim, and the Ninth Circuit has, in

response, created a right to discovery that exists independently of any substantive claim. Here, Mr. Osborne asserts an intent to advance a freestanding claim of innocence, but Mr. Osborne presently has no ongoing substantive claim that would permit the discovery he seeks. Section 1983 was never intended to be used as a device to obtain discovery of evidence that is material to a claim that has yet to be asserted.

Indeed, if Mr. Osborne were to obtain the testing he seeks and the results of that testing inculpated him or were inconclusive, it is unlikely that he would proceed with a freestanding innocence claim. Consequently, the Ninth Circuit's conclusion that "[u]ntil Osborne has actually brought an actual innocence claim . . . Osborne's access-to-evidence claim may proceed on the well-established assumption that his intended freestanding innocence claim will be cognizable in federal court," 521 F.3d, at 1131, severs the right of access to evidence from a pending action or procedure, and the Ninth Circuit does not identify a valid basis for permitting Mr. Osborne to conduct discovery that is unconnected to a pending substantive claim.

Moreover, application of *Brady v. Maryland* to the instant case would result in a rule that effectively would require federal courts to re-try a convicted person's guilt or innocence of a state offense, which is the ultimate issue in the state criminal trial. Such an expansionist rule cannot be justified because there is no constitutional authority for extending an inquiry into guilt or innocence beyond the deliberations of the fact-finder at trial.

An accused person is convicted only upon evidence that is sufficient to fairly support a conclusion that every element of the crime has been established beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 314 (1979). A vast array of due process protections exists that help to assure that no innocent person is convicted of a

crime.[2] The integrity of the legal process in a criminal case is protected by rules governing the admissibility of evidence, the requirement that a defendant receive the effective assistance of counsel, the placement of the burden of proof on the prosecution, the condition that guilt be established beyond a reasonable doubt, and other measures. Where a prosecutor withholds exculpatory evidence, post-trial relief is available pursuant to the *Brady v. Maryland* doctrine.

Regarding judicial creation of a constitutional right to post-conviction DNA testing, the Fourth Circuit has noted in *Harvey I* that

> "our decision reflects the core democratic ideal that if this entitlement is to be conferred, it should be accomplished by legislative action rather than by a federal court as a matter of constitutional right. Permitting [petitioner's § 1983] claim to proceed would improperly

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[2] While it is well settled that the Due Process Clause does not permit the government to punish an individual unless and until it has proven his or her guilt beyond a reasonable doubt at a criminal trial in accordance with relevant constitutional guarantees, *Bell v. Wolfish*, 441 U.S. 520, 535-536 & n.16 (1979), by proving plaintiff's guilt at trial the state has satisfied that requirement. Accordingly, plaintiff may no longer properly be viewed as an innocent person. In *Herrera v. Collins*, 506 U.S., at 399-400, this Court noted that "[o]nce a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears (citation omitted) . . . [t]hus, in the eyes of the law, petitioner does not come before the Court as one who is 'innocent,' but, on the contrary, as one who has been convicted by due process of law . . . ."

short-circuit legislative activity by allowing judges, rather than legislatures, to determine the contours of the right.

This is not an area in which legislatures have been inactive. For example, the Innocence Protection Act of 2001 has been introduced in both houses of Congress. *See* S. 486, 107th Cong. (2001), 147 Cong. Rec. S1999 (Mar. 7, 2001); H.R. 912, 107th Cong. (2001). The Act would increase the availability of post-conviction DNA testing for a person convicted of a federal crime. The Act would also condition the grant of federal funds for state DNA-related programs on an assurance that the state will make post-conviction DNA testing available in specified types of cases. And the Act would require states to increase the availability of post-conviction DNA testing for death row inmates. *See* S. 486 §§ 101-104, 147 Cong. Rec. at S2001-03; H.R. 912 §§ 101-104.

Allowing [petitioner's] action to proceed . . . would judicially preempt legislative initiatives in this area . . . [petitioner] urges us to balance, under *Mathews*, an inmate's need for post-conviction DNA testing against the administrative burden to the state of providing it. However, this very balance is the one that legislative bodies are currently trying to strike. Establishing a federally supervised right of access via *Mathews* would cut off this on-going process and place the federal courts in a distinctly legislative posture."

Harvey v. Horan, supra, 278 F.3d at 376. Many states have already reached such a balance.[3]

In addition, the accuracy of conviction and sentence are further promised by state and federal habeas review. State collateral review encompasses claims of fundamental or constitutional error, and federal habeas review encompasses claims of federal constitutional error. Although the existence of newly presented evidence relevant to guilt does not establish a basis for federal habeas review where the evidence is not related to a constitutional violation, *Townsend v. Sain*, 372 U.S., at 317, actual innocence is considered in an evaluation of whether a procedural default or abuse of the writ forecloses review of a constitutional claim.

2. The Scope Of Federal Review Should Not Be Extended To Post-Conviction Claims Of Actual Innocence Based On Newly Asserted Evidence.

"[I]t is an assumption of our system of criminal justice 'so rooted in the traditions and conscience of our people as to be ranked as fundamental' that no person may be punished criminally save upon proof of some specific illegal conduct (citations omitted)." *Schad v. Arizona*, 501

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[3] For example, the New York State Legislature did so in Article 440 of the Criminal Procedure Law: Section 440.30 specifically provides a post-trial mechanism by which a convicted person may obtain DNA evidence if a minimal threshold showing is made, and Section 440.10 specifically provides an avenue by which a criminal defendant can challenge his conviction with such evidence - both, unlike section 1983 or federal habeas review, without any time bar to such relief.

U.S. 624, 633 (1991). The Supreme Court has also recognized that the "states possess primary authority for defining and enforcing the criminal law." *Engle v. Isaac*, 456 U.S. 107, 128 (1982). States should be allowed to make the final determination of guilt or innocence.

Consequently, the determination by a federal court of a state prisoner's actual guilt of a state offense based upon a post-conviction proffer of newly-discovered evidence, independent of any causative constitutional error, is overly intrusive. Direct review is the primary avenue for the review of a conviction or sentence, and when the process of direct review reaches a conclusion, a presumption of finality and legality attaches to that conviction and sentence. Despite the importance of federal habeas proceedings to ensure that constitutional rights are observed, the role of federal habeas is secondary and limited, and the federal courts are not forums in which to relitigate state trials. *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983).

C. This Case Does Not Present A Violation Of A Procedural Due Process Interest.

Procedural due process requires a balancing of the individual interest, state interest, and probability that further procedural safeguards will reduce any risk of error. *Mathews v. Eldridge*, 424 U.S. 329, 334-35 (1976). The Court has made clear that "[p]rocess is not an end in itself," and does not create a liberty interest where there is no underlying substantive "interest for process to protect." *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983). Any presumed procedural right should not be afforded greater protection than the substantive right to which plaintiff cannot demonstrate entitlement.

The Due Process Clause applies where governmental action deprives a person of liberty or property. Accordingly, when an individual claims a denial of due process, courts inquire into the nature of the individual's claimed interest. *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 7 (1979). It has been observed that the "Supreme Court has not established, clearly or otherwise, a constitutional right to postconviction DNA testing." *Shenouda v. Breslin*, 2004 U.S. Dist. Lexis 17018 (E.D.N.Y. 2004).

The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972).

The Court has not held that, for procedural due process purposes, an inmate has a liberty interest in overcoming the fact of conviction pursuant to a valid conviction. *See Greenholtz v. Nebraska Penal Inmates*, 442 U.S., at 7. The Court has also observed that "an inmate has 'no constitutional or inherent right' to commutation of his sentence" and has noted that, unlike probation decisions, "pardon and commutation decisions have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review." *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S., at 464.

Accordingly, the Court should find that there has been no due process violation here.

II. A Post-Conviction Request For Access To Biological Evidence Cannot Be Brought As A Claim Under 42 U.S.C. § 1983 In The Absence Of A Showing That The Conviction Was Invalid.

State prisoners have two potential avenues to remedy violations of their federal constitutional rights: a habeas petition under 28 U.S.C. § 2254, and a civil suit under 42 U.S.C. § 1983. *Heck v. Humphrey*, 512 U.S. 477, 480 (1994). Under the federal habeas corpus statute, a prisoner seeking release from state custody on account of a wrongful conviction must first exhaust state judicial remedies before filing a habeas petition in federal court.[4]

A § 1983 suit, unlike a habeas petition, is generally not barred by a failure to exhaust state remedies. Id. at 480-81. In *Preiser v. Rodriguez*, 411 U.S. 475 (1973), the Court held that "when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release from that imprisonment, his sole federal remedy is a writ of habeas corpus." 441 U.S., at 500. In *Heck*, the Court enunciated what is referred to as the "favorable termination" requirement: where, if successful, a prisoner's § 1983 action "would necessarily imply the invalidity" of his or her conviction or sentence, it must be dismissed "unless the prisoner can demonstrate that the conviction or sentence has already been invalidated." *Heck*, 512 U.S., at 487.

In *Preiser*, the Court discussed the potential overlap between § 1983 actions[5] and habeas corpus petitions[6] for

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[4] 28 U.S.C. 2254(b).

[5] Section 1983, which contains no requirement that state judicial remedies be exhausted, provides:

the first time. Both § 1983 and habeas corpus share the common requirement that the suit must allege the violation of a constitutional right.[7]

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

42 U.S.C. 1983.

[6] In pertinent part, Title 28 U.S.C. 2254 provides that "[A]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State; or there is an absence of available State corrective process; or circumstances exist that render such process ineffective to protect the rights of the applicant." 28 U.S.C. 2254(b).

[7] One commentator has noted that "[a] post-conviction right of access to evidence is difficult to categorize as a constitutional right because it fails to neatly fit into any preexisting categories of recognized procedural or substantive due process rights." Vetter, *Habeas, Section 1983, and Post-conviction Access to DNA Evidence*, 71 U. Chi. L. Rev. 587, 590 (2004).

See also Harvey v. Horan, 285 F.3d 298, 310-311 (4th Cir. 2002) (Luttig concurring) ('[A post-conviction right of

In *Preiser*, the Court recognized practical reasons why a prisoner might prefer to bring a § 1983 action, and noted a "literal applicability" of the language of that statute. 411 U.S., at 486. Of course, § 1983 enables a prisoner to immediately go to federal court and, effectively, potentially bypass the state court system.

Nonetheless, the Court held that for those cases at the heart of habeas corpus, when a state prisoner challenges the fact or duration of his or her physical imprisonment, and by way of relief seeks a determination that he or she is entitled to immediate or a speedier release, the exclusive federal remedy is habeas. The Court, contemplating the strong policy considerations of federal-state comity which require giving a state court system that has convicted a defendant the first opportunity to correct its own errors, reasoned that:

> In amending the habeas corpus laws in 1948, Congress clearly required exhaustion of adequate state remedies as a condition precedent to the invocation of federal judicial relief under those laws. It would wholly frustrate explicit congressional intent to hold that the respondents in the present case could evade this requirement by the simple expedient of putting a different label on their pleadings. In short, Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement, and that

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access to evidence] is not one to material, exculpatory evidence necessary to ensure a fair trial . . . It is not a right of 'factual innocence' . . . Nor is it one of right to the preservation of potentially exculpatory evidence.").

> specific determination must override the general terms of § 1983.
>
> The policy reasons underlying the habeas corpus statute support this conclusion. The respondents concede that the reason why only habeas corpus can be used to challenge a state prisoner's underlying conviction is the strong policy requiring exhaustion of state remedies in that situation - - to avoid the unnecessary friction between the federal and state court systems that would result if a lower federal court upset a state court conviction without first giving the state court system an opportunity to correct its own constitutional errors (citation omitted).

Id. at 489-490. Thus, defining the scope of the "implicit exception from § 1983's otherwise broad scope for actions that lie 'within the core of habeas corpus'"[8] the Court concluded that a § 1983 action will not lie when a state prisoner challenges the fact or duration of his or her confinement and seeks either immediate release from prison or the shortening of his or her term of confinement. 411 U.S., at 482.

As recently as 2005, the Court reiterated that "a prisoner in state custody cannot use a § 1983 action to challenge 'the fact or duration of his confinement.' He must seek federal habeas corpus relief (or appropriate state relief) instead (citations omitted)." *Wilkinson v. Dotson*, 544 U.S. 74 (2005). Reviewing *Preiser* and *Heck*, the Court explained that:

> "Throughout the legal journey from *Preiser* to *Balisok* the Court has focused on the need to

[8] 411 U.S., at 487.

> ensure that state prisoners use only habeas corpus (or similar state) remedies when they seek to invalidate the duration of their confinement - - either *directly* through an injunction compelling speedier release or *indirectly* through a judicial determination that necessarily implies the unlawfulness of the State's custody . . . These cases, taken together, indicate that a state prisoner's § 1983 action is barred (absent prior invalidation) - - no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings) - - *if* success in that action would necessarily demonstrate the invalidity of confinement or its duration (emphasis in original)."

544 U.S., at 81-82.

Thus, *Dotson* clarifies that *Heck* provides the relevant test to a determination of the applicability of § 1983 under circumstances involving post-conviction access to DNA evidence. Nonetheless, the courts of appeal are divided on this issue. The Seventh, Ninth and Eleventh Circuits have allowed access-to-evidence claims to be brought under § 1983, while the Second, Fourth, Fifth and Sixth Circuits have rejected those claims.

In *Harvey v. Horan*, 278 F.3d 370 (4th Cir. 2002), *reh'g en banc denied*, 285 F.3d 298 (4th Cir. 2002)[9], the Court of Appeals for the Fourth Circuit applied this Court's rationale in a matter where a criminal defendant sought injunctive relief that "necessarily implies the invalidity of

[9] The defendant's application for a rehearing was ultimately mooted because the state adopted a statutory right to DNA testing.

his conviction." 278 F.3d, at 375. The Fourth Circuit reasoned that this Court's holding that civil tort actions are inappropriate for challenging the validity of outstanding criminal judgments was based upon the view that allowing such a usage "would undercut the long-standing concern not to undermine the finality of criminal convictions through civil suits." 278 F.3d, at 375.

In *Harvey*, where the convicted defendant proclaimed his innocence and argued that DNA testing would lead to his exoneration, the Fourth Circuit correctly held that an action under § 1983 could not lie. The Fourth Circuit found that the convicted defendant sought to use § 1983 to invalidate a final state conviction without having challenged the lawfulness of that conviction, and held that the defendant failed to state a claim under the statute. In reaching its determination, the Fourth Circuit properly noted that § 1983 exists for the limited purpose of redressing violations of the Constitution and federal statutes, and not for the purpose of attacking the finality of criminal judgments. The Fourth Circuit also noted that "[t]he whole point of *Heck* was to protect the finality of state judgments of conviction from challenge via unexhausted § 1983 actions." 278 F.3d 375, at fn. 1.[10]

Recognizing that "[t]he Supreme Court has made clear that the finality of convictions cannot be brought into question by every change in the law," the Fourth Circuit reasoned that "finality cannot be sacrificed to every change in technology." 278 F.3d at 376. The Fourth Circuit also noted the distinction between the introduction of newly

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[10] *See also Harvey v. Horan*, 285 F.3d 298, 303 (4th Cir. 2002) ("the whole point of *Heck* was to keep a state prisoner from challenging his conviction in federal court in the first instance through an unexhausted habeas claim masquerading as a § 1983 claim").

discovered evidence, which in some cases may warrant a new trial, and the new testing of existing biological evidence, which the convicted defendant in that matter sought.

In addition, the Fourth Circuit considered the substantive issue underlying the claim; that is, what rights to the testing of DNA evidence does a prisoner have, after having unsuccessfully appealed his conviction and failing in his habeas petitions. Reversing the District Court, which asserted that the prisoner had an affirmative due process right of access to DNA evidence under *Brady v. Maryland*[11], the Fourth Circuit stated, in dicta, that capital prisoners have no constitutional right to post-conviction access to DNA evidence, and that "if this entitlement is to be conferred, it should be accomplished by legislative action rather than by a federal court as a matter of constitutional right." 278 F.3d, at 376. The Fourth Circuit also took the position that "[e]stablishing a constitutional due process right under § 1983 to retest evidence with each forward step in forensic science would leave perfectly valid judgments in a perpetually unsettled state. This we cannot do." 278 F.3d, at 376.

Finally, the Fourth Circuit reasoned that when a prisoner requests access to DNA evidence "for one reason and one reason only – as the first step in undermining his conviction," his § 1983 action constitutes, in effect, a

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[11] 373 U.S. 83 (1963) (entitling criminal defendants to disclosure from the prosecution of all favorable and material evidence in the state's possession, upon request, as a matter of due process). In *Brady*, the Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment." *Id*. at 87.

successive habeas petition and thus is an impermissible attempt to circumvent *Heck*. 278 F.3d, at 375.[12]

The Court of Appeals for the Fifth Circuit reached a similar conclusion in *Kutzner v. Montgomery County*, 303 F.3d 339 (5th Cir. 2002), affirming the District Court's *sua sponte* dismissal, pursuant to Fed. R. Civ. P. 12(b)(6), of the complaint and "treating [the] complaint as, in effect, another successive habeas corpus petition." 303 F.3d, at 340. In that action, the petition asserted claims against county officials who refused to release biological evidence introduced at trial for DNA testing, where that evidence was sought on the ground that it might be exculpatory.

In agreeing with the Fourth Circuit's analysis in *Harvey, supra*, the Fifth Circuit properly relied upon this Court's holding in *Heck* that under § 1983, no cause of action exists that would necessarily imply the invalidity of a plaintiff's conviction or sentence unless it is proven that the conviction or sentence has already been invalidated. Finding *Harvey* to be "strongly persuasive," the Fifth Circuit noted that it had also previously held that:

> claims seeking to attack the fact or duration of confinement, as well as claims which are "so

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[12] In his concurrence to the denial of rehearing en banc, Judge Luttig disagreed, writing that post-conviction DNA testing does not even arguably "necessarily impl[y]" the invalidity of the underlying conviction, and stating that "The results of any DNA tests that are eventually performed may be inconclusive, they may be insufficiently exculpatory, or they may even be inculpatory. That these scientific possibilities exist, in and of itself, suffices to establish that the asserted right of mere access is not a direct, or for that matter even an indirect, attack on one's conviction or sentence." 285 F.3d 298, 307 (4th Cir. 2002).

> intertwined" with attacks on confinement that their success would "necessarily imply" revocation or modification of confinement, must be brought as habeas corpus petitions and not under § 1983. *Martinez v. Texas Court of Criminal Appeals,* 292 F.3d 417, 423 (5th Cir. 2002). Under *Martinez,* a prisoner's request for DNA testing of evidence relevant to his prior conviction is "so intertwined" with the merits of the conviction as to require habeas corpus treatment.

303 F.3d, at 341.

In contrast, the Second Circuit in *McKithen v. Brown*, 481 F.3d 89 (2d Cir. 2007), recently joined the Seventh, Ninth, and Eleventh Circuits, agreeing with them that a claim seeking post-conviction access to evidence for DNA testing may properly be brought as a § 1983 suit. 481 F.3d at 99. The Second Circuit openly split with the Fourth Circuit and held that a § 1983 action may be maintained where a prisoner seeks post-conviction DNA evidence because success in that suit would not demonstrate the invalidity of his conviction or sentence. The Second Circuit concluded that "the governing standard for application of the Preiser-Heck exception, then, is whether a prisoner's victory in a § 1983 suit would *necessarily demonstrate* the invalidity of his conviction or sentence; that a prisoner's success might be merely helpful or *potentially* demonstrative of illegal confinement is, under this standard, irrelevant (emphasis in original). 481 F.3d at 102.

In the matter presently before the Court, *Osborne v. Dist. Atty's Office for the Third Judicial Dist.*, 423 F.3d 1050 (9th Cir. 2005), the Court of Appeals for the Ninth Circuit acknowledged that *Dotson* "clarifies that Heck provides the relevant test to determine whether § 1983 is a

permissible avenue of relief for Osborne." 423 F.3d, at 1053. Nevertheless, the Ninth Circuit, in departing from the reasoning of the Fourth Circuit in *Harvey*, held that success in a § 1983 action would not necessarily demonstrate the invalidity of confinement or its duration. 423 F.3d, at 1054. Citing to *Dotson*, the Ninth Circuit reasoned that it is only access to evidence that would result from a prisoner's successful § 1983 action in this situation, and nothing more. The Ninth Circuit further reasoned that there is a significant chance that further DNA analysis would either confirm or have no effect on the validity of the prisoner's confinement and would not necessarily prove exculpatory. In addition, the Ninth Circuit noted that, even if the DNA evidence exonerated a prisoner, he or she would need to bring a separate action, alleging a separate constitutional violation, to overturn the conviction.

The Ninth Circuit concedes that "the *Dotson* court found it key that neither prisoner sought an injunction ordering 'immediate or speedier release'" 423 F.3d, at 1055, but apparently overlooks this Court's determination that a state prisoner's § 1983 action is barred "if success in that action would necessarily demonstrate the invalidity of confinement or its duration." 544 U.S. 74, 82 (2005). It is respectfully submitted that the Ninth Circuit's narrow reading of *Dotson* would result in an unintended and impermissible expansion of § 1983.

To the extent that the *McKithen* and *Osborne* decisions, which sever the § 1983 petition from its ultimate objective, may be read as being faithful to the letter of *Preiser* and *Heck*, it is respectfully submitted that those decisions are not faithful to the spirit of the decisions of the Supreme Court. The *Preiser* and *Heck* decisions clearly were intended to direct claims attacking the validity of a prisoner's conviction or sentence toward the rigorous

procedure of habeas corpus and away from § 1983 actions.[13]

It is critical to this discussion to note that in virtually all the cases discussed in which an appellant has sought post-conviction DNA testing of blood or semen or articles of clothing, the prosecution had introduced some evidence of this type against defendant when he/she was a defendant in the criminal trial which resulted in conviction. Moreover, there is often an identity issue involved in the prosecution. In their post-conviction applications, these appellants are seeking to have more scientifically advanced methods of testing utilized in order to demonstrate that they were not in fact the perpetrator of the crime for which they were convicted. *See, e.g. Bradley v. Pryor*, 305 F.3d 1287 (9th Cir. 2002) (state used rape kit at trial to connect him to the crime and identify him as rapist and murderer, and the appellant seeks to have the biological evidence tested now with more advanced scientific methods); *Kutzner v. Montgomery County*, 303 F.3d 339 (5th Cir. 2002) (the appellant seeks biological evidence introduced against him at his trial for retesting by more advanced methods to prove innocence). In these cases there is a presumed materiality of the testing of the biological evidence to the appellants' convictions since the prosecution used the evidence at least in part to make its case for conviction. In other words, there is a presumed relevance to guilt or innocence of the request for more sophisticated testing.

In the action before this Court, it may not be denied that, at bottom, Mr. Osborne seeks DNA testing for the sole

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[13] *See* Kreimer & Rudovsky, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, 151 U. Pa. L. Rev. 547, 614 (2002) (the Supreme Court was concerned that § 1983 not be used to circumvent the exhaustion requirement of federal habeas corpus petitions).

purpose of attempting to demonstrate his innocence of the crime for which he was convicted. 521 F.3d, at 1126. This lies at the "core of habeas corpus." *Preiser*, 411 U.S., at 489.

To the extent that Mr. Osborne seeks to demonstrate his innocence, it is undeniable that he necessarily seeks to attack the fact of his conviction. Accordingly, this Court should look to the substance of the remedy sought. For a prisoner who obtains exculpatory post-conviction DNA evidence, success would necessarily demonstrate the invalidity of his or her confinement and ultimately lead to immediate or speedier release from confinement, falling squarely within the ambit of *Heck*. The possibility that such DNA evidence may prove to be inconclusive or even inculpatory, and that an immediate or early release is not assured, does not negate the fact that the relief sought pursuant to § 1983 goes to the heart of the issue of the invalidity of confinement.

It is respectfully submitted that permitting Mr. Osborne the relief he seeks pursuant to § 1983, without a previous determination that the conviction is constitutionally invalid, would necessarily imply the invalidity of his conviction irrespectively of the outcome of such a DNA test. Mr. Osborne's § 1983 claim, seeking post-conviction DNA testing of evidence relevant to that conviction, is inextricably intertwined with the merits of his conviction, such that success would necessarily imply a revocation or modification of his confinement.

Mr. Osborne impermissibly seeks to use 42 U.S.C. §1983 as an initial step to overturn his conviction, and thereby obtain his immediate or speedier release from prison. Accordingly, the *Heck* rule is plainly applicable.

In sum, for all of the reasons above, the Court should reverse the judgment of the court below.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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Dated: December 29, 2008

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December 30, 2008

Honorable William K. Suter
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Supreme Court of the United States
1 First Street N.E.
Washington, D.C. 20543

Re: District Attorney's Office for the Third Judicial District, et al. v. Osborne
Case No. 08-6

Dear Mr. Suter:

As required by Supreme Court Rule 33.1(h), I certify that the City of New York's amicus brief in the above-referenced appeal contains 7,385 words, including the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Respectfully,

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cc: Office of Special Prosecutions & Appeals
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