No. 08-6

IN THE
Supreme Court of the United States

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

v.

WILLIAM G. OSBORNE,
Respondent.

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

BRIEF OF AMICI CURIAE INDIVIDUALS EXONERATED BY POST-CONVICTION DNA TESTING IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE

Amici Kirk Bloodsworth, Kennedy Brewer, Roy Brown, Jeffrey Deskovic, Dennis Fritz, Bruce Godschalk, Kevin Green, Ray Krone, Christopher Ochoa, and Anthony Robinson were all exonerated after post-conviction testing of DNA evidence demonstrated that they had not committed the crimes of which they were convicted.[1] Amici's experiences

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

have left them committed to seeking the recognition of the constitutional rights of prisoners to obtain access to DNA evidence and to be released from custody if such evidence demonstrates their innocence. They are uniquely positioned to aid the Court in understanding the significance of its decision not only for Respondent but for others who, like amici, were wrongfully imprisoned, and who could be exonerated if afforded access to DNA evidence.

INTRODUCTION

Since 1989, post-conviction testing of DNA evidence has exonerated at least 232 individuals in the United States—including five in the last week.[2] The extraordinary potential of DNA evidence to identify the perpetrator of a crime places it at the heart of criminal justice's function: "to convict the guilty and free the innocent." *Herrera* v. *Collins*, 506 U.S. 390, 398 (1993). This case requires the Court to confront whether a state may constitutionally withhold such potentially powerful evidence from a prisoner, despite conceding that a favorable result would conclusively exonerate him.

In this brief, amici will address three issues. First, amici argue that a right of post-conviction access to evidence for DNA testing should extend to individuals for whom the proof of guilt appears overwhelming—as was the case for the great majority of amici at the time they secured testing—so long as a favorable result would demonstrate innocence. Second, amici argue

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[2] Anna Jo Bratton, *5 Pardoned After Wrongful Conviction In Neb. Crime*, A.P., Jan. 27, 2009 (describing pardon of five individuals who falsely confessed to 1985 rape-murder).

that this Court should recognize a "freestanding" actual innocence claim—that is, that the continued incarceration of an individual who has presented truly persuasive new evidence of actual innocence is constitutionally intolerable. Third, amici argue that, whether or not this Court recognizes a freestanding actual innocence claim today, Respondent's suit seeking access to evidence is cognizable under 42 U.S.C. § 1983.

I. THE COURT SHOULD RECOGNIZE A CONSTITUTIONAL RIGHT OF POST-CONVICTION ACCESS TO DNA EVIDENCE EXTENDING TO INDIVIDUALS FOR WHOM EVIDENCE OF GUILT APPEARS OVERWHELMING

For the reasons set forth in Respondent's brief (at 27-45), amici urge this Court to recognize a constitutional right of post-conviction access to DNA evidence. Petitioners and the United States suggest that, if a constitutional right exists, it should be limited to cases where the prisoner's guilt is already in serious doubt. *See* Pet. Br. 36; U.S. Br. 25-26. Amici urge the Court to reject this position and to hold instead that a court must assume that the results will be exculpatory when evaluating whether withholding such evidence violates due process. As the following accounts make clear, the evidence against amici when they sought testing compellingly indicated guilt. A number of amici had, like Respondent, confessed to the crime, or were alleged to have admitted guilt to jailhouse informants. In several of amici's cases, as in Respondent's case, jurors and reviewing courts alike found forensic evidence, such as "matches" of microscopic hair features, bite marks, or shoeprints, to be convincing evidence of guilt. And several amici were, like Respondent, positively identified by the crime's victims. Petitioners' suggested limitation on the right

would exclude from relief the majority of amici and many other actually innocent incarcerated individuals.

A. False Confessions And Jailhouse Informants

1. Bruce Godschalk

In the summer of 1986, two women living in a housing complex in Montgomery County, Pennsylvania, were raped.[3] Police believed that a single perpetrator had committed both rapes, and, based on the victims' descriptions, prepared a drawing of the suspect. Bruce Godschalk's sister saw the drawing and called the police, leading to his arrest and an audiotaped confession to the crimes.

On the tape, Godschalk narrated twenty separate details of the rapes that had not been released to the public. The prosecutor presented the tape to the jury as overwhelming evidence of Godschalk's guilt, arguing that "it was a 'mathematical impossibility' that Godschalk could have guessed correctly on so many nonpublic facts regarding how the crime was committed."[4] In fact, detectives had supplied these facts to Godschalk during the interrogation through the use of leading questions.[5] In addition to the confession,

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[3] Unless otherwise indicated, the facts in this section are drawn from Seth F. Kreimer & David Rudovsky, *Double Helix, Double Bind: Factual Innocence And Postconviction DNA Testing*, 151 U. Pa. L. Rev. 547, 547-51 (2002); *Godschalk* v. *Montgomery County Dist. Attorney's Office*, 177 F. Supp. 2d 366, 367-70 (E.D. Pa. 2001).

[4] Brandon L. Garrett, *The Substance Of False Confessions* 20 (Oct. 22, 2008) (quoting Trial Tr., *Commonwealth* v. *Godschalk*, No. 00934-87 (May 27, 1987) at 22), <tinyurl.com/falseconfessions>.

[5] *See id.* at 22-23.

the prosecutor presented an identification by one of the two victims and the statement of a jailhouse informant that, while in custody, Godschalk had admitted committing the crimes. The jury convicted him of both rapes.

After unsuccessful post-trial motions and appeal, Godschalk asked a Pennsylvania court to order the District Attorney to turn over for DNA testing seminal residue samples obtained from the victims. Although Pennsylvania was then among the few states whose courts recognized a limited post-conviction right to access such evidence, the court denied the petition on the ground that Godschalk's conviction did not rest "largely on identification evidence," but instead on his own confession. *See Commonwealth* v. *Godschalk*, 679 A.2d 1295, 1297 (Pa. Super. Ct. 1996) (italics omitted). Godschalk then filed a Section 1983 claim in federal district court. Despite the seemingly "overwhelming evidence" of guilt, the district court recognized that the "well-known powerful exculpatory effect" of DNA testing could raise doubts in the minds of reasonable jurors as to Godschalk's guilt and granted the motion. *Godschalk* v. *Montgomery County Dist. Attorney's Office*, 177 F. Supp. 2d 366, 367, 370 (E.D. Pa. 2001) (internal quotation marks omitted).

Two independent laboratories confirmed the police theory that the semen collected from the two crimes came from a single perpetrator, but excluded Godschalk as the source of the semen. Fifteen years after sentencing, the Commonwealth released Godschalk from prison.[6] Four months later, the

[6] The prosecutor did not immediately consent to Godschalk's release, saying that he believed the tests were flawed, and

legislature enacted a post-conviction DNA testing statute, 42 Pa. Cons. Stat. § 9543.1.[7]

2. Christopher Ochoa

In 1989, Christopher Ochoa and Richard Danziger had a meal at a Pizza Hut in Austin, Texas, that had recently been the scene of the brutal rape and murder of Nancy DePriest.[8] A worker overheard them talking about DePriest and thought their behavior suspicious. Police brought in Ochoa, then 22, for questioning, showed him horrifying photos of the crime scene, and

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Godschalk remained in jail for another two weeks. *See* Sara Rimer, *DNA Testing In Rape Cases Frees Prisoner After 15 Years*, N.Y. Times, Feb. 15, 2002, at A12. An even greater delay occurred in the case of Douglas Warney, where prosecutors actually withheld an exculpatory DNA test result. They had submitted DNA evidence for testing without telling Warney, while simultaneously opposing his state-court petition for access. *See Warney* v. *City of Rochester*, 536 F. Supp. 2d 285, 289-90 (W.D.N.Y. 2008). Test results excluded Warney and a CODIS database search inculpated Eldred Johnson—who had committed further crimes, including stabbing three people, while Warney was serving time for the murder Johnson committed, *see* Jim Dwyer, *Inmate To Be Freed As DNA Tests Upend Murder Confession*, N.Y. Times, May 16, 2006, at B1—but prosecutors did not inform Warney of the result until two months later. *Warney*, 536 F. Supp. 2d at 290.

[7] *See* Amie Parnes, *Schweiker Signs Law Letting Convicts Seek DNA Testing*, Phila. Inquirer, July 11, 2002, at B1. Ironically, under recent decisions, Godschalk himself would be unable to obtain DNA evidence under the statute passed in the wake of his exoneration. *See Commonwealth* v. *Wright*, 935 A.2d 542, 543 (Pa. Super. Ct. 2007) (holding that prisoner who confessed did not qualify for relief), *appeal granted*, 951 A.2d 263 (Pa. 2008).

[8] The facts in this section are drawn from Mark Donald, *Lethal Rejection*, Dallas Observer, Dec. 12, 2002.

told him that he would get the death penalty if he did not confess and implicate Danziger. Terrified, Ochoa confessed to the crime and agreed to plead guilty and testify against Danziger. At Danziger's trial, the prosecution introduced forensic evidence that semen found at the scene could have belonged to ten to sixteen percent of the Hispanic population, including Ochoa, and microscopic hair analysis indicating that a hair found at the scene was consistent with Danziger's hair. Ochoa and Danziger were both sentenced to life in prison.

In 1996 and again in 1998, Achim Marino, having experienced a religious conversion, wrote letters to the police and prosecutors confessing to the murder and describing where he had buried the gun and handcuffs used in the crime. When police reinvestigating the crime first approached Ochoa, he continued to assert his guilt because he feared jeopardizing his chances for parole.[9] Danziger had sustained head injuries from a beating by a fellow inmate and was in a mental institution. But Ochoa subsequently requested Short Tandem Repeat (STR) DNA testing of the biological

[9] Prisoners are aware that confessing guilt will improve their chances of obtaining parole. *See* Daniel S. Medwed, *The Innocent Prisoner's Dilemma: Consequences Of Failing To Admit Guilt At Parole Hearings*, 93 Iowa L. Rev. 491, 538 (2008) (observing that inmates are often aware of parole criteria and tailor their presentations accordingly). For example, former Utah prisoner Bruce Dallas Goodman, like Respondent, confessed to a parole board; Goodman was later exonerated. *See id.* at 523-28; *see also id.* at 515 (observing that Utah parole board uses "Rationale Sheet" that "designates complete acceptance of responsibility as a mitigating factor"). Like Utah, the Alaska Board of Parole considers acceptance of responsibility in making parole determinations. *See* Alaska Admin. Code tit. 22, § 20.165(c)(12).

evidence, the results of which exculpated both Ochoa and Danziger and inculpated Marino. After twelve years in prison, Ochoa enrolled at the University of Wisconsin Law School and is now a practicing attorney.

3. Jeffrey Deskovic

In January 1990, Jeffrey Deskovic, a 16-year-old high school sophomore from Westchester County, New York, with no criminal background, was arrested in connection with the rape and murder of his 15-year-old classmate.[10] Police investigators had administered a polygraph test and told Deskovic that he had failed, whereupon Deskovic confessed.

Prosecutors obtained an indictment based on the confession, despite the fact that they were still awaiting the results of early-generation DNA testing of semen from the crime scene. Three days after the indictment was filed, those tests excluded Deskovic as the source of the semen, but the state proceeded with the prosecution, theorizing that the semen might have come from an unknown consensual sexual partner of the victim's, and Deskovic was convicted.

As a 2007 report commissioned by the Westchester County District Attorney later concluded, "[f]ollowing his conviction and sentence, Deskovic received all of the traditional elements of post-judgment due process, but he obtained no relief."[11] The Appellate Division

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[10] Unless otherwise indicated, the facts in this section are drawn from Leslie Crocker Snyder, et al., *Report On The Conviction Of Jeffrey Deskovic: Prepared At The Request Of Janet DiFiore, Westchester County District Attorney* 1-4, 20, 22, 31 (June 2007).

[11] *Id.* at 4.

affirmed his conviction, concluding that his confession was "overwhelming evidence" of guilt and finding no "indication in the record that the defendant's extensive statements . . . were precipitated by a coercive environment or police misconduct that could induce a false confession." *People* v. *Deskovic*, 607 N.Y.S.2d 957, 957 (App. Div. 1994) (internal quotation marks omitted). Deskovic's subsequent federal habeas petition was dismissed as time-barred, *see Deskovic* v. *Mann*, No. 97 Civ. 3023, 1997 WL 811524, at *2 (S.D.N.Y. Nov. 20, 1997), apparently due to an error by his attorney.

Over the next ten years, Deskovic repeatedly requested that evidence from the crime be compared against records in state and federal DNA databases, but prosecutors denied his requests and courts refused to compel them to act. In June 2006, however, a newly-elected District Attorney agreed to perform an STR DNA analysis and database search, which inculpated Steven Cunningham, who was then serving a life sentence for an unrelated murder committed in 1993.[12] In late 2006, after Deskovic had been incarcerated for nearly seventeen years—more than half his life—the District Attorney consented to his immediate release. Cunningham later confessed and pleaded guilty to the crime.

[12] Jim Fitzgerald, *Convict Freed After 16 Years Sees Real Killer Sentenced In Murder*, A.P. State & Local Wire, May 3, 2007.

4. Dennis Fritz and Ron Williamson

In 1982, Debra Sue Carter was raped and murdered in Ada, Oklahoma.[13] The crime went unsolved for five years. Police approached Ron Williamson because he lived near the apartment where Carter was murdered and had a reputation for vulgar language and a bad temper. Suspicions about Williamson then led police to question Williamson's only friend, Dennis Fritz, a junior high school science teacher and widower with one daughter.

The prosecution's case was built around the testimony of a jailhouse informant, Terri Holland.[14] Holland, who was facing check-kiting charges, told police that during a previous stint in jail she had heard Williamson confess that he had killed Carter. The police arrested Williamson and Fritz, theorizing that Fritz had been present when Williamson committed the crime. At trial, two other men testified that Fritz, while in jail awaiting trial, had confessed to them. Another witness, Glen Gore, testified that he had seen Williamson at the bar where Carter was working on the night of the murder, and that Carter had told him that Williamson was bothering her. An expert also testified that several hairs found on the victim were microscopically consistent with Williamson's and

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[13] Unless otherwise indicated, the facts in this section are drawn from Barry Scheck, et al., *Actual Innocence* 168-203 (2003).

[14] Holland had previously provided police with testimony about another supposed jailhouse confession that led to the conviction of one Karl Fontenot for a different long-unsolved murder.

Fritz's.[15] Williamson was sentenced to death, Fritz to life in prison.

Williamson's direct appeals failed. Only five days before his scheduled execution, a federal district court issued a stay and subsequently granted his habeas petition, concluding that Williamson's defense counsel had been ineffective in failing to request a competency hearing to evaluate Williamson's mental health. *See Williamson* v. *Reynolds*, 904 F. Supp. 1529, 1545 (E.D. Okla. 1995), *abrogated on other grounds by Nguyen* v. *Reynolds*, 131 F.3d 1340, 1353-54 (10th Cir. 1997). In preparation for retrial, prosecutors submitted the hairs and other biological evidence from the crime scene for DNA testing and agreed to compare the results against samples from both Williamson and Fritz. The tests exculpated both men, and inculpated Glen Gore, the witness who had testified against Williamson. After eleven years of incarceration, Fritz was reunited with his daughter, who was thirteen when he was convicted. Williamson died in 2004 of cirrhosis of the liver.[16]

B. Forensic Evidence

1. Kennedy Brewer

In March 1995, Kennedy Brewer was convicted and sentenced to death in Mississippi for the rape and murder of the 3-year-old daughter of Brewer's

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[15] *See* Craig M. Cooley & Gabriel S. Oberfield, *Increasing Forensic Evidence's Reliability And Minimizing Wrongful Convictions*, 43 Tulsa L. Rev. 285, 302 (2007).

[16] Jim Dwyer, *Ronald Williamson, Freed From Death Row, Dies At 51*, N.Y. Times, Dec. 9, 2004, at C11.

girlfriend.[17] The victim disappeared from Brewer's girlfriend's house one morning after Brewer had spent the night there, and, when her body was found in a nearby creek two days later, semen was recovered from the victim and her clothes. The victim's body bore a number of marks that the state's forensic odontologist, Dr. Michael West, considered to be bite marks. Dr. West testified that five of the bite marks on the victim's body had been inflicted by Brewer.[18]

The Mississippi Supreme Court affirmed Brewer's conviction, observing that "[t]he circumstances in this case consistently point to Brewer's guilt." *Brewer* v. *State*, 725 So. 2d 106, 134 (Miss. 1998). The court laid special emphasis on the strength of the bite-mark evidence, noting that "[t]he photographs of the doctor's direct comparison test buttress his opinion. Brewer's teeth contained several unique characteristics that are evident in the photos." *Id.*

Shortly after his appeal was denied, Brewer filed a petition for post-conviction relief, arguing that he was

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[17] Unless otherwise indicated, the facts in this section are drawn from *Brewer* v. *State*, 725 So. 2d 106, 113-16 (Miss. 1998); *Brewer* v. *State*, 819 So. 2d 1165, 1166, 1168 & n.1 (Miss. 2000); *Brewer* v. *State*, 819 So. 2d 1169, 1171-72 (Miss. 2002); Shaila Dewan, *New Suspect Is Arrested In Mississippi Killings In Which 2 Men Were Convicted*, N.Y. Times, Feb. 8, 2008, at A11; Shaila Dewan, *Despite DNA Result, Prosecutor Retries A '92 Rape-Murder Case*, N.Y. Times, Sept. 6, 2007, at A1.

[18] A panel of forensic experts who later examined the evidence concluded that the marks that Dr. West relied upon were not human bite marks, but were probably caused by crawfish and insects, decomposition, and rough treatment when the body was recovered. *See* Shelia Byrd, *Mississippi Autopsies Being Questioned*, A.P., Mar. 6, 2008.

denied the opportunity at trial to submit biological evidence for DNA testing. The Mississippi Supreme Court denied the petition, but noted that Brewer should be given access to the state's evidence for post-conviction testing. DNA tests conducted in 2001 excluded Brewer as the source of the semen recovered from the victim; nonetheless, prosecutors remained convinced of his guilt, and sought a new trial for capital murder, pending which he remained in jail. In 2006, a new prosecutor assumed responsibility for Brewer's retrial and decided not to seek the death penalty, rendering Brewer eligible for bail. In August 2007, after 15 years of incarceration, and six years after the exculpatory DNA test, Brewer was released on bail.

Brewer's lawyers later discovered that another man, Justin Johnson, had previously been a suspect in both the crime of which Brewer was convicted and another, similar rape-murder of a young girl. Testing in 2007 indicated that semen recovered from the victim's body in Brewer's case belonged to Johnson, and in February 2008 Johnson was arrested and confessed to both murders. Another man, Levon Brooks, who had earlier been convicted of the second murder based in part on bite-mark testimony by Dr. West, was likewise exonerated.[19]

2. Ray Krone

In 1992, Ray Krone, a former Air Force sergeant with no prior criminal record, was convicted of the

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[19] Shelia Byrd, *Bite-Mark Testimony Is Disputed In Two Mississippi Murder Cases; Defendants Have Both Gone Free*, A.P., Feb. 29, 2008; *Miss. Man Cleared In 1990s Child Murder Case*, A.P. State & Local Wire, Mar. 13, 2008.

murder of a bartender and sentenced to death.[20] The prosecution's case rested principally on testimony from a forensic odontologist that Krone's teeth perfectly matched bite marks found on the victim's breast—for which Krone became known as the "snaggletooth killer."

Krone subsequently filed a request in Arizona state court for STR DNA testing of the saliva found on the victim's blouse and previously-untested blood on the victim's jeans. The government opposed the request on the ground that Krone had insufficiently impeached the scientific evidence used at trial. But the court granted Krone's request, and testing of the saliva and blood yielded a "hit" in the CODIS database, inculpating a man who was in an Arizona prison for attempting, shortly after committing the murder of which Krone was convicted, to sexually assault a child. Krone was released after spending ten years in prison, including almost three years on death row.

3. Roy Brown

In January 1992, Roy Brown was convicted and sentenced to 25 years to life in New York for the murder of a social services worker.[21] At trial, a dentist

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[20] The facts in this section are drawn from Robert Nelson, "*About Face*," Phoenix New Times, Apr. 21, 2005; Rachel King, *Capital Consequences: Families Of The Condemned Tell Their Stories* 12-48 (2005).

[21] Unless otherwise indicated, the facts in this section are drawn from *People* v. *Brown*, 162 Misc. 2d 555, 556 (N.Y. Cayuga County Ct. 1994); *Brown* v. *New York*, 2008-009-029, Claim No. 113684 (N.Y. Ct. Cl. Oct. 20, 2008); Fernanda Santos, *With DNA From Exhumed Body, Man Finally Wins Freedom*, N.Y. Times, Jan. 24, 2007, at B5.

testified that bite marks on the victim showed a bite pattern, including three missing teeth, identical to Brown's. Other witnesses testified that Brown had threatened social services workers for taking his child away from him, and that after the murder he had admitted that he had killed a woman.

In 1994, before the enactment of New York's DNA-access statute, Brown brought a suit seeking DNA testing of saliva samples taken from the scene. The court denied his request, stating that "[f]or a court to willy-nilly tamper with verdicts long after their determination is extremely prejudicial to the People." *People* v. *Brown*, 162 Misc. 2d 555, 558 (N.Y. Cayuga County Ct. 1994). When New York enacted a post-conviction DNA statute later in 1994, Brown again sought relief, but the court held that Brown had made an insufficient showing under the new law that testable DNA evidence still existed.[22]

While in prison, Brown tried to identify the real perpetrator. He obtained police records via a freedom of information law request and found among the records documents implicating another local man, Barry Bench.[23] Brown wrote to Bench from prison accusing him of the crime; shortly after receiving this letter, Bench committed suicide. In 2006, Brown sought again to have the saliva samples tested, and this

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[22] Teresa Starr Fugit, *Convicted Killer Loses DNA Ruling*, Post-Standard (Syracuse, N.Y.), July 29, 1995, at A5.

[23] Fernanda Santos, *Inmate Finds Vindication In His Quest For A Killer*, N.Y. Times, Dec. 20, 2006, at B1.

time, the prosecutor consented.[24] After DNA tests excluded Brown as the source of the saliva and showed a similarity to DNA samples taken from Bench's daughter, Bench's body was exhumed, and tests confirmed that he had been the perpetrator. After serving fifteen years of his sentence, Brown was released in January 2007.

4. Kirk Bloodsworth

In 1985, Kirk Bloodsworth, a 24-year-old former Marine with no criminal background, was convicted and sentenced to death in Maryland for the rape and murder of a 9-year-old girl.[25] An anonymous tipster had informed police that Bloodsworth had been seen with the victim on the day of the murder, and five witnesses testified at trial that they had seen Bloodsworth with the victim. Testimony further showed that a shoeprint found near the victim's body was the same size as Bloodsworth's. Bloodsworth himself had told acquaintances that he had done something "terrible" that day that would affect his marriage. Finally, Bloodsworth had mentioned a "bloody rock" during his first interrogation, a detail allegedly known only to the police. On appeal,

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[24] John Stith, *Another Chance For Convicted Murderer*, Post-Standard (Syracuse, N.Y.), Apr. 21, 2006, at A1.

[25] Unless otherwise indicated, the facts in this section are drawn from 149 Cong. Rec. S11751 (daily ed. Sept. 22, 2003) (statement of Sen. Leahy); Edward Connors, et al., *Convicted By Juries, Exonerated By Science: Case Studies In The Use Of DNA Evidence To Establish Innocence After Trial* 35-37 (U.S. Dep't of Justice, Nat'l Instit. of Justice, June 1996); James Dao, *In Same Case, DNA Clears Convict And Finds Suspect*, N.Y. Times, Sept. 6, 2003, at A7.

Bloodsworth argued that the police had withheld information regarding another possible perpetrator, and explained that he had mentioned the "bloody rock" because the police had placed it next to him on the table during his interrogation and that the "terrible" thing he had done was failing to buy some Mexican food he had promised his wife. The Maryland Court of Appeals overturned the conviction on the basis of the withheld information, but Bloodsworth was convicted on retrial and sentenced to two consecutive life terms.

Bloodsworth later requested to have biological evidence subjected to DNA testing that had not been available at the time of trial. The prosecution consented to testing, and, in 1993, the results of those tests excluded Bloodsworth as the source of semen found on the victim's underwear. After nearly nine years in prison, including two years on death row, Bloodsworth was ordered released in June 1993, and received a gubernatorial pardon in December 1993. Nonetheless, prosecutors refused to concede Bloodsworth's innocence. It was not until ten years later, when the evidence was re-tested using STR DNA and a search of the CODIS database yielded a "hit" on the real killer—a convicted sex offender—that the assistant state's attorney who had originally prosecuted Bloodsworth apologized for the prosecution and convictions. Bloodsworth was the first person who had previously been sentenced to death to have his conviction vacated based on DNA evidence.[26]

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[26] Since his release, Bloodsworth has become active as an advocate for criminal justice reform. *See* Stephanie Hanes, *New Peace, New Purpose*, Baltimore Sun, Oct. 24, 2003, at 1A. Recent federal legislation includes a program named in honor of

C. Misidentified By Victims

1. Kevin Green

In 1980, Kevin Green, a 21-year-old Marine corporal, was convicted in California of second-degree murder and attempted murder after the severe beating of his wife resulted in the stillbirth of their unborn daughter.[27] Tests of semen samples collected from the victim, before the advent of DNA testing, failed to exclude Green as the source.

Green was convicted largely on the basis of his wife's testimony. She suffered brain damage in the attack and initially remembered nothing about it, but she testified at Green's trial that, three months later, she had suddenly regained memory and recalled that her husband had assaulted her when she refused to have sex with him.

Green was exonerated in 1996 when state investigators running semen samples from unsolved cases against a new state DNA database matched several to a convicted rapist, Gerald Parker, who then confessed to the attack on Green's wife. Subsequent testing of the evidence from that attack inculpated

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Bloodsworth, the Kirk Bloodsworth Post-Conviction DNA Testing Grant Program, which provides for funding for the states for post-conviction DNA testing. *See* 42 U.S.C. § 14136e.

[27] The facts in this section are drawn from Anne C. Mulkern, et al., *Wrongly Convicted Man Is Free At Last*, Orange County Register (Cal.), June 21, 1996, at A1; H.G. Reza & Rene Lynch, *Freed O.C. Man Goes Home To Tearful Reunion*, L.A. Times, June 23, 1996, at A1; *Falsely Accused*, Forensic Examiner, Sept. 22, 2007, at 82.

Parker, and Green was released after serving more than seventeen years in prison.

2. Anthony Robinson

In 1987, Anthony Robinson, a 27-year-old former Army officer with a college degree in sociology, was convicted in Texas of aggravated sexual assault and sentenced to twenty-seven years' imprisonment.[28] The victim was assaulted in a campus restroom; Robinson was apprehended nearby and immediately identified by the victim. A jury convicted Robinson and the Texas Court of Appeals affirmed, commenting that the record contained "overwhelming evidence of appellant's guilt." *Robinson* v. *State*, No. C14-87-00345-CR, 1989 WL 102335, at *7 (Tex. Ct. App. Sept. 7, 1989).

Although his initial request for DNA testing was denied, prosecutors consented to testing in 2000, and the results excluded Robinson as the attacker. Robinson went on to earn a law degree from the Thurgood Marshall Law School at Texas Southern University.[29]

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[28] The facts in this section are drawn from *Robinson* v. *State*, No. C14-87-00345-CR, 1989 WL 102335, at *1 (Tex. Ct. App. Sept. 7, 1989); Melissa Fletcher Stoeltje, *Fight For Freedom*, San Antonio Express-News, Feb. 15, 2004, at 1K; Frontline, *Burden Of Innocence: Anthony Robinson*, May 1, 2003 (updated Aug. 2006), <tinyurl.com/anthonyrobinson>.

[29] A similar exoneration after an at-the-scene identification occurred in the case of Eduardo Velasquez. Velasquez was convicted based on the victim's identification and testimony that blood-typing of semen evidence revealed that he, along with 11 percent of the Hispanic population, could have been the source. Like Respondent, Velasquez instructed his attorneys to seek DNA testing, but his attorneys disregarded his instructions.

* * *

These accounts demonstrate that DNA testing has the power to exonerate individuals who were convicted based on evidence that appeared to be overwhelming. Were any of amici in Respondent's place—denied access to evidence by prosecutors and with no meaningful state judicial avenue available—their convictions would still stand today. Likewise, had their requests for access to DNA evidence been judged against the standard Petitioners urge, they would not have qualified for relief.

II. THE COURT SHOULD RECOGNIZE A CONSTITUTIONAL RIGHT NOT TO BE INCARCERATED OR EXECUTED IF ACTUALLY INNOCENT

This Court has never definitively resolved whether the continued incarceration of an individual who presents truly persuasive new evidence of actual innocence violates the Constitution. Amici agree with Respondent (Br. 30-31) that recognizing a constitutional right of post-conviction access to DNA evidence does not require resolution of that question. Nevertheless, recognizing a right of access may one day bring before this Court a habeas petition asserting such

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Velasquez's first petition for post-conviction access to DNA evidence was denied on the ground that the instructions he gave to his attorneys demonstrated that the evidence had been available at trial. *See* Brief and Record Appendix for Defendant [Eduardo Velasquez, f/k/a Angel Hernandez] on Appeal from Denial of a Motion for Access to Evidence for Purpose of DNA Testing, *Commonwealth* v. *Hernandez*, No. 99-P-1288 (Mass. App. Ct. Sept. 10, 1999). He was exonerated when a different court later ordered testing. *See* Pamela H. Sacks, *A Study In Contrasts*, Worcester Telegram & Gazette, May 14, 2002, at C1.

a "freestanding" claim of actual innocence based upon highly probative DNA evidence. When confronted with such a case, the Court should decide what it has already assumed, *see Herrera* v. *Collins*, 506 U.S. 390, 417 (1993), and hold that executing or continuing to punish one who has demonstrated his innocence is unconstitutional. *See Harvey* v. *Horan*, 285 F.3d 298, 306 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing en banc) ("[I]t would be a high credit to our system of justice that it recognizes the need for, and imperative of, a safety valve in those rare instances where objective proof that the convicted actually did not commit the offense later becomes available through the progress of science.").

A. A Freestanding Actual Innocence Right Is Guaranteed By Both The Due Process Clause And The Eighth Amendment

Six Justices in *Herrera* recognized a constitutional right not to be executed upon compelling proof of actual innocence. 506 U.S. at 419 (O'Connor, J., joined by Kennedy, J., concurring) ("I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution."); *id.* at 429 (White, J., concurring in the judgment) ("[A] persuasive showing of 'actual innocence' made after trial, even though made after the expiration of the time provided by law for the presentation of newly discovered evidence, would render unconstitutional the execution of petitioner in this case."); *id.* at 435 (Blackmun, J., joined by Stevens and Souter, JJ., dissenting) ("Nothing could be more contrary to contemporary standards of decency or more shocking to the conscience than to execute a person who is actually innocent." (citations omitted)). The majority

opinion in *Herrera* assumed *arguendo* that "a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional." 506 U.S. at 417; *see also House* v. *Bell*, 547 U.S. 518, 554-55 (2006); *Schlup* v. *Delo*, 513 U.S. 298, 315 n.31 (1995). Although *Herrera* involved an individual facing execution, "the principle at stake is no different for one who has been sentenced not to death, but to a term of extended incarceration." *Harvey*, 285 F.3d at 304-05 (Luttig, J., respecting the denial of rehearing en banc); *see also Herrera*, 506 U.S. at 405 ("It would be a rather strange jurisprudence . . . which held that under our Constitution [a petitioner demonstrating actual innocence] could not be executed, but that he could spend the rest of his life in prison.").

The fundamental right assumed to exist in *Herrera* has two independent sources in the Constitution. Once a prisoner has made a truly persuasive showing of actual innocence, the Due Process Clause demands that the government no longer deprive him of his liberty, and the Eighth Amendment demands that the government no longer punish him. The right these Amendments secure should be cognizable on habeas review as a freestanding actual innocence claim.

1. Executing or continuing to incarcerate a prisoner who makes a truly persuasive showing of actual innocence violates substantive due process

The Due Process Clause protects an individual "against arbitrary action of government," *County of Sacramento* v. *Lewis*, 523 U.S. 833, 845 (1998) (internal quotations marks omitted), and forbids any abuse of executive power that "'shocks the conscience,'" *see id.* at 846 (quoting *Rochin* v. *California*, 342 U.S. 165, 172

(1952)). Holding fast to the distinction between legal guilt and factual innocence in the face of a truly persuasive showing of actual innocence would be the acme of arbitrary and unjust government conduct. *Cf. Herrera*, 506 U.S. at 398 ("After all, the central purpose of any system of criminal justice is to convict the guilty and free the innocent."). Indeed, few things could be more shocking to the conscience, or more destructive of rights "implicit in the concept of ordered liberty," *Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937), than continuing to punish someone who has made such a showing.[30]

Thus far, however, the Court has only assumed, without deciding, that a petitioner's freestanding actual innocence claim is cognizable under 28 U.S.C. § 2254. *See Herrera*, 506 U.S. at 417. The Court's reluctance to decide the issue in *Herrera* stemmed in part from doubts that such a "truly persuasive" showing would ever be made in federal court, *see id.* at 427 (O'Connor, J., concurring) (concluding that issue "may never require resolution at all"); *id.* at 428 (Scalia, J., concurring) ("With any luck, we shall avoid ever having to face this embarrassing question again[.]"), and in part from its conclusion that such a showing had not been made in that case, *see id.* at 417-19. As the submissions in this case make clear, however, modern

[30] The presumptively innocent and presumptively guilty alike have a substantive due process right to be free from arbitrary incarceration, though the person who has been convicted must meet a much higher standard to vindicate that right. *See Harvey*, 285 F.3d at 313 (Luttig, J., respecting the denial of rehearing en banc) (observing that after conviction, a person's liberty interests are "residual and considerably reduced . . . from those existing pre-conviction"); *infra* Part II.B (proposing standard of adjudication).

DNA analysis *does* enable a prisoner to make a truly persuasive showing of actual innocence. *See* Cert. Reply 8-9 (Petitioners' concession that a favorable DNA test result would completely exculpate Respondent); *supra* Part I. Nor does a truly persuasive showing of actual innocence necessarily result in an executive pardon. *See Herrera*, 506 U.S. at 413 ("'A pardon is an act of grace[.]'" (quoting *United States* v. *Wilson*, 32 U.S. (7 Pet.) 150, 160 (1833))). Scientific advances have cleared away the doubts expressed in *Herrera*. *See infra* Part II.C. Should the Court be called upon to recognize the right it assumed in that case, it should hold that the continued detention of a person who has made a truly persuasive showing of actual innocence shocks the conscience and thus violates the Due Process Clause.[31]

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[31] The *Herrera* majority appears to have analyzed the freestanding innocence claim as a procedural due process right, *see Herrera*, 506 U.S. at 407 n.6, perhaps because Herrera was "imprecise in describing the sort of federal relief to which a suitable showing of actual innocence would entitle him," *id.* at 402. The majority construed his petition as a challenge to Texas's thirty-day limit on motions for a new trial, *see id.* at 406-07, 411, which is appropriately analyzed under the rubric of procedural due process. Amici, by contrast, do not suggest that any particular state procedure is the locus of the constitutional error; rather, they assert that a government that continues to detain a person who has persuasively demonstrated innocence violates the Constitution.

The same result follows if the Court analyzes the claim in terms of procedural due process. Continued incarceration of an individual who makes the requisite "extraordinarily high" showing of actual innocence offends a "fundamental" "principle of justice . . . rooted in the traditions and conscience of our people." *See id.* at 407-08 (quoting *Medina* v. *California*, 505 U.S. 437, 445-46 (1992)). That principle is simply the one identified in Justice Harlan's

2. Executing or continuing to incarcerate a prisoner who makes a truly persuasive showing of actual innocence constitutes cruel and unusual punishment

The right of a prisoner who has presented truly persuasive evidence of actual innocence not to be executed or detained is firmly grounded in established Eighth Amendment principles. The Amendment's protections extend to questions of guilt or innocence, *see Beck* v. *Alabama*, 447 U.S. 625, 638 (1980) (applying Eighth Amendment to "rules that diminish the reliability of the guilt determination"), and do not cease upon conviction and sentencing, *see Johnson* v. *Mississippi*, 486 U.S. 578, 584-85 (1988); *Ford* v. *Wainwright*, 477 U.S. 399, 410 (1986) (plurality opinion). The Amendment is centrally concerned with the relationship between the offense and the punishment—not simply consideration of whether, in the abstract, a certain type or duration of punishment is cruel and unusual. *See Robinson* v. *California*, 370 U.S. 660, 667 (1962) ("Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold.").

A truly persuasive showing of actual innocence based on new evidence fundamentally erodes the result of even a constitutionally perfect trial, the foundation of the state's power to punish. Such a showing of actual innocence rebuts the presumption of guilt that attaches upon conviction following a fair trial, *see Herrera*, 506 U.S. at 399, and severs the legal connection between the guilty verdict and the punishment. And without a

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concurrence in *In re Winship*, 397 U.S. 358, 372 (1970): "[I]t is far worse to convict an innocent man than to let a guilty man go free."

legitimate reason to punish, any punishment is inherently cruel and unusual. *See id.* at 431 (Blackmun, J., joined by Stevens and Souter, JJ., dissenting).

B. A "Modified-*Jackson*" Standard Strikes The Proper Balance Between Prisoners' Rights And Concerns Of Finality, Comity, And Conservation Of Judicial Resources

To prevail on a freestanding actual innocence claim, the showing of "truly persuasive" evidence, *see Herrera*, 506 U.S. at 417, must be "extraordinarily high" and "requires more convincing proof of innocence than *Schlup*." *See House*, 547 U.S. at 555. In *Schlup*, the Court held that for a habeas petitioner to overcome a procedural bar by showing that "'a constitutional violation has probably resulted in the conviction of one who is probably innocent,' . . . the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." 513 U.S. at 327 (quoting *Murray* v. *Carrier*, 477 U.S. 478, 496 (1986)). The standard is higher than that required to establish prejudice, *see id.* at 327, but lower than the "extraordinarily high" standard for prevailing on a freestanding claim of actual innocence, *see House*, 547 U.S. at 555.

Amici submit that a petitioner satisfies this "extraordinarily high" standard when he shows that, "based on proffered newly discovered evidence and the entire record before the jury that convicted him, 'no rational trier of fact [w]ould [find] proof of guilt beyond a reasonable doubt.'" *Herrera*, 506 U.S. at 429 (White, J., concurring in judgment) (quoting *Jackson* v.

Virginia, 443 U.S. 307, 324 (1979)).[32] In *Jackson*, the Court reasoned that because conviction is unjust except upon sufficient proof, a conviction would be unconstitutional if no rational juror could have concluded that the proof adduced at trial was sufficient to find the defendant guilty beyond a reasonable doubt. *See* 443 U.S. at 316-17. A slightly modified version of the standard set forth in *Jackson*—changing the word "could" to "would" to reflect the forward-looking nature of the inquiry—is appropriate for determining whether to grant relief to a petitioner presenting a freestanding actual innocence claim. Like a *Jackson* claim, a freestanding actual innocence claim requires a legal conclusion as to what a rational juror would decide based on all of the evidence, *see id.* at 319, not, as with the *Schlup* inquiry, "'a probabilistic determination about what reasonable, properly instructed jurors would do.'" *House*, 547 U.S. at 538 (quoting *Schlup*, 513 U.S. at 329). The standard affords the outcome of a constitutionally-conducted trial the tremendous weight to which it is entitled, yet recognizes the principle, embodied in the Fourteenth and Eighth Amendments, that a just government can no longer detain a prisoner who has demonstrated his innocence with truly persuasive new evidence. *See Harvey*, 285 F.3d at 306 (Luttig, J., respecting the denial of hearing en banc)

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[32] As when a habeas court considers actual innocence in the context of a *Schlup* claim, the court "must make its determination concerning the petitioner's innocence 'in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial.'" 513 U.S. at 328 (quoting Henry J. Friendly, *Is Innocence Irrelevant?*, 38 U. Chi. L. Rev. 142, 160 (1970)).

(concluding that categorically denying the existence of a freestanding actual innocence claim would "confer a sanctity upon finality that not even that concededly substantial interest deserves").

C. Recent Experience With DNA Evidence Addresses Many Of The Concerns Expressed In *Herrera*

In *Herrera*, the majority voiced concern that recognizing a freestanding claim of actual innocence would be "disruptive of our federal system," 506 U.S. at 401, and would saddle state courts with an "enormous burden" of conducting costly and inconclusive new trials, *see id.* at 417. Underlying these concerns was the premise that newly-discovered evidence, by its nature, lacks the probative power necessary to meet the "extraordinarily high" standard that the Court envisioned for freestanding actual innocence claims. *Id.* at 417; *see id.* at 403 ("[T]he passage of time only diminishes the reliability of criminal adjudications."); *id.* at 405 ("[I]t is far from clear that a second trial 10 years after the first trial would produce a more reliable result."); *id.* at 406 ("[T]he question of guilt or innocence . . . becomes more uncertain with time for evidentiary reasons."). Since *Herrera* was decided, however, advances in DNA analysis have made possible "the generation of evidence qualitatively like no other previously known." *Harvey*, 285 F.3d at 305 (Luttig, J., respecting the denial of rehearing en banc). We now know that biological evidence—usually hair, blood, or semen—can be subjected to STR DNA testing that, to a practical certainty, confirms or eliminates the prisoner as its source. *See* Resp. Br. 4. Moreover, criminalists and courts have amassed sufficient experience with STR DNA techniques to avoid the

need to "'make a case-by-case determination about the reliability of the newly-discovered evidence under the circumstances.'" *Herrera*, 506 U.S. at 403 (quoting *id.* at 443 (Blackmun, J., dissenting)).

The proposed standard of adjudication ensures that freestanding innocence claims would burden neither state nor federal courts because the vast majority of cases lack the type of evidence that could meet the standard. *See* Brandon L. Garrett, *Claiming Innocence*, 92 Minn. L. Rev. 1629, 1709 (2008) (observing that "criminal cases do not often both have identity as a disputed issue and also involve relevant biological evidence"). The availability of other mechanisms for relief, although not eliminating the need for habeas review in the extraordinary case, significantly reduces the number of actual innocence claims that reach the federal courts. *See* Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 94 (2008) (reporting that, of 133 exonerees in study for whom written decisions exist, only twenty-three percent filed federal habeas petitions).[33] Nor is there any doubt that, when the rare case arises, courts can easily distinguish between claims based on STR DNA testing or similarly persuasive evidence and claims based on less conclusive evidence, as this Court has itself demonstrated. *Compare Herrera*, 506 U.S. at 418-19 (analyzing affidavits in light of evidence offered at trial and finding them insufficient to satisfy any possible standard of review), *with House*, 547 U.S. at

[33] Of course, a prisoner must exhaust available state remedies before filing a federal habeas petition asserting a freestanding actual innocence claim. *See* 28 U.S.C. § 2254(b).

540-54 (analyzing DNA and other evidence and finding *Schlup* gateway standard satisfied).

The question of factual innocence has been a subject of inquiry in federal habeas cases for over twenty years. *See Kuhlmann* v. *Wilson*, 477 U.S. 436, 454 (1986) (plurality opinion) (federal courts must entertain successive petition "only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence"); *Carrier*, 477 U.S. at 496 ("[W]here a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default[.]"); *Smith* v. *Murray*, 477 U.S. 527, 537 (1986) (same). In light of this long experience examining factual innocence, as well as more recent experience with STR DNA testing, the Court may be confident that a freestanding actual innocence claim, subject to the appropriately high standard of adjudication, would properly vindicate constitutional rights without being disruptive or burdensome.

III. A Suit Seeking Post-Conviction Access To Evidence For DNA Testing Is Cognizable Under Section 1983

Petitioners assert that an access-to-evidence suit like Respondent's is not cognizable under Section 1983, arguing that, under *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973), and *Heck* v. *Humphrey*, 512 U.S. 477 (1994), it may be brought only in habeas. *See* Pet. Br. 18-35. In fact, under *Preiser*, *Heck*, and their progeny, Respondent's claim for access to evidence is clearly cognizable under Section 1983, and Petitioners' argument to the contrary would become no more plausible if this Court were to recognize a freestanding

cause of action based on a demonstration of actual innocence.

A. The Rule Of *Heck* v. *Humphrey* Does Not Bar A Section 1983 Suit Seeking Access To Evidence

Section 1983 provides a cause of action for anyone subjected "to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" by a person acting under color of state law. 42 U.S.C. § 1983. A habeas corpus suit typically also alleges that a state actor—the prisoner's custodian—is causing a deprivation of rights by subjecting the prisoner to continued incarceration in violation of the Constitution. *See* 28 U.S.C. § 2254(a). Consequently, most habeas corpus challenges will also, prima facie, state a claim under Section 1983. Habeas corpus, however, is subject to familiar preconditions and limitations—including exhaustion of state remedies—that do not apply to Section 1983. Reasoning that prisoners with habeas corpus challenges could circumvent these restrictions by styling their suits as Section 1983 actions, this Court announced an implicit exception to Section 1983 in *Preiser*. It held that the prisoners' claims in that case—alleging "illegal physical confinement" and requesting relief that would result in "release from physical custody"—could be brought only in habeas. *Preiser*, 411 U.S. at 487, 500.

In *Heck*, the Court further developed the test for distinguishing cases that must be brought in habeas from those permitted under Section 1983. The prisoner in *Heck* sued prosecutors and a police investigator for damages while his state-court conviction was still pending on direct appeal, alleging unconstitutional actions in the investigation and trial of his case. 512

U.S. at 478-79. This Court held that "when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." *Id.* at 487. To illustrate, the Court noted that a claim seeking damages for an allegedly unreasonable search and seizure may be brought under Section 1983 because, in light of "doctrines like independent source and inevitable discovery, and especially harmless error, such a § 1983 action, even if successful, would not *necessarily* imply that the plaintiff's conviction was unlawful." *Id.* at 487 n.7 (citations omitted).

By its plain terms, *Heck* does not rule out Respondent's Section 1983 action. He alleges a constitutional right to gain access to potentially-exculpatory evidence, *not* a constitutional right to be released from prison simply because the government refuses to turn over the evidence. Thus, his claim does not seek "a determination that he is entitled to immediate release or a speedier release." *Preiser*, 411 U.S. at 500. Nor would a judgment in his favor "necessarily imply the invalidity of his conviction or sentence." *Heck*, 512 U.S. at 487; *see also Wilkinson* v. *Dotson*, 544 U.S. 74, 78 (2005) (rejecting state's contention that Section 1983 plaintiff's hopes or purpose of securing earlier release renders the suit *Heck*-barred); *Nelson* v. *Campbell*, 541 U.S. 637, 647 (2004) ("[W]e were careful in *Heck* to stress the importance of the term 'necessarily.'"). On the contrary, a judgment in his favor would result only in the government's releasing evidence for DNA

testing—and the results of that testing could be exculpatory, inculpatory, or inconclusive. Because winning such a judgment would not necessarily imply the invalidity of Respondent's conviction or sentence, his suit is cognizable under Section 1983.

B. Recognizing A Freestanding Innocence Claim Does Not Alter The *Heck* Analysis

Petitioners maintain (at 19, 26-28) that Respondent's suit seeking access to evidence is an "artful[ly] plead[ed]" version of an entirely different suit: one asserting a constitutional right not to be incarcerated on account of actual innocence, and seeking access to evidence for DNA testing as discovery in that suit. But this mistakes the constitutional violation Respondent alleges. He claims that the refusal to turn over evidence, not the fact of his incarceration, is unconstitutional. *See* Resp. Br. 22. For the reasons just discussed and those set out in Respondent's brief, *see id.* at 18-25, *Heck* does not require such an access-to-evidence claim to be brought in habeas. Moreover, if and when this Court recognizes a freestanding claim of actual innocence, that analysis will not change. *Heck* requires a court to determine whether success in the action *actually before the court* necessarily would imply the invalidity of the prisoner's conviction or sentence. *See McKithen* v. *Brown*, 481 F.3d 89, 102 (2d Cir. 2007) ("[T]he test is whether success in the § 1983 suit *sub judice* will necessarily demonstrate the invalidity of a conviction or sentence[,] and not whether a plaintiff *intends* to bring subsequent challenges[.]"). A suit that will result only in the release of biological material for testing—testing that might or might not yield persuasive evidence of

innocence—will not necessarily imply invalidity, whatever subsequent avenues for relief might exist.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted.

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