No. 09-9000

In The
Supreme Court of the United States

HENRY W. SKINNER,

Petitioner,

v.

LYNN SWITZER, District Attorney
for the 31st Judicial District of Texas,

Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit**

BRIEF OF *AMICUS CURIAE* THE NATIONAL CRIME VICTIM LAW INSTITUTE SUPPORTING RESPONDENT

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QUESTION PRESENTED

May duly-convicted prisoners like Henry Skinner use 42 U.S.C. § 1983 as a post-conviction discovery device for obtaining access to the state's biological evidence for DNA testing when doing so would make an end run around legal rights and protections for crime victims found in existing federal law?

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INTERESTS OF *AMICUS CURIAE*[1]

The National Crime Victim Law Institute (NCVLI) is a nonprofit educational organization located at Lewis & Clark Law School, in Portland, Oregon. NCVLI's mission is to actively promote balance and fairness in the justice system through crime victim-centered legal advocacy, education, and resource sharing. NCVLI accomplishes its mission through education and training; promoting the National Alliance of Victims' Rights Attorneys; researching and analyzing developments in crime victim law; assisting crime victims by providing information on crime victim law; and participating as *amicus curiae* in cases involving victims' rights issues of national importance.

SUMMARY OF THE ARGUMENT

After countless unsuccessful post-conviction proceedings in state and federal courts spanning fifteen years – including two separate proceedings pursuant to Texas's post-conviction DNA testing statute and a federal habeas proceeding during which he sought DNA testing – Petitioner Henry Skinner now seeks to

[1] Together with this brief, *Amicus Curiae* have filed letters of consent from counsel for both Petitioner Skinner and Respondent Switzer. *Amicus Curiae* states that no counsel for a party authored any part of this brief, and no person or entity other than *Amicus Curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

obtain DNA testing yet again by way of a tort action under 42 U.S.C. § 1983.[2] In *District Attorney's Office for the Third Judicial District v. Osborne*, ___ U.S. ___, 129 S.Ct. 2308 (2009), this Court declined to create a freestanding constitutional right to access biological evidence for DNA testing. The Court left open, however, the issue of whether a post-conviction request for DNA testing under 42 U.S.C. § 1983 is barred by the rule set forth in *Heck v. Humphrey,* 512 U.S. 477 (1994). *See Osborne,* 129 S.Ct. at 2319. As more fully set forth below and in Respondent Lynn Switzer's brief, this Court should hold that *Heck* bars Skinner's post-conviction discovery request.

In addition to the arguments set forth by Respondent Switzer, additional factors bear on the *Heck* analysis. First, allowing Skinner and other post-conviction DNA testing applicants to seek discovery of allegedly exculpatory evidence through a § 1983 action instead of a habeas proceeding would effectively allow prisoners to make an end run around vital protections for crime victims contained in the

[2] Skinner was convicted of capital murder in 1995 and sentenced to death for the brutal 1993 murder of Twila Busby and her two sons, Elwin Caler and Randy Busby. The horrible details of the triple homicide are recounted in *Skinner v. State*, 956 S.W.2d 532 (Tex. Crim. App. 1997). These victims are survived by several family members. Surviving family members of murder victims are "victims" for purposes of asserting rights in relevant proceedings. *See* 18 U.S.C. § 3771(e); *see also* Tex. Code Crim. Proc. Ann. art. 56.02(a). This brief will use the phrase "crime victim" as including both the murder victim and the victim's surviving family members.

Crime Victims' Rights Act (CVRA or Act), 18 U.S.C. § 3771. Among other rights, the CVRA guarantees crime victims the right to be present and heard in federal habeas proceedings. 18 U.S.C. § 3771(b)(2)(A). The Act also grants victims the right to "proceedings free from unreasonable delay." 18 U.S.C. § 3771(a)(7). The CVRA further promises victims the right to "be treated with fairness and with respect for [their] dignity and privacy." 18 U.S.C. § 3771(b)(2)(A).

Second, a crime victim's legitimate interest in finality in a case such as this – where the state prisoner has had ample opportunity to challenge his conviction during fifteen years of traditional post-conviction litigation in state *and* federal courts – outweighs Skinner's illegitimate interest in evading the appropriate avenue for review, which is a habeas petition.

Amicus is not arguing that Skinner should be denied any opportunity to seek testing. *Amicus*' more limited point is that a prisoner's request for post-conviction DNA testing for the purpose of finding exculpatory evidence "falls within 'the core' of habeas" and therefore should proceed only by way of a habeas petition, thus ensuring that crime victims' rights will be respected and considered. *Osborne*, 129 S.Ct. at 2326 (Alito, J., concurring) (quoting *Preiser v. Rodriguez,* 411 U.S. 475, 489 (1973)).

If this Court nonetheless recognizes the viability of a § 1983 claim for post-conviction DNA testing, it should be guided by some of the requirements set

forth in the carefully crafted federal post-conviction DNA testing statute, 18 U.S.C. § 3600. In particular, the Court should require that any such claim be predicated on an actually innocent applicant seeking access to previously-unavailable evidence. The applicant should also be required to demonstrate good cause for not having obtained testing before trial. Further, the Court should hold that any testing must be conducted in a fashion that takes the victim's rights, interests, and concerns into account.

ARGUMENT

I. SKINNER SHOULD BE REQUIRED TO PROCEED BY WAY OF A FEDERAL HABEAS CORPUS PETITION SO THAT CRIME VICTIMS' STATUTORY RIGHTS ARE RESPECTED.

A crime victim has significant interests at stake when a prisoner seeks post-conviction DNA testing for the purpose of discovering exculpatory evidence. First, the proceeding obviously may have an impact on the validity of the underlying conviction. Therefore, a crime victim has legitimate interests in receiving notice of and taking part in the proceedings. Second, the crime victim may have significant privacy interests in the biological evidence at issue.[3] While a

[3] For example, a rape victim has a significant interest in the DNA analysis of the rape-scene evidence, as the analysis

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crime victim's legitimate interests do not, in and of themselves, necessarily trump the interest of a prisoner such as Skinner in having the biological evidence tested, the crime victim's rights and concerns should be weighed when considering the competing interests at stake. The Court should not permit a procedure that would allow Skinner and other post-conviction DNA testing applicants to circumvent the protections that crime victims are entitled to in the federal criminal justice system.

A. The Crime Victims' Rights Act Protects Victims' Rights In Federal Habeas Corpus Proceedings.

Passed by Congress in 2004, the Crime Victims' Right Act is a far-reaching federal statute that protects victims' rights in the federal criminal justice system. *See generally* Jon Kyl, Steven J. Twist & Stephen Higgins, *On the Wings of Angels: the Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*, 9 Lewis & Clark L. Rev. 581 (2005). The CVRA is intended to address the "dramatic disparity between the rights of defendants in our constitution and laws, and the rights of crime victims and their families"

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may reveal intimate details about the previous sexual partners of the victim. Moreover, the evidence may include not only biological material from the rapist but also from the victim; analysis of the victim's blood and genetic material can seriously intrude on the victim's privacy.

because "our criminal justice system can and should care about both the rights of accused and the rights of victims." 150 Cong. Rec. S4262 (Apr. 22, 2004) (statement of Sen. Feinstein). Congress enacted the CVRA because "[i]n case after case [it] found victims . . . were ignored, cast aside, and treated as non-participants in a critical event in their lives." *Id*.

Enacted with near universal congressional support, the CVRA is a "broad and encompassing" statutory victims' bill of rights. 150 Cong. Rec. S4261 (Apr. 22, 2004) (statement of Sen. Feinstein). To make victims participants in the criminal process, the Act specifically grants to victims rights to notice of all public court proceeding, to attend any such proceedings, and to be heard at proceedings involving release, plea, sentencing, and parole. 18 U.S.C. § 3771(a)(2)-(4). The Act also grants victims the right to "proceedings free from unreasonable delay." 18 U.S.C. § 3771(a)(7). The Act further promises that victims will be treated "with fairness and with respect for [their] dignity and privacy." 18 U.S.C. § 3771(a)(8).

In its original form, the Act protected only victims of federal offenses during federal criminal proceedings. *See* 18 U.S.C. § 3771(b)(1), (e). In 2006, Congress extended crime victims' rights to victims during federal habeas corpus proceedings that arise out of state convictions. *See* 18 U.S.C. § 3771(b)(2)(A). This extension granted the victims of state crimes rights that federal courts must respect while resolving habeas petitions – including the rights to be

present and heard at proceedings, to proceedings free from unreasonable delay, and to be treated with fairness and with respect for the victim's dignity and privacy. *Id*.[4]

B. Skinner and Other Post-Conviction Testing Applicants Should Not Be Permitted to Circumvent the Crime Victims' Rights Act's Protections for Crime Victims By Avoiding the Federal Habeas Corpus Process Through Artful Pleading.

This Court has repeatedly stated that the habeas corpus statute "is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement." *Preiser v. Rodriguez*, 411 U.S. at 490; a*ccord Heck v. Humphrey*, 512 U.S. at 481. This is true whether the state prisoner seeks injunctive relief or monetary damages. *Heck,* 512 U.S. at

[4] Indeed, it bears emphasizing that a habeas application in this case would have triggered a judicial obligation under the CVRA to respect the crime victims' interests without any court appearance by the victims. A federal court considering a habeas petition from a prisoner is obligated to "ensure" that the crime victims are "afforded" their rights. 18 U.S.C. § 3771(b)(2)(A). This fact is important because crime victims often lack the funds to obtain legal counsel to protect their interests during prisoners' extended legal maneuvering in state and federal courts at trial court and appellate levels. Typically, crime victims (like criminal defendants) are disproportionately poor. *See* U.S. Dept. of Justice, Bureau of Justice Statistics, *Criminal Victimization in the United States* tbl.14 (2006) (finding higher victimization rates at lower income levels).

483-88. Although Skinner has artfully re-characterized his claims so that they neither actually assert his innocence nor directly attack the validity of his conviction, the only purpose for seeking post-conviction DNA testing is to find exculpatory evidence. *See* J.A. 20-21 (prayer for relief alleges that Respondent Switzer violated Skinner's constitutional rights "[b]y refusing to release the biological evidence for testing, and thereby preventing [Skinner] from gaining access to exculpatory evidence that could demonstrate he is not guilty of capital murder"). A claim for "discovery of evidence that has a material bearing on his conviction. . . . falls within 'the core' of habeas." *Osborne,* 129 S.Ct. at 2325 (Alito, J., concurring). Such claims implicate crime victims' rights under the CVRA.

In contrast, proper objects of a § 1983 action that are unrelated to the guilt/innocence of a convicted prisoner do not trigger CVRA interests. For example, if a prisoner were to bring a § 1983 action after being assaulted by a prison guard, *see, e.g., Wilkins v. Gaddy,* ___ U.S. ___, 130 S.Ct. 1175 (2010), the crime victim of the prisoner's underlying criminal conduct would lack a legal right to be notified, present, or heard at proceedings in that action.

No matter how Skinner labels his discovery request, there can be no doubt that a prisoner's post-conviction proceeding to obtain discovery of allegedly exculpatory DNA evidence is a "critical event" in crime victims' lives. 150 Cong. Rec. S4262 (Apr. 22, 2004) (statement of Sen. Feinstein). When

considering whether *Heck* bars Skinner's § 1983 claim, the Court should be mindful of Congress' intent to bring crime victims into the folds of the criminal justice system and consider the crime victims' legitimate interests in post-conviction discovery proceedings that may have a bearing on the validity of the prisoner's conviction.

As stated above, Congress intended for the CVRA to provide broad and encompassing rights to crime victims. "It would wholly frustrate explicit congressional intent to hold that the [petitioner] in the present case could" circumvent the important protections in place for crime victims "by the simple expedient of putting a [§ 1983] label" on his request. *Preiser*, 411 U.S. at 489-90. Allowing Skinner and other post-conviction DNA testing applicants to raise their discovery requests through a civil tort action rather than a federal habeas petition would leave the crime victims without any statutory rights in the process. This approach runs contrary to the command of Congress in passing the CVRA that crime victims' rights be respected throughout the criminal justice process.

II. IN A CASE SUCH AS THIS WHERE THE PRISONER HAS HAD AMPLE OPPORTUNITY TO CHALLENGE HIS CONVICTION AND SEEK THE REQUESTED DNA TESTING THROUGH EXISTING STATE AND FEDERAL AVENUES, THE CRIME VICTIMS' INTEREST IN FINALITY OUTWEIGHS THE PRISONER'S INTEREST IN SECURING YET ANOTHER AVENUE TO OBTAIN POST-CONVICTION DISCOVERY.

The Court has recognized that "[f]inality is essential to both the retributive and the deterrent functions of criminal law." *Calderon v. Thompson*, 523 U.S. 538, 555 (1998) (discussing principles that guide the Court in habeas corpus jurisprudence). "'Without finality, the criminal law is deprived of much of its deterrent effect.'" *Id.* (quoting *Teague v. Lane,* 489 U.S. 288, 309 (1989)). Furthermore, "[o]nly with real finality can the victims of crime move forward knowing the moral judgment will be carried out. To unsettle these expectations is to inflict a profound injury to the powerful and legitimate interest in punishing the guilty, an interest shared by the State and victims of crime alike." *Id.* at 556 (quoting *Herrera v. Collins*, 506 U.S. 390, 421 (1993)) (internal citations and quotations omitted).

This case illustrates what could happen if the Court were to allow Skinner and other applicants for post-conviction DNA testing to obtain discovery under § 1983. First, as discussed more fully by Respondent Switzer, Skinner would be able to mount a

post-conviction evidentiary attack on his state court conviction "without any of the restrictions the Court and Congress have imposed on such attempts." Resp't Br. 41.

Second, crime victims would face even more years of uncertainty than they do now. Here, Skinner has filed multiple state and federal habeas petitions as well as three separate post-conviction motions for DNA testing since his 1995 conviction. *See* Resp't Br. 9-13. Two of his earlier DNA testing requests were filed under Texas's post-conviction DNA statute, article 64 of the Texas Code of Criminal Procedure[5]

[5] Texas's post-conviction DNA statute is arguably less stringent than the federal counterpart, 18 U.S.C. § 3600. Section 3600 requires, *inter alia,* that the applicant "assert[ ], under penalty of perjury, that the applicant is actually innocent of" the relevant offense at issue. 18 U.S.C. § 3600(a)(1). Article 64 of the Texas Code of Criminal Procedure does not have a similar requirement. *See* Tex. Code Crim. Proc. Ann. art. 64.01-.03; *see also Smith v. State*, 165 S.W.3d 361, 364 (Tex. Crim. App. 2005) (observing legislative history indicates "the Legislature did not intend for the defendant to have to prove actual innocence (a principle under habeas law) in order to meet his burden to have the test done") (internal quotations omitted). As of July 2010, 47 states and the District of Columbia have joined Texas in enacting post-conviction DNA testing statutes. *See* Ala. Code § 15-20-200; Alaska Stat. §§ 12.72.010, 12.73.010 -.090 (effective July 1, 2010); Ariz. Rev. Stat. Ann. § 13-4240; Ark. Code Ann. §§ 16-112-202 to -208; Cal. Penal Code § 1405; Colo. Rev. Stat. §§ 18-1-411 to -416; Conn. Gen. Stat. § 54-102kk; Del. Code. Ann. tit. 11, § 4504; D.C. Code Ann. § 22-4133; Fla. Stat. Ann. §§ 925.11 to 925.12, 943.3251; Ga. Code Ann. § 5-5-41(c); Haw. Rev. Stat. Ann. §§ 844D-121 to -133; Idaho Code Ann. § 19-4902(b)-(f); 725 Ill. Comp. Stat. Ann. 5/116-3; Ind. Code Ann.

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and one motion was filed in connection with his federal habeas petition. Rather than seek this Court's review of the Court of Criminal Appeals' decisions by certiorari, Skinner filed this § 1983 action.

Generally, when lengthy post-conviction habeas proceedings have run their course, the crime victim may expect the matter to have reached an end. However, if the Court were to allow post-conviction DNA testing requests to proceed under § 1983, the Court would effectively extend the already lengthy post-conviction challenge period by an untold number of years. Moreover, given the different legal standards that apply in § 1983 actions and habeas proceedings,[6]

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§§ 35-38-7-1 to -19; Iowa Code § 81.10; Kan. Stat. Ann. § 21-2512; Ky. Rev. Stat. Ann. § 422.285; La. Code Crim. Proc. Ann. art. 926.1; Me. Rev. Stat. Ann. tit. 15, §§ 2137-2138; Md. Code Ann. Crim. Proc. § 8-201; Mich. Comp. Laws Serv. § 770.16; Minn. Stat. § 590.01(1a); Miss. Code Ann. §§ 99-39-5 to -11; Mo. Rev. Stat. §§ 547.035-.037; Mont. Code Ann. § 46-21-110; Neb. Rev. Stat. Ann. §§ 29-4116 to -4125; Nev. Rev. Stat. Ann. § 176.0918; N.H. Rev. Stat. Ann. § 651-D:2; N.J. Stat. Ann. § 2A:84A-32a; N.M. Stat. Ann. § 31-1A-2; N.Y. Crim. Proc. Law § 440.30(1-a); N.C. Gen. Stat. §§ 15A-269 to -270.1; N.D. Cent. Code § 29-32.1-15; Ohio Rev. Code Ann. §§ 2953.71-2953.82; Or. Rev. Stat. §§ 138.690 to .696; 42 Pa. Cons. Stat. Ann. § 9543.1; R.I. Gen. Laws § 10-9.1-12; 2008 S.C. Code Ann. §§ 17-28-10 to -120; S.D. Codified Laws § 23-5B-1; Tenn. Code Ann. §§ 40-30-301 to -313; Utah Code Ann. §§ 78B-9-301 to -304; Vt. Stat. Ann. tit. 13, §§ 5561-5570; Va. Code Ann. § 19.2-327.1; Wash. Rev. Code Ann. § 10.73.170; W. Va. Code Ann. § 15-2B-14; Wis. Stat. § 974.07; Wyo. Stat. Ann. §§ 7-12-303 to -315.

[6] For example, this Court and Congress have imposed sharp limits to discovery in federal habeas proceedings. *See*, *e.g.*, *Williams v. Taylor*, 529 U.S. 420, 436 (2000); *Wainwright v.*

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the crime victims could be subject to additional uncertainty caused by the possible re-litigation of evidentiary disputes that should have been resolved at trial and through the direct appeal process.

Here, Skinner has already unsuccessfully sought DNA testing of the items at issue pursuant to the state post-conviction DNA statute.[7] Bypassing the direct appeal process, Skinner now seeks to proceed in a civil tort action in federal court (where the victim would not have any clear statutory rights) that could set the stage for an untold number of additional proceedings. Indeed, Skinner's brief admits that he may drag out the proceedings indefinitely without ever needing to state that he is actually innocent of the crime. *See*, *e.g.*, Pet. 29 (acknowledging, at best, that this is a "case brought by a *possibly innocent* man") (emphasis added); Pet'r Br. 18 ("While Mr.

Sykes, 433 U.S. 72, 87-90 (1977); 28 U.S.C. § 2254(e)(2). Generally far more liberal civil discovery rules apply in § 1983 actions.

[7] During trial, Skinner's counsel made a deliberate decision not to test certain biological evidence for strategic purposes. *See Skinner v. Quarterman,* No. 2:99-CV-0045, 2007 WL 582808, *31-32 (N.D. Tex. 2007) (rejecting Skinner's ineffective assistance of counsel claim and finding that the record "reflects . . . that trial counsel thoroughly considered [the DNA testing] issue and made the conscious decision not to have any additional nuclear DNA testing performed" and "this decision was an informed one based on trial tactics and sound strategy"). Yet he was still afforded the opportunity to seek DNA testing under Texas' post-conviction DNA statute, and he did so twice. *See* Resp't Br. 10-12; *Skinner v. State*, 293 S.W.3d 196, 199 (Tex. Crim. App. 2009) (discussing procedural history).

Skinner may, at some future date, use the results of DNA testing of this evidence to initiate a separate proceeding"); Pet'r Br. 18 n.5 (discussing other possible applications).

Criminal justice involves weighing the interests of defendant, state, crime victim, and society. Where, as here, a state prisoner has been afforded all the traditional avenues of challenging his conviction and seeking post-conviction DNA testing, the crime victims' interest in finality outweighs the prisoner's interest in securing yet another avenue for mounting his evidentiary challenge to the underlying conviction.

The crime victims' interest in finality is particularly compelling where the post-conviction DNA applicant like Skinner has failed to demonstrate that there is a need for federal courts to create a § 1983 action for purposes of post-conviction discovery and doing so would remove all of the protections due crime victims under the CVRA. "Since 1874, the habeas corpus statute has directed the courts to determine the facts and dispose of the case summarily, 'as law and justice require.'" *Preiser,* 411 U.S. at 487; *see* 28 U.S.C. § 2243. The habeas statute provides Skinner, and similarly situated prisoners, all necessary protection against injustice, while at the same time creating a process that protects the rights of crime victims. Skinner should not be allowed to skirt this process.

III. EVEN IF THIS COURT WERE TO RECOGNIZE A SECTION 1983 CLAIM FOR POST-CONVICTION ACCESS TO DNA EVIDENCE, THE CLAIM SHOULD BE NARROWLY DEFINED TO PROTECT CRIME VICTIMS' LEGITIMATE INTERESTS IN PRIVACY AND FINALITY.

Assuming *arguendo*, that this Court were to decide that post-conviction access to evidence for DNA testing is cognizable under § 1983, the Court should be guided by 18 U.S.C. § 3600, the federal post-conviction DNA testing statute, and require an applicant (like Skinner) to make several showings before securing access to the evidence. First, the applicant should be required to show that he or she is attempting to prove "actual innocence." Second, the applicant should be required to demonstrate that the evidence was indeed "previously unavailable." Third, the applicant should be required to show that the evidence will help "establish" actual innocence – a materiality requirement.[8] Construing § 1983 as requiring an applicant for post-conviction DNA testing to prove these points to establish a state actor has subjected him or her to "the deprivation of . . . rights, privileges, or immunities secured by the Constitution," 42 U.S.C. § 1983, would be a step in the direction of securing a fairer process for crime victims.

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[8] This brief does not discuss the "materiality" requirement under the facts of this case, leaving such discussion to the parties.

A. The Applicant Should Be Required to File a Sworn Affidavit, Under Penalty of Perjury, That He Is Actually Innocent of the Crime.

Skinner's § 1983 complaint claims, *inter alia*, that his due process rights have been violated because he has been prevented "from gaining access to *exculpatory* evidence that could demonstrate he is not guilty of capital murder." J.A. 20-21 (Skinner's First Claim for Relief) (emphasis added). Skinner's innocence should therefore be a prerequisite to any constitutional deprivation by the state. Yet at no time during the previous post-conviction DNA testing proceedings has Skinner sworn that he is actually innocent of the crime.[9] Similarly, neither his complaint nor any of the supporting briefs in this proceeding clearly states, without qualifications, that he is actually innocent.[10]

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[9] Texas's post-conviction DNA statute does not require a claim of actual innocence, and it is more generous in this regard than its counterpart in federal law as well as a number of sister states. *Compare* Tex. Code Crim. Proc. Ann. art. 64.01-.03 *with* 18 U.S.C. § 3600(a)(1), Alaska Stat. § 12.73.010(b)(1), Fla. Stat. Ann. § 925.11(2)(a), Mont. Code Ann. § 46-21-110(1), N.C. Gen. Stat. § 15A-269(b)(3), Or. Rev. Stat. § 138.692(1)(a)(A)(i), 42 Pa. Stat. Ann. § 9543.1(c)(2), S.D. Codified Laws § 23.5B-1(1), Utah Code Ann. § 78B-9-301(2), Vt. Stat. Ann. tit. 13, § 5561(a)(2), *and* Wis. Stat. § 974.07(7)(a)(1).

[10] At one point, the Petition for Writ of Certiorari claims that "Mr. Skinner has always maintained that he is innocent of the crimes of which he was convicted." Pet. 7. But the procedural history does not support that contention, as Respondent

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The Court should require that Skinner submit a sworn affidavit, under penalty of perjury, that he is indeed innocent before he is allowed to proceed on the merits. This requirement is vitally important to crime victims, as it can help deter fraudulent and frivolous claims for DNA testing by guilty prisoners. Fraudulent claims impose psychological trauma on victims and their families. The interest in deterring fraudulent and frivolous claims is recognized by 18 U.S.C. § 3600(a)(1) and the many state statutes that have made a sworn statement of actual innocence a prerequisite to moving forward with a post-conviction application for DNA testing. *See supra* note 9; *see also* 150 Cong. Rec. S10676 (Oct. 7, 2004) (statement of Sen. Leahy) (the reason for this requirement was to provide a "check[ ] against frivolous litigation"); 150 Cong. Rec. S11609 (Nov. 19, 2004) (statement of Sen. Grassley) (such a requirement is meant to deter "false claims" or attempts to "'game the system'"). Without such a check, guilty prisoners might use post-conviction requests for DNA testing to "muddy the waters" and "fuel a new and frivolous series of appeals." 149 Cong. Rec. S12294 (Oct. 1, 2003)

Switzer's brief persuasively establishes. And tellingly, Skinner's counsel has been careful to not actually assert in either the § 1983 complaint or moving papers that Skinner is actually innocent of the crimes, presumably because proclaiming his actual innocence would undermine Skinner's position that he is not really challenging the validity of his conviction (therefore making his claim one that must be brought via a habeas proceeding).

(statement of Sen. Hatch). It is hard to believe that Congress would have intended these detailed anti-fraud provisions in § 3600 to be easily circumvented by prisoners through the simple expedient of filing claims under § 1983.

B. The Applicant Should Be Required to Show Good Cause for Not Having Conducted Testing Before Conviction.

This Court has instructed that "[t]here is no general constitutional right to discovery in a criminal case," *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977), much less a general constitutional right to discovery after conviction. And any obligation to produce exculpatory evidence is limited to situations "involv[ing] the discovery, after trial, of information which had been known to the prosecution but *unknown* to the defense." *United States v. Agurs*, 427 U.S. 97, 103 (1976) (emphasis added).

In light of these principles, an applicant should not be able to obtain post-conviction testing of biological evidence unless he demonstrates good cause for failing to obtain pre-conviction testing. *Cf. Williams v. Taylor*, 529 U.S. at 432-33 (holding that 28 U.S.C. § 2254(e)(2) codifies the "cause-and-prejudice" standard set forth in *Kenney v. Tamayo-Reyes*, 504 U.S. 1, 112 (1992), which requires state prisoners to meet a threshold standard of diligence in developing the material facts in the state-court record). Any

other approach would unfairly harm crime victims. A criminal could bet on an acquittal at trial without DNA testing (and avoid discovering incriminating evidence); then, if convicted, the criminal could take a second shot at acquittal by seeking DNA testing – all the while extending the anxiety that the crime victim and her family will understandably feel while the prisoner's original conviction and sentence remains subject to being potentially overturned. Such a result would encourage "'sandbagging' on the part of defense lawyers, who may take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off." *Wainwright v. Sykes,* 433 U.S. at 89. For this reason, the federal post-conviction DNA testing statute and a number of other similar state statutes, including Texas, have imposed a requirement that the applicant show good cause for failing to secure previous testing.[11] If the Court were to allow Skinner to proceed under § 1983, this Court should similarly require

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[11] *See* 18 U.S.C. § 3600(a)(3)(A); Ala. Code 1975 § 15-18-200(e)(2); Ark. Code Ann. § 16-112-201(a); Colo. Rev. Stat. § 18-1-413(1); Del. Code. Ann. tit. 11, § 4504(a)(2); Ga. Code Ann. § 5-5-41(c)(3)(a); Idaho Code Ann. § 19-4902(b); Minn. Stat. § 590.01(1a)(2); Mo. Rev. Stat. § 547.035(2); Nev. Rev. Stat. Ann. § 176.0918; N.D. Cent. Code Ann. § 29-32.1-15(1)(b); 42 Pa. Stat. Ann. § 9543.1(a)(2); S.D. Codified Laws § 23-5B-1(5)-(6); Tex. Code Crim. Proc. Ann. art. 64.01(b)(1)-(2); Utah Code Ann. § 78B-9-301(4); Va. Code Ann. § 19.2-327.1(A); Wash. Rev. Code Ann. § 10.73.170(2)(a); W. Va. Code Ann. § 15-2B-14(f)(8); Wyo. Stat. Ann. § 7-12-303(c)(viii).

Skinner to establish good cause for failure to obtain DNA testing before trial.[12] Because the record shows Skinner cannot satisfy this requirement, the Court should deny Skinner's petition for relief even if his claim were allowed to proceed under § 1983.[13]

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[12] This showing may be satisfied in a number of ways, including a showing that DNA testing was not previously available. *See* statutes cited *supra* note 11.

[13] In this case, Skinner previously moved for DNA testing under Texas's post-conviction DNA testing statute. Under Texas Code of Criminal Procedure Article 64.01(b)(1)(B), if, as here, previous DNA testing were available or technologically capable of providing probative results, the applicant must establish that the evidence was not previously subjected to DNA testing "through no fault of the convicted person, for reasons that are of a nature that the interests of justice require DNA testing." Tex. Code Crim. Proc. Ann. art. 64.01(b)(1)(B).

In affirming the lower court's denial of Skinner's second state court post-conviction DNA testing motion, the Texas Court of Criminal Appeals held that Skinner failed to meet statute's "no fault" requirement. *Skinner v. State,* 293 S.W.3d at 202. The court concluded that the "no fault" requirement cannot be satisfied where trial counsel's failure to request DNA testing of the items at issue was part of a deliberate and reasonable trial strategy. *Id.* at 202-03, 209. "To hold otherwise would allow defendants to 'lie behind the log' by failing to seek testing because of a reasonable fear that the results would be incriminating at trial but then seeking testing after conviction when there is no longer anything to lose." *Id.* at 203.

C. The Crime Victims Should Be Treated Fairly and With Respect for Their Dignity and Privacy and Should Be Heard With Regard to Any Testing.

The Court should direct lower courts to take into consideration the crime victims' legitimate interests in being heard and treated fairly and with respect for their dignity and privacy when determining the scope of any DNA testing. There can be little doubt that Congress would want victims' interests considered in construing the broad language of § 1983. In passing the Innocence Protection Act of 2004, Congress explicitly directed that any testing must be "reasonable in scope." 18 U.S.C. § 3600(a)(5). More generally, as explained above, Congress has commanded that crime victims have "the right to be treated with fairness and with respect for [their] dignity and privacy," 18 U.S.C. § 3771(a)(8), and has extended these rights to both federal criminal and habeas proceedings, 18 U.S.C. § 3771(b)(1)-(2).

In construing § 1983 in other contexts, the Court has not hesitated to read into the general language qualifications to ensure that congressional concerns are not frustrated. For instance, in *Pierson v. Ray*, 386 U.S. 547, 555 (1967), this Court read § 1983 as containing a doctrine of judicial immunity in light of presumed congressional intentions. Similarly, in *Preiser v. Rodriguez,* 411 U.S. 475, this Court limited the application of § 1983, precluding its use by prisoners in lieu of federal habeas proceedings. To do otherwise, this Court explained, "would wholly

frustrate explicit congressional intent." *Id.* at 489. The Court has also read procedural requirements into the statute. *See, e.g., Haines v. Kerner*, 404 U.S. 519, 520 (1972) (creating more relaxed procedural requirements for *pro se* § 1983 suits).

In the same fashion, this Court should construe any right for prisoners to use § 1983 to obtain post-conviction access to DNA testing as being implicitly bound by the requirement that the testing be "reasonable in scope" – the same requirement found in the current federal post-conviction DNA testing statute, 18 U.S.C. § 3600(a)(5). Testing is obviously not reasonable in scope if it is conducted without regard for the victims' interests. Therefore, the Court should instruct lower courts to conduct such inquiry when ordering DNA testing under § 1983.[14]

Moreover, in the limited areas of post-conviction DNA testing under § 1983, the Court should consider the § 1983 action as an extension of the underlying criminal proceeding and, as such, recognize that crime victims should have the right to be present and heard during the proceedings without any formal intervention motion. *Cf.* 18 U.S.C. § 3771(a)(2)-(4) (crime victims have the right to be present and be reasonably heard at "any public court proceeding" "involving the crime"). In particular, lower courts should request that prosecutors relay any concerns

[14] What limits, if any, should be placed on any testing is a fact specific inquiry and would vary from case to case.

that crime victims might have about the scope of testing. Lower courts should also use their statutory and discretionary power to appoint counsel for crime victims when victims' issues appear to be at stake. *See generally* Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims' Rights Act*, 2005 BYU L. Rev. 835, 912-16 (2005) (reviewing judicial power to appoint counsel for crime victims); John W. Gillis & Douglas E. Beloof, *The Next Step for a Maturing Victim Rights Movement: Enforcing Crime Victim Rights in the Courts*, 33 McGeorge L. Rev. 689, 693-95 (2002).

In cases such as this, fairness will only be achieved by hearing from crime victims and crafting testing procedures that protect their interests. As this Court has repeatedly noted, "'Justice, though due to the accused, is due to the accuser also. . . . We are to keep the balance true.'" *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934) (Cardozo, J.)). Accordingly, if the Court were to permit post-conviction DNA testing claims to proceed under § 1983, the Court should direct lower courts to consider crime victims' interests and concerns in the proposed testing procedures.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

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