AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 11: The Contemporary Era—Criminal Justice/Due Process and Habeas Corpus/Due Process

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District Attorney's Office for the Third Judicial District v. Osborne, 557 U.S. 52 (2009)

William Osborne in 1993 was convicted of a brutal sexual assault and sentenced to twenty-six years in prison. While in prison, Osborne filed a civil suit against Alaska officials. He claimed he had a constitutional right to have access to the DNA evidence used to convict him at trial. Osborne claimed he intended to perform a Short Tandem Repeat (STR) test, which all parties agreed was more accurate than the DNA tests used to convict him at his original trial. The federal district court and Court of Appeals for the Ninth Circuit agreed with Osborne. Alaska officials appealed to the Supreme Court of the United States.

The United States, most states and many local government agencies submitted amicus briefs urging the Supreme Court not to find a constitutional right to DNA evidence. The brief for thirty-one states declared,

> *Recognizing the importance of postconviction DNA testing, most state legislatures and the United States Congress have enacted comprehensive statutes that provide convicted offenders a meaningful opportunity to seek such testing in appropriate cases. . . . These state procedures allow convicted felons a fair opportunity for postconviction DNA testing while prudently enforcing limiting criteria that minimize wasteful and irrelevant testing. There is no legal foundation for the Ninth Circuit's reading of the Due Process Clause to require a less discriminate procedure . . . that would supersede this national body of legislation.*

Liberal public interest groups and associations of persons proved innocent by DNA testing filed briefs urging the Supreme Court to find a due process right in certain circumstances to DNA testing. A brief filed by former attorney general Janet Reno on behalf of former and current prosecutors asserted,

> *Some [signatories] have had the experience of obtaining the conviction of an individual who was later proven innocent by postconviction DNA testing, or have participated in the release of evidence to a convicted person who would later establish proof of their innocence and vacatur of their sentence. To be sure, such an experience is humbling. Many of these convicted individuals faced overwhelming evidence against them. Often times they were positively identified by multiple eyewitnesses, and a number even confessed to the crime. But with advances in science now allowing an individual to be absolutely exonerated or identified as the true perpetrator with an extremely high rate of accuracy, circumstantial and testimonial evidence are, in some cases, no longer the best indicia of guilt we have.*

The Supreme Court by a 5–4 vote rejected Osborne's claim that he had a due process right to DNA testing. Chief Justice Roberts's majority opinion asserted that state legislation was providing an adequate framework for ensuring fairness to criminal defendants and the courts should not interfere. Was this assertion correct? Given that almost every state has passed legislation authorizing DNA testing in certain circumstances, is the Chief Justice correct that democratic processes are functioning adequately to protect rights? Is Justice Stevens right to think that this is a matter that calls for a judicial rule? Osborne's appeal was complicated both by his previous trial decisions and special judicial rules for federal habeas corpus appeals. Suppose from the very beginning of his trial, Osborne had insisted on DNA testing and Alaska had declined. Would the Supreme Court have issued the same ruling on a direct appeal from his state court conviction?

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The dilemma [in this case] is how to harness DNA's power to prove innocence without unnecessarily overthrowing the established system of criminal justice.

That task belongs primarily to the legislature. "[T]he States are currently engaged in serious, thoughtful examinations" of how to ensure the fair and effective use of this testing within the existing criminal justice framework. Forty-six States have already enacted statutes dealing specifically with access to DNA evidence. The Federal Government has also passed the Innocence Protection Act of 2004, which allows federal prisoners to move for court-ordered DNA testing under certain specified conditions. . . .

Alaska is one of a handful of States yet to enact legislation specifically addressing the issue of evidence requested for DNA testing. But that does not mean that such evidence is unavailable for those seeking to prove their innocence. Instead, Alaska courts are addressing how to apply existing laws for discovery and postconviction relief to this novel technology.

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Both parties agree that under these provisions of [Alaska law], "a defendant is entitled to post-conviction relief if the defendant presents newly discovered evidence that establishes by clear and convincing evidence that the defendant is innocent." . . .

In addition to this statutory procedure, the Alaska Court of Appeals has invoked a widely accepted three-part test to govern additional rights to DNA access under the State Constitution. . . . "[A]defendant who seeks post-conviction DNA testing . . . must show (1) that the conviction rested primarily on eyewitness identification evidence, (2) that there was a demonstrable doubt concerning the defendant's identification as the perpetrator, and (3) that scientific testing would likely be conclusive on this issue." . . .

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"No State shall . . . deprive any person of life, liberty, or property, without due process of law." . . . Osborne argues that access to the State's evidence is a "process" needed to vindicate his right to prove himself innocent and get out of jail. Process is not an end in itself, so a necessary premise of this argument is that he has an entitlement (what our precedents call a "liberty interest") to prove his innocence even after a fair trial has proved otherwise. We must first examine this asserted liberty interest to determine what process (if any) is due.

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A criminal defendant proved guilty after a fair trial does not have the same liberty interests as a free man. At trial, the defendant is presumed innocent and may demand that the government prove its case beyond reasonable doubt. But "[o]nce a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears." . . . .

The State accordingly has more flexibility in deciding what procedures are needed in the context of postconviction relief. . . . Osborne'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. *Brady* is the wrong framework.

Instead, the question is whether consideration of Osborne'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."

We see nothing inadequate about the procedures Alaska has provided to vindicate its state right to postconviction relief in general, and nothing inadequate about how those procedures apply to those who seek access to DNA evidence. Alaska provides a substantive right to be released on a sufficiently compelling showing of new evidence that establishes innocence. . . .

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. . . [Osborne] asks that we recognize a freestanding right to DNA evidence untethered from the liberty interests he hopes to vindicate with it. We reject the invitation and conclude, in the circumstances

of this case, that there is no such substantive due process right. "As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended."

And there are further reasons to doubt. The elected governments of the States are actively confronting the challenges DNA technology poses to our criminal justice systems and our traditional notions of finality, as well as the opportunities it affords. To suddenly constitutionalize this area would short-circuit what looks to be a prompt and considered legislative response. . . .

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Federal courts should not presume that state criminal procedures will be inadequate to deal with technological change. The criminal justice system has historically accommodated new types of evidence, and is a time-tested means of carrying out society's interest in convicting the guilty while respecting individual rights. That system, like any human endeavor, cannot be perfect. DNA evidence shows that it has not been. But there is no basis for Osborne's approach of assuming that because DNA has shown that these procedures are not flawless, DNA evidence must be treated as categorically outside the process, rather than within it. That is precisely what his § 1983 suit seeks to do, and that is the contention we reject.

JUSTICE ALITO, with whom JUSTICE KENNEDY joins, and with whom JUSTICE THOMAS joins in part, concurring.

. . . [A] defendant who declines the opportunity to perform DNA testing at trial for tactical reasons has no constitutional right to perform such testing after conviction.

The principles of federalism, comity, and finality are not the only ones at stake for the State in cases like this one. To the contrary, DNA evidence creates special opportunities, risks, and burdens that implicate important state interests. Given those interests—and especially in light of the rapidly evolving nature of DNA testing technology—this is an area that should be (and is being) explored "through the workings of normal democratic processes in the laboratories of the States."

Forty-six States, plus the District of Columbia and the Federal Government, have recently enacted DNA testing statutes. . . .

. . . JUSTICE STEVENS argues that the State should welcome respondent's offer to perform modern DNA testing (at his own expense) on the State's DNA evidence; the test will either confirm respondent's guilt (in which case the State has lost nothing) or exonerate him (in which case the State has no valid interest in detaining him).

Alas, it is far from that simple. First, DNA testing—even when performed with modern STR technology, and even when performed in perfect accordance with protocols—often fails to provide "absolute proof" of anything. . . .

Second, the State has important interests in maintaining the integrity of its evidence, and the risks associated with evidence contamination increase every time someone attempts to extract new DNA from a sample.

Third, even if every test was guaranteed to provide a conclusive answer, and even if no one ever contaminated a DNA sample, that still would not justify disregarding the other costs associated with the DNA-access regime proposed by respondent. As the Court notes, recognizing a prisoner's freestanding right to access the State's DNA evidence would raise numerous policy questions, not the least of which is whether and to what extent the State is constitutionally obligated to collect and preserve such evidence.

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When a criminal defendant, for tactical purposes, passes up the opportunity for DNA testing at trial, that defendant, in my judgment, has no constitutional right to demand to perform DNA testing after conviction. Recognition of such a right would allow defendants to play games with the criminal justice system. A guilty defendant could forgo DNA testing at trial for fear that the results would confirm his guilt, and in the hope that the other evidence would be insufficient to persuade the jury to find him guilty. Then, after conviction, with nothing to lose, the defendant could demand DNA testing in the hope that some happy accident—for example, degradation or contamination of the evidence—would provide

the basis for seeking postconviction relief. Denying the opportunity for such an attempt to game the criminal justice system should not shock the conscience of the Court.

JUSTICE STEVENS contends that respondent should not be bound by his attorney's tactical decision and notes that respondent testified in the state postconviction proceeding that he strongly objected to his attorney's strategy. His attorney, however, had no memory of that objection, and the state court did not find that respondent's testimony was truthful. Nor do we have reason to assume that respondent was telling the truth, particularly since he now claims that he lied at his parole hearing when he twice confessed to the crimes for which he was convicted.

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In any event, even assuming for the sake of argument that respondent did object at trial to his attorney's strategy, it is a well-accepted principle that, except in a few carefully defined circumstances, a criminal defendant is bound by his attorney's tactical decisions unless the attorney provided constitutionally ineffective assistance. . . .

JUSTICE STEVENS, with whom JUSTICE GINSBERG and JUSTICE BREYER join, dissenting.

The State of Alaska possesses physical evidence that, if tested, will conclusively establish whether respondent William Osborne committed rape and attempted murder. If he did, justice has been served by his conviction and sentence. If not, Osborne has needlessly spent decades behind bars while the true culprit has not been brought to justice. The DNA test Osborne seeks is a simple one, its cost modest, and its results uniquely precise. Yet for reasons the State has been unable or unwilling to articulate, it refuses to allow Osborne to test the evidence at his own expense and to thereby ascertain the truth once and for all.

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. . . Osborne asserts a right to access the State's evidence that derives from the Due Process Clause itself. Whether framed as a "substantive liberty interest . . . protected through a procedural due process right" to have evidence made available for testing, or as a substantive due process right to be free of arbitrary government action, the result is the same: On the record now before us, Osborne has established his entitlement to test the State's evidence.

. . .

Although a valid criminal conviction justifies punitive detention, it does not entirely eliminate the liberty interests of convicted persons. For while a prisoner's "rights may be diminished by the needs and exigencies of the institutional environment . . ., [t]here is no iron curtain drawn between the Constitution and the prisons of this country." . . .

Recognition of this right draws strength from the fact that 46 States and the Federal Government have passed statutes providing access to evidence for DNA testing, and 3 additional states (including Alaska) provide similar access through court-made rules alone. These legislative developments are consistent with recent trends in legal ethics recognizing that prosecutors are obliged to disclose all forms of exculpatory evidence that come into their possession following conviction. . . . The fact that nearly all the States have now recognized some postconviction right to DNA evidence makes it more, not less, appropriate to recognize a limited federal right to such evidence in cases where litigants are unfairly barred from obtaining relief in state court.

In [*Brady v. Maryland* (1963)], we held that the State violates due process when it suppresses "evidence favorable to an accused" that is "material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Although *Brady* does not directly provide for a postconviction right to such evidence, the concerns with fundamental fairness that motivated our decision in that case are equally present when convicted persons such as Osborne seek access to dispositive DNA evidence following conviction.

Recent scientific advances in DNA analysis have made "it literally possible to confirm guilt or innocence beyond any question whatsoever, at least in some categories of cases." . . . Discussing these important forensic developments in his oft-cited opinion in *Harvey v. Horan* (4th Cir. 2002), Judge Luttig explained that although "no one would contend that fairness, in the constitutional sense, requires a post-

conviction right of access or a right to disclosure anything approaching in scope that which is required pre-trial," in cases "where the government holds previously-produced forensic evidence, the testing of which concededly could prove beyond any doubt that the defendant did not commit the crime for which he was convicted, the very same principle of elemental fairness that dictates pre-trial production of all potentially exculpatory evidence dictates post-trial production of this infinitely narrower category of evidence." It does so "out of recognition of the same systemic interests in fairness and ultimate truth."

. . .

If the right Osborne seeks to vindicate is framed as purely substantive, the proper result is no less clear. "The touchstone of due process is protection of the individual against arbitrary action of government," . . . .

Throughout the course of state and federal litigation, the State has failed to provide any concrete reason for denying Osborne the DNA testing he seeks, and none is apparent. Because Osborne has offered to pay for the tests, cost is not a factor. And as the State now concedes, there is no reason to doubt that such testing would provide conclusive confirmation of Osborne's guilt or revelation of his innocence

While we have long recognized that States have an interest in securing the finality of their judgments, finality is not a stand-alone value that trumps a State's overriding interest in ensuring that justice is done in its courts and secured to its citizens. Indeed, when absolute proof of innocence is readily at hand, a State should not shrink from the possibility that error may have occurred. . . .

The arbitrariness of the State's conduct is highlighted by comparison to the private interests it denies. It seems to me obvious that if a wrongly convicted person were to produce proof of his actual innocence, no state interest would be sufficient to justify his continued punitive detention. If such proof can be readily obtained without imposing a significant burden on the State, a refusal to provide access to such evidence is wholly unjustified.

In sum, an individual's interest in his physical liberty is one of constitutional significance. That interest would be vindicated by providing postconviction access to DNA evidence, as would the State's interest in ensuring that it punishes the true perpetrator of a crime. In this case, the State has suggested no countervailing interest that justifies its refusal to allow Osborne to test the evidence in its possession and has not provided any other nonarbitrary explanation for its conduct. Consequently, I am left to conclude that the State's failure to provide Osborne access to the evidence constitutes arbitrary action that offends basic principles of due process. . . .

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JUSTICE SOUTER, dissenting.

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