No. 08-6

IN THE

Supreme Court of the United States

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

v.

WILLIAM G. OSBORNE,
Respondent.

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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

The Ninth Circuit has recognized a postconviction constitutional right to on-demand access to forensic evidence. In support of that ruling, Osborne's amici recount compelling stories of miscarriages of justice. But those stories are not Osborne's story. The State is not seeking to keep an innocent man in jail. Instead, the State has a strong interest in not casting needless doubt on its final criminal judgments and in not wasting its resources dealing with a flood of meritless prisoner requests. A State may reasonably re-

serve postconviction DNA testing for those prisoners who, quite unlike Osborne, have steadfastly maintained their innocence, have not confessed to their crimes, and never had an opportunity to pursue advanced DNA testing at trial. There is neither a settled tradition nor widespread contemporary practice in this country, *see Medina v. California*, 505 U.S. 437, 445-48 (1992), of allowing prisoners to reopen criminal investigations on demand. Because the Ninth Circuit was wrong to discern such a right "under the open-ended rubric of the Due Process Clause," *id*. at 443, and because § 1983 was never the proper vehicle for asserting it, the judgments below should be reversed.

ARGUMENT

I. OSBORNE CANNOT USE § 1983 AS A DISCOVERY DEVICE FOR A YET UNASSERTED ACTUAL-INNOCENCE CLAIM

Osborne seeks to collaterally attack his state convictions by proving his actual innocence, and postconviction DNA testing is the means by which he hopes to accomplish that goal. J.A. 24-25, 36-37. But Osborne may not use § 1983 to discover evidence needed to support a claim within the exclusive realm of habeas. *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973). To hold otherwise, as the Ninth Circuit did, would permit piecemeal litigation of federal habeas claims and, when prisoners intend to use the evidence to pursue state remedies, would sidestep state discovery rules and postconviction procedures.

Osborne admits seeking discovery of DNA evidence to support an actual-innocence claim. Resp. Br. 2. In fact, the cornerstone of his due-process argument is

his alleged liberty interest "in freedom from confinement" or "in obtaining his release from custody if he is innocent of the charge for which he was incarcerated." Resp. Br. 27, 32. Osborne does not dispute that an actual-innocence claim—like the one to which the requested discovery relates—falls within the core of federal habeas. Resp. Br. 18-25. A claim that one's conviction is invalid and must be vacated in the face of evidence establishing actual innocence (whether or not the claim is ultimately valid) is "an attack by a person in custody upon the legality of that custody." *Preiser*, 411 U.S. at 484. If Osborne asserts that claim in federal court, he must do so in a federal habeas action.

This fundamental connection between the discovery Osborne seeks and the substantive claim to which it relates forms the core of the State's argument. Pet. Br. 21-26. Permitting Osborne's piecemeal-litigation strategy would transform § 1983 into a discovery device that would allow parties to circumvent discovery rules and avoid threshold issues that normally precede discovery. Osborne fails to address this aspect of his strategy or cite any precedent to support his reading of § 1983. Resp. Br. 18-25.

Instead, Osborne focuses on matters that are either irrelevant or wrongly analyzed. Resp. Br. 18-25. For example, Osborne suggests that a stand-alone access-to-evidence claim could not be brought in federal habeas. Resp. Br. 21. But that misses the point. Discovery should be treated as discovery; it cannot be asserted in an action separate from the substantive claim to which it relates. Pet. Br. 21-23. To seek discovery in federal court, Osborne must first assert a substantive federal claim. *See Houston Business Journal, Inc. v. Office of the Comptroller of Currency*,

86 F.3d 1208, 1213 (D.C. Cir. 1996) ("The federal courts are not free-standing investigative bodies whose coercive power may be brought to bear at will in demanding documents from others.").

Osborne responds that discovery is discretionary in federal habeas actions. Resp. Br. 23-24. This statement is true as far as it goes. *See* Rule 6(a), Rules Governing Section 2254 Cases; *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). But when a prisoner states a prima facie claim for habeas relief, "it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry." *Harris v. Nelson*, 394 U.S. 286, 300 (1969). Under this standard, if Osborne asserts a valid claim for federal habeas relief and if DNA testing is relevant to that claim, then he could seek access to the DNA evidence under Rule 6(a). In fact, *Thomas v. Goldsmith*, 979 F.2d 746, 749-50 (9th Cir. 1992), *required* the discovery of DNA evidence to a petitioner who had asserted a gateway-innocence claim. Although *Thomas* went beyond what was necessary to vindicate this discovery interest, the decision places in perspective Osborne's objection to the adequacy of discovery in federal habeas actions.

Osborne's real complaint is not that discovery is discretionary, but that it must proceed in an orderly fashion. Discovery does not begin until the petitioner has established a prima facie claim. *See, e.g.*, *Harris*, 394 U.S. at 290 (district court may order discovery when "confronted by a petition for habeas corpus which establishes a prima facie case for relief"). Requiring the assertion of a prima facie claim allows the court to determine what evidence will be material as well as the procedure for the orderly discovery of that evidence. *See Bracy*, 520 U.S. at 904 (in reviewing

the denial of a habeas petitioner's discovery request, this Court had to identify the "essential elements" of the substantive claim for relief before it could determine the existence of good cause for the requested discovery). It also protects States from the burdens of discovery in response to frivolous or procedurally barred habeas claims.

But therein lies the rub for Osborne. This Court has never recognized a stand-alone habeas claim of actual innocence. *See House v. Bell*, 547 U.S. 518, 554-55 (2006). And Osborne has alleged no independent constitutional errors that would support a gateway claim of actual innocence. Pet. App. 19a. If Osborne is bound by orderly process—if he must assert a prima facie claim before discovery—then his request will fail because he has no substantive federal claim to which the discovery would relate.

To avoid this dilemma, Osborne now asserts that he does not intend to file a federal actual-innocence claim. Resp. Br. 22-23. Instead, he intends to pursue state remedies. *Id*. This change in tack does not advance Osborne's argument; it merely highlights the federalism concerns addressed in the State's brief. Pet. Br. 24-26.

For example, if Osborne intends to use the DNA evidence to support a postconviction claim in state court, then he is asking the federal court to trump state discovery rules. Alaska law applies the civil discovery rules in postconviction-relief actions. *See* Alaska R. Crim. P. 35.1(g). Under those rules, a party "may obtain discovery regarding any matter, not privileged which is relevant to the subject matter involved in the pending action." Alaska R. Civ. P. 26(b)(1).

But Osborne has not alleged a claim that would trigger discovery. In his state postconviction-relief action, Osborne argued that his counsel was ineffective, and he sought DNA testing to prove prejudice from his counsel's actions. Pet. App. 97a. His requests were denied because he did not allege a prima facie claim that his counsel's actions were ineffective. *Id*. at 100a-02a. Therefore, the issue of prejudice was moot. *Id*. Osborne then argued that he needed the testing to support a future claim based on newly discovered evidence. *Id*. at 103a. But the Alaska court believed that Osborne likely could not meet the statutory requirements for asserting a claim of newly discovered evidence. *Id*. at 104a-05a, 109a-10a. And until Osborne asserts a prima facie claim for relief, discovery is unnecessary.

The Alaska Court of Appeals, however, also recognized the possibility that a prisoner might pursue an actual-innocence claim under the state constitution even if he could not meet the statutory requirements for postconviction relief based on newly discovered evidence. Pet. App. 104a-11a. But Osborne asserted no such claim for relief; instead he asked for discovery without asserting such a claim. Drawing on examples from other States, the court devised a three-part test for determining when a prisoner is entitled to discover DNA evidence before asserting a substantive claim of innocence. *Id.* at 110a-12a. Osborne failed that test. *Id*. at 75a-82a. Most important, the Alaska court found that Osborne could not show that favorable testing would conclusively establish his innocence. *Id*. at 78a-82a. Further testing of the semen in the condom found at the scene might exclude him as the source of the material, but would not conclusively establish his innocence because it could not rule out the possibility

that the condom recovered at the scene was not the one used to commit the rape. *Id*. at 78a-79a. To establish that fact, epithelial cells on the outside of the condom would have to be tested–a fact that Osborne raised only in passing in the Alaska courts.

Osborne has not challenged the reasonableness of the Alaska courts' rulings. Instead, with only a passing nod to the state courts, Osborne bases his § 1983 claim on an informal, essentially over-the-counter, request he made to the District Attorney's Office. J.A. 36-37; Pet. App. 8a. But when that request was made, the District Attorney was opposing counsel in Osborne's state postconviction action, and the state court had already denied his request for testing. *Id*. Osborne's § 1983 complaint essentially asked the federal court to superintend discovery in the state court. The implications of such an approach to the state-federal balance are profound.

Osborne also suggests that he will use the evidence to pursue a clemency petition. Resp. Br. 23. Under Alaska law, "[i]f a prisoner relies on a particular basis recognized by the state as a potential ground for clemency, the prisoner must have a fair opportunity to make a factual showing that the ground has been satisfied." *Lewis v. State, Dep't of Corrections*, 139 P.3d 1266, 1270 (Alaska 2006). But Osborne has not requested clemency. Instead, he is asking the federal court to intervene in, and set procedures for, a not-yet-initiated state clemency proceeding, thereby eliminating the State's right to determine in the first instance what evidence will be provided to a prisoner who seeks clemency.

In identifying possible state remedies, Osborne has perhaps revealed his true intentions. In particular, he identifies "prosecutorial consent" as a possible

form of state relief. Resp. Br. 23. Osborne notes that in 88% of cases in which postconviction DNA testing is exonerative, no further litigation is required to obtain the petitioner's release; release is the product of the prosecutor's consent to vacate the conviction. *Id*. This process has always been the subtext of Osborne's case. Pressure brought to bear on a prosecutor through a well-planned publicity campaign may achieve Osborne's goals regardless of whether testing conclusively establishes innocence or merely casts doubt on guilt. Osborne thus acknowledges that a separate action may be unnecessary to secure his release. *Id*. That is, the discovery claim is sufficient by itself to cause his release. Under this analysis, the discovery claim falls squarely within the core of federal habeas.

Finally, Osborne disputes the State's interpretation of *Wilkinson v. Dotson*, 544 U.S. 74 (2005). Resp. Br. 24-25. According to Osborne, the State is arguing that his discovery claim must be asserted in a habeas action because his ultimate purpose is to challenge his confinement, and Osborne asserts that *Dotson* rejected this type of "but for" test. Resp. Br. 24. But the State is not arguing that Osborne's "ultimate purpose" should determine whether the claim must be brought in habeas. Although Osborne's "ultimate purpose" is relevant, it is the closeness of the connection between that purpose and the § 1983 claim that is decisive. This is the distinction between *Dotson*–where prisoners asserted outcome-neutral procedural claims, the success of which would, at most, provide the prisoners with new or earlier parole hearings and would not assure their release—and *Edwards v. Balisok*, 520 U.S. 641, 646-48 (1997)—where the prisoner's claim was not outcome-neutral, because proof of alleged bias and egregious misconduct of a hearing

officer would, if successful, "necessarily imply the invalidity of the punishment imposed." *Id*. at 648.

Osborne implicitly concedes this connection between testing and release: according to Osborne, release often occurs without the prisoner's having to file a separate action after exonerative results. Resp. Br. 23. In short, while the final test will occur in a laboratory, the die will be cast by the ruling on the discovery claim. Further action to set aside the conviction, to the extent such action is needed, would be *pro forma*.

II. OSBORNE DOES NOT HAVE A RIGHT OF ACCESS TO THE DNA EVIDENCE INDEPENDENT OF A MECHANISM FOR POSTCONVICTION RELIEF

Osborne's due-process arguments can be distilled to a single question: If it costs the State nothing, why not test? But it does not cost the State nothing. The State's interest in limiting meritless attacks on its criminal judgments—sometimes referred to as "finality"—is no mere abstraction. Beyond the victims' interests, *see generally* Br. of K.G. and Crime Victims Institute, there is the State's need to husband the resources that must be expended in reviewing, processing, and (when necessary) litigating these requests. And those burdens—which are borne by prosecutors' offices, crime laboratories, and courts—increase when the standards for requesting testing are set so low as to encourage gamesmanship by prisoners with no valid claim of innocence but nothing to lose by requesting testing. Furthermore, as the various statutes regulating DNA testing in other States reflect, States have an interest in ensuring that postconviction claims are heard by the court in which the criminal trial itself took place—the court most famil-

iar with the record and best able to appreciate the significance of any new evidence.

States thus have a strong interest in setting reasonable limits that focus state resources on cases in which testing is most likely to result in exoneration. Alaska has procedures that allow this type of screening, and the constitutionality of those procedures is unchallenged. Alaska cannot be faulted for insisting that Osborne follow these procedures.

A. Osborne Has Only a Limited Liberty Interest Based on the State-Created Procedures Available to Him

Due process protects from arbitrary government action "a substantive interest to which [an] individual has a legitimate claim of entitlement." *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983). Thus, in resolving a due process claim, one must first determine whether state action has "infringed or implicated a 'liberty' interest . . . within the meaning of the Due Process Clause." *Meachum v. Fano*, 427 U.S. 215, 223-24 (1976).

The Ninth Circuit created a stand-alone postconviction right to discover evidence but failed to identify the liberty interest served by this due process right. Pet. App. 15a-23a. Osborne does not fill this gap. Instead, he identifies meaningful access to state postconviction relief as his liberty interest.[1] Resp. Br. 27-31. But meaningful access is not itself a liberty interest; "[p]rocess is not an end in itself." *Wakinekona*, 461 U.S. at 250. Rather, meaningful

[1] In casting his asserted liberty interest solely in the context of state remedies, Osborne has seemingly abandoned a potential freestanding claim of actual innocence in federal court as a basis for seeking the evidence in question. *See* Resp. Br. 30-31.

access secures an individual's ability to redress the deprivation of a liberty interest. *Christopher v. Harbury*, 536 U.S. 403, 415 (2002) (right of access to courts "is ancillary to the underlying claim, without which a plaintiff cannot have suffered injury by being shut out of court").

Thus, Osborne must look elsewhere for a liberty interest. First, Osborne hints at a broad liberty interest in freedom from unjust confinement. Resp. Br. 27, 32. But a conviction after a fair trial "extinguishe[s]" this liberty interest. *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 7 (1979) (citing *Meachum*, 427 U.S. at 224). Second, Osborne points to state-created mechanisms for postconviction relief. Resp. Br. 29-31. A State may create a liberty interest by establishing substantive, mandatory criteria that govern official decisionmaking. *See Kentucky, Dep't of Corrections v. Thompson*, 490 U.S. 454, 463 (1989).

It is this latter form of liberty interest—created by States themselves—on which Osborne's due process claim must stand or fall. In Alaska, a prisoner may pursue postconviction relief through a court proceeding or a request for executive clemency. But Osborne cannot rely on executive clemency to create a liberty interest. Because executive clemency is discretionary, it gives rise at most to a residual interest that requires only "*minimal* procedural safeguards," *i.e.*, protection against random action.[2] *Ohio Adult*

[2] Osborne's amici argue for a broader liberty interest in clemency for prisoners who can conclusively establish their innocence. Br. of Eleven Individuals 23-28. But amici offer little to support a protected expectation in a form of relief that has traditionally been left entirely to executive discretion. And even if there were some added liberty interest, amici fail to

Parole Authority v. Woodard, 523 U.S. 272, 289 (1998) (O'Connor, J., concurring); *but see id*. at 280-82 (Rehnquist, C.J.) (plurality opinion) (prisoner has no liberty interest in clemency). More important, even if there is a liberty interest based on state-created remedies, Osborne cannot show that Alaska's procedures are constitutionally deficient.

B. Alaska Law Provides Access to Evidence Needed to Support a Claim for Postconviction Relief

Osborne's brief is almost devoid of any discussion of the procedures available under Alaska law. But any analysis of Osborne's meaningful-access claim must begin with a review of the access available under state law. *See Parratt v. Taylor*, 451 U.S. 527, 542 (1981) ("the existence of an adequate state remedy . . . avoids the conclusion that there has been any constitutional deprivation"). There are at least three avenues by which Osborne could seek state postconviction relief based on actual innocence—assuming that he could meet the relevant procedural requirements. These include: (1) a court action for postconviction relief under Alaska Statute 12.72; (2) pre-claim discovery under the three-part test adopted by the Alaska Court of Appeals in Osborne's state proceeding (Pet. App. 110a); and (3) executive clemency under the Alaska Constitution, article III, section 21.[3]

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explain how that interest gives Osborne a right to obtain evidence *before he submits a clemency petition*.

[3] In its opening brief, the State identified another form of postconviction relief: an administrative petition for discretionary parole. Pet. Br. 46. Osborne does not mention this option in his brief. Resp. Br. 29-30.

Each of these avenues provides a mechanism by which deserving applicants may obtain access to evidence to support a claim of actual innocence. The traditional rules of civil discovery apply to court proceedings for postconviction relief under Alaska Statute 12.72. *See* Alaska R. Crim. P. 35.1(g). Similarly, the Alaska Court of Appeals has recognized a limited right to pre-claim discovery if the prisoner can show "(1) that their conviction rested primarily on eyewitness identification evidence, (2) that there was a demonstrable doubt concerning the defendant's identification as the perpetrator, and (3) that scientific testing would likely be conclusive on this issue." Pet. App. 110a. Finally, state clemency investigations must provide petitioners "a fair opportunity to make a factual showing" to support a clemency request. *See Lewis*, 139 P.3d at 1270. These avenues remain available to Osborne, although they do not necessarily guarantee the result Osborne seeks.

In addition, the Ninth Circuit speculated that "the Alaska Constitution might require court intervention if a defendant were to present" a strong DNA-based case of actual innocence, despite procedural default under the statutory postconviction procedures. Pet. App. 19a (citing Pet. App. 89a). Even if such speculation is legitimate, there is no reason to doubt that an Alaska court would adopt discovery procedures similar to those that apply to claims under Alaska Statute 12.72. *See Lewis*, 139 P.3d at 1270.

C. Osborne Has Not Invoked and Been Denied Discovery Under the State Procedures Available to Him

Although the Ninth Circuit based its ruling on an extension of a prisoner's pretrial right to exculpatory evidence (Pet. App. 15a-23a), Osborne takes a differ-

ent approach, arguing that the District Attorney's refusal to grant him informal access to the DNA evidence denied him meaningful access to state postconviction relief. Resp. Br. 27-31. But a meaningful-access claim depends not on whether the State has refused to provide something an individual believes is needed to pursue legal relief, but on whether there exist constitutionally adequate means to pursue relief in a meaningful fashion; the focus is on the procedures actually available. *See Lewis v. Casey*, 518 U.S. 343, 351 (1996).

Here, Osborne has not asserted an actual-innocence claim in the state courts, filed a petition for clemency, or requested discovery through those state-provided mechanisms. While those state mechanisms do not guarantee him access to the DNA evidence, Osborne cannot show that the pre-claim denial of his informal request for DNA testing precluded him from seeking relief under those state procedures. In short, because he has not invoked the state-provided mechanisms, he has not been denied meaningful access. *See Lewis*, 518 U.S. at 351-53 (meaningful-access claim requires prisoner to establish actual injury by demonstrating that alleged shortcomings in process "hindered his efforts to pursue a [nonfrivolous] legal claim"); *Harbury*, 536 U.S. at 415 (constitutional right of access to courts "is ancillary to the underlying claim, without which a plaintiff cannot have suffered injury by being shut out of court").

The State acknowledges that Osborne filed a state-court action for postconviction relief in which he sought access to the DNA evidence. *See* Pet. App. 63a-90a, 97a-112a. But Osborne did not assert an actual-innocence claim in that action. And he did not present a persuasive argument for pre-claim access to

evidence under the state court's three-part test. Instead, he focused on the semen and hair, which could not conclusively establish his innocence. Pet. App. 78a-79a; J.A. 220-21. Though he mentioned the epithelial cells in the state courts, he did not pursue their significance.[4] And Osborne did not challenge the three-part test adopted by the Alaska court for pre-claim discovery. Osborne's opportunity for federal review of that standard would have been certiorari review in this Court, which he did not seek, and he cannot now relitigate the merits of that test. *See Allen v. McCurry*, 449 U.S. 90, 103 (1980) ("a generally framed principle that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court . . . cannot lie in the Constitution . . . [a]nd no such authority is to be found in § 1983 itself"); *accord San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 343 (2005).

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[4] Osborne complains of the timing of the State's concession that new DNA testing could conclusively establish his innocence. Resp. Br. 52. But Osborne mentioned the epithelial cells only in passing in the state courts—in an affidavit submitted by his attorney and as support for an unrelated argument concerning an alleged waiver by the State. More important, his focus in the federal litigation was solely on the semen and hair. It was not until the second argument before the Ninth Circuit that Osborne explicitly argued to a federal court the potential effect of testing the epithelial cells. Once Osborne pressed that issue, the State recognized that testing both the epithelial cells and the semen carried the potential of conclusively establishing Osborne's innocence and candidly conceded that fact. More important, Osborne misstates the State's concession, asserting it has conceded that new testing would conclusively establish his innocence." Resp. Br. 16, 30, 45 (emphasis added). But the State has conceded only the possibility of exoneration. Cert. Rpy. 8.

Because Osborne did not present his current post-conviction claim to the state courts, his earlier post-conviction-relief case cannot be considered an invocation of state postconviction-relief procedures, nor can the resolution of that case against Osborne be cited as a failure on the part of the State to provide Osborne with meaningful access to such relief.

D. Procedural Due Process Does Not Require the State to Provide Pre-Claim Discovery of DNA Evidence

Because Osborne has not yet invoked any state-created postconviction mechanism, his assertion that he has been denied meaningful access is premature. Osborne nevertheless argues that his inability to obtain evidence *before* asserting a claim for post-conviction relief interferes with meaningful access to those remedies. Resp. Br. 31-39. But the State's insistence that Osborne follow the rules does not violate due process.

1. Osborne does not satisfy the applicable due process standard of *Medina v. California*

Osborne contends that *Mathews v. Eldridge*, 424 U.S. 319 (1976), supplies the method for analyzing his procedural due-process claim. Resp. Br. 31-36. But *Mathews* "does not provide the appropriate framework for assessing the validity of state procedural rules which . . . are part of the criminal process." *Medina v. California*, 505 U.S. 437, 443 (1992). Expanding the guarantees of fair criminal procedure "under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order." *Id.*; *see also Smith v. Robbins*, 528 U.S.

259, 274-75 (2000) (emphasizing broad leeway given to States in determining how to handle post-conviction proceedings); *Murray v. Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring in judgment) (same).

In matters of criminal procedure, this Court "exercis[es] substantial deference to legislative judgments" and asks only whether a State has "offend[ed] 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 445-46 (internal quotation marks omitted). "[I]t is not the role of the courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution." *Lewis*, 518 U.S. at 349. Thus in *Herrera v. Collins*, 506 U.S. 390, 407-17 (1993), this Court used a *Medina*—not a *Mathews*—analysis to evaluate a claimed due-process right to assert "actual innocence" in postconviction proceedings.

Osborne is demanding (as Herrera was) a supplement to the established procedures for ascertaining the truth at trial. And, as the State and the United States have explained, Osborne's demand directly implicates (as Herrera's did) the considerations supporting a legislature's decision whether to furnish a particular additional safeguard against a wrongful conviction. *See* Pet. Br. 49-52; U.S. Br. 17-24. Osborne's statement that he is not "seeking micromanagement of criminal procedure under the guise of 'due process,'" Resp. Br. 37, is simply wrong: the Ninth Circuit's ruling accomplishes precisely that, thus violating this Court's injunction against "'intrud[ing] upon the administration of justice by the individual States.'" *Medina*, 505 U.S. at 445 (quoting *Patterson v. New York*, 432 U.S. 197, 201-02 (1977)).

Moreover, although Osborne's amici cite cases of exoneration as proof of the need for federal oversight, there is no indication that federal courts played a role in those cases. Those cases show only that *state* procedures have led to appropriate grants of clemency by *state* officials. They hardly constitute a clarion call for *federal* intrusion into these state matters.

Osborne fails the *Medina* test. Osborne concedes that there is no "settled tradition" of granting the relief he seeks. Resp. Br. 37. He tries to explain away this problem because DNA testing "did not even exist until twenty years ago." *Id*. But as the United States explains, there is no "settled tradition" in this country of granting on-demand postconviction access to *any* physical evidence, many kinds of which have been used for decades to convict individuals. *See* U.S. Br. 16.

Osborne responds that, if "history and tradition" are defined at a sufficiently general level, *Medina* is satisfied because "the core objective of our criminal justice system" is to convict the guilty and free the innocent. Resp. Br. 37. But "'[d]ue process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person.'" *Medina*, 505 U.S. at 451 (quoting *Patterson*, 432 U.S. at 208). Osborne also argues that the "contemporary practice" component of a *Medina* inquiry, *see* 505 U.S. at 447-48; *Herrera*, 506 U.S. at 410-11, works in his favor. Resp. Br. 38. But that is not true. Forty-six jurisdictions have enacted DNA testing statutes, but, as even Osborne's amici acknowledge, *see* Br. of Current and Former Prosecutors 21-26, he would not qualify for testing under many of them. *See also* U.S. Br. 17-24; Br. of 31 States 3-13.

Osborne's final *Medina* argument is that "fundamental fairness" works in his favor because the State has "fail[ed] to articulate *any* valid interest" supporting its position. Resp. Br. 38. But the State has articulated several interests, including expending scarce resources available for DNA testing on only the most promising cases and not allowing prisoners to game the system. *See* Pet. Br. 36, 50, 52, 53; *see also* Br. of 31 States 6-7. Those interests are no less "valid" than the interests accorded respect in *Schlup v. Delo*, 513 U.S. 298, 324 (1995), *McCleskey v. Zant*, 499 U.S. 467, 493 (1991), and *Williams v. Taylor*, 529 U.S. 362, 386, 404 (2000), all of which limited collateral challenges to States' presumptively valid criminal judgments.

2. Osborne's claim would fail even under *Mathews v. Eldridge*, if it applied

Even if the *Mathews* test applied—which it does not—Osborne's claim would fail. *Mathews* considers: (1) the private interest affected by official action, (2) the risk of erroneous deprivation of that interest through use of available procedures and the probable value of additional procedural safeguards, and (3) the government's interest, including the burdens that any additional procedures might impose. *Mathews*, 424 U.S. at 335. Viewed in the light of the post-conviction procedures available to Alaska prisoners, the *Mathews* balance tips decidedly in the State's favor.

Osborne defines his interest as the "almost uniquely compelling" interest in the accuracy of the criminal proceeding that resulted in his imprisonment. Resp. Br. 32 (citing *Ake v. Oklahoma*, 470 U.S. 68, 78 (1985)). But *Ake* was a pretrial case. By contrast,

"federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact." *Herrera*, 506 U.S. at 400. Thus, any interest in accuracy that survives a fair trial is minimal. *See Greenholtz*, 442 U.S. at 7 (conviction after fair trial "extinguishe[s]" prisoner's pretrial liberty interest).

Osborne's analysis of the risk of erroneous deprivation of his personal interest misses the mark for two reasons. First, he claims that this risk stems from an absence of a "*statutory mechanism* for obtaining access to the evidence for DNA testing." Resp. Br. 32-33 (emphasis added). But Osborne cites no authority for the proposition that procedural protections must be statutory or specific to DNA evidence. Second, Osborne fails to account for the procedures that are available to him. *See*, *supra*, pp. 12-13 (discussing available remedies for prisoner who has made a prima facie case). In light of the availability of these procedures, Osborne fails to identify any substantial risk of erroneous deprivation. That is, Osborne has not explained why he must have access to the evidence *before* he asserts a prima facie claim for relief, in addition to the state-created procedures available to him after he has asserted such a claim.

Finally, Osborne attempts to define the State's interest as merely a "generic interest in the finality of criminal convictions." Resp. Br. 33. The State does not rely solely on its "indisputable interest in finality." *Harvey v. Horan*, 285 F.3d 298, 306 (4th Cir. 2002) (Luttig, J., opinion respecting denial of rehearing *en banc*). The State has never claimed that access should be denied in all circumstances. But when a prisoner seeks to attack a fairly obtained conviction on the ground of actual innocence, the State has a

strong interest in screening out claims that clearly lack merit and devoting its resources to those claims that are extraordinary. *Cf. Herrera*, 506 U.S. at 417 (assuming threshold showing for claim of actual innocence "would necessarily be extraordinarily high"). The concern for state resources is substantial. The problem of DNA backlogs at crime laboratories implicates not merely the ability to address post-conviction innocence claims but also the investigation and prosecution of crimes in the first instance. *See* National Institute of Justice, National Forensic DNA Study Report, Executive Summary (2003) (providing statistics on backlogs and impact on criminal justice system).[5] In addition, the State has a strong interest in ensuring that claims are resolved in accordance with the orderly process defined by the legislature and the courts. These interests support the types of requirements imposed by Alaska, other States, and Congress.[6]

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[5] This report is available online at http://tinyurl.com/NatlForensicDNAStudy (last visited February 17, 2009).

[6] Osborne suggests that the Ninth Circuit's decision will not affect DNA statutes in other jurisdictions. Resp. Br. 51. But many of those statutes would deny Osborne the testing he seeks. To the extent the Ninth Circuit would require testing that is otherwise precluded under state law, that decision renders those laws invalid. And any limits imposed by those laws could be sidestepped by filing a § 1983 action. Indeed, the amicus brief of current and former prosecutors encourages such sidestepping. After proclaiming in a heading on page 20 that recognizing a constitutional right "Would Not Affect the State Statutory Mechanisms Currently In Place," amici on the next page acknowledge that several state statutes would *not* provide Osborne relief and decry their criteria as "arbitrary line-drawing" that they say the Constitution should override.

Osborne attempts to divert attention from the State's legitimate interests by asserting that, as far as his attorneys are aware, "[Alaska] is the only one of those States [without a DNA testing statute] that has not conducted a single postconviction DNA test pursuant to court order or consent." Resp. Br. 38. That statement is proof of nothing because Osborne provides no information on how many requests have been made to the State. The absence of DNA testing could reflect nothing more than the State's relatively small prison population and the lack of any requests in which DNA testing had the potential to conclusively establish innocence.[7]

E. Osborne Cannot Avoid State Procedural Requirements By Independently Requesting Evidence from the District Attorney

The District Attorney's denial of Osborne's informal request for evidence does not change this analysis because that denial had no effect on Osborne's purported liberty interest. *Cf. Young v. Hayes*, 218 F.3d 850, 853 (8th Cir. 2000) (Circuit Attorney "unconscionably interfere[d]" with state-created clemency process by inducing subordinate to withhold from governor information favorable to pending clemency petition). Osborne has put the cart before

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[7] Osborne's assertion that no requests for testing have been granted is not based on the record before this Court. Moreover, counsel for the State has been able to identify only seven requests (including Osborne's), most of which were made in the context of court proceedings. Most are still pending, but one was granted by the state court (although no testing occurred because the evidence had already been destroyed). *See Patterson v. State*, 2006 WL 573797 (Alaska Ct. App. Mar. 8, 2006) (unpublished).

the horse by suggesting that the District Attorney could interfere with postconviction procedures *before* Osborne has even invoked them. "It is for the courts to remedy *past or imminent* official interference with individual inmates' presentation of claims to the courts." *Lewis*, 518 U.S. at 349 (emphasis added). Thus, with no evidence that the District Attorney's decision affected Osborne's ability to make meaningful use of Alaska's postconviction-relief mechanisms, there is nothing to analyze under either *Medina* or *Mathews*.

Osborne offers no adequate explanation why a direct request to the District Attorney should be the exclusive means for securing meaningful access to state postconviction procedures in the absence of a statute providing for DNA access. The absence of a specific statute, he asserts, means that "no meaningful procedural safeguards" exist to ensure against the erroneous deprivation of his purported liberty interest. *See* Resp. Br. 33. But, as noted above, state post-conviction mechanisms incorporate procedures through which he could seek access to the DNA evidence. And Osborne offers no authority that meaningful procedural safeguards can be provided only by statute. One need look no further than *Brady v. Maryland*, 373 U.S. 83 (1963), for an example of a judicially imposed procedural safeguard.

F. *Brady v. Maryland* Does Not Impose an Extrajudicial, Postconviction Right to Discovery from a Prosecuting Authority

The Ninth Circuit relied on *Brady* to create a stand-alone postconviction discovery right. Pet. App. 15a-16a. Osborne all but concedes that *Brady* does not create such a right detached from any substan-

tive claim for relief. *Compare* Pet. Br. 35-38 *with* Resp. Br. 39-41. Instead, he argues that there exists in the penumbra of *Brady* a transcendent right to discovery of any evidence that advances the truth-seeking function of the justice system. Resp. Br. 40-41. Because "truth is a fundamental goal of our legal system," *United States v. Havens*, 446 U.S. 620, 626 (1980), the application of such a shadowy principle would have virtually no limit.

The State shirks neither its dedication to the truth nor its duty to establish justice by insisting that a defendant follow the orderly procedures available for obtaining discovery of evidence. The point of Osborne's claim, however, is to avoid those procedures. Osborne does not seek due process; he seeks to avoid the process due.

G. *Arizona v. Youngblood* Does Not Support Osborne's Due Process Claim

Osborne cites Judge Luttig for the proposition that withholding evidence from a convicted defendant "for no reason at all" where that evidence could establish factual innocence comes "perilously close" to the bad-faith destruction of potentially useful evidence and should be prohibited. Resp. Br. 42 (quoting *Harvey*, 285 F.3d at 318 (Luttig, J.) (citing *Arizona v. Youngblood*, 488 U.S. 51 (1988)). But the State action Osborne complains of does not fall within the concerns of *Youngblood*.

Youngblood affords a remedy only for destruction of evidence and only if the State acts in bad faith. Neither of these factors is present here. First, a refusal to provide access to evidence "is not the equivalent of destruction" because the evidence is preserved and could be tested if the prisoner "otherwise

had a right of access to the evidence." *Grayson v. King*, 460 F.3d 1328, 1338 n.6 (11th Cir. 2006). Second, a bad-faith requirement reasonably limits the duty to preserve evidence to those cases "where the interests of justice most clearly require it," *i.e.*, where the conduct by the police "indicate[s] that the evidence could form a basis for exonerating the defendant." *Youngblood*, 488 U.S. at 58. But as discussed previously, the State had ample reason to deny Osborne's ad hoc request to the District Attorney.

H. Osborne's Right to Substantive Due Process Was Not Violated Because the State's Denial of Osborne's Request for Access Was Not Arbitrary

Osborne argues that the State's decision to withhold access "rises to the level of conscience-shocking behavior" and, therefore, violates substantive due process. Resp. Br. 43. To support this argument, Osborne persistently mischaracterizes the State's position as stubborn and arbitrary. *See* Resp. Br. (I), 16, 18, 26, 28, 32, 33, 43, 45, 49, 52. But the State's position was neither arbitrary nor stubborn.

The only request for access at issue in this case is the request Osborne made directly to the District Attorney's Office. *See* J.A. 36-37 (¶39). Osborne apparently made this request *after* the Alaska Superior Court ruled that the State did not have to provide him access to the evidence and *after* he had initiated state appellate review of that ruling. *Id.*; Pet. App. 8a, 99a-100a. In fact, despite the pending litigation, Osborne made his request outside of any recognized procedure that would provide the necessary oversight to ensure the integrity of the evidence. The State thus had ample justification for refusing this type of informal, over-the-counter request.

The State does not dispute that in the truly extraordinary case—a case in which (1) the evidence could conclusively establish innocence, (2) there is substantial reason to believe that testing would be favorable to the prisoner, and (3) *state procedures have failed to correct clear injustice*—due process might support a federal right of access. But Osborne is essentially arguing that no restrictions, other than some limited showing of materiality, may be placed on postconviction access to DNA evidence. In fact, that is what he must argue, because he cannot meet even the most basic criteria adopted by States and the federal government: he has confessed his guilt rather than declared his innocence, and there is no reason to doubt his guilt. In this and many other respects, Osborne's case differs from the stories of misapplied justice set out in the amicus briefs filed on Osborne's behalf.

First, Osborne has not maintained his innocence. He confessed his guilt under circumstances that do not suggest coercion or other improper action by the State. Pet. App. 71a & n.11, 73a. While some of the prisoners mentioned by amici confessed, the confessions were usually pretrial, either to the police or as part of a plea agreement to avoid the death penalty. Nothing like that exists here. Other than his desire to get out of prison, there is no evidence that Osborne was under any of the inherent pressures that attend interrogation when he prepared his confession during the parole proceedings. For this reason, Osborne would fail even the standard set by Judge Luttig, who identified as a key component of a request for testing the fact that the defendant have "*steadfastly* maintain[ed] his factual innocence." *Harvey*, 285 F.3d at 319 (emphasis added).

Consistent with his confession, Osborne, unlike many of the prisoners mentioned by amici, has never affirmatively stated his innocence under oath. In the affidavit filed with the federal court, he merely stated that he had "always maintained [his] innocence," ignoring the confession he gave to the Parole Board less than two years earlier and mentioned in the same affidavit. J.A. 226. As if this were not enough to cast doubt on anything Osborne might say, he then confirmed that doubt by asserting that new testing "will prove once and for all time *either my guilt or innocence*." J.A. 227 (emphasis added).

Second, unlike many of the situations discussed by amici, Osborne's trial lawyer deliberately chose not to pursue more advanced testing. As the United States points out, "a decision to forgo testing at trial is plainly relevant if the Court must evaluate the interest that the government has in denying post-conviction testing to those who have engaged in strategic behavior that does not appear to be consistent with actual innocence." U.S. Br. 25 n.3.

Third, unlike many of the cases cited by amici, Osborne's conviction did not depend on a single eyewitness identification. Osborne was identified not only by K.G., but also by his codefendant, Jackson, who knew Osborne. J.A. 219; Pet. App. 98a. Osborne has offered no reason for disbelieving Jackson, who inculpated himself as well as Osborne. And circumstantial evidence supports K.G.'s and Jackson's accusations: Osborne's telephone calls to Jackson from the arcade before the rape, the testimony of witnesses who saw Osborne get into Jackson's car before the rape and saw Osborne and Jackson together shortly after the rape, arcade tickets found inside Jackson's car, the testimony of witnesses who saw blood on Os-

borne's clothing shortly after the rape, and Osborne's access to an axe handle similar to the one found at the crime scene and similar to the object K.G. described. J.A. 215-16.

Fourth, unlike many of the cases described by amici, DNA testing *was* performed in Osborne's case. Pet. App. 117a. That testing excluded Jackson (and his later passenger, Hunter) and identified Osborne as within the 14-16% of the population who could have been the source of the semen in the condom found at the crime scene. Pet. App. 5a, 117a. Although there is a remote possibility that a more discriminating test might yield a different result, that possibility does not negate the value of the testing that was performed.

All of this sets Osborne's case apart from the extraordinary cases that he and his amici cite. Osborne's case is not extraordinary, and it would not warrant relief under most of the procedures in place across the country. While there may be prisoners for whom postconviction testing is appropriate, it is reasonable for the State to conclude that Osborne is not one of them. Alaska (like most other States) has adopted a reasonable approach that provides adequate relief in deserving cases. While the Ninth Circuit might prefer a different approach, that difference of opinion is not grounds for federal intervention.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

Alaska Statute 33.16.070 provides:

> The [parole] board or a member of the board may issue subpoenas and subpoenas duces tecum in the performance of board duties under AS 33.16.060(a). Subpoenas issued under this section are enforceable in Superior Court.

Alaska Statute 33.20.080(a) provides:

> The governor may not grant executive clemency to a person unless the governor has first provided notice of consideration of executive clemency to the board of parole for investigation and at least 120 days have elapsed since the notice required under (b) of this section has been provided. The board shall investigate each case and, not later than 120 days after receipt of the notice of consideration, submit to the governor a report of the investigation, together with all other information the board has regarding the person. When the report is submitted, the board shall also transmit to the governor the comments it has received under (b) of this section.

Alaska Rule of Civil Procedure 26(b)(1) provides:

> Parties may obtain discovery regarding any matter, not privileged which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The in-

> formation sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Alaska Rule of Civil Procedure 34(a) provides in part:

> Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served[.]

Alaska Rule of Criminal Procedure 35.1 provides in part:

> (d) *Application—Contents*. The application shall (1) identify the proceedings in which the applicant was convicted, (2) state the date shown in the clerk's certificate of distribution on the judgment complained of, (3) state the sentence complained of and the date of sentencing, (4) specifically set forth the grounds upon which the application is based, and (5) clearly state the relief desired. . . . Facts within the personal knowledge of the applicant shall be set out separately from other allegations of facts and shall be under oath. Affidavits, records, or other evidence supporting

its allegations shall be attached to the application or the application shall recite why they are not attached. The application shall identify all previous proceedings, together with the grounds therein asserted, taken by the applicant to secure relief from the conviction or sentence including any previous applications for post-conviction relief. Argument, citations and discussion of authorities are unnecessary. Applications which are incomplete shall be returned to the applicant for completion.

* * *

(g) *Hearing—Evidence—Order*. The application shall be heard in, and before any judge of, the court in which the underlying criminal case is filed. An electronic recording of the proceeding shall be made. All rules and statutes applicable in civil proceedings, including pre-trial and discovery procedures are available to the parties except that Alaska Rule of Civil Procedure Rule 26(a)(1)–(4) does not apply to post-conviction relief proceedings. The court may receive proof by affidavits, depositions, oral testimony, or other evidence. Unless otherwise required by statute or constitution, the applicant bears the burden of proving all factual assertions by clear and convincing evidence. The court may order the applicant brought before it for the hearing or allow the applicant to participate telephonically or by video conferencing. If the court finds in favor of the applicant, it shall enter an appropriate order with respect to the conviction or sentence in the former proceedings, and any supplementary orders as to rearraignment, retrial, custody, bail, discharge, correction of sentence, or other mat-

ters that may be necessary and proper. The court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented. The order made by the court is a final judgment.