No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

ROBERT MUIR WADE,

Petitioner

v.

MONROE COUNTY DISTRICT ATTORNEY,
E. DAVID CHRISTINE, D.A. MONROE COUNTY

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE AMENDED ORDER OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE AMENDED ORDER OF THE COURT OF APPEALS VACATING THE ORDER OF THE DISTRICT COURT AND DISMISSING THE 1983 ACTION BASED ON THE ROOKER-FELDMAN DOCTRINE CONFLICTS WITH THE DECISIONS OF THE UNITED STATES SUPREME COURT INCLUDING THE FOLLOWING: SKINNER V. SWITZER, 562 U.S. 521 (2011) AND DISTRICT ATTORNEY'S OFFICE FOR THE THIRD JUDICIAL DISTRICT V. OSBORNE, 557 U.S. 52 (2009)?

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CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution reads, in pertinent part, as follows:

> No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use, without just compensation.

LIST OF PARTIES BELOW

The parties are named in the caption.

OPINIONS BELOW

On April 8, 2020, the Third Circuit Court of Appeals entered an amended order denying an application for rehearing and suggestion for rehearing en banc. Two members of the Court would have granted the petition [Appendix "A"]

On February 11, 2020, a Panel of the Third Circuit entered an order vacating the order of the United States District Court of the Middle District of Pennsylvania on the theory that the 1983 action was barred by the ***Rooker-Feldman*** doctrine. [Appendix "B"].

On May 13, 2019, the United States District Court for the Middle District of Pennsylvania entered an order granting the Petitioner's action under 28 U.S.C. 1983. The District Court held that the Monroe County County District Attorney must take all steps necessary to preserve the physical evidence taken from the victim's body, including fingernails of the victim and any scrapings from those fingernails; the yellow turtleneck sweater worn by the victim and which had a bloodstain on the neck and body of the sweater; the lavender leather coat; the bra, underpants, pantyhose, and shoes of the victim; the trash bag in which the body of the victim was found; the contents of the lavender coat of the victim; and the inventory of the items found in the lavender coat. The Order directed the defendant to produce the evidence described above for inspection and touch DNA testing. [Appendix "C"].

The District court's Memorandum dated May 13, 2019 explains the District Court's rationale for the order granting the relief. [Appendix "D"].

APPENDIX

Petition for rehearing and suggestion for rehearing en banc. [Appendix E]. Two

members of the court of appeals would have granted the petition.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. 1983. The court of appeals had jurisdiction under 28 USC 1291. This Court has jurisdiction under 28 USC 1254(1) or 1257.

STATEMENT OF THE CASE

The Memorandum Opinion of the District Court [Appendix D] sets out in painstaking detail findings of fact and it relies, almost exclusively, on **the joint stipulation of facts** [1]submitted by the parties prior to trial since the opinion of the PCRA Court was inaccurate in material respects. [Appendix D, pp. 11-26, Appendix E]

Mr. Wade was convicted of the first-degree murder of Lekitha Council on entirely circumstantial evidence. He has consistently maintained his innocence. There was no physical evidence linking Wade to the crime--no DNA, and no fingerprints.

At trial, Wade presented substantial physical evidence of actual innocence. Lekitha Council was killed on November 26, 1996 or November 27, 1996. Wade presented footage from security cameras at Cunningham Graphics where he worked full-time. [Appendix D, page 17, paragraph 34]. According to the security camera footage, Wade came to work at 3:00 p.m. and he left work at 11:00 p.m. on November 26th. [Appendix D, paragraph 34], and he came to work at 3:00 p.m. and he left work at 11:32 p.m. on November 27th. [Appendix D, page 17, paragraph 34]. Wade presented time clock records which showed he was at work from 3:00 P.M. until 11:00 P.M. on November 26th, 1996, the last day Ms. Council was seen alive. According to the time clock records, Wade punched in at 3:00 P.M. and punched out at 11:32 P.M. on November

[1] Notably, the parties agreed that the decision of the state court system was based on a set of facts that was not accurate. The District Court's Opinion [Appendix A] relied on the facts stipulated by the parties. [Appendix E].

27th. [Appendix D p. 17, paragraph 34]. On the day she disappeared (November 26th) Ms. Council was recorded on a video at a Pathmark at 1:25 P.M. buying food items found in the trunk of Mr. Wade's car. Significantly, she returned to her place of employment after making the purchases, and she was observed by co-workers leaving work at 5:00 P.M. [Appendix D, page 17, paragraph 36]. Ms. Council called Mr. Wade at his place of employment at 5:00 p.m. [Appendix D, page 17, paragraph 37] Ms. Council's mother did not report her missing because she believed Ms. Council was away with a man other than Mr. Wade. [Appendix D, p. 18, paragraph 38]. Ms. Council was looking to buy a car, and she had a number of cards from card dealers in the pocket of her coat. The prosecution did not investigate whether anyone accompanied Ms. Council to the car dealerships.

Ms. Council's body was found in a trash bag which was tested for DNA. The test did not find the DNA of Mr. Wade but did find the DNA of a person other than Mr. Wade. [Appendix D, p. 18]. The bag was tested for fingerprints and the fingerprints found did not belong to Mr. Wade. [Appendix D, page 18 paragraph 39]

When the body of Ms. Council was found, her sweater was on backwards, suggesting she had been redressed; the body was nude from the waist to her ankles, with pantyhose and underpants pulled down to the ankles. [Appendix D, page 44]. Among other items of clothing, Mr. Wade sought DNA testing and "touch" DNA testing of the sweater, bra, pantyhose, underpants which the assailant likely touched [Appendix D, p. 44] as well as the scrapings from her long fingernails. [Appendix D, p. 36]. Expert testimony reported the cause of death as "manual strangulation or suffocation" suggesting substantial involvement of Ms. Council with the perpetrator [Appendix D, p. 12, paragraph 2].

The parties stipulated that the PCRA court's findings were not accurate. The PCRA Court claims that the items Mr. Wade had requested for touch DNA testing had previously been tested and that the results had been presented to the jury. Notably, the PCRA Court's findings of fact on this key point were "erroneous and contrary to the record." State court records showed that only a blood-stained swatch of leather from Mr. Wade's car had been subjected to pre-trial DNA testing. [Appendix D, p. 35-36, fn. 5]. Based on the clearly erroneous findings of fact, the PCRA court found, *sua sponte*, that Wade failed to satisfy the threshold requirement that Wade prove that the evidence had not previously been tested because the technology to do so did not exist at the time of trial. The PCRA Court found that the specified evidence had already "undergone a thorough DNA analysis on fibers, hair and blood and none of Wade's DNA was found on any of the items tested.". This was just not so. [Appendix D, pages 37-38].

Mr. Wade filed three motions for DNA testing. The history of the DNA testing requests is set forth in the District Court's Opinion at pages 19-24. [Appendix D, pages 19-24]. Focusing on the most recent request filed on December 9, 2011, through counsel, Mr. Wade requested testing of the victim's long fingernails and fingernail scrapings; yellow turtleneck sweater worn by the victim and having a blood stain at the neck and on the body of the sweater; the lavender leather coat; bra; underpants, panty hose and shoes of the victim; trash bag in which the body was found and contents of lavender coat of victim. [Appendix D, pp. 21-22, paragraph 55]. Wade filed a supplemental motion for DNA testing on March 21, 2012 asking that the items listed above be subjected to the new technology of "touch" DNA testing. [Appendix D, page 22, paragraph 57]. Following a hearing on the motion, Mr. Wade filed a memorandum requesting that the results of DNA testing be sent for inclusion in CODIS for comparison with information stored in that data base. [Appendix D, pages 22-23, paragraph 58]. On June 15, 2012, Mr.

Wade's Motion and Supplemental Motion were denied. [Appendix D, page 23, paragraph 60]. The PCRA court found the motion for touch DNA testing to be untimely; (erroneously and contrary to the record) and that some of the items requested for DNA testing had already been subjected to DNA testing. [Appendix D, page 23, paragraph 60]. On March 20, 2013, the Pennsylvania Superior Court affirmed. The PCRA court found that Wade did not make out a ***prima facie*** case that he was actually innocent.

> [W]e find that [Wade's] assertion that the results of Touch DNA analysis of the specified evidence, assuming exculpatory results, will establish his actual innocence of the murder of Lekitha Council, is speculative and irrelevant. [Wade] makes a bald assertion that touch DNA will be recovered from the items of evidence and that when subjected to the standard DNA processing (PCR analysis) the results will show the existence of someone other than [Wade]. [Wade's] argument is speculative and he offers no evidence to support this bald assertion. The Superior Court in [Commonwealth v.] Smith [citation omitted] held that in the face of such speculation, the absence of a defendant's DNA cannot be meaningful and cannot establish a defendant's actual innocence of the murder....In the present case, there was no evidence presented at trial that [Wade's] DNA was found anywhere on the victim, on her clothes or on the garbage bag that the victim's body was found in. In fact, the jury heard substantial evidence regarding the absence of [Wade's] DNA. Accordingly, [Wade's] request for general DNA and Touch DNA testing.....is denied.

As the District Court's Opinion highlights and underscores, Mr. Wade's PCRA motion did not seek DNA testing to demonstrate the absence of <u>HIS</u> DNA from places it would be likely to be found, but instead to determine if skin cells- not visible to the naked eye and not discernable by older, less sophisticated methods, might, with new methods, identify a previously unknown third party in locations and in quantities that would point to an assailant other than Mr. Wade under the "redundancy" theory, "data bank" theory and "confession" theories explained in ***Commonwealth v. Conway,*** 14 A.3d 101, 109 (Pa Super. 2011). [Appendix D, page 38, fn. 7]

The Pennsylvania Superior Court affirmed on March 20, 2013. [Appendix D, page 24, p. paragraph 64]. [Commonwealth v. Wade, No. 2041 EDA 2012, 2013 WL 11273719] The

Superior Court addressed only the PCRA Court's conclusion that "there is no reasonable possibility that the DNA testing requested would produce exculpatory evidence that would establish [Wade's] actual innocence of the crimes for which he was convicted." [Appendix D, page 24, paragraph 64]

On November 15, 2013, the Pennsylvania Supreme Court denied allocatur. [Appendix D, p. 24, paragraph 64.]

On March 24, 2015, Mr. Wade filed a complaint pursuant to 42 U.S.C. §1983. The case was submitted for a bench trial and a hearing was conducted to receive oral argument. [Appendix D, p. 9-11].

In the 1983 action. Wade requested an order directing the district attorney to take all steps reasonably necessary to preserve the physical evidence and to cooperate with Wade in selecting a qualified laboratory for testing the evidence, or in the alternative, ordering the evidence be tested at a laboratory selected by the court; reasonable attorney's fees and costs and any other just and proper relief.

The District Court held a hearing and then granted relief on Count I of the Complaint. In Count I, Wade claimed that the defendant's refusal to release physical evidence from his case for DNA testing violated his procedural due process rights under the Fourteenth Amendment. [Appendix D, p. 26]

The District Court found that the issue before it was a narrow one: "Whether the Pennsylvania post-conviction DNA testing statute, as construed by the state courts in Wade's case, 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental, or transgresses any recognized principle of fundamental fairness in operation.'" quoting ***Dist. Attorney's Office for Third Judicial Dist. v. Osborne,*** 557 U.S. 52,

69 (2009). The District Court found the "particular- and peculiar-construction of the state post-conviction DNA testing statute [42 Pa. C.S.A.9543.1] applied by the PCRA court in Wade's case was fundamentally unfair." [Id. p. 42]

The District Court observed that although on its face the statute appears to give an applicant for DNA testing a fair procedure to seek relief, the Pennsylvania Court's construction and interpretation of the statute was not fair and violated due process. The District Court granted relief on Count I of the complaint. The District Court's analysis is as follows:

> Under the facts presented, we find that the state PCRA court's strained interpretation of the Pennsylvania DNA testing statute utterly foreclosed any possibility of relief for Wade. By interpreting the statute in this fashion, requiring Wade to do the impossible (prove that DNA testing would produce exculpatory results without access to the very evidence he seeks to test) and in contravention of an express statutory presumption that DNA that DNA testing would indeed produce exculpatory results, Wade has been denied the opportunity promised by this statute to demonstrate his actual innocence. We find this to be fundamentally unfair and a violation of Wade's federal constitutional right to procedural due process. ***See Osborne,*** 557 U.S. at 69.....Accordingly, we will grant judgment in favor of the plaintiff with respect to Count I of the complaint. [Appendix D, pp. 45-47]

The District Court also stated:

> If this interpretation of the statute by the PCRA court in Wade's case were applied to other applicants, they too would be utterly foreclosed from obtaining relief. The prospect of relief under DNA testing procedures that require, as a threshold matter, proof that the requested DNA testing will produce exculpatory results to obtain that DNA testing in the first instance is circular and entirely illusory. [Appendix D, p. 46, fn 11]

The District Attorney appealed. On appeal, the panel vacated the judgment of the District Court and remanded with instructions to dismiss the complaint for lack of subject matter jurisdiction. [Wade v. Monroe County District Attorney, 800 Fed. Appx. 114 (3d Cir. 2020)]. The panel found that the ***Rooker-Feldman*** doctrine barred Mr. Wade's claim. The panel found that under ***Rooker-Feldman,*** "the federal court lacks subject-matter jurisdiction to consider Wade's 1983 action as-an applied challenge to Pennsylvania's DNA statute." [Appendix D, p. 7]

Wade filed a petition for rehearing and suggestion for rehearing en banc. [Appendix E]. Two judges would have granted the request for rehearing.

STATEMENT OF THE FACTS

Pennsylvania has enacted a post-conviction DNA testing statute. 42 PA.Cons. Stat. Ann. 9543.1 which permits a convicted person to file a written motion in the sentencing court for the performance of DNA testing on specific items of evidence related to the investigation or prosecution that led to his conviction 9545.1(a)((1).

The statute sets forth several threshold requirements to obtain DNA testing: (1) the evidence specified must be available for testing on the date of the motion; (2) if the evidence was discovered prior to the applicant's conviction, it was not already DNA tested because (a) technology for testing did not exist at the time of the applicant's trial; (b) the applicant's counsel did not request testing in a case that went to verdict before January 1, 1995; or (c) counsel sought funds from the court to pay for DNA testing because his client was indigent, and the court refused the request despite the client's indigency. [Appendix D, page 30].

Once the threshold requirements are met, the statute requires the petitioner to present a *prima facie* case demonstrating that (1) the identity of the perpetrator was at issue at trial, and (2) DNA testing of the specified evidence, **assuming exculpatory results**, would establish the applicant's actual innocence of the crime for which he was convicted 42 PA.Cons. Stat. Ann. 9543.1(c)(3). The statute further provides that "the court shall not order the testing requested...if, after review of the record of the applicant's trial, the court determines that there is no reasonable possibility that the testing would produce exculpatory evidence...would establish the applicant's actual innocence of the offense for which the applicant was convicted. 9543.1(d)(2).

The statute does not define the term "actual innocence." But Pennsylvania state courts have adopted the definition articulated by this Court ***in Schlup v. Delo***, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995): to wit, that the newly discovered evidence must make it more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt. ***Commonwealth v. Conway***, 14 A3d 101, 109 (PA. Super 2011). Under the statute, the petitioner has the burden of making a prima facie case that favorable results from the DNA testing would establish his innocence.

Wade filed a motion under the state PCRA for post-conviction DNA testing of several items of evidence, to wit, fingernail clippings from the victim; scrapings taken from the fingernails, a trash bag that partially covered the body of the victim, a yellow sweater, lavender leather coat, bra, underpants, pantyhose, and shoes worn by the victim when her body was recovered, and contents recovered from the pockets of the leather coat. In support, he noted that his identity as the perpetrator was an issue hotly contested at trial, and that he had been convicted on circumstantial evidence. He noted the exculpatory evidence including the security camera footage at Cunningham Graphics, time-clock records, a credit card receipt all admitted in support of bis alibi that he was at work when the murder was committed. Wade's defense was actual innocence. Wade claimed he was at work at the time of the victim's death. He further noted that fingerprints and palmprints that did not belong to him were found on the trash bag, and that the victim's sweater was on backwards suggesting that she had been redressed by her assailant. He further noted the mother's testimony that the victim was going to meet another man. He postulated that the testing of the specified evidence for "touch DNA" --a technology not available at the time of trial--might reveal a source for the DNA other than Wade and the victim.

Relying on ***Conway, supra***, Wade advanced three separate theories under which the specified DNA testing of the specified evidence, assuming exculpatory results, might establish his actual innocence of the crime for which he was convicted. As described in ***Conway***, the three theories are as follows:

> (1) a "redundancy" theory, which postulates that if the individual DNA tests reveal evidence of a third person on multiple items connected with the crime, then those "redundant" results would give rise to an inference of a separate assailant; (2) a "data bank" theory, which postulates that any DNA results that are obtained from DNA testing that prove the existence of an unknown person could be run through state and federal data banks for a match which, if successful, would lead to the identification of a separate assailant; and (3) a "confession" theory, which postulates that an assailant who is discovered by using the data bank theory could, when confronted with the DNA evidence, confess to the crime. ***Conway***, 14 A3d at 110.

In ***Conway***, the state appellate court weighed the three theories against the evidence presented at trial, noting that the evidence at trial was "wholly circumstantial" and that there had been no prior history between the defendant and the victim, and that the victim's hands were bound and her clothing ripped in a manner that indicated extensive contact with her assailant. Id. at 112. The state appellate court ultimately found that, based on these facts, the plaintiff had satisfied his burden of demonstrating a prima facie case that the requested DNA evidence, assuming exculpatory results, would establish his actual innocence. ***Id.*** at 114.

In Wade's case, the state PCRA court denied his motion, articulating three alternative grounds for its decision. First, the PCRA court *sua sponte* found Wade's motion to be untimely noting that, while "touch DNA" technology was not yet available at the time of trial, it had been available since 2003, and "although the statute does not state what constitutes a timely manner for filing a DNA motion, we do not believe that a delay of eight years from the time the new technology became available constitutes a 'timely manner' for filing a DNA motion." [Appendix D, page 34]. Second, the PCRA court summarized the trial evidence at issue. [Appendix D, page

35]. Notably, the PCRA court characterized the "DNA evidence presented to the jury" but the state court records indicate that the only item submitted for DNA testing was a blood-stained swatch of leather retrieved from the back seat of Wade's car. [Appendix D, page 35, note 5]. Both parties stipulated that the PCRA Court's findings of fact were "erroneous" and "contrary to the record." [Appendix D, page 36, note 5].

Based on the erroneous findings of fact, the PCRA Court found sua sponte that Wade failed to satisfy the statute's threshold requirement that the specified DNA evidence had not already been DNA tested because the technology to do so did not exist at the time of trial. [Appendix D, page 37]. In particular, the PCRA court acknowledged that "touch DNA" technology was not yet available at the time of trial in 2000, but found that the specified evidence had already "undergone a thorough DNA analysis on fibers, hair and blood and none of Wade's DNA was found in any of the items tested." [Appendix D, pages 27-38].

Third and finally, the PCRA Court found that Wade had failed to present a prima facie case of actual innocence. The PCRA Court explained its rationale as follows:

> We find that Wade's assertion that the results of Touch DNA analysis of the specified evidence, assuming exculpatory results, will establish his actual innocence of the murder of Lekitha Council, is speculative and irrelevant. Wade makes a bald assertion that touch DNA will be recovered from the items of evidence and that when subjected to the standard DNA processing (PCR analysis) the results will show the existence of someone other than Wade. Wade's argument is speculative and he offers no evidence to support this bald assertion. The Superior Court in [Commonwealth v. Smith, 889 A2d 582 (PA Super. 2005) held that in the face of such speculation, the absence of a defendant's DNA cannot be meaningful and cannot establish the defendant's actual innocence of the murder. The Court stated that "The statute does not contemplate the speculative type of argument advanced by Appellant. In the present case, there was no evidence presented at trial that Wade's DNA was found anywhere on the victim, on her clothes, or on the garbage bag that the victim's body was found in. In fact, the jury heard substantial evidence regarding the absence of Wade's DNA. Accordingly, Wade's request for general DNA and Touch DNA testing of the fingernails of the victim and scrapings from those fingernails; the yellow turtleneck sweater; the lavender leather coat; the victim's bra, underpants, pantyhose and shoes; the trash bag in which the body of Lekitha Council was found; and the contents of the lavender coat of the victim is denied.

As a result, the PCRA Court found there is no reasonable possibility that the DNA testing requested will produce exculpatory evidence that would establish Wade's actual innocence. [Appendix D, pages 38-39]

The District Court observed that Wade's motion for DNA testing sought touch DNA testing not to demonstrate the absence of his DNA where it would logically be expected to be found were he the assailant but instead to determine whether touch DNA testing would reveal the existence of an unidentified third party found on evidence in locations and quantities suggestive of an assailant other than Wade. ***Commonwealth v. Payne***, 129 A3d 546 at 562. [Appendix D, page 38, footnote 7].

On appeal, it was upon the third basis that the Superior Court affirmed the PCRA court's denial of Wade's PCRA motion for post-conviction DNA testing. [Appendix D page 40].

The District Court addressed the ***Rooker-Feldman*** doctrine. [Appendix D, page 40]. The District Court stated:

> The question properly before us is a narrow one: Whether the Pennsylvania post-conviction DNA testing statute, as construed by the state courts in Wade's case, "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental, or transgresses any recognized principle of fundamental fairness in operation. [Appendix D, page 41].

The District Court held that the PCRA statute did not violate principles of fundamental fairness on its face. [Appendix D, page 41].

Even so, the District Court held that the PCRA statute, as construed in Wade's case, violates principles of fundamental fairness because it reads out the part of the PCRA statute that reads: "assuming exculpatory results." [Appendix D, page 43-45]. The District Court held that no person could meet the standard applied by the State court's construction of the PCRA statute.

A Panel of the Third Circuit disagreed with the District Court, and applied the ***Rooker-Feldman*** doctrine, which had been applied only to ***Rooker*** and ***Feldman***. The doctrine, which has been applied very sparingly until now, held that only the Supreme Court of the United States has jurisdiction to overrule a state court judgment. The Panel's opinion would nullify 28 USC 2254 which gives the district court jurisdiction to make decisions which relieve prisoners of state court judgments where, as here, the judgments violate the Constitution.

Petitioner filed a petition for rehearing and suggestion for rehearing en banc. [Exhibit E]. The Court affirmed but two appellate judges agreed with the petition for rehearing and suggestion for rehearing en banc.

REASONS WHY THE WRIT SHOULD BE GRANTED

Rule 10. Considerations Governing Review on Certiorari

> Review on certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons. The following, though neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of the Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

THE APPELLATE COURT'S AMENDED ORDER CONFLICTS WITH U.S. SUPREME COURT PRECEDENT IN SKINNER V. SWITZER, 562 U.S. 521 (2011) AND THIS COURT'S OPINION IN DISTRICT ATTORNEY'S OFFICE FOR THE THIRD JUDICIAL DISTRICT V. OSBORNE, 557 U.S. 52 (2009)

The Panel of the Third Circuit argued that the District Court's analysis is wrong and the civil action is jurisdictionally barred by the ***Rooker-Feldman*** doctrine. That doctrine provides that the federal district court lacks subject matter jurisdiction to sit in direct review of state court judgment, but the doctrine is limited to the kinds of cases brought by ***Rooker*** and ***Feldman***, which involved the appeal of state court judgment. See ***Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*** 544 U.S. 280, 284, 125 S.Ct. 1517, 161 L.Ed.2d 454 (2005). The ***Exxon Mobil*** case recognized the Third Circuit's tendency to extend the boundaries of ***Rooker-Feldman*** to territory where it does not apply.

In ***Skinner v. Switzer***, 562 U.S. 521, 131 S.Ct. 1289, 179 L.Ed.2d 233 (2011), this Court addressed the fourth requirement--whether the plaintiff is inviting the district court to review and reject the state court's judgment. Id at page 532. The plaintiff in ***Skinner***

> Stated his due process claim in a paragraph alleging that the state's refusal to "release the biological evidence for testing… has deprived him of his liberty interests in utilizing state procedures to obtain reversal of his conviction and/or to obtain a pardon or reduction of his sentence…

At oral argument, Skinner's counsel stated:

> Skinner's counsel clarified the gist of Skinner's due process claim: He does not challenge the prosecutor's conduct or the decisions reached by the state court in applying state law to his motions; instead, he challenges, as denying him procedural due process, the state's post conviction DNA statute "as construed" by the state courts…State courts, Skinner's counsel argued, have construed the statute to completely foreclose any prisoner who could have sought DNA testing prior to trial, but did not, from seeking testing post-conviction…

Under these circumstances, this Court concluded that

> Skinner's litigation, in light of Exxon, encounters no Rooker-Feldman shoal. "If a federal plaintiff "presents an independent claim," it is not an impediment to the exercise of federal jurisdiction that the "same or a related question" was earlier aired between the parties in state court…Skinner does not challenge the adverse state court decisions themselves.; instead, he targets as unconstitutional the state statute they authoritatively construed. As the court explained in Feldman, and reiterated in Exxon, a state-court decision is not reviewable by lower federal courts, but a statute or rule governing the decision may be challenged in a federal action. Skinner's federal case falls within the latter category. There was, therefore, no lack of subject matter jurisdiction over Skinner's federal suit. Id. 532-533.

With respect to application of the ***Rooker-Feldman*** doctrine, the District Court held that Wade's due process claims were independent of the state court judgment, and there was no meaningful difference between the procedural due process claims advanced by Wade and the ones advanced by Skinner.

Despite the ***Exxon Mobil*** case, the Third Circuit continues to see ***Rooker-Feldman*** lurking in every §1983 action seeking DNA testing. This view is contrary to ***Skinner v. Switzer*** which observed that the Supreme Court has employed the ***Rooker-Feldman*** doctrine sparingly only in two cases- ***Rooker*** and ***Feldman. Skinner,*** 562 U.S. at 531.

Over-application of the ***Rooker-Feldman*** doctrine clashes with jurisdiction vested in the district court under 28 U.S.C. 2254 to review the constitutionality of state court judgments. In every case filed under 2254, the state habeas petitioner has been convicted in a state court. In all such cases, the conviction has been affirmed. The 2254 habeas asks the district court to grant relief from a state court judgment based on violations of the U.S. Constitution. The 2254 habeas petition, if successful, does not attack the state court judgment itself, but instead, eliminates the custody component and thus vitiates the effect of the state court judgment based on the

constitutional violation. The same principle applies here. The District Court did not vitiate the judgment or have an effect on the state court judgment. It merely states that the state court judgment violates the constitution and prescribes a remedy tailored to the violation.

The District Court correctly found that the ***Rooker-Feldman*** doctrine did not bar Mr. Wade's §1983 action. The District Court identified the question before it to be a narrow one: "Whether the Pennsylvania post-conviction DNA testing statute, as construed by the state courts in Wade's case, 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental, or transgresses any recognized principle of fundamental fairness in operation.'" Quoting ***Osborne***, 577 U.S. at 69. [Appendix D, p. 41] Although the decision of the District Court relied in large part on ***Osborne***, the Panel Opinion does not address ***Osborne.***

The Third Circuit has wrongly narrowed the criteria for the court's jurisdiction in a §1983 action in contravention of ***Skinner***. First, the Panel wrongly concluded that Mr. Wade did not challenge the statute "as 'authoritatively construed' by Pennsylvania courts or as it applies to prisoners generally." Mr. Wade claimed that the defendant's refusal to release physical evidence from his criminal case to him for DNA testing was a violation of his procedural due process right under the Fourteenth Amendment. F.R.Civ.P. 8(a) did not require more. In his Pre-Argument Brief, Mr. Wade argued that the Pennsylvania Court denied Mr. Wade his right to due process when it failed to follow the definition of "actual innocence" contained in the DNA testing statute at 9543.1. [District Court Docket Entry # 49, p. 14.

The District Court correctly found that Mr. Wade is entitled to relief under § 1983 because the Pennsylvania Courts' interpretation of the DNA testing statute, which denies a fair procedure and "offends some principle of justice so rooted in the traditions and conscience of our

people as to be ranked as fundamental, or transgresses any recognized principle of fundamental fairness in operation." quoting ***Dist. Attorney's Office for Third Judicial Dist. v. Osborne,*** 557 U.S. 52, 69 (2009). The District Court found the "particular- and peculiar-construction of the state post-conviction DNA testing statute [42 Pa. C.S.A.9543.1] applied by the PCRA court in Wade's case was fundamentally unfair." [Id. p. 42]

In ***Osborne,*** at 53, The United States Supreme Court stated that the question was

> whether consideration of Osborne's claim within the framework of the State's postconviction relief procedures 'offends some [fundamental] principle of justice' or 'transgresses any recognized principle of fundamental fairness in operation.' ***Medina v. California,*** 505 U.S. 437, 446, 448, 112 S. Ct. 2572, 120 L.Ed.2d 353. Federal Courts may upset a State's postconviction procedures only if they are fundamentally inadequate to vindicate the substantive rights provided.

That was the exact claim raised by Wade and addressed by the District Court. [Appendix D, p. 41] ["Wade has been denied the opportunity promised by this statute to demonstrate his actual innocence. We find this to be fundamentally unfair and a violation of Wade's federal constitutional right to procedural due process."][Id, p. 46] ***Osborne*** did NOT say that a court had no jurisdiction to entertain a 1983 action unless the claimant alleged that the statute, on its face, was unconstitutional. The District Court found the interpretation by the state courts to be fundamentally unfair. The Panel did not find the interpretation to be fair. It only found the unfairness to be unassailable as to Wade under the ***Rooker-Feldman Doctrine.***

The District Court granted relief in a well-reasoned decision. Appellant applied for rehearing and rehearing en banc. Notably, two appellate judges agreed with the Appellant that the Court should have granted a rehearing.

CONCLUSION

The Third Circuit's Amended Order applying ***Rooker-Feldman*** should, itself, be vacated. The order of the District Court should be reinstated and affirmed.

Respectfully submitted,

/s/Cheryl J. Sturm
Cheryl J. Sturm
Attorney-At-Law
408 Ring Road
Chadds Ford, PA 19317

CERTIFICATE OF COMPLIANCE WITH

TYPE-VOLUME LIMITATION

Pursuant to Fed.R. App. 32(a)(7)(C), the undersigned certifies that the Petition is prepared with 12 point Times New Roman type and that it contains 6274 words.

/s/Cheryl J. Sturm

CERTIFICATE OF ELECTRONIC FILING

The undersigned certifies that s/he caused the original and ten hard copies of the Petition to be sent to the Clerk's Office on the same day the E-Brief was transmitted. The undersigned certifies that the text of the hard copies and the E-Brief are identical. The undersigned certifies that the Petition was checked for viruses using Norton provided by Comcast.

/s/Cheryl J. Sturm

Respectfully submitted,

/s/Cheryl J. Sturm
Cheryl J. Sturm
Attorney-At-Law
408 Ring Road
Chadds Ford, PA 19317

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/s/Cheryl J. Sturm

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-2201

ROBERT MUIR WADE

v.

MONROE COUNTY DISTRICT ATTORNEY;
E. DAVID CHRISTINE, D.A. MONROE COUNTY,
Appellants

(D.C. Civil Action No. 3-15-cv-00584)

SUR PETITION FOR REHEARING
AMENDED ORDER[1]

Present: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, *SCIRICA, and *RENDELL, Circuit Judges

The petition for rehearing filed by appellee in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the

*Hon. Anthony J. Scirica and Hon. Marjorie O. Rendell votes are limited to panel rehearing only.

[1] Hon. Theodore M. McKee and Hon. Cheryl Krause would have granted the petition.

circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/Patty Shwartz
Circuit Judge

Dated: April 8, 2020
Tmm/cc: Cheryl J. Sturm, Esq.
Gerard J. Geiger, Esq.
Robert J. Kidwell, III, Esq.

APPENDIX B

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-2201

ROBERT MUIR WADE

v.

MONROE COUNTY DISTRICT ATTORNEY;
E. DAVID CHRISTINE, D.A. MONROE COUNTY,
Appellants

Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 3-15-cv-00584)
Magistrate Judge: Hon. Joseph F. Saporito

Submitted pursuant to Third Circuit L.A.R. 34.1(a)
February 3, 2020

Before: SHWARTZ, SCIRICA, and RENDELL, Circuit Judges.

JUDGMENT

This cause came to be considered on the record of the United States District Court for the Middle District of Pennsylvania and was submitted pursuant to Third Circuit L.A.R. 34.1(a) on February 3, 2020.

On consideration whereof, it is now hereby ORDERED and ADJUDGED by this Court that the judgment of the District Court entered on May 13, 2019 is VACATED and

REMANDED with instructions to DISMISS the complaint for lack of subject matter jurisdiction. All of the above in accordance with the Opinion of this Court.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

Dated: February 11, 2020

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-2201

ROBERT MUIR WADE

v.

MONROE COUNTY DISTRICT ATTORNEY;
E. DAVID CHRISTINE, D.A. MONROE COUNTY,
Appellants

Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 3-15-cv-00584)
Magistrate Judge: Hon. Joseph F. Saporito

Submitted pursuant to Third Circuit L.A.R. 34.1(a)
February 3, 2020

Before: SHWARTZ, SCIRICA, and RENDELL, Circuit Judges.

(Filed: February 11, 2020)

OPINION*

---

* This disposition is not an opinion of the full Court and, pursuant to I.O.P. 5.7, does not constitute binding precedent.

SHWARTZ, Circuit Judge.

The Monroe County District Attorney and District Attorney E. David Christine (collectively, the "District Attorney") appeal the District Court's order entering judgment for Robert Muir Wade on his claim that the Pennsylvania courts violated his right to procedural due process under the Fourteenth Amendment to the United States Constitution by denying him access to post-conviction DNA testing. Because the Rooker-Feldman doctrine bars Wade's claim, we will vacate the judgment and remand with instructions to dismiss the complaint for lack of subject-matter jurisdiction.

I[1]

A

In December 1996, hunters in Monroe County found the body of Lekitha Council, a woman with whom Wade once had a relationship, partially wrapped in a garbage bag. Circumstantial evidence connected Wade to the murder.

A jury convicted Wade of first-degree murder and abuse of a corpse in violation of 18 Pa. Cons. Stat. Ann. § 2502(a) and 18 Pa. Cons. Stat. Ann. § 5510, respectively. Wade was sentenced to life imprisonment without parole for murder and a concurrent one to two years' imprisonment for abuse of a corpse. The Superior Court of Pennsylvania affirmed the judgment of conviction and sentence. Commonwealth v. Wade, 790 A.2d 344 (Table) (Pa. Super. Ct. 2001). The Pennsylvania Supreme Court denied Wade's

[1] These facts are drawn from the parties' joint stipulation of facts.

petition for leave to petition for allowance of appeal nunc pro tunc.[2] Wade thereafter filed petitions under the Pennsylvania Post Conviction Relief Act ("PCRA") and a request for DNA testing in the state courts. Each was unsuccessful.

Wade filed another motion for post-conviction DNA testing,[3] and a supplemental motion thereafter, specifically requesting that certain evidence be subject to "Touch" DNA testing.[4] App. 88. The PCRA court denied the motions. Commonwealth v. Wade, No. CP-45-CR-0000639-1998 (Monroe Cty. Ct. Com. Pl. June 15, 2012). The court held, among other things, that Wade failed to meet the requirements of Pennsylvania's DNA testing statute, 42 Pa. Cons. Stat. Ann. § 9543.1[5] for additional DNA testing

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[2] Wade also filed a petition for habeas corpus in 2003, which was denied, and we denied Wade's application for a certificate of appealability.

[3] Wade requested DNA testing of: (1) the victim's fingernails and any scrapings from those fingernails; (2) the blood-stained yellow turtle neck the victim had worn; (3) the victim's lavender leather coat, bra, underwear, pantyhose, and shoes; (4) the contents of the victim's lavender coat; and (5) the trash bag in which the victim's body was found.

[4] The PCRA court stated that Touch DNA testing refers to DNA removed from skin "left behind when a person touches or comes into contact with items such as clothes, weapons, or other objects." Commonwealth v. Wade, No. CP-45-CR-0000639-1998, slip op. at 3 n.2 (Monroe Cty. Ct. Com. Pl. June 15, 2012).

[5] Section 9543.1 provides in pertinent part:

> (a) Motion.--
>
> (1) An individual convicted of a criminal offense in a court of this Commonwealth may apply by making a written motion to the sentencing court at any time for the performance of forensic DNA testing on specific evidence that is related to the investigation or prosecution that resulted in the judgment of conviction.
>
> (2) The evidence may have been discovered either prior to or after the applicant's conviction. The evidence shall be available for testing as of the date of the motion. If the evidence was discovered prior to the applicant's conviction, the evidence shall not have been subject to the DNA testing requested because the technology for testing was not in

because (1) Wade's "assertion that the results of Touch DNA analysis of the specified evidence, assuming exculpatory results, will establish his actual innocence of the murder of Lekitha Coun[cil], is speculative and irrelevant," (2) "there was no evidence presented at trial that [Wade's] DNA was found anywhere on the victim, on her clothes or on the

---

> existence at the time of the trial or the applicant's counsel did not seek testing at the time of the trial in a case where a verdict was rendered on or before January 1, 1995, or the evidence was subject to the testing, but newer technology could provide substantially more accurate and substantially probative results, or the applicant's counsel sought funds from the court to pay for the testing because his client was indigent and the court refused the request despite the client's indigency.
>
> . . .
>
> (c) Requirements.--In any motion under subsection (a), under penalty of perjury, the applicant shall:
>
> . . .
>
> (3) present a prima facie case demonstrating that the:
>
> (i) identity of or the participation in the crime by the perpetrator was at issue in the proceedings that resulted in the applicant's conviction and sentencing; and
>
> (ii) DNA testing of the specific evidence, assuming exculpatory results, would establish:
>
> (A) the applicant's actual innocence of the offense for which the applicant was convicted;
>
> . . .
>
> (d) Order.--
>
> . . .
>
> (2) The court shall not order the testing requested in a motion under subsection (a) if, after review of the record of the applicant's trial, the court determines that there is no reasonable possibility for an applicant under State supervision . . . that the testing would produce exculpatory evidence that:
>
> (i) would establish the applicant's actual innocence of the offense for which the applicant was convicted . . . .

42 Pa. Cons. Stat. Ann. § 9543.1(a)-(d).

garbage bag that the victim's body was found in,"[6] and (3) "the jury heard substantial evidence regarding the absence of [Wade's] DNA." Wade, slip op. at 9-10.

The Superior Court affirmed, agreeing with the PCRA court that, given the evidence at trial,

> even assuming DNA testing would reveal DNA from someone other than [Wade] or the victim on the multiple items [Wade] seeks to have tested, [Wade] does not demonstrate it is more likely than not that no reasonable juror confronted with the DNA and other evidence would find the defendant guilty beyond a reasonable doubt.

Commonwealth v. Wade, No. 2041 EDA 2012, 2013 WL 11273719, at *3 (Pa. Super. Ct. Mar. 20, 2013). The Pennsylvania Supreme Court denied his petition for allowance of appeal. Commonwealth v. Wade, 80 A.3d 777 (Table) (Pa. 2013). Wade maintains that he is actually innocent.

B

Wade sued the District Attorney in federal district court under 42 U.S.C. § 1983, alleging that he had been denied access to, and DNA testing of, physical evidence in the District Attorney's possession and that this denial violated his right to procedural due process and to a reasonable opportunity to prove his innocence. Wade sought a judgment directing the District Attorney to, among other things, produce certain physical evidence and allow Wade to test it.

---

[6] In summarizing the forensic evidence presented to the jury at trial, the PCRA court noted that the fingerprints of a forensic scientist at the Pennsylvania State Police Crime Lab and four other fingerprints that lacked sufficient detail or characteristics to identify the source were discovered on the garbage bag in which the victim was found. Wade, slip op. at 8. The parties also stipulated that the DNA of another individual was detected.

Following a bench trial, the District Court entered judgment in favor of Wade on his procedural due process claim and granted him access to the physical evidence and the DNA testing he sought. The Court held that the PCRA court's application of Pennsylvania's post-conviction DNA testing statute, § 9543.1, to Wade violated procedural due process. Wade v. Monroe Cty. Dist. Att'y, No. 3:15-CV-00584, 2019 WL 2084533, at *14-15 (M.D. Pa. May 13, 2019). The Court reasoned that, on its face, § 9543.1 does not violate due process but that "the particular—and peculiar—construction of [§ 9543.1] applied by the PCRA court in Wade's case was fundamentally unfair" because (1) § 9543.1 does not require a petitioner to show that the DNA testing results would be favorable but only requires him to "present a prima facie case demonstrating that DNA testing of the specific evidence, assuming exculpatory results, would establish . . . the applicant's actual innocence," id. at *14 (omission in original) (quoting § 9543.1(c)(3)(ii)(A)); (2) the PCRA court rejected "as speculative" Wade's argument that the Touch DNA testing would support an inference that an assailant other than Wade had killed the victim, id. at *15; and (3) this construction read the words "assuming exculpatory results" out of § 9543.1, denied him the opportunity to show his actual innocence, and thereby violated his right to procedural due process, id. The District Attorney appeals.

II[7]

Wade claims that the denial of access to physical evidence in the District Attorney's possession for DNA testing violated his Fourteenth Amendment right to procedural due process. On appeal, Wade states that he is not challenging the DNA testing statute itself, but instead contends that the state court's "interpretation" and "application of the statute" to him is "fundamentally unfair." Appellee's Br. 8. We hold that, under the Rooker-Feldman doctrine, the federal court lacks subject-matter jurisdiction to consider Wade's as-applied challenge to Pennsylvania's DNA statute.

The Rooker-Feldman doctrine stems from the Supreme Court's decisions in Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923), and District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983), and bars federal district courts from exercising jurisdiction "over suits that are essentially appeals from state-court judgments," Great W. Mining & Mineral Co. v. Fox Rothschild LLP, 615 F.3d 159, 165 (3d Cir. 2010). The doctrine prohibits "state-court losers" from complaining about "injuries caused by state-court judgments" and from "inviting district court review and rejection of those judgments." Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 284 (2005).

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[7] The District Court exercised jurisdiction under 28 U.S.C. § 1331. To the extent we have jurisdiction, we exercise it under 28 U.S.C. § 1291.

Courts "have an independent obligation to determine whether subject-matter jurisdiction exists." Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006). We exercise de novo review over questions of subject-matter jurisdiction. Great W. Mining & Mineral Co. v. Fox Rothschild LLP, 615 F.3d 159, 163 (3d Cir. 2010).

For the Rooker-Feldman doctrine to apply, four requirements must be met: "(1) the federal plaintiff lost in state court, (2) the plaintiff complains of injuries caused by the state-court judgment, (3) that judgment issued before the federal suit was filed, and (4) the plaintiff invites the district court to review and reject the state-court judgment." Geness v. Cox, 902 F.3d 344, 360 (3d Cir. 2018) (quoting In re Phila. Entm't & Dev. Partners, 879 F.3d 492, 500 (3d Cir. 2018); see Exxon Mobil, 544 U.S. at 284.

All four requirements are met here. First, Wade lost his state-court action when the PCRA court denied his motion for post-conviction DNA testing under § 9543.1, the Superior Court affirmed the decision, and the Pennsylvania Supreme Court denied his petition for allowance of appeal. Second, Wade asserts he was injured by the Pennsylvania courts' alleged misinterpretation and application of § 9543.1 and resulting denial of his motion. Specifically, Wade contends that the PCRA court interpreted § 9543.1 to require him to prove the DNA testing would produce exculpatory results, while § 9543.1 requires courts to "assum[e] exculpatory results," and this allegedly erroneous interpretation led to the denial of relief and thus injured him. Third, the state-court judgment was entered before Wade filed his federal suit. Fourth, Wade asked the District Court to review the validity of the state-court judgment, hold that its interpretation violated procedural due process, and grant him the DNA testing he seeks. Because all four elements are met, the Rooker-Feldman doctrine bars his claim.[8]

[8] Several other circuit courts also have held that the Rooker-Feldman doctrine bars challenges nearly identical to Wade's. See Cooper v. Ramos, 704 F.3d 772, 779-81 (9th Cir. 2012) (holding that the Rooker-Feldman doctrine barred challenge to state court's application of the state's DNA testing statute since, although plaintiff tried to cast his

Wade relies on Skinner v. Switzer, 562 U.S. 521 (2011), to argue that Rooker-Feldman does not foreclose his claim because he asserts that he does not directly attack the state court's judgment. Skinner's claim, however, is unlike Wade's because Skinner challenged the DNA statute generally while Wade challenges its application to him specifically. In Skinner, after the petitioner was convicted of murder, he moved for DNA testing under Texas's post-conviction DNA testing statute, but the Texas courts denied his motions. Petitioner brought a § 1983 claim against the District Attorney, alleging that Texas had violated his right to procedural due process by refusing to provide for the DNA testing he requested. Id. at 529. The Supreme Court held that the Rooker-Feldman doctrine did not bar the suit because petitioner did "not challenge the prosecutor's conduct or the decisions reached by the [state court] in applying [the DNA statute] to his motions" but "instead, he challenge[d] . . . Texas' postconviction DNA statute 'as

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complaint as a general attack on the statute, he asserted legal errors by the state court as his legal injury and relief from the state-court judgment as his remedy); Alvarez v. Att'y Gen., 679 F.3d 1257, 1263-64 (11th Cir. 2012) (affirming district court's determination that it lacked jurisdiction over plaintiff's claim that the Florida courts' application of state DNA access procedures violated procedural due process because the claim "broadly attack[ed] the state court's application of Florida's DNA access procedures to the facts of his case" and not "the constitutionality of those underlying procedures"); McKithen v. Brown, 626 F.3d 143, 154-55 (2d Cir. 2010) (holding that Rooker-Feldman barred claim that the state court "incorrectly and unconstitutionally interpreted the [New York DNA] statute by not assuming exculpatory results" because plaintiff alleged he was injured by the state court's interpretation of the statute and sought review of the validity of its court judgment); In re Smith, 349 F. App'x 12, 15 (6th Cir. 2009) (holding that Rooker-Feldman barred claim that plaintiff's procedural due process rights were violated when he was denied statutory DNA testing because the "source of the injury" was the state trial court order denying access to the testing). Cf. Morrison v. Peterson, 809 F.3d 1059, 1069-70 (9th Cir. 2015) (holding that Rooker-Feldman doctrine did not bar as-applied challenge to California's post-conviction DNA testing statute where plaintiff sought to invalidate the statute as unconstitutional but did not seek an order granting DNA testing).

construed' by the Texas courts," as denying him procedural due process. Id. at 530. Thus, "he target[ed] as unconstitutional the Texas statute [that state courts] authoritatively construed," and because he challenged the statute governing the decision, the Court had subject-matter jurisdiction over the suit. Id. at 532-33.

Unlike the claim in Skinner, Wade contends that the PCRA court misinterpreted the DNA statute in his case specifically, and in doing so, violated his procedural due process rights. At its core, Wade's challenge is to the PCRA court's particular interpretation of the DNA statute and application of the statute to him, not to the statute as "authoritatively construed" by Pennsylvania courts or as it applies to prisoners generally. Indeed, the PCRA court applied the DNA statute to Wade specifically, reasoning that Wade's "assertion that the results of Touch DNA analysis of the specified evidence, assuming exculpatory results, will establish his actual innocence of the murder of Lekitha Council, [was] speculative and irrelevant." Wade, slip op. at 10. The court concluded that Wade had failed to present a prima facie case that would entitle him to DNA testing because, given the evidence at trial, there was no reasonable possibility that the testing would establish his actual innocence. Id. at 11. Similarly, the District Court examined the PCRA court's application of the statute to Wade and found that the PCRA court's "particular—and peculiar—construction of the state post-conviction DNA testing statute . . . in Wade's case was fundamentally unfair." Wade, 2019 WL 2084533, at *14.

The language of both the PCRA court and District Court reveal that the state court entered a ruling based upon Wade's situation, and made no broad pronouncement about how the statute should be construed in all cases. Wade's due process claim is based on

the injury caused by this adverse state-court ruling, and it is exactly the type of claim a federal court cannot review. See Cooper v. Ramos, 704 F.3d 772, 780-81 (9th Cir. 2012) (reasoning that plaintiff's procedural due process claim that the state court "made it impossible" for him to utilize the DNA statute was dissimilar to Skinner, where the claim was that the Texas statute was inadequate as to any prisoner, and holding that Rooker-Feldman barred plaintiff's claim); Alvarez v. Att'y Gen., 679 F.3d 1257, 1263-64 (11th Cir. 2012) (holding that Rooker-Feldman barred plaintiff's procedural due process claim that the state court's denial of access to DNA testing caused him injury, reasoning that it was unlike the claim in Skinner that Texas's DNA statute as "authoritatively construed" was unconstitutional).

III

For these reasons, we will vacate the judgment of the District Court and remand with instructions to dismiss Wade's complaint for lack of subject-matter jurisdiction.

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

ROBERT MUIR WADE, Plaintiff, v. MONROE COUNTY DISTRICT ATTORNEY, et al., Defendants.	CIVIL ACTION NO. 3:15-cv-00584 (SAPORITO, M.J.)

ORDER

AND NOW, this 13th day of May, 2019, in accordance with the accompanying Memorandum, **IT IS HEREBY ORDERED THAT**:

1. Count II of the complaint (access to courts) shall be **DISMISSED without prejudice** for failure to state a claim upon which relief can be granted, pursuant to 28 U.S.C. § 1915A(b)(1);

2. The Clerk is directed to enter **JUDGMENT** in favor of the plaintiff with respect to Count I of the complaint (procedural due process), pursuant to Rule 58 of the Federal Rules of Civil Procedure;

3. The defendants shall take all steps reasonably necessary to preserve: the physical evidence taken from the victim's body, including fingernails of the victim and any scrapings from those fingernails; the yellow turtleneck sweater worn by the victim and which had a bloodstain on the neck and body of the sweater; the lavender leather coat; the bra,

underpants, pantyhose, and shoes of the victim; the trash bag in which the body of the victim was found; the contents of the lavender coat of the victim; and the inventory of the items found in the lavender coat;

4. The defendants shall produce the evidence described in the preceding paragraph to the plaintiff for inspection and touch DNA testing;

5. The defendants shall cooperate with the plaintiff in selecting a qualified laboratory for touch DNA testing of the evidence described in paragraph 3; and

6. Within **sixty (60) days** after the date of this Order, the parties shall file a joint status report with respect to their progress or performance under paragraphs 3, 4, and 5 of this Order.

s/Joseph F. Saporito, Jr.
JOSEPH F. SAPORITO, JR.
United States Magistrate Judge

APPENDIX D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

ROBERT MUIR WADE, Plaintiff, v. MONROE COUNTY DISTRICT ATTORNEY, et al., Defendants.	CIVIL ACTION NO. 3:15-cv-00584 (SAPORITO, M.J.)

MEMORANDUM

This is a federal civil rights action, brought under 42 U.S.C. § 1983. The plaintiff, Robert Muir Wade, is a state prisoner incarcerated at SCI Dallas, located in Luzerne County, Pennsylvania. He is serving a sentence of life in prison without parole. Appearing through counsel, he alleges that the defendants' failure to release certain physical evidence to him for DNA testing has violated his federal constitutional rights. He seeks an order from this Court directing the defendants to release this evidence for DNA testing, plus costs and fees.

I. FACTUAL BACKGROUND

By way of background only, we refer to an appellate opinion by the Superior Court of Pennsylvania, which ably summarizes the facts

underlying Wade's criminal conviction:

> [Wade] and the victim had known each other for approximately six years and had lived together at one point during their relationship. Although [Wade] was married, he and the victim had sexual relations until at least two months before the victim's death.
>
> As the victim did not own a vehicle, [Wade] routinely drove her to and from work. [Wade] admitted that he drove the victim to work on November 26, 1996, the day she was last seen alive. It was also confirmed that the victim made various telephone calls to [Wade] that day from her workplace. The victim had also telephoned her mother and explained that she was going to meet [Wade] after work to shop for a vehicle. Several business cards of car dealers were found in the victim's pockets. [Wade] testified that he talked to the victim at approximately 5:00 p.m., which was also the last time she was seen alive. [The victim's] body was discovered six days later, on December 2, 1996.
>
> On December 3, 1996, a search warrant was issued in New Jersey for [Wade's] automobile. During the search, the police found bloodstains on the back of the passenger seat. The autopsy revealed that the victim had bled from the nose and that there was a substantial amount of blood around her mouth and on the top of her turtleneck. The Commonwealth introduced evidence establishing that the blood found in the vehicle matched the victim's blood within 1 of 207,000 in the African-American population.
>
> In the trunk of [Wade's] automobile, the police discovered plastic shopping bags. One of these bags contained "Pathmark" brand products and a receipt from a "Pathmark" store in Montclair, New Jersey[,] dated November 26, 1996. The receipt was timed at approximately 1:25 p.m. and had the victim's name on

> it. The information on the receipt was corroborated with a timed videotape depicting the victim at this store purchasing items found in the shopping bags. The victim was wearing the same clothes that she was found in when her body was discovered on December 2, 1996.
>
> The garbage bag that the body was found in also led to evidence linking [Wade] to the crime. On December 3, 1996, [Wade's] wife consented to a search of their home. During the search, the police found clothing that belonged to the victim. [Wade's] wife gave police a garbage bag, which was identical to the bag in which the victim was found. Two days later, while executing a search of [Wade's] home on December 5, 1996, the police found a box of these particular garbage bags in the basement.
>
> The garbage bags in this case were unusual and proved to be important circumstantial evidence. The Commonwealth presented two experts in bag manufacturing to testify about the garbage bags. Frank Ruiz, one of the experts, testified that the bag in which the body was found and the bags discovered in [Wade's] home were manufactured by the same company within the same eight hours. Tests revealed that they were institutional garbage bags, not commonly sold in the consumer market. Further, the process by which this particular garbage bag was manufactured revealed that it was extremely uncommon within the garbage bag industry.

Commonwealth v. Wade, No. 2041 EDA 2012, 2013 WL 11273719, at *1 (Pa. Super. Ct. Mar. 20, 2013) (unpublished opinion) (brackets omitted.)

In 1998, Wade was arrested and charged with the victim's murder. *Id.* at *2.

II. PROCEDURAL BACKGROUND

On April 3, 2000, following a jury trial, Wade was convicted in the Court of Common Pleas of Monroe County for first-degree murder and abuse of a corpse. *Commonwealth v. Wade*, Docket No. CP-45-CR-0000639-1998 (Monroe Cty. C.C.P.). On July 18, 2000, Wade was sentenced to serve a term of mandatory life imprisonment without parole for the first-degree murder conviction and a term of 1 to 2 years imprisonment for abuse of a corpse. *Id.* His conviction and sentence were affirmed on direct appeal by the Superior Court of Pennsylvania on October 12, 2001. *Commonwealth v. Wade*, Docket No. 3406 EDA 2000 (Pa. Super. Ct.). Nearly a year later, on September 10, 2001, Wade filed a *nunc pro tunc* petition for allocatur with the Supreme Court of Pennsylvania, which was denied on December 16, 2002. *Commonwealth v. Wade*, Docket No. 208 MM 2002 (Pa.).

On June 9, 2003, Wade filed a federal petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. *Wade v. Warden of SCI Rockview*, Case No. 4:03-cv-00952 (M.D. Pa. filed June 9, 2003). On December 2, 2004, Wade's petition was denied by this Court. *Id.* Wade filed an untimely appeal to the Third Circuit, which remanded the case for this

Court to determine in the first instance whether a certificate of appealability should issue. *Id.* On February 7, 2006, this Court declined to issue a certificate of appealability. *Id.* On December 21, 2006, the Third Circuit likewise denied Wade's request for a certificate of appealability. *Id.*

In the meantime, Wade filed a *pro se* PCRA petition in the state trial court on August 23, 2004. Counsel was appointed thereafter to represent Wade in the PCRA proceedings. *Commonwealth v. Wade*, Docket No. CP-45-CR-0000639-1998 (Monroe Cty. C.C.P.). On February 7, 2005, the PCRA court denied Wade's PCRA petition as untimely filed. *Id.* The denial of this first PCRA petition was affirmed on appeal by the Superior Court on August 22, 2005. *Commonwealth v. Wade*, 885 A.2d 587 (Pa. Super. Ct. 2005) (table decision) (No. 586 EDA 2005).

On or about September 1, 2005, Wade submitted a *pro se* motion for post-conviction DNA testing for filing in the state trial court. *Commonwealth v. Wade*, Docket No. CP-45-CR-0000639-1998 (Monroe Cty. C.C.P.). Because he was represented by counsel of record, the trial court forwarded the motion to his attorney without docketing or recording it, as required under state rules of civil procedure. *Id.*

On or about May 8, 2006, Wade filed a second *pro se* PCRA petition, which was denied by the PCRA court on May 9, 2006, as having been previously litigated, and therefore barred from further review. *Id.* The denial of this second PCRA petition was affirmed on appeal by the Superior Court on November 9, 2006. *Commonwealth v. Wade*, 915 A.2d 152 (Pa. Super. Ct. 2006) (table decision) (No. 1372 EDA 2006).

On or about June 12, 2006, Wade filed a second *pro se* motion for post-conviction DNA testing. *Commonwealth v. Wade*, Docket No. CP-45-CR-0000639-1998 (Monroe Cty. C.C.P.). In this motion, Wade sought testing of the following evidence: (1) blood stains collected from Wade's vehicle; (2) any semen found on the victim; (3) finger and palm print analysis of latent prints on the garbage bag in which the victim's body was found; (4) hairs found on the passenger-side floor mats that were microscopically compared to the victim's hair and found to be similar; (5) hairs found on the driver-side rear floor; and (6) other hairs found in the vehicle that were not suitable for comparison. On December 4, 2006, the state trial court notified Wade of its intention to deny the petition on multiple grounds. *Commonwealth v. Wade*, Docket No. CP-45-CR-0000639-1998 (Monroe Cty. C.C.P.). On December 27, 2006, the state

trial court denied the motion for the stated reasons that Wade failed to meet the requirements for post-conviction DNA testing of evidence that was available prior to trial, and that there was no reasonable probability that testing would produce favorable results that would establish his actual innocence of the offense for which he was convicted. The denial of this second motion for DNA testing was affirmed on appeal by the Superior Court on December 10, 2007. *Commonwealth v. Wade*, 945 A.2d 771 (Pa. Super. Ct. 2007) (table decision) (No. 190 EDA 2007). In particular, the Superior Court agreed with the trial court that the requested DNA testing, regardless of its results, would not have demonstrated Wade's actual innocence. Four months later, on or about April 2, 2008, Wade filed a *nunc pro tunc* petition for allocatur with the Supreme Court of Pennsylvania, which was denied on September 2, 2008. *Commonwealth v. Wade*, Docket No. 80 MM 2008 (Pa.).

On December 9, 2011, Wade filed his third motion for post-conviction DNA testing, this time appearing through counsel. *Commonwealth v. Wade*, Docket No. CP-45-CR-0000639-1998 (Monroe Cty. C.C.P.). This third motion sought additional testing not requested in the second motion for DNA testing, including the following evidence: (1)

the fingernails of the victim and any scrapings from those fingernails; (2) the victim's yellow turtleneck sweater, which had blood stains on it; (3) the victim's leather coat, bra, underpants, pantyhose, and shoes; (4) the trash bag in which the victim's body was found;[1] and (5) the contents of the victim's coat, which were removed and inventoried by police investigators. On March 21, 2012, Wade filed a supplement to his third motion for DNA testing, requesting that these same pieces of evidence be tested for "touch DNA," using new testing technologies not previously available. On June 15, 2012, the state PCRA court denied the motion. *Commonwealth v. Wade*, Docket No. CP-45-CR-0000639-1998 (Monroe Cty. C.C.P.). In denying his motion, the PCRA court considered the evidence presented at trial and the particular testing requested, and it found that there was no reasonable probability that testing would produce favorable results that would establish his actual innocence of the offense for which he was convicted. The denial of this third motion for DNA testing was affirmed on appeal by the Superior Court on March 20, 2013. *Commonwealth v. Wade*, 69 A.3d 1297 (Pa. Super. Ct. 2013) (table

[1] While the second motion requested forensic analysis of the trash bag, it did not request DNA testing.

decision); *Commonwealth v. Wade*, No. 2041 EDA 2012, 2013 WL 11273719 (Pa. Super. Ct. Mar. 20, 2013) (unpublished opinion). In affirming the PCRA court decision, the Superior Court found that, in light of the evidence presented at trial,

> even assuming DNA testing would reveal DNA from someone other than [Wade] or the victim on the multiple items [Wade] seeks to have tested, [Wade] does not demonstrate it is more likely than not that no reasonable juror confronted with the DNA and other evidence would find [Wade] guilty beyond a reasonable doubt.

Wade, 2013 WL 11273719, at *3. Wade filed a timely petition for allocatur with the Supreme Court of Pennsylvania, which was denied on November 15, 2013. *Commonwealth v. Wade*, 80 A.3d 777 (Pa. 2013) (table decision) (No. 277 MAL 2013).

Appearing through counsel, Wade filed his original complaint in this action on March 24, 2015. (Doc. 1.) The original complaint named three defendants: (a) the Monroe County District Attorney's Office; (b) the Commonwealth of Pennsylvania; and (c) E. David Christine, District Attorney for Monroe County, sued in his official capacity only. (*Id.*) Wade seeks injunctive relief only. (*Id.*)

On April 18, 2015, the defendants filed their answer to the

complaint. (Doc. 6.) On August 5, 2015, Wade moved for leave to amend his complaint to eliminate the Commonwealth of Pennsylvania as a defendant to the action based on its immunity from suit under the Eleventh Amendment to the United States Constitution. (Doc. 7.) On August 10, 2015, the Court granted Wade's motion, and the Commonwealth was terminated as a defendant to this action. (Doc. 9.)

On October 14, 2016, following the exchange of discovery, the remaining defendants filed a motion for summary judgment, together with a statement of material facts and a brief in support. (Doc. 20; Doc. 21; Doc. 22.) On November 4, 2016, Wade filed his answer to the statement of facts, together with several documentary exhibits and a brief in opposition to summary judgment. (Doc. 23; Doc. 24.) On September 29, 2017, we denied the defendants' motion for summary judgment and dismissed three of the five counts of the plaintiff's complaint *sua sponte* for failure to state a claim. (Doc. 25; Doc. 26.)

On January 10, 2018, the plaintiff filed a motion for summary judgment with respect to the two remaining counts, together with a statement of material facts and a brief in support. (Doc. 32; Doc. 33; Doc. 34.) On January 31, 2018, the defendants filed their answer to the

statement of facts, together with a brief in opposition to summary judgment. (Doc. 36; Doc. 37.) On February 14, 2018, the plaintiff filed a reply brief in support of summary judgment. (Doc. 40.) On June 15, 2018, we denied the plaintiff's motion for summary judgment. (Doc. 42; Doc. 43.)

By agreement of the parties, the case was submitted for a bench trial on the papers under Rule 52(a) of the Federal Rules of Civil Procedure. *See generally Hess v. Hartford Life & Accident Ins. Co.*, 274 F.3d 456, 461 (7th Cir. 2001); *May v. Evansville-Vanderburgh Sch. Corp.*, 787 F.2d 1105, 1116 (7th Cir. 1986). In addition to a joint stipulation of facts (Doc. 48), both sides submitted legal briefs in support of their positions (Doc. 49; Doc. 50), and a hearing was conducted by the Court to receive oral argument from counsel for both sides. (Doc. 51 (minute sheet); Doc. 53 (stenographic transcript).)

III. FINDINGS OF FACT

In accordance with Rule 52(a) of the Federal Rules of Civil Procedure, we adopt the joint stipulation of facts submitted by the parties and make the following findings of fact in this matter:[2]

[2] We have renumbered paragraphs, corrected typographical errors,

1. On December 2, 1996, hunters discovered the body of Lekitha Council partially enveloped in a garbage bag in a rural area of Pocono Township, Monroe County, Pennsylvania.

2. Dr. Isidore Mihalakis, a forensic pathology expert, conducted the autopsy and concluded that Council was the victim of homicide by manual strangulation or suffocation.

3. Dr. Mihalakis testified at Wade's criminal trial that Council had been dead for three to five days at most.

4. Robert Muir Wade was charged with the murder.

5. The following evidence was presented by the Commonwealth at Wade's criminal jury trial before the Monroe County Court of Common Pleas:

Evidence Leading Up to Council's Death

6. Wade and Council knew each other for approximately six years and had lived together at one point during their relationship.

7. Although Wade was married, he and Council had sexual relations until at least two months before Council's death.

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and made some stylistic, non-substantive modifications. Otherwise, we have largely adopted the joint stipulation of facts verbatim.

8. Wade routinely drove Council to and from work because she did not own a vehicle.

9. Wade admitted he drove Council to work on November 26, 1996, the last day she was seen alive.

10. Council made various telephone calls to Wade that day from her workplace.

11. Council had also telephoned her mother and explained that she was going to meet Wade after work to shop for a vehicle.

12. Several business cards of car dealers were found in Council's pockets. Wade testified that he talked to Council at approximately 5:00 p.m., which was also the last time she was seen alive.

13. Council's body was discovered six days later, on December 2, 1996.

Blood in Wade's Car

14. On December 3, 1996, a search warrant was issued in New Jersey for Wade's car.

15. During the search, the police found bloodstains on the back of the passenger seat.

16. The autopsy revealed that Council had bled from the nose and

that there was a substantial amount of blood around her mouth and on the top of her turtleneck.

17. The Commonwealth introduced evidence establishing that the blood found in the vehicle matched Council's blood within 1 of 207,000 in the African-American population.

Pathmark Shopping Bags

18. The police discovered plastic shopping bags in the trunk of Wade's car.

19. One of these bags contained "Pathmark" brand products and a receipt from a "Pathmark" store in Montclair, New Jersey, dated November 26, 1996.

20. The receipt was time-stamped at approximately 1:25 p.m. and had Council's name on it.

21. The information on the receipt was corroborated with a timed videotape depicting Council at this store purchasing items found in the shopping bags.

22. Council was wearing the same clothes she was found in when her body was discovered on December 2, 1996.

23. Evidence was introduced at trial that Wade was familiar with

the area in which the body was found.

24. Specifically, the Commonwealth established that Wade had stayed at the Caesar's Brookdale Resort in July 1996. This resort was within a few miles of where the body was found. The body was found near Route 314. Evidence was introduced that Dyson Road directly linked Caesar's Brookdale to Route 314. Dyson Road is located 30-40 yards south of where the body was found.

25. Council's mother testified at trial that, considering the nature and 6-year length of the relationship between Wade and Council, she considered it "strange" that when informed of Council's death, Wade did not ask for any details.

26. The Commonwealth tested the trash bag in which Ms. Council's body was found. The test did not find the DNA of Mr. Wade but did detect the DNA of another individual. The bag was also tested for fingerprints. No fingerprints of Mr. Wade were found but the fingerprints of another individual were found on the bag.

Council's Clothing Was in Wade's Home

27. On December 3, 1996, Wade's wife consented to a search of their home.

28. During the search, the police found clothing that belonged to Council.

Unique Garbage Bags

29. Wade's wife gave police a garbage bag, which was identical to the bag in which the victim was found.

30. On December 5, 1996, while executing a search of Wade's home, the police found a box of these particular garbage bags in the basement.

31. The garbage bags in this case were unique.

32. The Commonwealth presented two experts in bag manufacturing to testify about the garbage bags:

a. Frank Ruiz, one of the experts, testified that the bag in which the body was found and the bags discovered in Wade's home were manufactured by the same company within the same eight hours.

b. Tests revealed that the bags were institutional garbage bags, not commonly sold in the consumer market.

c. Further, the process by which this particular garbage bag was manufactured revealed that it was extremely

uncommon within the garbage bag industry.

The Defense

33. The defense established that Ms. Council had a key to Wade's car.

34. Security cameras did not reveal that Mr. Wade left work early. According to the time clock kept by Cunningham Graphics where Mr. Wade worked full-time, Mr. Wade punched in at 3:00 p.m. and punched out at 11:00 p.m. on November 26th and punched in at 3:00 and out at 11:32 p.m. on November 27th.

35. The defense introduced a credit card receipt indicating that Mr. Wade purchased gas at 1:40 p.m. on November 26, 1996, in Plainfield, New Jersey.

36. Although on the day she disappeared, Ms. Council was seen at a Pathmark at 1:25 p.m. buying food items that were found in the trunk of Mr. Wade's vehicle, after purchasing those items, Ms. Council returned to her place of employment and her co-workers saw her leaving at 5 P.M.

37. Ms. Council called Mr. Wade at his place of employment at 5 P.M.

43. The Pennsylvania Supreme Court denied Wade's petition for leave to file a petition for allowance of appeal *nunc pro tunc* on December 16, 2002. *Commonwealth v. Wade*, Docket No. 208 MM 2002 (Pa.).

44. On August 23, 2004, Wade filed his first petition under the Post-Conviction Relief Act ("PCRA").

45. The PCRA court appointed counsel and later dismissed the PCRA petition as untimely. The Superior Court affirmed this dismissal in 2005. *Commonwealth v. Wade*, 885 A.2d 587 (Pa. Super. Ct. 2005) (unpublished table decision).

46. On May 8, 2006, Wade filed his second PCRA petition, requesting DNA testing. The PCRA court denied relief on the ground that the petition was "untimely." The Superior Court affirmed the denial of Wade's second PCRA petition. *Commonwealth v. Wade*, 915 A.2d 152 (Pa. Super. Ct. 2006) (unpublished table decision).

Wade's DNA Testing Requests

47. On September 9, 2005, Wade filed a pro se motion for post-conviction DNA testing and preservation of certain evidence. The Court ordered that the *pro se* motion be forwarded to Wade's attorney.

48. On May 8, 2006, Mr. Wade filed a second PCRA petition

requesting DNA testing. On May 9, 2006, the Common Pleas judge dismissed it as "untimely." While his appeal was pending, on June 12, 2006, Mr. Wade resubmitted his motion for DNA testing.

49. On November 9, 2006, the Superior Court affirmed the denial of Mr. Wade's second PCRA petition. *Commonwealth v. Wade*, 915 A.2d 152 (Pa. Super. Ct. 2006) (unpublished table decision).

50. On December 4, 2006, the trial judge filed a notice of disposition without a hearing stating that Mr. Wade was not entitled to DNA testing.

51. Mr. Wade had requested DNA testing of the following items:

- Blood stains collected from Wade's vehicle;
- Any semen found on the victim;
- Finger and palm print analysis of latent prints on the garbage bag in which the victim's body was found;
- Hairs found on the passenger side floor mats that were microscopically compared to the victim's hair and found to be similar;
- Hairs found on the driver's side rear floor; and
- Other hairs found in the vehicle which were not suitable

for comparison.

52. On December 27, 2006, the trial court filed an Opinion and Order denying the motion for post-conviction DNA testing and other outstanding motions.

53. On December 10, 2007, the Superior Court affirmed. The Superior Court did not reach the question of whether Mr. Wade's Motion for post-conviction DNA testing was timely filed. Instead, the Superior Court affirmed denial of the motion because it concluded that the DNA testing of the items identified in Wade's motion would not have established Mr. Wade's actual innocence.

54. According to the PCRA court's opinion filed June 12, 2012, Mr. Wade filed a second *pro se* motion for post-conviction DNA testing and preservation of certain evidence on December 27, 2006. This motion was denied by Order dated January 2, 2007. The Superior Court affirmed denial of the request for DNA testing on December 10, 2007.

55. On December 9, 2011, Mr. Wade filed his third motion for post-conviction DNA testing. In that motion, Mr. Wade requested DNA testing of the following items:

a. The fingernails of the victim and any scrapings from those

fingernails;

b. The yellow turtleneck sweater worn by the victim, which had a blood stain at the neck and on the body of the sweater, and the lavender leather coat, bra, underpants, pantyhose, and shoes of the victim;

c. The trash bag in which the body of the victim was found; and

d. The contents of the lavender coat of the victim.

56. Those items of evidence continue to exist and have not been subjected to DNA testing and had never been subjected to DNA testing. The items are in the possession of the Pennsylvania State Police.

57. Mr. Wade filed a supplemental motion for DNA testing on March 21, 2012. In the supplemental motion, he requested that the items enumerated in paragraph 55 be subjected to the new technology of "touch" DNA testing.

58. On March 22, 2012, the court held a hearing limited to argument on the motion and supplemental motion. Mr. Wade filed a supplemental memorandum of law in support of his motion on April 19, 2012. In the supplemental memorandum, Mr. Wade requested that the

38. Ms. Council's mother believed that she was away with a man other than Mr. Wade and did not report her missing.

39. The Commonwealth tested the trash bag in which Ms. Council's body was found. The test did not find the DNA of Mr. Wade but did detect the DNA of another individual. The bag was also tested for fingerprints. No fingerprints of Mr. Wade were found but the fingerprints of another individual were found on the bag.

Criminal Trial Conviction

40. In 2000, a jury convicted Wade of first-degree murder, 18 Pa. Cons. Stat. Ann. § 2502(a), and abuse of a corpse, 18 Pa. Cons. Stat. Ann. § 5510.

41. On July 18, 2000, Wade was sentenced to mandatory life in prison for first-degree murder, and a concurrent term of 1-2 years' imprisonment for abuse of a corpse.

Wade's Challenges to His Conviction

42. Wade appealed his conviction and sentence to the Pennsylvania Superior Court, which affirmed the judgment of sentence on October 12, 2001. *Commonwealth v. Wade*, 790 A.2d 344 (Pa. Super. Ct. 2001) (unpublished table decision).

DNA testing be done at the Commonwealth's expense and that the results of the DNA testing be sent for inclusion in CODIS for comparison with that database, and that they should be loaded into the Pennsylvania and federal DNA databases for testing.

59. "CODIS" is a computer software program that operates local, state, and national databases of DNA profiles from convicted offenders, unsolved crime evidence, and missing persons.

60. On June 15, 2012, the court entered an order denying Mr. Wade's third petition for DNA testing and supplemental motion for touch DNA testing and filed an opinion. In the opinion, the PCRA court recognized that "touch DNA testing is a new technology that has become available since [Wade]'s trial in 2000; however, we note that this new technology was available in 2003, three years before [Wade]'s last (second) request for DNA testing and 8 years prior to the present motion. Thus, we do not believe the present motion was filed in a timely manner." In the alternative, the PCRA court found, erroneously, that some of the items that were the subject of Mr. Wade's motion for DNA testing and supplemental motion for DNA testing had already been subjected to DNA testing.

61. The forensic records and the trial testimony of the forensic scientist at the Pennsylvania State Police DNA crime lab established that DNA tests were performed on four items only: K-1 (alcohol patches of the victim's blood), Q-1 (a cotton patch with a stain), Q-2 (a control sample), Q-3 (a piece of leather with a stain), and Q-4 (an unused cotton patch used to make Q-1).

62. The only DNA testing done was to match the victim's blood to a small spot of blood on the seat of Mr. Wade's automobile. The DNA scientist specifically testified she was *not* provided with "any additional samples of anything else to test [relating to] the case."

63. The PCRA judge's conclusion that the pieces of evidence Mr. Wade requested be subjected to DNA testing had previously been tested is contrary to the record.

64. Mr. Wade filed a timely notice of appeal. On March 20, 2013, the Pennsylvania Superior Court affirmed and on November 15, 2013, the Pennsylvania Supreme Court denied a petition for allowance of appeal.

65. Wade has maintained and continues to maintain that he is actually innocent.

Habeas Petition

66. On June 9, 2003, Mr. Wade filed a counseled petition for habeas corpus with the United States District Court for the Middle District of Pennsylvania, docket number 4:03-cv-00952-JEJ.

67. The Court denied the petition on December 2, 2004.

68. On December 20, 2006, the United States Court of Appeals for the Third Circuit denied an application for a certificate of appealability.

Section 1983 Action

69. Wade filed this Section 1983 action on March 24, 2015, asking for the following relief:

a. Ordering the district attorney to take all steps reasonably necessary to preserve: the physical evidence taken from the victim's body, including fingernails of the victim and any scrapings from those fingernails; the yellow turtleneck sweater worn by the victim and which had a bloodstain on the neck and body of the sweater; the lavender leather coat; the bra, underpants, pantyhose, and shoes of the victim; the trash bag in which the body of the victim was found; the contents of the lavender coat of the victim; and the

inventory of the items found in the lavender coat;

b. Ordering the district attorney to produce to the plaintiff the evidence listed in paragraph 69(a) above;

c. Ordering the district attorney to cooperate with the plaintiff in selecting a qualified laboratory for testing the evidence or, in the alternative, ordering the evidence to be tested at a specific, qualified laboratory chosen by the Court;

d. Reasonable attorneys' fees and costs; and

e. Any other relief that this Court deems just and proper.

In addition to the foregoing, we have taken judicial notice of the state PCRA court's order and opinion of June 15, 2012, denying Wade's third motion for post-conviction DNA testing and his supplemental motion for touch DNA testing (Doc. 23-2, at 4–15), and the Superior Court's appellate opinion affirming the PCRA court's denial of those motions, *Commonwealth v. Wade*, No. 2041 EDA 2012, 2013 WL 11273719 (Pa. Super. Ct. Mar. 20, 2013).

IV. CONCLUSIONS OF LAW

The complaint in this action originally contained five separate

counts, all brought pursuant to 28 U.S.C. § 1983. *See generally Grief v. Klem*, 591 F.3d 672, 678 (3d Cir. 2010) ("[A] plaintiff can use the § 1983 vehicle to request the release of evidence for postconviction DNA analysis."). Counts III, IV, and V were previously dismissed for failure to state a claim. *See generally Wade v. Monroe Cty. Dist. Attorney*, Civil Action No. 3:15-cv-00584, 2017 WL 4413195 (M.D. Pa. Sept. 29, 2017). Two counts remain. In Count I, Wade claims that the defendants' refusal to release physical evidence from his criminal case to him for DNA testing was a violation of his procedural due process rights under the Fourteenth Amendment. In Count II, Wade claims that the defendants' refusal to release the physical evidence to him for DNA analysis was a violation of his right to meaningful access to the courts under the First and Fourteenth Amendments.

A. Fourteenth Amendment Procedural Due Process Claim

Wade contends that the defendants have violated—and continue to violate—his procedural due process rights under the Fourteenth Amendment to the United States Constitution, which guarantees fair procedure for the deprivation of a constitutionally protected interest in life, liberty, or property. *See Zinermon v. Burch*, 494 U.S. 113, 125 (1990).

Although the federal constitution does not provide a freestanding substantive due process right to DNA evidence, the Supreme Court has held that a convicted prisoner may have a constitutionally protected liberty interest in demonstrating his innocence with new evidence under state law. *See Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 68, 72 (2009); *see also Skinner v. Switzer*, 562 U.S. 521, 525 (2011). "This 'state-created right can, in some circumstances, beget yet other rights to procedures essential to the realization of the parent right.'" *Osborne*, 557 U.S. at 68.

Here, as in *Osborne*, we find that Wade has an analogous state-created liberty interest in demonstrating his innocence in the context of post-conviction proceedings with appropriate evidence. *See Wagner v. Dist. Attorney Allegheny Cty.*, Civil Action No. 11-762, 2012 WL 290093, at *8 (W.D. Pa. May 21, 2012); *Grier v. Klem*, Civil Action No. 05-05 Erie, 2011 WL 4971925, at *7 (W.D. Pa. Sept. 19, 2011), *report and recommendation adopted by* 2011 WL 5008326 (W.D. Pa. Oct. 19, 2011). Thus, the question is whether, as applied to him, the state procedures for post-conviction DNA testing violated Wade's procedural due process rights. *See Wagner*, 2012 WL 2090093, at *8; *Grier*, 2011 WL 4971925, at

*7.

A post-conviction prisoner's procedural due process rights with respect to the disclosure of potentially exculpatory evidence are more limited than those of a pre-conviction criminal defendant. As the Supreme Court has explained:

> A criminal defendant proved guilty after a fair trial does not have the same liberty interest as a free man. At trial, the defendant is presumed innocent and may demand that the government prove its case beyond a reasonable doubt. But once a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears. Given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty.
>
> The State accordingly has more flexibility in deciding what procedures are needed in the context of postconviction relief. When a State chooses to offer help to those seeking relief from convictions, due process does not dictate the exact form such assistance must assume. [A postconviction prisoner's] right to due process is not parallel to a trial right, but rather must be analyzed in light of the fact that he has already been found guilty at a fair trial, and has only a limited interest in postconviction relief. . . .
>
> Instead, the question is whether consideration of [the prisoner's] claim within the framework of the State's procedures for postconviction relief offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental, or transgresses any recognized principle of fundamental

> fairness in operation. Federal courts may upset a State's postconviction relief procedures only if they are fundamentally inadequate to vindicate the substantive rights provided.

Osborne, 557 U.S. at 68–69 (cleaned up). Moreover, it is the plaintiff's "burden to demonstrate the inadequacy of the state-law procedures available to him in state postconviction relief." *Id.* at 71.

Pennsylvania has enacted a post-conviction DNA testing statute, 42 Pa. Cons. Stat. Ann. § 9543.1, which permits a convicted prisoner to make a written motion in the sentencing court for the performance of forensic DNA testing on specific evidence related to the investigation or prosecution that led to his conviction. *Id.* § 9543.1(a)(1).

> The statute sets forth several threshold requirements to obtain DNA testing: (1) the evidence specified must be available for testing on the date of the motion; (2) if the evidence was discovered prior to the applicant's conviction, it was not already DNA tested because (a) technology for testing did not exist at the time of the applicant's trial; (b) the applicant's counsel did not request testing in a case that went to verdict before January 1, 1995; or (c) counsel sought funds from the court to pay for the testing because his client was indigent, and the court refused the request despite the client's indigency.

Wagner, 2012 WL 2090093, at *10 (citing 42 Pa. Cons. Stat. Ann. § 9543.1(a)(2)).

Once these threshold requirements are met, the statute requires the petitioner to present a *prima facie* case demonstrating that (1) the identity of the perpetrator was at issue at trial, and (2) DNA testing of the specified evidence, *assuming exculpatory results*, would establish the applicant's actual innocence of the crime for which he was convicted. 42 Pa. Cons. Stat. Ann. § 9543.1(c)(3). The statute further provides that "[t]he court shall not order the testing requested . . . if, after review of the record of the applicant's trial, the court determines that there is no reasonable possibility that the testing would produce exculpatory evidence that . . . would establish the applicant's actual innocence of the offense for which the applicant was convicted." *Id.* § 9543.1(d)(2). The statute itself does not define the term "actual innocence," but Pennsylvania state courts have adopted the definition of "actual innocence" articulated by the Supreme Court of the United States in *Schlup v. Delo*, 513 U.S. 298 (1995): "namely, that the newly discovered evidence must make it 'more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt.'" *Commonwealth v. Conway*, 14 A.3d 101, 109 (Pa. Super. Ct. 2011) (quoting *Schlup*, 513 U.S. at 327); *see also In re Payne*, 129 A.3d 546, 556

(Pa. Super. Ct. 2015) (quoting *Conway*, 14 A.3d at 109). Under the statute, "the burden lies with the petitioner to make a *prima facie* case that favorable results from the requested DNA testing would establish his innocence." *Wagner*, 2012 WL 2090093, at *10.

Here, Wade filed a motion in the state PCRA court for post-conviction DNA testing of several items of evidence: fingernail clippings from the victim and scrapings taken from those fingernails; a trash bag that partially covered the body of the victim; a yellow sweater, lavender leather coat, bra, underpants, pantyhose, and shoes worn by the victim when her body was recovered; and contents recovered from the pockets of the leather coat. In support, he noted that his identity as the perpetrator had been at issue at trial, and that he had been convicted on circumstantial evidence. He noted that security camera footage, payroll timeclock records, and a credit card receipt were admitted in support of an alibi defense—Wade contended at trial that he had been at work in New Jersey at the time of the victim's death. He further noted that fingerprints and palm prints that did not belong to Wade were found on the trash bag, and that the victim's sweater was on backwards when she

was found, suggesting that she had been redressed by her assailant.[3] He postulated that testing of the specified evidence for "touch DNA"—a technology not available at the time of trial—might reveal a source other than Wade and the victim, which would constitute a *prima facie* case that someone other than Wade murdered the victim.

Relying on *Conway*, Wade has advanced three separate theories under which DNA testing of the specified evidence, assuming exculpatory results, might establish his actual innocence of the crime for which he was convicted. As described by the *Conway* court, these three theories are:

> (1) a "redundancy" theory, which postulates that if the individual DNA tests reveal evidence of a third person on multiple items connected with the crime, then those "redundant" results would give rise to an inference of a separate assailant; (2) a "data bank" theory, which postulates that any DNA results that are obtained from DNA testing that prove the presence of an unknown person could be run through state and federal data banks for a match, which, if successful, would lead to the identification of a separate assailant; and (3) a "confession" theory, which postulates that an assailant who is discovered by using the data bank theory could, when confronted with the DNA evidence, confess to the crime.

[3] We also note that her pantyhose and underpants were pulled down to her ankles when she was found.

Conway, 14 A.3d at 110. In *Conway*, the state appellate court weighed these theories against the evidence presented at trial, noting that the evidence at trial was "wholly circumstantial," that there had been no prior history between the defendant and the victim, and that the victim's hands were bound and her clothing ripped in a manner that indicated "extensive contact" with the hands of her assailant. *Id.* at 112. The state appellate court ultimately found that, based on these facts, the plaintiff had satisfied his burden of demonstrating a *prima facie* case that the requested DNA evidence, assuming exculpatory results, would establish his actual innocence. *Id.* at 114.

In Wade's case, the state PCRA court denied his motion, articulating three alternative grounds for its decision. First, the PCRA court *sua sponte* found Wade's motion to be untimely, noting that, while "touch DNA" technology was not yet available at the time of trial, it had been available since 2003, and "[a]lthough the statute does not state what constitutes 'a timely manner' for filing of a DNA motion, we do not believe that a delay of eight years from the time the new technology became available constitutes 'a timely manner' for filing a DNA motion." (Doc.

23-2, at 9).[4]

Second, the PCRA court summarized the trial evidence at issue:[5]

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[4] The post-conviction DNA testing statute provides that the PCRA court should determine whether the "motion is made in a timely manner and for the purpose of demonstrating the applicant's actual innocence and not to delay the execution of sentence or administration of justice." 42 Pa. Cons. Stat. Ann. § 9543.1(d)(1)(iii). The statute does not define "timely manner," and Pennsylvania courts have mostly sidestepped the timeliness issue, leaving this provision generally undefined. *See Commonwealth v. Edmiston*, 65 A.3d 339, 356 (Pa. 2013) ("Other that a Superior Court panel's observation that 'Section 9543.1 places no time limits on motions for DNA testing,' Pennsylvania courts have not otherwise construed the requirement of timeliness in this context."). In *Edmiston*, the Supreme Court of Pennsylvania addressed the statute's timeliness requirement as a matter of first impression, finding a motion for DNA testing to be untimely filed where the movant knew of the existence of the evidence at issue for more than twenty years and had been represented by counsel in post-conviction proceedings throughout the entire period since his trial. *Id.* at 357. The *Edmiston* court further noted that the DNA motion was only filed as PCRA proceedings were coming to their conclusion, and it had the effect of delaying execution of the movant's death sentence. *Id.* at 358. It should also be noted that the timeliness issue in *Edmiston* had been expressly preserved by the Commonwealth's objection in the PCRA court. *See Payne*, 129 A.3d at 555 n.12 (discussing *Edmiston* and noting that the appellate court could not raise the non-jurisdictional timeliness issue *sua sponte* in *Payne* as it had been waived by the Commonwealth in PCRA proceedings below). In this case, the Commonwealth's brief in the PCRA court opposed the motion on its merits only, and the Superior Court subsequently affirmed on the merits, without discussing timeliness. *See Wade*, 2013 WL 11273719, at *3 n.4.

[5] We note that the PCRA court characterized this as "DNA evidence presented to the jury," but it appears from the state court records that a blood-stained swatch of leather from the back seat of Wade's automobile was the only evidence subjected to pre-trial DNA testing—the blood was

> (1) *Yellow Turtleneck Sweater*: the blood on the front (actually the back) of the sweater was identified as belonging to the victim. The sweater was also tested for fibers. []Three head hairs found on the sweater exhibited similar characteristics to the victim's hair. Black fibers that were also found on the sweater were similar to the black fibers comprising the collar and cuff of the victim's leather coat.
>
> (2) *Fingernails of Victim & Scrapings*: The fingernails of the victim were extremely long (1 to 1-1/2 inches in length) and showed no signs of damage. Fibers found under the fingernails of victim's left hand were found to be the same type of fibers comprising the collar and cuffs of victim's coat. Nothing else was found in or about the nails of the victim and nothing of probative value was found in the bags used to cover victim's right and left hands prior to removing the body from scene.
>
> (3) *Prints on Garbage Bag that Victim was found in*: Fingerprints and palm prints found on the garbage bag that were identified as belonging to George Surma, Forensic Scientist at the Pennsylvania State Police Crime Lab in Wyoming. There were eight prints in all; four sets of fingerprints and four palm prints. The remaining four prints (palm prints) lacked sufficient detail or characteristics to identify to anybody.
>
> (4) *Fibers on Garbage Bag that Victim was found in*: The garbage bag in which victim's body was found was checked for fibers, as well as for any other significant

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identified as that of the victim. (*See* Doc. 23-2, at 76–78, 89, 159–74; Doc. 48 ¶¶ 52–53.) The remainder of the evidence appears to have been examined using other forensic laboratory methods, such as serology blood tests and microscopic fiber comparisons. (*See* Doc. 23-2, at 34–38, 63–66, 69–71, 77.) Both parties have stipulated that the PCRA court's finding on this point was "erroneous[]" and "contrary to the record." (Doc. 48 ¶¶ 51, 54.)

> evidence such as blood or body fluids. Nothing was found.
>
> (5) *Underwear and Pantyhose*: The underwear and pantyhose of the victim were tested for seminal matters (combination of sperm cells and seminal fluid) and nothing was found. Also, no fibers were found on the pantyhose or underwear. Similarly, no fibers were found on the purple head band (except victim's hairs) or the flower patterned bra.
>
> (6) None of the fibers collected from various areas of [Wade's] car and trunk were similar to the fibers comprising the victim's clothing.

(Doc. 23-2, at 12–13 (citations omitted)).

Based on this, the PCRA court then found *sua sponte* that Wade failed to satisfy the statute's threshold requirement that the specified evidence had not already been DNA tested because the technology to do so did not exist at the time of trial. *See* 42 Pa. Cons. Stat. Ann. § 9543.1(a)(2).[6] In particular, the PCRA court acknowledged that "touch DNA" technology was not yet available at the time of trial in 2000, but found that the specified evidence had already "undergone a thorough

[6] The PCRA court also noted that Wade's criminal case went to verdict after January 1, 1995, and defense counsel had not requested and been refused court funding for DNA testing despite the client's indigency, and therefore the other two alternative threshold requirements had not been met. *See* 42 Pa. Cons. Stat. Ann. § 9543.1(a)(2).

DNA analysis on fibers, hair and blood[,] and none of [Wade's] DNA was found on any of the items tested." (Doc. 23-2, at 13–14).[7]

Third and finally, the PCRA court found that Wade had failed to present a *prima facie* case that he was actually innocent. The PCRA court explained:

> [W]e find that [Wade's] assertion that the results of Touch DNA analysis of the specified evidence, assuming exculpatory results, will establish his actual innocence of the murder of Lekitha Council, is speculative and irrelevant. [Wade] makes a bald assertion that touch DNA will be recovered from the items of evidence and that when subjected to the standard DNA processing (PCR analysis) the results will show the existence of someone other than [Wade]. [Wade's] argument is speculative and he offers no evidence to support this bald assertion. The Superior Court in [*Commonwealth v.*] *Smith*[, 889 A.2d 582 (Pa. Super. Ct. 2005),] held that in the face of such speculation, the absence of a

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[7] *But see supra* note 5. Moreover, we note that Wade's third motion for DNA testing sought touch DNA analysis not to demonstrate the *absence* of his DNA where it might be expected to be found if he were the assailant, but to determine if epithelial (skin) cells—not visible to the naked eye and not amenable to earlier, less sophisticated DNA testing methods—from a previously unidentified third-party might be found on the specified evidence in locations and in quantities suggestive of an assailant other than Wade. *See, e.g.*, *Payne*, 129 A.3d at 560–62. The Commonwealth's brief in the PCRA court opposed the motion only on the ground that Wade had failed to make a *prima facie* case that exculpatory DNA testing results would establish his actual innocence (Doc. 23-2, at 148–49), and the Superior Court subsequently affirmed on this ground, without discussing the statutory threshold requirements, *see Wade*, 2013 WL 11273719, at *3 n.4.

> defendant's DNA cannot be meaningful and cannot establish a defendant's actual innocence of the murder. The Court stated that "The statute does not contemplate the speculative type of argument advanced by appellant. . ." *Smith*, [889 A.2d] at 586. In the present case, there was no evidence presented at trial the [Wade's] DNA was found anywhere on the victim, on her clothes or on the garbage bag that the victim's body was found in. In fact, the jury heard substantial evidence regarding the absence of [Wade's] DNA. Accordingly, [Wade's] request for general DNA and Touch DNA testing of the finger nails of the victim and any scrapings from those fingernails; the yellow turtleneck sweater; the lavender leather coat; the victim's bra, underpants, pantyhose and shoes; the trash bag in which the body of Lekitha Counsel was found; and the contents of the lavender coat of the victim is denied.

(Doc. 23-2, at 14–15). The PCRA court further noted that it had previously found, in earlier post-conviction proceedings, that Wade's conviction had been supported by "overwhelming" evidence, and the Superior Court of Pennsylvania had subsequently affirmed that decision. (*Id.* at 15). As a result of all of this, the PCRA court concluded that "there is no reasonable possibility that the DNA testing requested would produce exculpatory evidence that would establish [Wade's] actual innocence of the crimes for which he was convicted." (*Id.*).

On appeal, it was upon this third basis that the appellate court affirmed the PCRA court's denial of Wade's motion for post-conviction

DNA testing. *See Commonwealth v. Wade*, No. 2041 EDA 2012, 2013 WL 11273719, at *3 (Pa. Super. Ct. Mar. 20, 2013). The appellate court declined to address the alternative grounds for dismissal articulated by the PCRA court—timeliness and whether the specified evidence had not been DNA-tested because the technology to do so did not exist at the time of trial. *See id.* at *3 n.4. Wade filed a timely petition for allocatur with the Supreme Court of Pennsylvania, which was summarily denied. *Commonwealth v. Wade*, 80 A.3d 777 (Pa. 2013) (table decision) (No. 277 MAL 2013).

The parties have spent much of their time in this federal litigation debating whether the state courts' decisions were legally and factually correct under state law—i.e., whether the motion was timely (a moot point, in light of the Superior Court's affirmance on the merits), whether the specified evidence had been previously subjected to DNA testing (also a moot point), and whether DNA testing of the specified evidence, assuming exculpatory results, would establish Wade's actual innocence of the crimes for which he was convicted. But under the *Rooker-Feldman* doctrine, we lack jurisdiction to review the state court decisions themselves for legal error. *See Exxon Mobil Corp. v. Saudi Basic Indus.*

Corp., 544 U.S. 280, 284 (2005); *Great W. Mining & Mineral Co. v. Fox Rothschild LLP*, 615 F.3d 159, 166 (3d Cir. 2010); *FOCUS v. Allegheny Cty. Ct. Com. Pl.*, 75 F.3d 834, 840 (3d Cir. 1996).

The question properly before us is a narrow one: Whether the Pennsylvania post-conviction DNA testing statute, as construed by the state courts in Wade's case, "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental, or transgresses any recognized principle of fundamental fairness in operation." *Osborne*, 557 U.S. at 69; *see also Wagner*, 2012 WL 2090093, at *15. On their face, Pennsylvania's procedures for post-conviction DNA testing do not. *See Wagner*, 2012 WL 2090093, at *15; *see also Osborne*, 557 U.S. at 69–70. Under these procedures, Wade had the opportunity to file a motion for post-conviction DNA testing and did so.[8] He was represented by counsel. He was afforded a hearing before the

[8] Notably, he was not barred by a *per se* procedural rule, *cf. Grier*, 2011 WL 4971925, at *8–*9 (finding *per se* rule "[p]rohibiting defendants who have confessed to a crime from accessing DNA evidence after conviction violates the concept of fundamental fairness"), but instead his motion was denied on the merits. Although the PCRA court articulated untimeliness as one of the alternative grounds for dismissal, the PCRA court also addressed Wade's motion on its merits, and the Superior Court addressed his appeal exclusively on the merits, declining to address the timeliness issue at all.

PCRA court. He was provided with a reasoned decision by the PCRA court when it denied his motion. He was afforded the opportunity to appeal that decision and did so. He was provided with a reasoned decision by the Superior Court on appeal, when it affirmed the lower court's decision. He was afforded an opportunity to file a discretionary appeal to the Supreme Court and did so. He was provided with written notice of the Supreme Court's denial of allocatur.

But weighing the record before us, we nevertheless find that the particular—and peculiar—construction of the state post-conviction DNA testing statute applied by the PCRA court in Wade's case was fundamentally unfair.

As written, the statute affords an applicant for post-conviction DNA testing a fair procedure for seeking relief. Notably, as Pennsylvania state courts have repeatedly recognized, "the statute does not require [a] petitioner to show that the DNA testing results would be favorable." *See Commonwealth v. Irizarry*, No. 1386 MDA 2018, 2019 WL 1750839, at *2 (Pa. Super. Ct. Apr. 16, 2019); *Commonwealth v. Williams*, 35 A.3d 44, 50 (Pa. Super. Ct. 2011); *Commonwealth v. Smith*, 889 A.2d 582, 584 (Pa. Super. Ct. 2005). Rather, the statute requires the applicant to "present a

prima facie case demonstrating that . . . DNA testing of the specific evidence, *assuming exculpatory results*, would establish . . . the applicant's actual innocence of the offense for which the applicant was convicted." 42 Pa. Cons. Stat. Ann. § 9543.1(c)(3)(ii)(A). "The threshold question is, therefore, not the likelihood of proof of innocence, but whether it is within the realm of reason that some result(s) could prove innocence." *Payne*, 129 A.3d at 563. As the *Payne* court recognized,

> with respect to the burden on a Section 9543.1 petitioner, "no reasonable probability" [that the testing would produce exculpatory evidence sufficient to establish the applicant's actual innocence] does not mean "no likely probability." It should go without saying that the most *likely* result of Section 9543.1 DNA testing will corroborate a petitioner's guilt, confirm it outright, or simply fail to cast significant doubt on the verdict. However, the very purpose of Section 9543.1 must be to afford the petitioner the *opportunity* to demonstrate the unlikely.

Id. (emphasis in original).

But that is not how the PCRA court interpreted and applied the statute in Wade's case.

Wade seeks touch DNA testing of various items of evidence—namely, the clothing the victim was wearing when her body was found, and the trash bag in which her body was found—advancing a

"redundancy" theory based on *Conway*. In particular, Wade has noted that the victim was found with her sweater on backwards, suggesting that she had been redressed by her assailant.[9] We further note that that her body was nude from the waist to her ankles, with her pantyhose and underpants pulled down to her ankles. Among other items of clothing, Wade seeks touch DNA testing of the victim's sweater, bra, pantyhose, and underpants—items of clothing which the assailant likely touched in assaulting her or transporting her body, and with which incidental contact by other individuals was unlikely. Wade suggested that, if multiple sets of epithelial cells belonging to an individual other than himself were found on these items of clothing or the trash bag in which the victim was found, these results would give rise to an inference that a separate assailant, other than Wade, had killed her.

The PCRA court rejected Wade's argument on the grounds that it was "speculative" and relied on "a bald assertion that touch DNA [from a third person] will be recovered from the items of evidence."[10] (Doc. 23-2,

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[9] He has also noted that his conviction was based entirely upon circumstantial evidence, and that he produced substantial evidence in support of an alibi defense.

[10] We note that the PCRA court relied on a Superior Court decision, *Commonwealth v. Smith*, 889 A.2d 582 (Pa. Super. Ct. 2005), for the

at 14.) In doing so, the PCRA court construed the DNA testing statute to read the critical words "assuming exculpatory results" entirely out of the statute, effectively foreclosing *any possibility whatsoever* of relief.

As we noted above, Wade possesses a state-created liberty interest in demonstrating his innocence in the context of post-conviction proceedings with appropriate evidence. *See Wagner*, 2012 WL 290093, at *8; *Grier*, 2011 WL 4971925, at *7. And while we may not sit in review of a state court decision for mere legal error, *see Exxon Mobil*, 544 U.S. at 284; *Great W. Mining & Mineral Co.*, 615 F.3d at 166; *FOCUS*, 75 F.3d at 840, we may properly consider whether the Pennsylvania post-conviction DNA testing statute, as construed by the state PCRA court in Wade's case, has deprived him of his due process rights, *see Osborne*, 557 U.S. at 69; *Wagner*, 2012 WL 2090093, at *15.

Under the facts presented, we find that the state PCRA court's

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proposition that "[t]he statute does not contemplate the speculative type of argument advanced by [Wade.]" (Doc. 23-2, at 14 (quoting *Smith*, 889 A.2d at 586).) But the speculation at issue in *Smith* was based on that applicant's contention that DNA testing would reveal the *absence* of his DNA, not the affirmative presence of another person's DNA. The *Smith* court found it too speculative to rely on the mere absence of a criminal defendant's DNA to establish his actual innocence. It did not conclude that the likelihood of exculpatory results was too speculative.

strained interpretation of the Pennsylvania DNA testing statute utterly foreclosed any possibility of relief for Wade.[11] By interpreting the statute in this fashion, requiring Wade to do the impossible (prove that DNA testing would produce exculpatory results without access to the very evidence he seeks to test) and in contravention of an express statutory presumption that DNA testing would indeed produce exculpatory results, Wade has been denied the opportunity promised by this statute to demonstrate his actual innocence.[12] We find this to be fundamentally unfair and a violation of Wade's federal constitutional right to procedural due process. *See Osborne*, 557 U.S. at 69; *Wagner*, 2012 WL 2090093, at

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[11] If this interpretation of the statute by the PCRA court in Wade's case were applied to other applicants, they too would be utterly foreclosed from obtaining relief. The prospect of relief under DNA testing procedures that require, as a threshold matter, proof that the requested DNA testing will produce exculpatory results to obtain that DNA testing in the first instance is circular and entirely illusory.

[12] Moreover, we note that that, assuming the exculpatory results posited by Wade and ignored by the state courts—DNA evidence that a third person, other than Wade, had touched her sweater, her bra, her pantyhose, her underpants, and the inside of the trash bag in which she was found—it is difficult to imagine a scenario in which a reasonable juror would have found him guilty beyond a reasonable doubt, notwithstanding the quantum of circumstantial evidence arrayed against him. Although the prospect of obtaining such an overwhelmingly favorable result from touch DNA testing is unlikely, as we noted above, the intent of the Pennsylvania statute is to afford the applicant an *opportunity* to demonstrate the unlikely. *See Payne*, 129 A.3d at 563.

*15.

Accordingly, we will grant judgment in favor of the plaintiff with respect to Count I of the complaint.

B. First Amendment Access-to-Courts Claim

Wade also contends that the defendants have violated—and continue to violate—his constitutional right of access to courts by denying him access to potentially exculpatory DNA evidence.

It is well-established that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." *Bounds v. Smith*, 430 U.S. 817, 828 (1977). At least one federal court has found that "[d]enying prisoners access to potentially exculpatory DNA evidence limits meaningful access to the courts in even more profound terms than denying access to a law library or attorney." *Wade v. Brady*, 460 F. Supp. 2d 226, 250 (D. Mass. 2006). But "[a] prisoner raising an access-to-courts claim must show that the denial of access caused him to suffer an actual injury." *Garcia v. Dechan*, 384 Fed. App'x 94, 95 (3d Cir. 2010) (per curiam); *see also Lewis v. Casey*, 518 U.S.

343, 351 (1996). "An actual injury occurs when the prisoner is prevented from or has lost the opportunity to pursue a 'nonfrivolous' and 'arguable' claim." *Garcia*, 384 Fed. App'x at 95; *see also Christopher v. Harbury*, 536 U.S. 403, 415 (2002). This injury requirement reflects the fact that "the very point of recognizing any access claim is to provide some effective vindication for a separate and distinct right to seek judicial relief for some wrong." *Christopher*, 536 U.S. at 414–15.

Here, the underlying claim is a prospective PCRA petition in which Wade would seek release or a new trial based upon any exculpatory DNA evidence obtained as a result of his motion for post-conviction DNA testing. The denial of that motion, impeding his access to potentially exculpatory DNA evidence, is the official act frustrating that prospective litigation and purportedly denying Wade meaningful access to the courts.

While Wade may have a nonfrivolous and arguable claim for relief under the Pennsylvania DNA testing statute, *see supra*, without the results of the touch DNA testing he has requested, it is premature to conclude that he has established a nonfrivolous and arguable underlying claim for PCRA relief. While the DNA testing statute mandates a presumption of exculpatory results for the purpose of obtaining access to

evidence for DNA testing, there is no such presumption with respect to Wade's underlying PCRA claim—indeed, if anything, there is a presumption *against* relief under both state PCRA and federal habeas law.

For the time being, Wade is unable to satisfy the actual injury element of an access-to-courts claim. Accordingly, we will dismiss Count II of the complaint, asserting an access to courts claim, without prejudice for failure to state a claim upon which relief can be granted, pursuant to 28 U.S.C. § 1915A(b)(1).

V. CONCLUSION

For the foregoing reasons, Count II of the complaint will be dismissed without prejudice for failure to state a claim, and judgment will be entered in favor of the plaintiff with respect to Count I of the complaint.

An appropriate order will follow.

Dated: May 13, 2019

s/Joseph F. Saporito, Jr.
JOSEPH F. SAPORITO, JR.
United States Magistrate Judge

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

DOCKET NUMBER 19-2201

ROBERT MUIR WADE,

Appellee

v.

MONROE COUNTY DISTRICT ATTORNEY AND

E. DAVID CHRISTINE, DISTRICT ATTORNEY OF MONROE COUNTY

Appellants

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Cheryl J. Sturm

Attorney-At-Law

387 Ring Road

Chadds Ford, PA 19317

484-771-2000

ROBERT MUIR WADE submits the following petition for rehearing and suggestion for rehearing en banc.

CERTIFICATION

Undersigned counsel certifies that the panel decision overruling the decision of the district court conflicts with decisions of the United States Supreme Court including the following: ***Skinner v. Switzer,*** 562 U.S 521 (2011), ***Dist. Attorney's Office for the Third Judicial Dist. v. Osborne,*** 557 U.S. 52 (2009). Consideration by the full court is therefore necessary to secure and maintain uniformity.

ISSUES THAT MERIT REHEARING AND REHEARING EN BANC

The decision of the panel that the instant 1983 action is barred by the ***Rooker-Feldman*** doctrine is wrong and conflicts with ***Skinner v. Switzer,*** 562 U.S. 52 (2011) and ***Dist. Attorney's Office for Third Judicial District v. Osborne,*** 557 U.S. 52 (2009)?

STATEMENT OF THE FACTS

The Memorandum Opinion of the Magistrate Judge [District Court Docket Number 54] sets out findings of fact in detail and relies, almost exclusively, on the joint stipulation of facts submitted by the parties prior to trial. [Opinion, pp. 11-26]

Most importantly to this Pleading, Mr. Wade was convicted of the first-degree murder of Lekitha Council on entirely circumstantial evidence. He has consistently maintained his innocence. At trial, he presented physical evidence of

actual innocence. Security cameras and time clock records showed he was at work from 3:00 P.M. until 11:00 P.M. on November 26th, 1996, the last day Ms. Council was seen alive and that he punched in at 3:00 P.M. and out at 11:32 P.M. on November 27th. [Opinion p. 17, paragraph 34]. Ms. Council was recorded on video at a Pathmark at 1:25 P.M. buying food items found in the trunk of Mr. Wade's car. She returned to her place of employment after making the purchases. She was observed by co-workers leaving work at 5:00 P.M. [Id., paragraph 36]. Ms. Council called Mr. Wade at his place of employment at 5:00 P.M. [Id., paragraph 37] Ms. Council's mother did not report her missing because she believed Ms. Council was away with a man other than Mr. Wade. [Id., p. 18, paragraph 38]

The trash bag in which Ms. Council's body was found was tested for DNA and the DNA of a person other than Mr. Wade was found on the bag. The bag was tested for fingerprints and the fingerprints found did not belong to Mr. Wade. [Id. paragraph 39]

When the body of Ms. Council was found, her sweater was on backwards, suggesting she had been redressed,; the body was nude from the waist to her ankles, with pantyhose and underpants pulled down to the ankles. Mr. Wade sought DNA testing and "touch" DNA testing of the sweater, bra, pantyhose, underpants which the assailant likely touched [Id., p. 44] as well as the scrapings from her long fingernails. [Id., p. 36] Expert testimony reported the cause of death

as "manual strangulation or suffocation." [Opinion, p. 12, paragraph 2]. The parties stipulated that the PCRA court's findings, when denying Mr. Wade's most recent motion for DNA testing, that the items Mr. Wade had requested for DNA testing had previously been tested and the results presented to the jury were "erroneous and contrary to the record." State court records showed that only a blood-stained swatch of leather from Mr. Wade's car had been subjected to pre-trial DNA testing. [Id., p. 35-36, fn. 5]

Mr. Wade filed three motion for DNA testing. The history of the DNA testing requests is set forth in the Magistrate's Opinion at pages 19-24. Focusing on the most recent request filed on December 9, 2011, through counsel, Mr. Wade requested testing of the victim's fingernails and fingernail scrapings; yellow turtleneck sweater worn by the victim and having a blood stain at the neck and on the body of the sweater; the lavender leather coat; bra; underpants, panty hose and shoes of the victim; trash bag in which the body was found and contents of lavender coat of victim. [Opinion, pp. 21-22, paragraph 55]. He filed a supplemental motion for DNA testing on March 21, 2012 asking that the items listed above be subjected to the new technology of "touch" DNA testing. Id., paragraph 57]. Following a hearing on the motion, Mr. Wade filed a memorandum requesting that the results of DNA testing be sent for inclusion in CODIS for comparison with that data base. [Id., paragraph 58]. Mr. Wade's Motion and

Supplemental Motion were denied on June 15, 2012. The PCRA court found the motion to be untimely; (erroneously and contrary to the record) that some of the items requested for DNA testing had already been subjected to DNA testing. [Id., p. 23-24,paragraphs 60-63]. On March 20, 2013, the Pennsylvania Superior Court affirmed. The PCRA court found that Wade did not make out a ***prima facie*** case that he was actually innocent.

> [W]e find that [Wade's] assertion that the results of Touch DNA analysis of the specified evidence, assuming exculpatory results, will establish his actual innocence of the murder of Lekitha Council, is speculative and irrelevant. [Wade] makes a bald assertion that touch DNA will be recovered from the items of evidence and that when subjected to the standard DNA processing (PCR analysis) the results will show the existence of someone other than [Wade]. [Wade's] argument is speculative and he offers no evidence to support this bald assertion. The Superior Court in [Commonwealth v.] Smith [citation omitted] held that in the face of such speculation, the absence of a defendant's DNA cannot be meaningful and cannot establish a defendant's actual innocence of the murder....In the present case, there was no evidence presented at trial the [Wade's] DNA was found anywhere on the victim, on her clothes or on the garbage bag that the victim's body was found in. In fact, the jury heard substantial evidence regarding the absence of [Wade's] DNA. Accordingly, [Wade's] request for general DNA and Touch DNA testing.....is denied. [Id., p. 39]

As the Magistrate Judge's Opinion points out, Wade's motion did not seek DNA testing to demonstrate the absence of <u>HIS</u> DNA from places it would be likely to be found, but instead to determine if skin cells- not visible to the naked eye and not discernable by older, less sophisticated methods, might with new methods, identify a previously unknown third party in locations and in quantities that would point to an assailant other than Mr. Wade under the principles of the

"redundancy" theory, "data bank" theory and "confession" theories explained in ***Commonwealth v. Conway,*** 14 A.3d 101, 109 (Pa Super. 2011). [Id, pp. 33,38, fn. 7]

The Pennsylvania Superior Court affirmed on March 20, 2013. [Id., p. 24, paragraph 64]. [Commonwealth v. Wade, No. 2041 EDA 2012, 2013 WL 11273719] The Superior Court addressed only the PCRA Court decision that "there is no reasonable possibility that the DNA testing requested would produce exculpatory evidence that would establish [Wade's] actual innocence of the crimes for which he was convicted." [Id., pp. 39-40]

On November 15, 2013, the Pennsylvania Supreme court denied allocatur. [Id., p. 24, paragraph 64.]

Mr. Wade filed a complaint pursuant to 42 U.S.C. §1983 on March 24, 2015. The case was submitted for a bench trial and a hearing was conducted to receive oral argument. [Id., p. 9-11]. In the 1983 action he requested an order directing the district attorney to take all steps reasonably necessary to preserve the physical evidence and to cooperate with the plaintiff in selecting a qualified laboratory for testing the evidence, or in the alternative, ordering the evidence be tested at a laboratory selected by the court; reasonable attorney's fees and costs and any other just and proper relief.

The District Court granted relief on Count I of the Complaint. In Count I, Wade claimed that the defendant's refusal to release physical evidence from his case for DNA testing violated his procedural due process rights under the Fourteenth Amendment. [Id., p. 26] The District Court found that the issue before it was a narrow one: "Whether the Pennsylvania post-conviction DNA testing statute, as construed by the state courts in Wade's case, 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental, or transgresses any recognized principle of fundamental fairness in operation.'" quoting ***Dist. Attorney's Office for Third Judicial Dist. v. Osborne,*** 557 U.S. 52, 69 (2009). The District Court found the "particular- and peculiar-construction of the state post-conviction DNA testing statute [42 Pa. C.S.A.9543.1] applied by the PCRA court in Wade's case was fundamentally unfair." [Id. p. 42] The District Court observed that although on its face the statute gives an applicant for DNA testing a fair procedure to seek relief the Pennsylvania Court's application and interpretation of the statute was not fair. The District Court granted relief on Count I of the complaint:

> Under the facts presented, we find that the state PCRA court's strained interpretation of the Pennsylvania DNA testing statute utterly foreclosed any possibility of relief for Wade. By interpreting the statute in this fashion, requiring Wade to do the impossible (prove that DNA testing would produce exculpatory results without access to the very evidence he seeks to test) and in contravention of an express statutory presumption that DNA that DNA testing would indeed produce exculpatory results, Wade has been denied the opportunity promised by this statute to demonstrate his actual

> innocence. We find this to be fundamentally unfair and a violation of Wade's federal constitutional right to procedural due process. ***See Osborne,*** 557 U.S. at 69.....Accordingly, we will grant judgment in favor of the plaintiff with respect to Count I of the complaint. [Id., pp. 46-47]

The District Court also stated:

> If this interpretation of the statute by the PCRA court in Wade's case were applied to other applicants, they too would be utterly foreclosed from obtaining relief. The prospect of relief under DNA testing procedures that require, as a threshold matter, proof that the requested DNA testing will produce exculpatory results to obtain that DNA testing in the first instance is circular and entirely illusory. [Id., p. 46, fn 11]

The Defendants appealed. On appeal, the panel vacated the judgment of the District Court and remanded with instructions to dismiss the complaint for lack of subject matter jurisdiction. [Wade v. Monroe County District Attorney, et al. No. 19-2201. The panel found that the ***Rooker-Feldman*** doctrine barred Mr. Wade's claim. Opinion, p. 2. The panel found that under ***Rooker-Feldman,*** "the federal court lacks subject-matter jurisdiction to consider Wade's as-applied challenge to Pennsylvania's DNA statute". Opinion, p. 7

GROUNDS FOR GRANTING REHEARING AND REHEARING EN BANC

I. THE ROOKER-FELDMAN DOCTRINE IS NOT APPLICABLE AND DOES NOT BAR RELIEF. THE PANEL DECISION CONFLICTS WITH *DIST. ATTORNEY'S OFFICE FOR THIRD JUDICIAL DISTRICT V. OSBORNE,* 557 U.S. 52 (2009) AND *SKINNER V. SWITZER,* 562 U.S. 52 (2011)

A. The Complaint meets the requirements of F.R.Civ. P. 8 (a)

F.R.Civ.P. 8(a) reads:

> (a) Claim for Relief. A pleading that states a claim for relief must must contain:
>
> (1) A short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support.
>
> (2) A short and plain statement of the claim showing the pleader is entitled to relief; and
>
> (3) A demand for relief sought, which may include relief in the alternative or a different type of relief.

B. THE PANEL'S READING OF THE *ROOKER-FELDMAN* DOCTRINE IS TOO BROAD AND ITS INTERPRETATION OF *OSBORNE* AND *SKINNER V. SWITZER* IS TOO NARROW. THE PANEL DECISION IS WRONG AND IN CONFLICT WITH U.S. SUPREME COURT PRECEDENT

The District Court correctly found that the ***Rooker-Feldman*** doctrine did not bar Mr. Wade's §1983 action. That Court identified the question before it to be a narrow one: "Whether the Pennsylvania post-conviction DNA testing statute, as construed by the state courts in Wade's case, 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental, or transgresses any recognized principle of fundamental fairness in operation.'" Quoting ***Osborne***, 577 U.S. at 69. [Opinion, p. 41] Although the decision of the District Court relied in large part of ***Osborne***, the panel Opinion does not address ***Osborne.***

The panel has wrongly narrowed the criteria for the court's jurisdiction in a §1983 action. First, the panel wrongly concluded that Mr. Wade did not challenge

the statute "as 'authoritatively construed' by Pennsylvania courts or as it applies to prisoners generally." Mr. Wade claimed that the defendant's refusal to release physical evidence from his criminal case to him for DNA testing was a violation of his procedural due process right under the Fourteenth Amendment. F.R.Civ.P. 8(a) did not require more. In his Pre-Argument Brief, Mr. Wade argued that the Pennsylvania Court denied Mr. Wade his right to due process when it failed to follow the definition of "actual innocence" contained in the DNA testing statute at 9543.1. [District Court Docket Entry # 49, p. 14.

The District Court correctly found that Mr. Wade is entitled to relief under § 1983 because the Pennsylvania Courts' interpretation of the DNA testing statute, which denies a fair procedure and "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental, or transgresses any recognized principle of fundamental fairness in operation." quoting ***Dist. Attorney's Office for Third Judicial Dist. v. Osborne,*** 557 U.S. 52, 69 (2009). The District Court found the "particular- and peculiar-construction of the state post-conviction DNA testing statute [42 Pa. C.S.A.9543.1] applied by the PCRA court in Wade's case was fundamentally unfair." [Id. p. 42]

In ***Osborne,*** at 53, The United States Supreme Court stated that the question was

> whether consideration of Osborne's claim within the framework of the State's postconviction relief procedures 'offends some [fundamental]

> principle of justice' or 'transgresses any recognized principle of fundamental fairness in operation.' ***Medina c. California,*** 505 U.S. 437, 446, 448, 112 S. Ct. 2572, 120 L.Ed.2d 353. Federal Courts may upset a State's postconviction procedures only if they are fundamentally inadequate to vindicate the substantive rights provided.

That was the exact claim raised by Wade and addressed by the District Court. [District Court Opinion, p. 41] ["Wade has been denied the opportunity promised by this statute to demonstrate his actual innocence. We find this to be fundamentally unfair and a violation of Wade's federal constitutional right to procedural due process."][Id, p. 46] ***Osborne*** did NOT say that a court had no jurisdiction to entertain a 1983 action unless the claimant said the statute, on its face, was unconstitutional. The District Court found the interpretation by the state courts to be fundamentally unfair. The Panel did not find the interpretation to be fair. It only found the unfairness to be unassailable as to Wade under the ***Rooker-Feldman Doctrine.***

Turning to the ***Rooker-Feldman*** doctrine, in its Memorandum accompanying the Order denying the Defendants' Motion for Summary Judgment, the District Court also correctly found that Wade's case was indistinguishable from the plainiff's in ***Skinner v. Switzer,*** 562 U.S. 521 (2011) and that the ***Rooker-Feldman*** doctrine did not apply. [District Court Docket Number 25, pp. 16-19]. The District Court's analysis was as follows:

> The defendants argue that this action must be dismissed because this Court lacks subject matter jurisdiction over it under the ***Rooker-Feldman*** doctrine.

The ***Rooker-Feldman*** doctrine provides that federal district courts lack subject matter jurisdiction to sit in direct review of state court decisions. S***ee Exxon Mobil Corp. v. Saudi Basic Indus. Corp.,*** 544 U.S. 280, 284 (2005). It precludes a federal action if the relief requested in the federal action effectively would reverse the state decision or avoid its ruling. ***Focus v. Allegheny City. Ct. Com. Pl.,*** 75 F3d 834, 840 (3d Cir. 1996). 'There are four requirements that must be met for the ***Rooker-Feldman*** doctrine to apply: (1) the federal plaintiff lost in state court; (2) the plaintiff 'complain[s] of injuries caused by [the] state-court judgments'; (3) those judgments were rendered before the federal suit was filed; and (4) the plaintiff is inviting the district court to review and reject the state judgments.' ***Great W. Mining & Mineral Co. v. Fox Rothschild LLP,*** 615 F3d 159, 166 (3d Cir. 2010) (alterations in original) (quoting ***Exxon Mobil,*** 544 U.S. at 284).

In ***Skinner v. Switzer,*** 562 U.S. 521 (2011) the Supreme Court of the United States addressed the fourth requirement- whether the plaintiff is inviting the district court review and reject the state court' judgment. ***See id.*** at 532. The plaintiff in ***Skinner***

> stated his due process claim in a paragraph alleging that the State's refusal 'to release the biological evidence for testing...has deprived [him] of his liberty interests in utilizing state procedures to obtain reversal of his conviction and/or to obtain pardon or reduction of his sentence....

Id. at 530. (quoting plaintiff's complaint)(alterations in original). At oral argument, Skinner's counsel clarified the gist of Skinner's due process claim: He does not challenge the prosecutor's conduct or the decisions reached by the [state court] in applying [state law] to his motions; instead, he challenges, as denying him procedural due process, [the state's] postconviction DNA statute 'as construed' by the [state] courts. Skinner's counsel argued, have 'construed the statute to completely foreclose any prisoner who could have sought DNA testing prior to trial, but did not, from seeking testing' postconviction....

Id. (brackets omitted).

Under these circumstances, the Supreme Court concluded that:

> Skinner's litigation, in light of ***Exxon,*** encounters no ***Rooker-Feldman*** shoal. 'If a federal plaintiff "present[s] [an] independent

> claim,' it is not an impediment to the exercise of federal jurisdiction that the 'same or a related question' was earlier aired between the parties in state court....Skinner does not challenge the adverse [state court] decisions themselves; instead, he targets as unconstitutional the [state] statute they authoritatively construed. As the Court explained in ***Feldman***, and reiterated in ***Exxon***, a state court decision is not reviewable by lower federal courts, but a statute or rule governing the decision may be challenged in a federal action. Skinner's federal case falls within the latter category. There was, therefore, no lack of subject-matter jurisdiction over Skinner's federal suit.
> Id. at 532-33 (citations and footnotes omitted).
>
> With respect to the ***Rooker-Feldman*** doctrine, we are unable to discern any meaningful difference between the procedural due process claims advanced by the plaintiff in this case and by the plaintiff in ***Skinner.*** At bottom, Wade's claim appears to be that the Pennsylvania post-conviction DNA statute, as construed by the Pennsylvania courts, is fundamentally unfair and constitutionally inadequate to vindicate the substantive rights provided to him under state law. ***See Dist. Attorney's Office for the Third Judicial Dist. v. Osborne,*** 557 U.S. 52, 69 (2009); ***Grier v. Klem,*** 591 F3d 672 (3d Cir. 2010); ***see also Osborne,*** 557 U.S. at 68 (holding that a prisoner may retain a state-created 'liberty interest in demonstrating his innocence with new evidence under state law'). In particulate, Wade's challenge appears to focus on statutory limitations with respect to post-conviction DNA motions involving new or improved DNA testing technology and with respect to cases in which trial counsel filed to request DNA testing at the time of trial.
>
> Accordingly, the defendants' motion must be denied to the extent it seeks dismissal of this action for lack of subject matter jurisdiction pursuant to the ***Rooker-Feldman*** doctrine. [id.]

Moreover, the panel decision and the cases cited from various states see ***Rooker-Feldman*** lurking in every §1983 action seeking DNA testing. On the other hand, ***Skinner v. Switzer*** does not see this proliferation. Instead, in that case, the

U.S. Supreme Court observed that the Supreme Court had employed the doctrine only in two cases- ***Rooker*** and ***Feldman. Skinner*** 562 U.S. at 531.

Over -application of the ***Rooker-Feldman*** doctrine reaches dangerous grounds. For instance, application of the four tests of the doctrine could preclude federal habeas corpus review under 28 U.S.C. 2254 because a state prisoner seeking relief under 2254 runs afoul of all four tests.

The opinion of the panel observes that Mr. Wade relied on ***Skinner v. Switzer*** to argue ***Rooker-Feldman*** did not bar his §1983 action, but so did the District Court. The panel sees a distinction where there is none. Both Wade and Skinner challenged the state postconviction DNA statute governing the decision. The District Court found this to be the case in a well-reasoned decision.

CONCLUSION

The panel decision to vacate the judgment of the District Court and remand with instructions to dismiss the §1983 action should, itself, be vacated. The decision of the District Court should be affirmed.

Respectfully submitted,

/s/Cheryl J. Sturm
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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

Pursuant to Fed.R. App. 32(a)(7)(C), the undersigned certifies that Appellee's Petition is prepared with 14 point Times New Roman type and that it contains 3,435 words.

/s/Cheryl J. Sturm

CERTIFICATE OF ELECTRONIC FILING

The undersigned certifies that s/he caused a hard copy of Appellant's Petition to be sent to the Clerk's Office on the same day the E-Brief was transmitted. The undersigned certifies that the text of the hard copies and the E-Brief are identical. The undersigned certifies that Appellant's Petition was checked for viruses using Norton provided by Comcast.

/s/Cheryl J. Sturm

CERTIFICATE OF SERVICE

The undersigned certifies that on the 24th day of February, 2020, s/he caused the petition for rehearing and suggestion for rehearing en banc to be served on opposing counsel using the CM/ECF System addressed as follows:

Gerard J. Geiger, Esquire
712 Monroe Street
Stroudsburg, PA 18360

/s/Cheryl J. Sturm
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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-2201

ROBERT MUIR WADE

v.

MONROE COUNTY DISTRICT ATTORNEY;
E. DAVID CHRISTINE, D.A. MONROE COUNTY,
Appellants

Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 3-15-cv-00584)
Magistrate Judge: Hon. Joseph F. Saporito

Submitted pursuant to Third Circuit L.A.R. 34.1(a)
February 3, 2020

Before: SHWARTZ, SCIRICA, and RENDELL, Circuit Judges.

JUDGMENT

This cause came to be considered on the record of the United States District Court for the Middle District of Pennsylvania and was submitted pursuant to Third Circuit L.A.R. 34.1(a) on February 3, 2020.

On consideration whereof, it is now hereby ORDERED and ADJUDGED by this Court that the judgment of the District Court entered on May 13, 2019 is VACATED and

REMANDED with instructions to DISMISS the complaint for lack of subject matter jurisdiction. All of the above in accordance with the Opinion of this Court.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

Dated: February 11, 2020

NOT PRECEDENTIAL

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FOR THE THIRD CIRCUIT

No. 19-2201

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Submitted pursuant to Third Circuit L.A.R. 34.1(a)
February 3, 2020

Before: SHWARTZ, SCIRICA, and RENDELL, Circuit Judges.

(Filed: February 11, 2020)

OPINION*

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* This disposition is not an opinion of the full Court and, pursuant to I.O.P. 5.7, does not constitute binding precedent.

SHWARTZ, Circuit Judge.

The Monroe County District Attorney and District Attorney E. David Christine (collectively, the "District Attorney") appeal the District Court's order entering judgment for Robert Muir Wade on his claim that the Pennsylvania courts violated his right to procedural due process under the Fourteenth Amendment to the United States Constitution by denying him access to post-conviction DNA testing. Because the Rooker-Feldman doctrine bars Wade's claim, we will vacate the judgment and remand with instructions to dismiss the complaint for lack of subject-matter jurisdiction.

I[1]

A

In December 1996, hunters in Monroe County found the body of Lekitha Council, a woman with whom Wade once had a relationship, partially wrapped in a garbage bag. Circumstantial evidence connected Wade to the murder.

A jury convicted Wade of first-degree murder and abuse of a corpse in violation of 18 Pa. Cons. Stat. Ann. § 2502(a) and 18 Pa. Cons. Stat. Ann. § 5510, respectively. Wade was sentenced to life imprisonment without parole for murder and a concurrent one to two years' imprisonment for abuse of a corpse. The Superior Court of Pennsylvania affirmed the judgment of conviction and sentence. Commonwealth v. Wade, 790 A.2d 344 (Table) (Pa. Super. Ct. 2001). The Pennsylvania Supreme Court denied Wade's

[1] These facts are drawn from the parties' joint stipulation of facts.

petition for leave to petition for allowance of appeal nunc pro tunc.[2] Wade thereafter filed petitions under the Pennsylvania Post Conviction Relief Act ("PCRA") and a request for DNA testing in the state courts. Each was unsuccessful.

Wade filed another motion for post-conviction DNA testing,[3] and a supplemental motion thereafter, specifically requesting that certain evidence be subject to "Touch" DNA testing.[4] App. 88. The PCRA court denied the motions. Commonwealth v. Wade, No. CP-45-CR-0000639-1998 (Monroe Cty. Ct. Com. Pl. June 15, 2012). The court held, among other things, that Wade failed to meet the requirements of Pennsylvania's DNA testing statute, 42 Pa. Cons. Stat. Ann. § 9543.1[5] for additional DNA testing

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[2] Wade also filed a petition for habeas corpus in 2003, which was denied, and we denied Wade's application for a certificate of appealability.

[3] Wade requested DNA testing of: (1) the victim's fingernails and any scrapings from those fingernails; (2) the blood-stained yellow turtle neck the victim had worn; (3) the victim's lavender leather coat, bra, underwear, pantyhose, and shoes; (4) the contents of the victim's lavender coat; and (5) the trash bag in which the victim's body was found.

[4] The PCRA court stated that Touch DNA testing refers to DNA removed from skin "left behind when a person touches or comes into contact with items such as clothes, weapons, or other objects." Commonwealth v. Wade, No. CP-45-CR-0000639-1998, slip op. at 3 n.2 (Monroe Cty. Ct. Com. Pl. June 15, 2012).

[5] Section 9543.1 provides in pertinent part:

> (a) Motion.--
>
> (1) An individual convicted of a criminal offense in a court of this Commonwealth may apply by making a written motion to the sentencing court at any time for the performance of forensic DNA testing on specific evidence that is related to the investigation or prosecution that resulted in the judgment of conviction.
>
> (2) The evidence may have been discovered either prior to or after the applicant's conviction. The evidence shall be available for testing as of the date of the motion. If the evidence was discovered prior to the applicant's conviction, the evidence shall not have been subject to the DNA testing requested because the technology for testing was not in

because (1) Wade's "assertion that the results of Touch DNA analysis of the specified evidence, assuming exculpatory results, will establish his actual innocence of the murder of Lekitha Coun[cil], is speculative and irrelevant," (2) "there was no evidence presented at trial that [Wade's] DNA was found anywhere on the victim, on her clothes or on the

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> existence at the time of the trial or the applicant's counsel did not seek testing at the time of the trial in a case where a verdict was rendered on or before January 1, 1995, or the evidence was subject to the testing, but newer technology could provide substantially more accurate and substantially probative results, or the applicant's counsel sought funds from the court to pay for the testing because his client was indigent and the court refused the request despite the client's indigency.
>
> . . .
>
> (c) Requirements.--In any motion under subsection (a), under penalty of perjury, the applicant shall:
>
> . . .
>
> (3) present a prima facie case demonstrating that the:
>
> (i) identity of or the participation in the crime by the perpetrator was at issue in the proceedings that resulted in the applicant's conviction and sentencing; and
>
> (ii) DNA testing of the specific evidence, assuming exculpatory results, would establish:
>
> (A) the applicant's actual innocence of the offense for which the applicant was convicted;
>
> . . .
>
> (d) Order.--
>
> . . .
>
> (2) The court shall not order the testing requested in a motion under subsection (a) if, after review of the record of the applicant's trial, the court determines that there is no reasonable possibility for an applicant under State supervision . . . that the testing would produce exculpatory evidence that:
>
> (i) would establish the applicant's actual innocence of the offense for which the applicant was convicted . . . .

42 Pa. Cons. Stat. Ann. § 9543.1(a)-(d).

garbage bag that the victim's body was found in,"[6] and (3) "the jury heard substantial evidence regarding the absence of [Wade's] DNA." Wade, slip op. at 9-10.

The Superior Court affirmed, agreeing with the PCRA court that, given the evidence at trial,

> even assuming DNA testing would reveal DNA from someone other than [Wade] or the victim on the multiple items [Wade] seeks to have tested, [Wade] does not demonstrate it is more likely than not that no reasonable juror confronted with the DNA and other evidence would find the defendant guilty beyond a reasonable doubt.

Commonwealth v. Wade, No. 2041 EDA 2012, 2013 WL 11273719, at *3 (Pa. Super. Ct. Mar. 20, 2013). The Pennsylvania Supreme Court denied his petition for allowance of appeal. Commonwealth v. Wade, 80 A.3d 777 (Table) (Pa. 2013). Wade maintains that he is actually innocent.

B

Wade sued the District Attorney in federal district court under 42 U.S.C. § 1983, alleging that he had been denied access to, and DNA testing of, physical evidence in the District Attorney's possession and that this denial violated his right to procedural due process and to a reasonable opportunity to prove his innocence. Wade sought a judgment directing the District Attorney to, among other things, produce certain physical evidence and allow Wade to test it.

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[6] In summarizing the forensic evidence presented to the jury at trial, the PCRA court noted that the fingerprints of a forensic scientist at the Pennsylvania State Police Crime Lab and four other fingerprints that lacked sufficient detail or characteristics to identify the source were discovered on the garbage bag in which the victim was found. Wade, slip op. at 8. The parties also stipulated that the DNA of another individual was detected.

Following a bench trial, the District Court entered judgment in favor of Wade on his procedural due process claim and granted him access to the physical evidence and the DNA testing he sought. The Court held that the PCRA court's application of Pennsylvania's post-conviction DNA testing statute, § 9543.1, to Wade violated procedural due process. Wade v. Monroe Cty. Dist. Att'y, No. 3:15-CV-00584, 2019 WL 2084533, at *14-15 (M.D. Pa. May 13, 2019). The Court reasoned that, on its face, § 9543.1 does not violate due process but that "the particular—and peculiar—construction of [§ 9543.1] applied by the PCRA court in Wade's case was fundamentally unfair" because (1) § 9543.1 does not require a petitioner to show that the DNA testing results would be favorable but only requires him to "present a prima facie case demonstrating that DNA testing of the specific evidence, assuming exculpatory results, would establish . . . the applicant's actual innocence," id. at *14 (omission in original) (quoting § 9543.1(c)(3)(ii)(A)); (2) the PCRA court rejected "as speculative" Wade's argument that the Touch DNA testing would support an inference that an assailant other than Wade had killed the victim, id. at *15; and (3) this construction read the words "assuming exculpatory results" out of § 9543.1, denied him the opportunity to show his actual innocence, and thereby violated his right to procedural due process, id. The District Attorney appeals.

II[7]

Wade claims that the denial of access to physical evidence in the District Attorney's possession for DNA testing violated his Fourteenth Amendment right to procedural due process. On appeal, Wade states that he is not challenging the DNA testing statute itself, but instead contends that the state court's "interpretation" and "application of the statute" to him is "fundamentally unfair." Appellee's Br. 8. We hold that, under the Rooker-Feldman doctrine, the federal court lacks subject-matter jurisdiction to consider Wade's as-applied challenge to Pennsylvania's DNA statute.

The Rooker-Feldman doctrine stems from the Supreme Court's decisions in Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923), and District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983), and bars federal district courts from exercising jurisdiction "over suits that are essentially appeals from state-court judgments," Great W. Mining & Mineral Co. v. Fox Rothschild LLP, 615 F.3d 159, 165 (3d Cir. 2010). The doctrine prohibits "state-court losers" from complaining about "injuries caused by state-court judgments" and from "inviting district court review and rejection of those judgments." Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 284 (2005).

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[7] The District Court exercised jurisdiction under 28 U.S.C. § 1331. To the extent we have jurisdiction, we exercise it under 28 U.S.C. § 1291.

Courts "have an independent obligation to determine whether subject-matter jurisdiction exists." Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006). We exercise de novo review over questions of subject-matter jurisdiction. Great W. Mining & Mineral Co. v. Fox Rothschild LLP, 615 F.3d 159, 163 (3d Cir. 2010).

For the Rooker-Feldman doctrine to apply, four requirements must be met: "(1) the federal plaintiff lost in state court, (2) the plaintiff complains of injuries caused by the state-court judgment, (3) that judgment issued before the federal suit was filed, and (4) the plaintiff invites the district court to review and reject the state-court judgment." Geness v. Cox, 902 F.3d 344, 360 (3d Cir. 2018) (quoting In re Phila. Entm't & Dev. Partners, 879 F.3d 492, 500 (3d Cir. 2018); see Exxon Mobil, 544 U.S. at 284.

All four requirements are met here. First, Wade lost his state-court action when the PCRA court denied his motion for post-conviction DNA testing under § 9543.1, the Superior Court affirmed the decision, and the Pennsylvania Supreme Court denied his petition for allowance of appeal. Second, Wade asserts he was injured by the Pennsylvania courts' alleged misinterpretation and application of § 9543.1 and resulting denial of his motion. Specifically, Wade contends that the PCRA court interpreted § 9543.1 to require him to prove the DNA testing would produce exculpatory results, while § 9543.1 requires courts to "assum[e] exculpatory results," and this allegedly erroneous interpretation led to the denial of relief and thus injured him. Third, the state-court judgment was entered before Wade filed his federal suit. Fourth, Wade asked the District Court to review the validity of the state-court judgment, hold that its interpretation violated procedural due process, and grant him the DNA testing he seeks. Because all four elements are met, the Rooker-Feldman doctrine bars his claim.[8]

[8] Several other circuit courts also have held that the Rooker-Feldman doctrine bars challenges nearly identical to Wade's. See Cooper v. Ramos, 704 F.3d 772, 779-81 (9th Cir. 2012) (holding that the Rooker-Feldman doctrine barred challenge to state court's application of the state's DNA testing statute since, although plaintiff tried to cast his

Wade relies on Skinner v. Switzer, 562 U.S. 521 (2011), to argue that Rooker-Feldman does not foreclose his claim because he asserts that he does not directly attack the state court's judgment. Skinner's claim, however, is unlike Wade's because Skinner challenged the DNA statute generally while Wade challenges its application to him specifically. In Skinner, after the petitioner was convicted of murder, he moved for DNA testing under Texas's post-conviction DNA testing statute, but the Texas courts denied his motions. Petitioner brought a § 1983 claim against the District Attorney, alleging that Texas had violated his right to procedural due process by refusing to provide for the DNA testing he requested. Id. at 529. The Supreme Court held that the Rooker-Feldman doctrine did not bar the suit because petitioner did "not challenge the prosecutor's conduct or the decisions reached by the [state court] in applying [the DNA statute] to his motions" but "instead, he challenge[d] . . . Texas' postconviction DNA statute 'as

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complaint as a general attack on the statute, he asserted legal errors by the state court as his legal injury and relief from the state-court judgment as his remedy); Alvarez v. Att'y Gen., 679 F.3d 1257, 1263-64 (11th Cir. 2012) (affirming district court's determination that it lacked jurisdiction over plaintiff's claim that the Florida courts' application of state DNA access procedures violated procedural due process because the claim "broadly attack[ed] the state court's application of Florida's DNA access procedures to the facts of his case" and not "the constitutionality of those underlying procedures"); McKithen v. Brown, 626 F.3d 143, 154-55 (2d Cir. 2010) (holding that Rooker-Feldman barred claim that the state court "incorrectly and unconstitutionally interpreted the [New York DNA] statute by not assuming exculpatory results" because plaintiff alleged he was injured by the state court's interpretation of the statute and sought review of the validity of its court judgment); In re Smith, 349 F. App'x 12, 15 (6th Cir. 2009) (holding that Rooker-Feldman barred claim that plaintiff's procedural due process rights were violated when he was denied statutory DNA testing because the "source of the injury" was the state trial court order denying access to the testing). Cf. Morrison v. Peterson, 809 F.3d 1059, 1069-70 (9th Cir. 2015) (holding that Rooker-Feldman doctrine did not bar as-applied challenge to California's post-conviction DNA testing statute where plaintiff sought to invalidate the statute as unconstitutional but did not seek an order granting DNA testing).

construed' by the Texas courts," as denying him procedural due process. Id. at 530. Thus, "he target[ed] as unconstitutional the Texas statute [that state courts] authoritatively construed," and because he challenged the statute governing the decision, the Court had subject-matter jurisdiction over the suit. Id. at 532-33.

Unlike the claim in Skinner, Wade contends that the PCRA court misinterpreted the DNA statute in his case specifically, and in doing so, violated his procedural due process rights. At its core, Wade's challenge is to the PCRA court's particular interpretation of the DNA statute and application of the statute to him, not to the statute as "authoritatively construed" by Pennsylvania courts or as it applies to prisoners generally. Indeed, the PCRA court applied the DNA statute to Wade specifically, reasoning that Wade's "assertion that the results of Touch DNA analysis of the specified evidence, assuming exculpatory results, will establish his actual innocence of the murder of Lekitha Council, [was] speculative and irrelevant." Wade, slip op. at 10. The court concluded that Wade had failed to present a prima facie case that would entitle him to DNA testing because, given the evidence at trial, there was no reasonable possibility that the testing would establish his actual innocence. Id. at 11. Similarly, the District Court examined the PCRA court's application of the statute to Wade and found that the PCRA court's "particular—and peculiar—construction of the state post-conviction DNA testing statute . . . in Wade's case was fundamentally unfair." Wade, 2019 WL 2084533, at *14.

The language of both the PCRA court and District Court reveal that the state court entered a ruling based upon Wade's situation, and made no broad pronouncement about how the statute should be construed in all cases. Wade's due process claim is based on

the injury caused by this adverse state-court ruling, and it is exactly the type of claim a federal court cannot review. See Cooper v. Ramos, 704 F.3d 772, 780-81 (9th Cir. 2012) (reasoning that plaintiff's procedural due process claim that the state court "made it impossible" for him to utilize the DNA statute was dissimilar to Skinner, where the claim was that the Texas statute was inadequate as to any prisoner, and holding that Rooker-Feldman barred plaintiff's claim); Alvarez v. Att'y Gen., 679 F.3d 1257, 1263-64 (11th Cir. 2012) (holding that Rooker-Feldman barred plaintiff's procedural due process claim that the state court's denial of access to DNA testing caused him injury, reasoning that it was unlike the claim in Skinner that Texas's DNA statute as "authoritatively construed" was unconstitutional).

III

For these reasons, we will vacate the judgment of the District Court and remand with instructions to dismiss Wade's complaint for lack of subject-matter jurisdiction.