SUPREME COURT OF THE UNITED STATES

No. 08–6

DISTRICT ATTORNEY'S OFFICE FOR THE THIRD JUDICIAL DISTRICT, ET AL., PETITIONERS *v.* WILLIAM G. OSBORNE

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

[June 18, 2009]

JUSTICE ALITO, with whom JUSTICE KENNEDY joins, and with whom JUSTICE THOMAS joins as to Part II, concurring.

Respondent was convicted for a brutal sexual assault. At trial, the defense declined to have DNA testing done on a semen sample found at the scene of the crime. Defense counsel explained that this decision was made based on fear that the testing would provide further evidence of respondent's guilt. After conviction, in an unsuccessful attempt to obtain parole, respondent confessed in detail to the crime. Now, respondent claims that he has a federal constitutional right to test the sample and that he can go directly to federal court to obtain this relief without giving the Alaska courts a full opportunity to consider his claim.

I agree with the Court's resolution of respondent's constitutional claim. In my view, that claim also fails for two independent reasons beyond those given by the majority. First, a state prisoner asserting a federal constitutional right to perform such testing must file a petition for a writ of habeas corpus, not an action under 42 U. S. C. §1983, as respondent did here, and thus must exhaust state remedies, see 28 U. S. C. §2254(b)(1)(A). Second, even though respondent did not exhaust his state remedies, his claim may be rejected on the merits, see §2254(b)(2), because 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.

I

As our prior opinions illustrate, it is sometimes difficult to draw the line between claims that are properly brought in habeas and those that may be brought under 42 U. S. C. §1983. See *Preiser* v. *Rodriguez*, 411 U. S. 475 (1973); *Heck* v. *Humphrey*, 512 U. S. 477 (1994); *Wilkinson* v. *Dotson*, 544 U. S. 74 (2005). But I think that this case falls on the habeas side of the line.

We have long recognized the principles of federalism and comity at stake when state prisoners attempt to use the federal courts to attack their final convictions. See, *e.g.*, *Darr* v. *Burford*, 339 U. S. 200, 204 (1950); *Braden* v. *30th Judicial Circuit Court of Ky.*, 410 U. S. 484, 490–491 (1973); *Preiser*, *supra*, at 491–492; *Rose* v. *Lundy*, 455 U. S. 509, 518–519 (1982); *Rhines* v. *Weber*, 544 U. S. 269, 273–274 (2005). We accordingly held that "'it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation.'" *Lundy*, *supra*, at 518 (quoting *Darr*, *supra*, at 204). Congress subsequently codified *Lundy*'s exhaustion requirement in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U. S. C. §2254(b)(1)(A).

We also have long recognized the need to impose sharp limits on state prisoners' efforts to bypass state courts with their discovery requests. See, *e.g.*, *Wainwright* v. *Sykes*, 433 U. S. 72, 87–90 (1977); *Keeney* v. *Tamayo-Reyes*, 504 U. S. 1, 8–10 (1992); *Williams* v. *Taylor*, 529 U. S. 420, 436 (2000). For example, we have held that "concerns of finality, comity, judicial economy, and channeling the resolution of claims into the most appropriate forum" require a state prisoner to show "cause-and-

prejudice" before asking a federal habeas court to hold an evidentiary hearing. *Keeney*, *supra*, at 8. That result reduces opportunities for "'sandbagging' on the part of defense lawyers," *Sykes*, *supra*, at 89, and it "reduces the 'inevitable friction' that results when a federal habeas court 'overturns either the factual or legal conclusions reached by the state-court system,'" *Keeney*, *supra*, at 9 (quoting *Sumner* v. *Mata*, 449 U. S. 539, 550 (1981); brackets omitted). Congress subsequently codified *Keeney*'s cause-and-prejudice rule in AEDPA, 28 U. S. C. §2254(e)(2).

The rules set forth in our cases and codified in AEDPA would mean very little if state prisoners could simply evade them through artful pleading. For example, I take it as common ground that a state prisoner's claim under *Brady* v. *Maryland*, 373 U. S. 83 (1963), must be brought in habeas because that claim, if proved, would invalidate the judgment of conviction or sentence (and thus the lawfulness of the inmate's confinement). See *Heck*, *supra*, at 481. But under respondent's view, I see no reason why a *Brady* claimant could not bypass the state courts and file a §1983 claim in federal court, contending that he has a due process right to search the State's files for exculpatory evidence. Allowing such a maneuver would violate the principles embodied in *Lundy*, *Keeney*, and AEDPA.

Although respondent has now recharacterized his claim in an effort to escape the requirement of proceeding in habeas, in his complaint he squarely alleged that the State "deprived [him] of access to exculpatory evidence in violation of *Brady*[, *supra*], and the Due Process Clause of the Fourteenth Amendment to the U. S. Constitution." App. 37. That allegedly "exculpatory" evidence—which *Brady* defines as "evidence favorable to [the] accused" and "material either to guilt or to punishment," 373 U. S., at 87—would, by definition, undermine respondent's "guilt" or "punishment" if his allegations are true. Such claims

should be brought in habeas, see *Heck*, *supra*, at 481, and respondent cannot avoid that result by attempting to bring his claim under §1983, see *Dotson*, *supra*, at 92 (KENNEDY, J., dissenting).[1]

It is no answer to say, as respondent does, that he simply wants to use §1983 as a discovery tool to lay the foundation for a future state postconviction application, a state clemency petition, or a request for relief by means of "prosecutorial consent." See Brief for Respondent 23. Such tactics implicate precisely the same federalism and comity concerns that motivated our decisions (and Congress') to impose exhaustion requirements and discovery limits in federal habeas proceedings. If a petitioner can evade the habeas statute's exhaustion requirements in this way, I see no reason why a state prisoner asserting an ordinary *Brady* claim—*i.e.*, a state prisoner who claims that the prosecution failed to turn over exculpatory evidence prior to trial—could not follow the same course.

What respondent seeks was accurately described in his complaint—the discovery of evidence that has a material bearing on his conviction. Such a claim falls within "the core" of habeas. *Preiser*, *supra*, at 489. Recognition of a constitutional right to postconviction scientific testing of evidence in the possession of the prosecution would represent an expansion of *Brady* and a broadening of the discovery rights now available to habeas petitioners. See 28

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[1]This case is quite different from *Dotson*. In that case, two state prisoners filed §1983 actions challenging the constitutionality of Ohio's parole procedures and seeking "a new parole hearing that may or may not result in release, prescription of the composition of the hearing panel, and specification of the procedures to be followed." 544 U. S., at 86 (SCALIA, J., concurring). Regardless of whether such remedies fall outside the authority of federal habeas judges, compare *id.*, at 86–87, with *id.*, at 88–92 (KENNEDY, J., dissenting), there is no question that the relief respondent seeks in this case—"exculpatory" evidence that tends to prove his innocence—lies "within the core of habeas corpus," *Preiser* v. *Rodriguez,* 411 U. S. 475, 487 (1973).

U. S. C. §2254 Rule 6. We have never previously held that a state prisoner may seek discovery by means of a §1983 action, and we should not take that step here. I would hold that respondent's claim (like all other *Brady* claims) should be brought in habeas.

II

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." *Atkins*, *supra*, at 326 (Rehnquist, C. J., dissenting).[2]

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[2] Forty-six States, plus the District of Columbia and the Federal Government, have recently enacted DNA testing statutes. See 18 U. S. C. §3600; Ariz. Rev. Stat. Ann. §13–4240 (West 2001); Ark. Code Ann. §16–112–202 (2006); Cal. Penal Code Ann. §1405 (West Supp. 2009); Colo. Rev. Stat. Ann. §18–1–413 (2008); Conn. Gen. Stat. §52–582 (2009); Del. Code Ann., Tit. 11, §4504 (2007); D. C. Code §§22–4133 to §§22–4135 (2008 Supp.); Fla. Stat. §925.11 (2007); Ga. Code Ann. §5–5–41 (Supp. 2008); Haw. Rev. Stat. §844D–123 (2008 Cum. Supp.); Idaho Code §19–4902 (Lexis 2004); Ill. Comp. Stat., ch., 725, §5/116–3 (West 2006); Ind. Code Ann. §35–38–7–5 (West 2004); Iowa Code §81.10 (2009); Kan. Stat. Ann. §21–2512 (2007); Ky. Rev. Stat. Ann. §422.285 (Lexis Supp. 2008); La. Code Crim. Proc. Ann., Art. 926.1 (West Supp. 2009); Me. Rev. Stat. Ann., Tit. 15, §2137 (Supp. 2008); Md. Crim. Proc. Code Ann. §8–201 (Lexis 2008); Mich. Comp. Laws Ann. §770.16 (West Supp. 2009); Minn. Stat. §590.01 (2008); Mo. Rev. Stat. §547.035 (2008 Cum. Supp.); Mont. Code Ann. §46–21–110 (2007); Neb. Rev. Stat. §29–4120 (2008); Nev. Rev. Stat. §176.0918 (2007); N. H. Rev. Stat. Ann. §651–D:2 (2007); N. J. Stat. Ann. §2A:84A–32a (West Supp. 2009); N. M. Stat. Ann. §31–1a–2 (Supp. 2008); N. Y. Crim. Proc. Law Ann. §440.30(1–a) (West 2005); N. C. Gen. Stat. Ann. §15A–269 (Lexis 2007); N. D. Cent. Code Ann. §29–32.1–15 (Lexis 2006); Ohio Rev. Code Ann. §2953.72 (Lexis Supp. 2009); Ore. Rev. Stat. §138.690 (2007); 42 Pa.

A

As the Court notes, DNA testing often produces highly reliable results. See *ante*, at 8. Indeed, short tandem repeat (STR) "DNA tests can, in certain circumstances, establish to a virtual certainty whether a given individual did or did not commit a particular crime." *Harvey* v. *Horan*, 285 F. 3d 298, 305 (CA4 2002) (Luttig, J., respecting denial of rehearing en banc). Because of that potential for "virtual certainty," 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

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Cons. Stat. §9543.1 (2006); R. I. Gen. Laws §10–9.1–11 (Supp. 2008); S. C. Code Ann. §17–28–30 (Supp. 2008); Tenn. Code Ann. §40–30–304 (2006); Tex. Code Crim. Proc. Ann., Arts. 64.01–64.05 (Vernon 2006 and Supp. 2008); Utah Code Ann. §78B–9–300 to 78B–9–304 (Lexis 2008 Supp.); Vt. Stat. Ann., Tit. 13, §5561 (Supp. 2008); Va. Code Ann. §19.2–327.1 (Lexis 2008); Wash. Rev. Code §10.73.170 (2008); W. Va. Code Ann. §15–2B–14 (Lexis Supp. 2008); Wis. Stat. §974.07 (2005–2006); Wyo. Stat. Ann. §7–12–303 (2008 Supp.). The pace of the legislative response has been so fast that two States have enacted statutes while this case was *sub judice:* The Governor of South Dakota signed a DNA access law on March 11, 2009, see H. R. 1166, and the Governor of Mississippi signed a DNA access law on March 16, 2009, see S. 2709. The only States that do not have DNA-testing statutes are Alabama, Alaska, Massachusetts, and Oklahoma; and at least three of those States have addressed the issue through judicial decisions. See *Fagan* v. *State*, 957 So. 2d 1159 (Ala. Crim. App. 2007); *Osborne* v. *State*, 110 P. 3d 986, 995 (Alaska App. 2005) *(Osborne I); Commonwealth* v. *Donald*, 66 Mass. App. 1110, 848 N. E. 2d 447 (2006). Because the Court relies on such evidence, JUSTICE STEVENS accuses it of "resembl[ing]" Justice Harlan's position in *Miranda* v. *Arizona,* 384 U. S. 436 (1966). See *post*, at 15, n. 10 (quoting 384 U. S., at 523–524 (dissenting opinion)). I can think of worse things than sharing Justice Harlan's judgment that "this Court's too rapid departure from existing constitutional standards" may "frustrat[e]" the States' "long-range and lasting" legislative efforts. *Id.,* at 524.

him). See *post*, at 10–12.

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. *Post*, at 12 (STEVENS, J., dissenting). As one scholar has observed:

> "[F]orensic DNA testing rarely occurs [under] idyllic conditions. Crime scene DNA samples do not come from a single source obtained in immaculate conditions; they are messy assortments of multiple unknown persons, often collected in the most difficult conditions. The samples can be of poor quality due to exposure to heat, light, moisture, or other degrading elements. They can be of minimal or insufficient quantity, especially as investigators push DNA testing to its limits and seek profiles from a few cells retrieved from cigarette butts, envelopes, or soda cans. And most importantly, forensic samples often constitute a mixture of multiple persons, such that it is not clear whose profile is whose, or even how many profiles are in the sample at all. All of these factors make DNA testing in the forensic context far more subjective than simply reporting test results . . . ." Murphy, The Art in the Science of DNA: A Layperson's Guide to the Subjectivity Inherent in Forensic DNA Typing, 58 Emory L. J. 489, 497 (2008) (footnotes omitted).

See also R. Michaelis, R. Flanders, & P. Wulff, A Litigator's Guide to DNA 341 (2008) (hereinafter Michaelis) (noting that even "STR analyses are plagued by issues of suboptimal samples, equipment malfunctions and human error, just as any other type of forensic DNA test"); *Harvey* v. *Horan*, 278 F. 3d 370, 383, n. 4 (CA4 2002) (King, J., concurring in part and concurring in judgment) (noting that the first STR DNA test performed under Virginia's

postconviction DNA access statute was inconclusive). Such concerns apply with particular force where, as here, the sample is minuscule, it may contain three or more persons' DNA, and it may have degraded significantly during the 24 or more hours it took police to recover it.

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. According to Professor John Butler—who is said to have written "the canonical text on forensic DNA typing," Murphy, *supra*, at 493, n. 16—"[t]he extraction process is probably where the DNA sample is more susceptible to contamination in the laboratory than at any other time in the forensic DNA analysis process," J. Butler, Forensic DNA Typing 42 (2d ed. 2005).

Indeed, modern DNA testing technology is so powerful that it actually increases the risks associated with mishandling evidence. STR tests, for example, are so sensitive that they can detect DNA transferred from person X to a towel (with which he wipes his face), from the towel to Y (who subsequently wipes his face), and from Y's face to a murder weapon later wielded by Z (who can use STR technology to blame X for the murder). See Michaelis 62–64; Thompson, Ford, Doom, Raymer, & Krane, Evaluating Forensic DNA Evidence: Essential Elements of a Competent Defense Review (Part 2), The Champion, May 2003, pp. 25–26. Any test that is sensitive enough to pick up such trace amounts of DNA will be able to detect even the slightest, unintentional mishandling of evidence. See Michaelis 63 (cautioning against mishandling evidence because "two research groups have already demonstrated the ability to obtain STR profiles from fingerprints on paper or evidence objects"). And that is to say nothing of the intentional DNA-evidence-tampering scandals that have surfaced in recent years. See, *e.g.*, Murphy, The New

Forensics: Criminal Justice, False Certainty, and the Second Generation of Scientific Evidence, 95 Calif. L. Rev. 721, 772–773 (2007) (collecting examples). It gives short shrift to such risks to suggest that anyone—including respondent, who has twice confessed to his crime, has never recanted, and passed up the opportunity for DNA testing at trial—should be given a never-before-recognized constitutional right to rummage through the State's genetic-evidence locker.

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. See *ante*, at 20. But the policy problems do not end there.

Even without our creation and imposition of a mandatory-DNA-access regime, state crime labs are already responsible for maintaining and controlling hundreds of thousands of new DNA samples every year. For example, in the year 2005, the State of North Carolina processed DNA samples in approximately 1,900 cases, while the State of Virginia processed twice as many. See Office of State Budget and Management, Cost Study of DNA Testing and Analysis As Directed by Session Law 2005–267, Section 15.8, pp. 5, 8 (Mar. 1, 2006) (hereinafter North Carolina Study), http://www.osbm.state.nc.us/files/pdf_files/3-1-2006FinalDNAReport.pdf (all Internet materials as visited June 16, 2009, and available in Clerk of Court's case file); see also *id.*, at 8 (noting that the State of Iowa processed DNA samples in 1,500 cases in that year). Each case often entails many separate DNA samples. See

Wisconsin Criminal Justice Study Commission, Position Paper: "Decreasing the Turnaround Time for DNA Testing," p. 2 (hereinafter Wisconsin Study), http://www.wcjsc.org/WCJSC_Report_on_DNA_Backlog.pdf ("An average case consists of 8 samples"). And these data—which are now four years out of date—dramatically underestimate the States' current DNA-related caseloads, which expand at an average annual rate of around 24%. See Wisconsin Dept. of Justice, Review of State Crime Lab Resources for DNA Analysis 6 (Feb. 12, 2007), http://www.doj.state.wi.us/news/files/dnaanalysisplan.pdf.

The resources required to process and analyze these hundreds of thousands of samples have created severe backlogs in state crime labs across the country. For example, the State of Wisconsin reports that it receives roughly 17,600 DNA samples per year, but its labs can process only 9,600. Wisconsin Study 2. Similarly, the State of North Carolina reports that "[i]t is not unusual for the [State] Crime Lab to have several thousand samples waiting to be outsourced due to the federal procedures for [the State's] grant. This is not unique to North Carolina but a national issue." North Carolina Study 9.

The procedures that the state labs use to handle these hundreds of thousands of DNA samples provide fertile ground for litigation. For example, in *Commonwealth* v. *Duarte*, 56 Mass. App. 714, 723, 780 N. E. 2d 99, 106 (2002), the defendant argued that "the use of a thermometer that may have been overdue for a standardization check rendered the DNA analysis unreliable and inadmissible" in his trial for raping a 13-year-old girl. The court rejected that argument and held "that the status of the thermometer went to the weight of the evidence, and not to its admissibility," *id.*, at 724, 780 N. E. 2d, at 106, and the court ultimately upheld Duarte's conviction after reviewing the testimony of the deputy director of the laboratory that the Commonwealth used for the DNA

tests, see *ibid.* But the case nevertheless illustrates "that no detail of laboratory operation, no matter how minute, is exempt as a potential point on which a defense attorney will question the DNA evidence." Michaelis 68; see also *id.*, at 68–69 (discussing the policy implications of *Duarte*).

My point in recounting the burdens that postconviction DNA testing imposes on the Federal Government and the States is not to denigrate the importance of such testing. Instead, my point is that requests for postconviction DNA testing are not cost free. The Federal Government and the States have a substantial interest in the implementation of rules that regulate such testing in a way that harnesses the unique power of DNA testing while also respecting the important governmental interests noted above. The Federal Government and the States have moved expeditiously to enact rules that attempt to perform this role. And as the Court holds, it would be most unwise for this Court, wielding the blunt instrument of due process, to interfere prematurely with these efforts.

B

I see no reason for such intervention in the present case. 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.

There is ample evidence in this case that respondent attempted to game the system. At trial, respondent's lawyer made an explicit, tactical decision to forgo restriction-fragment-length-polymorphism (RFLP) testing in favor of less-reliable DQ Alpha testing. Having forgone more accurate DNA testing once before, respondent's reasons for seeking it now are suspect. It is true that the STR testing respondent now seeks is even more advanced than the RFLP testing he declined—but his counsel did not decline RFLP testing because she thought it was not good enough; she declined because she thought it was too good. *Osborne I*, 110 P. 3d 986, 990 (Alaska App. 2005). "[A] defendant should not be allowed to take a gambler's risk and complain only if the cards [fall] the wrong way." *Osborne* v. *State*, 163 P. 3d 973, 984 (Alaska App. 2007) *(Osborne II)* (Mannheimer, J., concurring) (internal quotation marks omitted).

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. See *post*, at 11–12, n. 8. His attorney, however, had no memory of that objection, and the state court did not find that respondent's testimony was truthful.[3] 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

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[3]The state court noted that respondent's trial counsel "'disbelieved Osborne's statement that he did not commit the crime'" and therefore "'elected to avoid the possibility of obtaining DNA test results that might have confirmed Osborne's culpability.'" *Osborne I*, 110 P. 3d, at 990. Given the reasonableness of trial counsel's judgment, the state court held that respondent's protestations (whether or not he made them) were irrelevant. *Id.*, at 991–992.

he was convicted.

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. See *Vermont* v. *Brillon*, 556 U. S. ___, ___ (2009) (slip op., at 8).[4] Here, the state postconviction court rejected respondent's ineffective-assistance claim, *Osborne I*, *supra*, at 991–992; respondent does not challenge that holding; and we must therefore proceed on the assumption that his attorney's decision was reasonable and binding.[5]

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If a state prisoner wants to challenge the State's refusal to permit postconviction DNA testing, the prisoner should proceed under the habeas statute, which duly accounts for

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[4] In adopting rules regarding postconviction DNA testing, the Federal and State Governments may choose to alter the traditional authority of defense counsel with respect to DNA testing. For example, the federal statute provides that a prisoner's declination of DNA testing at trial bars a request for postconviction testing only if the prisoner knowingly and voluntarily waived that right in a proceeding occurring after the enactment of the federal statute. 18 U. S. C. §3600(a)(3)(A)(i). But Alaska has specifically decided to retain the general rule regarding the authority of defense counsel. See *Osborne I*, *supra*, at 991–992 (citing *Simeon* v. *State*, 90 P. 3d 181, 184 (Alaska App. 2004)).

[5] JUSTICE STEVENS is quite wrong to suggest that the application of this familiar principle in the present context somehow lessens the prosecution's burden to prove a defendant's guilt. *Post*, at 12, n. 8 (citing *Sandstrom* v. *Montana*, 442 U. S. 510 (1979); *In re Winship*, 397 U. S. 358 (1970)). Respondent is not challenging the sufficiency of the State's evidence at trial. Rather, he claims that he has a right to obtain evidence that may be useful to him in a variety of postconviction proceedings. The principle that the prosecution must prove its case beyond a reasonable doubt and the principle that a defendant has no obligation to prove his innocence are not implicated in any way by the issues in this case.

the interests of federalism, comity, and finality. And in considering the merits of such a claim, the State's weighty interests cannot be summarily dismissed as "'arbitrary, or conscience shocking.'" *Post*, at 10 (STEVENS, J., dissenting). With these observations, I join the opinion of the Court.