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 STEVENS, with whom JUSTICE GINSBURG and JUSTICE BREYER join, and with whom JUSTICE SOUTER joins as to Part I, 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.

On two equally problematic grounds, the Court today blesses the State's arbitrary denial of the evidence Osborne seeks. First, while acknowledging that Osborne may have a due process right to access the evidence under Alaska's postconviction procedures, the Court concludes that Osborne has not yet availed himself of all possible avenues for relief in state court.[1] As both a legal and

[1] Because the Court assumes *arguendo* that Osborne's claim was

factual matter, that conclusion is highly suspect. More troubling still, based on a fundamental mischaracterization of the right to liberty that Osborne seeks to vindicate, the Court refuses to acknowledge "in the circumstances of this case" any right to access the evidence that is grounded in the Due Process Clause itself. Because I am convinced that Osborne has a constitutional right of access to the evidence he wishes to test and that, on the facts of this case, he has made a sufficient showing of entitlement to that evidence, I would affirm the decision of the Court of Appeals.

I

The Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." §1. Our cases have frequently recognized that protected liberty interests may arise "from the Constitution itself, by reason of guarantees implicit in the word 'liberty,' . . . or it may arise from an expectation or interest created by state laws or policies." *Wilkinson* v. *Austin*, 545 U. S. 209, 221 (2005). Osborne contends that he possesses a right to access DNA evidence arising from both these sources.

Osborne first anchors his due process right in Alaska Stat. §12.72.010(4) (2008). Under that provision, a person who has been "convicted of, or sentenced for, a crime may institute a proceeding for post-conviction relief if the person claims . . . that there exists evidence of material

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properly brought under 42 U. S. C. §1983, rather than by an application for the writ of habeas corpus, I shall state only that I agree with the Ninth Circuit's endorsement of Judge Luttig's analysis of that issue. See 423 F. 3d 1050, 1053–1055 (2005) (citing *Harvey* v. *Horan*, 285 F. 3d 298, 308–309 (CA4 2002) (opinion respecting denial of rehearing en banc)); see also *McKithen* v. *Brown*, 481 F. 3d 89, 98 (CA2 2007) (agreeing that a claim seeking postconviction access to evidence for DNA testing may be properly brought as a §1983 suit); *Savory* v. *Lyons*, 469 F. 3d 667, 669 (CA7 2006) (same); *Bradley* v. *Pryor*, 305 F. 3d 1287, 1290–1291 (CA11 2002) (same).

facts, not previously presented and heard by the court, that requires vacation of the conviction or sentence in the interest of justice." *Ibid.*[2] Osborne asserts that exculpatory DNA test results obtained using state-of-the-art Short Tandem Repeat (STR) and Mitochondrial (mtDNA) analysis would qualify as newly discovered evidence entitling him to relief under the state statute. The problem is that the newly discovered evidence he wishes to present cannot be generated unless he is first able to access the State's evidence—something he cannot do without the State's consent or a court order.

Although States are under no obligation to provide mechanisms for postconviction relief, when they choose to do so, the procedures they employ must comport with the demands of the Due Process Clause, see *Evitts* v. *Lucey*, 469 U. S. 387, 393 (1985), by providing litigants with fair opportunity to assert their state-created rights. Osborne contends that by denying him an opportunity to access the physical evidence, the State has denied him meaningful access to state postconviction relief, thereby violating his right to due process.

Although the majority readily agrees that Osborne has a protected liberty interest in demonstrating his innocence with new evidence under Alaska Stat. §12.72.010(4), see *ante*, at 14, it rejects the Ninth Circuit's conclusion that Osborne is constitutionally entitled to access the State's evidence. The Court concludes that the adequacy of the

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[2] Ordinarily, claims under §12.72.010(4) must be brought within one year after the conviction becomes final. §12.72.020(a)(3)(A). However, the court may hear an otherwise untimely claim based on newly discovered evidence "if the applicant establishes due diligence in presenting the claim and sets out facts supported by evidence that is admissible and (A) was not known within . . . two years after entry of the judgment of conviction if the claim relates to a conviction; . . . (B) is not cumulative to the evidence presented at trial; (C) is not impeachment evidence; and (D) establishes by clear and convincing evidence that the applicant is innocent." §12.72.020(b)(2) (2002).

process afforded to Osborne must be assessed under the standard set forth in *Medina* v. *California*, 505 U. S. 437 (1992). Under that standard, Alaska's procedures for bringing a claim under §12.72.010(4) will not be found to violate due process unless they "'offen[d] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,' or 'transgres[s] any recognized principle of fundamental fairness in operation.'" *Ante*, at 16 (quoting *Medina*, 505 U. S., at 446, 448).[3] After conducting a cursory review of the relevant statutory text, the Court concludes that Alaska's procedures are constitutional on their face.

While I agree that the statute is not facially deficient, the state courts' application of §12.72.010(4) raises serious questions whether the State's procedures are fundamentally unfair in their operation. As an initial matter, it is not clear that Alaskan courts ordinarily permit litigants to utilize the state postconviction statute to obtain new evidence in the form of DNA tests. The majority assumes that such discovery is possible based on a single, unpublished, nonprecedential decision from the Alaska Court of Appeals, see *ante*, at 16 (citing *Patterson* v. *State*, No. A–8814 (Mar. 8, 2006)), but the State concedes that no litigant yet has obtained evidence for such testing under the statute.[4]

Of even greater concern is the manner in which the state courts applied §12.72.010(4) to the facts of this case.

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[3] Osborne contends that the Court should assess the validity of the State's procedures under the test set forth in *Mathews* v. *Eldridge*, 424 U. S. 319 (1976), rather than the more exacting test adopted by *Medina* v. *California*, 505 U. S. 437 (1992). In my view, we need not decide which standard governs because the state court's denial of access to the evidence Osborne seeks violates due process under either standard. See *Harvey*, 285 F. 3d, at 315 (Luttig, J).

[4] The State explained at oral argument that such testing was ordered in the *Patterson* case, but by the time access was granted, the relevant evidence had been destroyed. See Tr. of Oral Arg. 12.

In determining that Osborne was not entitled to relief under the postconviction statute, the Alaska Court of Appeals concluded that the DNA testing Osborne wished to obtain could not qualify as "newly discovered" because it was available at the time of trial. See *Osborne* v. *State*, 110 P. 3d 986, 992 (2005) *(Osborne I)*. In his arguments before the state trial court and his briefs to the Alaska Court of Appeals, however, Osborne had plainly requested STR DNA testing, a form of DNA testing not yet in use at the time of his trial. See App. 171, 175; see also 521 F. 3d 1118, 1123, n. 2 (CA9 2008). The state appellate court's conclusion that the requested testing had been available at the time of trial was therefore clearly erroneous.[5] Given these facts, the majority's assertion that Osborne "attempt[ed] to sidestep state process" by failing "to use the process provided to him by the State" is unwarranted. *Ante*, at 17.

The same holds true with respect to the majority's suggestion that the Alaska Constitution might provide additional protections to Osborne above and beyond those afforded under afforded under §12.72.010(4). In Osborne's state postconviction proceedings, the Alaska Court of Appeals held out the possibility that even when evidence does not meet the requirements of §12.72.010(4), the State Constitution might offer relief to a defendant who is able to make certain threshold showings. See *Osborne I*, 110 P. 3d, at 995–996. On remand from that decision, however, the state trial court denied Osborne relief on the ground that he failed to show that (1) his conviction rested primarily on eyewitness identification; (2) there was a demonstrable doubt concerning his identity as the perpe-

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[5] The majority avoids confronting this serious flaw in the state court's decision by treating its mistaken characterization of the nature of Osborne's request as if it were binding. See *ante*, at 17. But see *ante*, at 5, n. 2 (conceding "[i]t is not clear" whether the state court erred in reaching that conclusion).

trator; and (3) scientific testing would like be conclusive on this issue. *Osborne* v. *State*, 163 P. 3d 973, 979–981 (Alaska App. 2007) *(Osborne II)*. The first two reasons reduce to an evaluation of the strength of the prosecution's original case—a consideration that carries little weight when balanced against evidence as powerfully dispositive as an exculpatory DNA test. The final reason offered by the state court—that further testing would not be conclusive on the issue of Osborne's guilt or innocence—is surely a relevant factor in deciding whether to release evidence for DNA testing. Nevertheless, the state court's conclusion that such testing would not be conclusive in this case is indefensible, as evidenced by the State's recent concession on that point. See also 521 F. 3d 1118, 1136–1139 (CA9 2008) (detailing why the facts of this case do not permit an inference that any exonerating test result would be less than conclusive).

Osborne made full use of available state procedures in his efforts to secure access to evidence for DNA testing so that he might avail himself of the postconviction relief afforded by the State of Alaska. He was rebuffed at every turn. The manner in which the Alaska courts applied state law in this case leaves me in grave doubt about the adequacy of the procedural protections afforded to litigants under Alaska Stat. §12.72.010(4), and provides strong reason to doubt the majority's flippant assertion that if Osborne were "simply [to] see[k] the DNA through the State's discovery procedures, he might well get it." *Ante*, at 17. However, even if the Court were correct in its assumption that Osborne might be given the evidence he seeks were he to present his claim in state court a second time, there should be no need for him to do so.

II

Wholly apart from his state-created interest in obtaining postconviction relief under Alaska Stat. §12.72.010(4),

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, see *Harvey* v. *Horan*, 285 F. 3d 298, 315, 319 (CA4 2002) (Luttig, J., respecting denial of rehearing en banc),[6] the result is the same: On the record now before us, Osborne has established his entitlement to test the State's evidence.

The liberty protected by the Due Process Clause is not a creation of the Bill of Rights. Indeed, our Nation has long recognized that the liberty safeguarded by the Constitution has far deeper roots. See Declaration of Independence ¶2 (holding it self-evident that "all men are. . . endowed by their Creator with certain unalienable Rights," among which are "Life, Liberty, and the pursuit of Happiness"); see also *Meachum* v. *Fano*, 427 U. S. 215, 230 (1976) (STEVENS, J., dissenting). The "most elemental" of the liberties protected by the Due Process Clause is "the interest in being free from physical detention by one's own government." *Hamdi* v. *Rumsfeld*, 542 U. S. 507, 529 (2004) (plurality opinion); see *Foucha* v. *Louisiana*, 504 U. S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause").

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

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[6] See *Harvey*, 285 F. 3d, at 318 (Luttig, J.) ("[T]he claimed right of access to evidence partakes of both procedural and substantive due process. And with a claim such as this, the line of demarcation is faint").

drawn between the Constitution and the prisons of this country." *Wolff* v. *McDonnell*, 418 U. S. 539, 555–556 (1974); *Shaw* v. *Murphy*, 532 U. S. 223, 228–229 (2001) ("[I]ncarceration does not divest prisoners of all constitutional protections"). Our cases have recognized protected interests in a variety of postconviction contexts, extending substantive constitutional protections to state prisoners on the premise that the Due Process Clause of the Fourteenth Amendment requires States to respect certain fundamental liberties in the postconviction context. See, *e.g.*, *Thornburgh* v. *Abbott*, 490 U. S. 401, 407 (1989) (right to free speech); *Turner* v. *Safley*, 482 U. S. 78, 84 (1987) (right to marry); *Cruz* v. *Beto*, 405 U. S. 319, 322 (1972) *(per curiam)* (right to free exercise of religion); *Lee* v. *Washington*, 390 U. S. 333 (1968) *(per curiam)* (right to be free of racial discrimination); *Johnson* v. *Avery*, 393 U. S. 483 (1969) (right to petition government for redress of grievances). It is therefore far too late in the day to question the basic proposition that convicted persons such as Osborne retain a constitutionally protected measure of interest in liberty, including the fundamental liberty of freedom from physical restraint.

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, see Brief for State of California et al. as *Amici Curiae* 3–4, n. 1, and 2; *ante*, at 9. 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. See, *e.g.*, ABA Model Rules of Professional Conduct 3.8(g)–(h) (2008); see also *Imbler* v. *Pachtman*, 424 U. S. 409, 427, n. 25 (1976) ("[A]fter a conviction the prosecutor also is bound by the ethics of his office to inform the appropriate

authority of after-acquired or other information that casts doubt upon the correctness of the conviction"). The fact that nearly all the States have now recognized some post-conviction 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.

Insofar as it is process Osborne seeks, he is surely entitled to less than "the full panoply of rights," that would be due a criminal defendant prior to conviction, see *Morrissey* v. *Brewer*, 408 U. S. 471, 480 (1972). That does not mean, however, that our pretrial due process cases have no relevance in the postconviction context. In *Brady* v. *Maryland*, 373 U. S. 83, 87 (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." *Harvey*, 285 F. 3d, at 305 (Luttig, J.). As the Court recognizes today, the powerful new evidence that modern DNA testing can provide is "unlike anything known before." *Ante*, at 8. Discussing these important forensic developments in his oft-cited opinion in *Harvey*, 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 pretrial," 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." 285 F. 3d, at 317. It does so "out of recognition of the same systemic interests in fairness and ultimate truth." *Ibid.*

Observing that the DNA evidence in this case would be so probative of Osborne's guilt or innocence that it exceeds the materiality standard that governs the disclosure of evidence under *Brady*, the Ninth Circuit granted Osborne's request for access to the State's evidence. See 521 F. 3d, at 1134. In doing so, the Court of Appeals recognized that Osborne possesses a narrow right of postconviction access to biological evidence for DNA testing "where [such] evidence was used to secure his conviction, the DNA testing is to be conducted using methods that were unavailable at the time of trial and are far more precise than the methods that were then available, such methods are capable of conclusively determining whether Osborne is the source of the genetic material, the testing can be conducted without cost or prejudice to the State, and the evidence is material to available forms of post-conviction relief." *Id.*, at 1142. That conclusion does not merit reversal.

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," *Meachum*, 427 U. S., at 226 (internal quotation marks omitted); *Wolff*, 418 U. S., at 558; *County of Sacramento* v. *Lewis*, 523 U. S. 833, 845–846 (1998). When government action is so lacking in justification that it "can properly be characterized as arbitrary, or conscience shocking, in a constitu-

tional sense," *Collins* v. *Harker Heights*, 503 U. S. 115, 128 (1992), it violates the Due Process Clause. In my view, the State's refusal to provide Osborne with access to evidence for DNA testing qualifies as arbitrary.

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.[7] In the courts below, the State refused to provide an explanation for its refusal to permit testing of the evidence, see Brief for Respondent 33, and in this Court, its explanation has been, at best, unclear. Insofar as the State has articulated any reason at all, it appears to be a generalized interest in protecting the finality of the judgment of conviction from any possible future attacks. See Brief for Petitioners 18, 50.[8]

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[7] JUSTICE ALITO provides a detailed discussion of dangers such as laboratory contamination and evidence tampering that may reduce the reliability not only of DNA evidence, but of any type of physical forensic evidence. *Ante*, at 3–10 (concurring opinion). While no form of testing is error proof in every case, the degree to which DNA evidence has become a foundational tool of law enforcement and prosecution is indicative of the general reliability and probative power of such testing. The fact that errors may occur in the testing process is not a ground for refusing such testing altogether—were it so, such evidence should be banned at trial no less than in postconviction proceedings. More important still is the fact that the State now concedes there is no reason to doubt that if STR and mtDNA testing yielded exculpatory results *in this case*, Osborne's innocence would be established.

[8] In his concurring opinion, JUSTICE ALITO suggests other reasons that might motivate States to resist access to such evidence, including concerns over DNA testing backlogs and manipulation by defendants. See *ante*, at 8–10. Not only were these reasons not offered by the State of Alaska as grounds for its decision in this case, but they are not in themselves compelling. While state resource constraints might justify

While we have long recognized that States have an interest in securing the finality of their judgments, see, *e.g.*, *Duncan* v. *Walker*, 533 U. S. 167, 179 (2001); *Teague* v. *Lane*, 489 U. S. 288, 309 (1989) (plurality opinion); *McCleskey* v. *Zant*, 499 U. S. 467, 491–492 (1991), 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. Rather, our system of justice is strengthened by "recogniz[ing] the need for, and imperative of, a safety valve in those rare instances where objective proof that the convicted actually did not commit the offense later becomes available through the progress of science." *Harvey*, 285 F. 3d, at 306 (Luttig, J.). DNA evidence has led to an extraordinary series of exonerations, not only in cases where the trial evidence was weak, but also in cases where the convicted

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delays in the testing of postconviction DNA evidence, they would not justify an outright ban on access to such evidence. And JUSTICE ALITO's concern that guilty defendants will "play games with the criminal justice system" with regard to the timing of their requests for DNA evidence is not only speculative, but gravely concerning. *Ante*, at 10. It bears remembering that criminal defendants are under no obligation to prove their innocence at trial; rather, the State bears the burden of proving their guilt. See *Sandstrom* v. *Montana*, 442 U. S. 510 (1979); *In re Winship*, 397 U. S. 358 (1970). Having no obligation to conduct pretrial DNA testing, a defendant should not be bound by a decision to forgo such testing at trial, particularly when, as in this case, the choice was made by counsel over the defendant's strong objection. See *Osborne I*, 110 P. 3d, at 990-991. (JUSTICE ALITO suggests there is reason to doubt whether Osborne asked his counsel to perform DNA testing prior to trial, *ante*, at 12. That fact was not disputed in the state courts, however. Although Osborne's trial counsel averred that she "did not have a present memory of Osborne's desire to have [a more specific discriminatory] test of his DNA done," she also averred that she was "willing to accept that he does" and that she "would have disagreed with him." *Id.*, at 990.)

parties confessed their guilt and where the trial evidence against them appeared overwhelming.[9] The examples provided by *amici* of the power of DNA testing serve to convince me that the fact of conviction is not sufficient to justify a State's refusal to perform a test that will conclusively establish innocence or guilt.

This conclusion draws strength from the powerful state interests that offset the State's purported interest in finality *per se*. When a person is convicted for a crime he did not commit, the true culprit escapes punishment. DNA testing may lead to his identification. See Brief for Current and Former Prosecutors as *Amici Curiae* 16 (noting that in more than one-third of all exonerations DNA testing identified the actual offender). Crime victims, the law enforcement profession, and society at large share a strong interest in identifying and apprehending the actual perpetrators of vicious crimes, such as the rape and attempted murder that gave rise to this case.

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

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[9] See generally Brief for Current and Former Prosecutors as *Amici Curiae*; Brief for Jeanette Popp et al. as *Amici Curiae*; see also Brief for Individuals Exonerated by Postconviction DNA Testing as *Amici Curiae* 1–20. See also Garrett, Judging Innocence, 108 Colum. L. Rev. 55, 109 (2008) (documenting that in 50% of cases in which DNA evidence exonerated a convicted person, reviewing courts had commented on the exoneree's likely guilt and in 10% of the cases had described the evidence supporting conviction as "overwhelming").

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. On that basis, I would affirm the judgment of the Ninth Circuit.

III

The majority denies that Osborne possesses a cognizable substantive due process right "under the circumstances of this case," and offers two meager reasons for its decision. First, citing a general reluctance to "'expand the concept of substantive due process,'" *ante*, at 19 (quoting *Collins*, 503 U. S., at 125), the Court observes that there is no long history of postconviction access to DNA evidence. "'The mere novelty of such a claim,'" the Court asserts, "'is reason enough to doubt that "substantive due process" sustains it,'" *ante*, at 19 (quoting *Reno* v. *Flores*, 507 U. S. 292, 303 (1993)). The flaw is in the framing. Of course courts have not historically granted convicted persons access to physical evidence for STR and mtDNA testing. But, as discussed above, courts have recognized a residual substantive interest in both physical liberty and in freedom from arbitrary government action. It is Osborne's interest in those well-established liberties that justifies the Court of Appeals' decision to grant him access to the State's evidence for purposes of previously unavailable DNA testing.

The majority also asserts that this Court's recognition of a limited federal right of access to DNA evidence would be ill advised because it would "short circuit what looks to be

a prompt and considered legislative response" by the States and Federal Government to the issue of access to DNA evidence. Such a decision, the majority warns, would embroil the Court in myriad policy questions best left to other branches of government. *Ante*, at 19–20. The majority's arguments in this respect bear close resemblance to the manner in which the Court once approached the now-venerable right to counsel for indigent defendants. Before our decision in *Powell* v. *Alabama*, 287 U. S. 45 (1932), state law alone governed the manner in which counsel was appointed for indigent defendants. "Efforts to impose a minimum federal standard for the right to counsel in state courts routinely met the same refrain: 'in the face of these widely varying state procedures,' this Court refused to impose the dictates of 'due process' onto the states and 'hold invalid all procedure not reaching that standard." Brief for Current and Former Prosecutors as *Amici Curiae* 28, n. 8 (quoting *Bute* v. *Illinois*, 333 U. S. 640, 668 (1948)). When at last this Court recognized the Sixth Amendment right to counsel for all indigent criminal defendants in *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), our decision did not impede the ability of States to tailor their appointment processes to local needs, nor did it unnecessarily interfere with their sovereignty. It did, however, ensure that criminal defendants were provided with the counsel to which they were constitutionally entitled.[10] In the same way, a decision to recognize a limited

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[10] The majority's position also resembles that taken by Justice Harlan in his dissent in *Miranda* v. *Arizona*, 384 U. S. 436, 523 (1966), in which he faulted the Court for its "ironic untimeliness." He noted that the Court's decision came at time when scholars, politicians, and law enforcement officials were beginning to engage in a "massive reexamination of criminal law enforcement procedures on a scale never before witnessed," and predicted that the practical effect of the Court's decision would be to "handicap seriously" those sound efforts. *Id.,* at 523–524. Yet time has vindicated the decision in *Miranda*. The Court's

right of postconviction access to DNA testing would not prevent the States from creating procedures by which litigants request and obtain such access; it would merely ensure that States do so in a manner that is nonarbitrary.

While it is true that recent advances in DNA technology have led to a nationwide reexamination of state and federal postconviction procedures authorizing the use of DNA testing, it is highly unlikely that affirming the judgment of the Court of Appeals would significantly affect the use of DNA testing in any of the States that have already developed statutes and procedures for dealing with DNA evidence or would require the few States that have not yet done so to postpone the enactment of appropriate legislation.[11] Indeed, a holding by this Court that the policy

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refusal to grant Osborne access to critical DNA evidence rests on a practical judgment remarkably similar to Justice Harlan's, and I find the majority's judgment today as profoundly incorrect as the *Miranda* minority's was yesterday.

[11] The United States and several States have voiced concern that the recognition of a limited federal right of access to DNA evidence might call into question reasonable limits placed on such access by federal and state statutes. See Brief for United States as *Amicus Curiae* 17–26; Brief for State of California et al. as *Amici Curiae* 1–16. For example, federal law and several state statutes impose the requirement that an applicant seeking postconviction DNA testing execute an affidavit attesting to his innocence before any request will be performed. See, *e.g.*, 18 U. S. C. §3600(a)(1); Fla. Stat. §925.11(2)(a)(3) (2009 Supp.). Affirming the judgment of the Ninth Circuit would not cast doubt on the constitutionality of such a requirement, however, since Osborne was never asked to execute such an affidavit as a precondition to obtaining access to the State's evidence. Similarly, affirmance would not call into question the legitimacy of other reasonable conditions States may place on access to DNA testing, such as Alaska's requirement that test results be capable of yielding a clear answer with respect to guilt or innocence. "[D]ue process is flexible," *Morrissey* v. *Brewer*, 408 U. S. 471, 481 (1972), and the manner in which it is provided may reasonably vary from State to State and case to case. So long as the limitations placed on a litigant's access to such evidence remain procedurally fair and nonarbitrary, they will comport with the demands of

judgments underlying that legislation rest on a sound constitutional foundation could only be constructive.

IV

Osborne has demonstrated a constitutionally protected right to due process which the State of Alaska thus far has not vindicated and which this Court is both empowered and obliged to safeguard. On the record before us, there is no reason to deny access to the evidence and there are many reasons to provide it, not least of which is a fundamental concern in ensuring that justice has been done in this case. I would affirm the judgment of the Court of Appeals, and respectfully dissent from the Court's refusal to do so.

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due process.