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District Attorney's Office for the Third Judicial District v. Osborne: Leaving Prisoners' Access to DNA Evidence in Limbo

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Note

DISTRICT ATTORNEY'S OFFICE FOR THE THIRD JUDICIAL DISTRICT v. OSBORNE: LEAVING PRISONERS' ACCESS TO DNA EVIDENCE IN LIMBO

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In *District Attorney's Office for the Third Judicial District v. Osborne*,[1] the Supreme Court of the United States considered whether a state prisoner's claims for access to the State's evidence for DNA testing are cognizable under 42 U.S.C. § 1983,[2] and whether the prisoner has a due process right to obtain access to such evidence for testing purposes.[3] The Court assumed without deciding that the claims could be pursued under Section 1983, and held that the State's post-conviction procedures did not violate the prisoner's due process rights.[4] In so holding, the Court concluded that Alaska's post-conviction review procedures were adequate on their face and that because the prisoner had failed to exhaust the procedures, the Court could not assess their fairness in practice.[5] In confining its reasoning to the circumstances of the case, the Court left the door open to future claims of a similar nature, and the boundaries of the right to access evidence post-conviction remain undefined.[6] The Court should have clarified the right by deciding the important Section 1983 question and conducting a meaningful procedural due process assessment of Alaska's procedures.[7] By recognizing Section 1983 as an avenue to bring such claims and making clear the process due, the Court could have faithfully

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1. 129 S. Ct. 2308 (2009).
2. 42 U.S.C. § 1983 (2006).
3. *Osborne*, 129 S. Ct. at 2316.
4. *Id.* at 2319, 2321. The Court went on to reject a free-standing constitutional right to access DNA evidence under the Due Process Clause. *Id.* at 2322.
5. *Id.* at 2320–21.
6. *See infra* Part IV.A.
7. *See infra* Part IV.A–B.

built upon precedent, avoided many of its expressed policy concerns, and provided both notice to prisoners and guidance to lower courts as the rapidly growing area of DNA technology continues to develop.[8]

I. THE CASE

In March 1993, a female prostitute ("K.G.") was attacked by two men in an isolated area of Anchorage, Alaska.[9] The men had invited her into the driver's car when she agreed to perform fellatio on them in exchange for $100.[10] They then drove her to a secluded area and forced her to perform fellatio on the driver while the passenger penetrated her vaginally.[11] Afterward, the men instructed K.G. to leave the car, and upon her refusal the driver hit K.G. in the head with a gun, and the passenger proceeded to choke her.[12] K.G. tried to flee from the two men, but they beat her with an axe handle.[13] Lying in the snow, she pretended to be dead, but one of her attackers fired a bullet that grazed her head.[14] The men then covered K.G. with snow and drove away.[15] K.G. made her way to the main road and flagged down a car, telling the people inside what had happened and asking for a ride home.[16] Law enforcement learned about the attack through a neighbor of one of K.G.'s rescuers and contacted K.G.[17] Although reluctant at first, K.G. eventually agreed to describe the events and submit to a physical examination.[18] Among the items the police found at the crime scene were a used blue condom and two pairs of K.G.'s pants stained with blood.[19]

The following week, military police apprehended Dexter Jackson for a traffic violation and found a pistol and pocketknife in his car.[20] The police arrested him upon discovering that Jackson and his car resembled the man and vehicle described in connection with K.G.'s

8. *See infra* Part IV.C.

9. Osborne v. Dist. Attorney's Office for the Third Judicial Dist., 521 F.3d 1118, 1122 (9th Cir. 2008).

10. Osborne v. State, 163 P.3d 973, 975 (Alaska Ct. App. 2007).

11. *Osborne*, 521 F.3d at 1122.

12. *Id.*

13. *Id.*

14. *Id.* She believed, based on the pants and footwear she witnessed, that it was the passenger of the car who shot at her. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 1123.

assault.[21] Jackson then told the Anchorage Police that William Osborne had been his accomplice on the night of the attack.[22] K.G. identified Jackson and Osborne from a series of photographs.[23] Ballistics connected the shell casing discovered at the crime scene to Jackson's pistol.[24] When sperm from the used condom were tested using DQ Alpha DNA technology, the results excluded Jackson and showed that the sperm were of the same DQ Alpha type as Osborne.[25]

A. State Court Proceedings

Osborne was charged with kidnapping, assault, sexual assault, and attempted murder.[26] He was tried before a jury and convicted of kidnapping, first-degree assault, and two counts of first-degree sexual assault.[27] The trial judge sentenced him to twenty-six years in prison with five years suspended.[28] On appeal, the Alaska Court of Appeals affirmed Osborne's conviction, rejecting his claim of insufficient evidence and other challenges.[29] Osborne then sought post-conviction relief in the Alaska Superior Court, asserting that his trial counsel was ineffective for failing to pursue Restriction Fragment Length Polymorphism ("RFLP") testing, a potentially more effective type of DNA testing available at the time, and that Osborne had a due process right to have evidence retested using methods developed after trial.[30] When the Superior Court denied his application, he appealed that decision to the Alaska Court of Appeals.[31] With those actions pending, Os-

21. *Id.*

22. *Id.*

23. *Id.* K.G. also identified Jackson's car and the pocketknife found inside it. *Id.*

24. *Id.*

25. *Id.* DQ Alpha testing reveals the alleles that occupy an individual genetic locus on a gene strand. *Id.* A more discriminating DNA testing method known as "RFLP" was available pre-trial, but was not conducted based on the State crime lab's decision that the sample was too degraded and defense counsel's judgment that additional testing would further incriminate the defendant. *Id.* at 1123–24. Pubic hairs recovered from the crime scene were not amenable to DQ Alpha testing, but under microscopic analysis were found to be consistent with having come from Osborne. *Id.* at 1124.

26. Jackson v. State, Nos. A-5276, A-5329, 1996 WL 33686444, at *3 (Alaska Ct. App. Feb. 7, 1996). Jackson was charged with kidnapping, assault, sexual assault, attempted murder, and solicitation to commit murder. *Id.*

27. *Osborne*, 521 F.3d at 1124. Osborne presented alibi and mistaken identity defenses, pointing out K.G.'s poor vision and details in her identification that did not fit his description. *Id.* The jury rejected those defenses. *Id.*

28. *Jackson*, 1996 WL 33686444, at *3. Jackson was convicted of kidnapping, first-degree sexual assault, first-degree assault, and third-degree assault, and received a composite sentence of twenty-seven years with five years suspended. *Id.*

29. *Id.* at *7–8.

30. *Osborne*, 521 F.3d at 1124.

31. *Id.*

borne applied for parole, confessing in his written application and at his hearing before the Parole Board to participating in the attack on K.G.[32] The Board denied his application for parole.[33]

The Alaska Court of Appeals affirmed in part and remanded in part the Superior Court's dismissal of Osborne's petition for post-conviction relief.[34] The court first rejected Osborne's ineffective assistance claim, concluding that his counsel's decision not to pursue more discriminating DNA testing fell within the acceptable standards of attorney competence.[35] In examining Osborne's due process claim, the court applied Alaska's post-conviction relief statute, which provides that defendants may be able to use clear and convincing evidence to prove their innocence if (1) the evidence is newly discovered and (2) the defendant exercises due diligence in presenting his or her claim.[36] The court determined that Osborne did not meet the statutory restrictions because the physical evidence in his case was not newly discovered, the DNA testing that Osborne sought existed at the time of trial, and Osborne's counsel consciously chose not to seek more precise testing.[37]

The court, however, chose instead to adopt a three-part test, applied by several other states, in examining Osborne's request for post-conviction DNA testing.[38] Under this test, a defendant must demonstrate "(1) that the conviction rested primarily on eye-witness 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."[39] The court thus remanded the case to the Superior Court to determine whether Osborne could satisfy this test and whether his claim was procedurally disqualified under state law.[40] The Superior Court held that Osborne failed to satisfy the three-part test and denied his petition for DNA testing.[41] The Alaska Court of Appeals affirmed, and the Alaska Supreme Court denied Osborne's subsequent petition for review.[42]

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32. *Id.* at 1125.

33. *Id.*

34. Osborne v. State, 110 P.3d 986, 987–88, 995 (Alaska Ct. App. 2005).

35. *Id.* at 991–92.

36. *Id.* at 995; ALASKA STAT. § 12.72.020(b)(2) (2008).

37. *Osborne*, 110 P.3d at 992.

38. *Id.* at 995.

39. *Id.*

40. *Id.*

41. Osborne v. Dist. Attorney's Office for the Third Judicial Dist., 521 F.3d 1118, 1125 (9th Cir. 2008).

42. *Id.*

B. Federal Court Proceedings

After the Alaska Superior Court denied his application for post-conviction relief, Osborne filed suit in federal district court under Section 1983, alleging that the Anchorage District Attorney's Office, the District Attorney, the Anchorage Police Department, and the Chief of Police violated his constitutional rights by denying him post-conviction access to evidence for DNA testing.[43] His claims included alleged violations of (1) "his due process right to access exculpatory evidence," (2) "his due process right to demonstrate actual innocence," and (3) "his due process and equal protection rights to meaningful access to the courts."[44] The district court dismissed the suit.[45] On appeal, the Ninth Circuit reversed the district court.[46] While the district court held that dismissal was required under *Heck v. Humphrey*[47]—a case establishing that a claim seeking to attack a conviction must proceed through a writ of habeas corpus[48]—the Ninth Circuit found that *Heck* did not preclude a suit seeking to compel release of biological evidence for DNA testing under Section 1983 because it was not certain that the suit would invalidate the conviction even if the suit proved successful.[49] The Ninth Circuit then remanded to the district court to determine whether Osborne had been deprived of a federally protected right.[50] The district court found in Osborne's favor, holding that under the circumstances there existed a "limited constitutional right to the testing sought."[51] The Ninth Circuit reviewed the district court's rulings de novo and affirmed.[52] The United States Supreme Court granted certiorari to decide whether Osborne's claims could be pursued under Section 1983 and whether he had a right under the Due Process Clause of the Fourteenth Amend-

43. *Id.* at 1126.

44. *Id.* Osborne also alleged an Eighth Amendment right to be free from cruel and unusual punishment, Sixth Amendment rights to confrontation and compulsory process, and a right to a fair clemency hearing. *Id.*

45. Osborne v. Dist. Attorney's Office for the Third Judicial Dist., 423 F.3d 1050, 1052 (9th Cir. 2005).

46. *Id.* at 1056.

47. 512 U.S. 477 (1994).

48. *Osborne*, 423 F.3d at 1051 (citing *Heck*, 512 U.S. at 489).

49. *Id.* at 1055–56.

50. *Id.* at 1056.

51. Osborne v. Dist. Attorney's Office for the Third Judicial Dist., 445 F. Supp. 2d 1079, 1081 (D. Alaska 2006).

52. Osborne v. Dist. Attorney's Office for the Third Judicial Dist., 521 F.3d 1118, 1128, 1142 (9th Cir. 2008).

ment to post-conviction access to the State's evidence for purposes of DNA testing.[53]

II. LEGAL BACKGROUND

The Supreme Court of the United States reviews state post-conviction procedures deferentially, recognizing that the procedures are discretionary and serve as the traditional avenue for a challenge to a state court conviction.[54] The Court has held that a prisoner has a liberty interest in effective access to state procedures, where they are provided, and that a prisoner may challenge those procedures in federal court.[55] While the Court thus recognizes a prisoner's right to challenge state post-conviction procedures in federal court, it places limits upon this right in order to protect interests in comity, federalism, and finality—claims that implicate these concerns must be brought under a writ of habeas corpus, while those that do not can be brought under Section 1983.[56] In determining what process is due in claims properly brought, the Court's standard of review has varied depending on the nature of the claim and whether it is based on a liberty interest deriving from flexible state procedures, or a liberty interest derived from more formal state rules of criminal procedure.[57]

A. The Court Recognizes a Prisoner's Liberty Interest in Access to State Post-Conviction Procedures, Where They Are Provided

The Court has established that a state prisoner has a liberty interest protected by the Fourteenth Amendment to the United States Constitution, which may arise from the word "liberty" in that text, or from the expectation or interest created by state laws or policies.[58] Precedent has long maintained that a prisoner loses the presumption

53. Dist. Attorney's Office for the Third Judicial Dist. v. Osborne, 129 S. Ct. 2308, 2316 (2009).

54. *See infra* Part II.A–B.

55. *See infra* Part II.A.

56. *See infra* Part II.B.

57. *See infra* Part II.C.

58. *See, e.g.*, Wilkinson v. Austin, 545 U.S. 209, 221 (2005) ("A liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word 'liberty' . . . ."); Evitts v. Lucey, 469 U.S. 387, 393 (1985) (noting that if a State has created appellate courts as "'an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant,'" the procedures used in deciding appeals must not violate the Due Process Clause (quoting Griffin v. Illinois, 351 U.S. 12, 18 (1956))); Wolff v. McDonnell, 418 U.S. 539, 557 (1974) (holding that the State, in providing a right to good-time credit, created a liberty interest).

of innocence after conviction at a fair trial,[59] and his liberty interest, though retained under the Fourteenth Amendment,[60] is limited thereafter.[61] That limited interest can be vindicated through a State's post-conviction procedures.[62] While a State has discretion as to whether to provide such procedures, where it does, a prisoner has a liberty interest in access.[63] In those instances, a State's post-conviction procedures must comport with due process.[64]

Pre-conviction, liberty interests often take the form of a due process right to procedures sufficient to vindicate constitutional rights.[65] Post-conviction, a liberty interest may be asserted either by petitioning for a writ of habeas corpus or by filing a civil claim under Section 1983.[66] Habeas corpus is the only remedy by which petitioners may challenge the fact or duration of confinement or seek immediate or quicker release.[67] Section 1983 is a means of civil redress for the violation of federal rights by way of damages or injunctive relief.[68]

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59. *See* Herrera v. Collins, 506 U.S. 390, 399 (1993) ("Once a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears."); Conn. Bd. of Pardons v. Dumschat, 452 U.S. 458, 464 (1981) ("'[G]iven a valid conviction, the criminal defendant has been constitutionally deprived of his liberty.'" (quoting Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 7 (1979))).

60. *See Wolff*, 418 U.S. at 557 ("[T]he State having created the right to good time [credit] and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated.").

61. Pennsylvania v. Finley, 481 U.S. 551, 559 (1987) (holding that when a State chooses to offer help to those seeking relief from convictions, due process does not dictate the precise form such assistance must assume).

62. *See, e.g.*, *Austin*, 545 U.S. at 209, 230 (upholding a state policy for placing inmates in supermax prisons); *Wolff*, 418 U.S. at 554–55 (finding that actual restoration of good-time credits could not be ordered, but that a declaratory judgment with respect to procedures for imposing a loss of good-time credits would not be barred).

63. *See infra* Part II.C.

64. Evitts v. Lucey, 469 U.S. 387, 393 (1985). There is, however, no liberty interest in mere process. Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 279–80 n.2 (1998). Rather, the state process serves the prisoner's underlying substantive right. Olim v. Wakinekona, 461 U.S. 238, 250 (1983); Harvey v. Horan, 285 F.3d 298, 315 n.5 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing en banc) (citing *Olim*, 461 U.S. at 249–50).

65. *See, e.g.*, Brady v. Maryland, 373 U.S. 83, 87 (1963) (finding that prosecutors have an obligation to seek justice for their defendants, including a duty to disclose material, favorable evidence for use at the defendant's trial).

66. *See infra* Part II.B.

67. Heck v. Humphrey, 512 U.S. 477, 481 (1994) (citing Preiser v. Rodriguez, 411 U.S. 475, 488–90 (1973)).

68. 42 U.S.C. § 1983 (2006); McKithen v. Brown, 481 F.3d 89, 99, 101 (2d Cir. 2007).

Though the Court has recognized a due process right to vindicate a liberty interest created by a State's post-conviction procedures brought via habeas corpus, the Court has imposed limits on such a right.[69] In *Darr v. Burford*,[70] when a state prisoner sought a writ of habeas corpus in federal court for release from a bank robbery conviction, the Court articulated the narrow path by which a habeas petitioner can challenge state proceedings in federal court.[71] The Court emphasized that a petitioner must exhaust state remedies before pursuing federal habeas relief, unless the circumstances render the state corrective process ineffective to protect the prisoner's rights.[72] In *Morrissey v. Brewer*,[73] when state prisoners challenged the revocation of their parole under the writ, the Court concluded that whether any procedural protections are due depends not on whether a government benefit is defined as a "right" or "privilege,"[74] but whether the individual will be "condemned to suffer grievous loss."[75] It stated that the question is not only the weight of the individual's interest, but whether the nature of the interest falls within the "liberty or property" language of the Fourteenth Amendment.[76] In *Evitts v. Lucey*,[77] a prisoner claimed a right to effective counsel on an appeal that was provided by the State as a matter of right.[78] The purpose of the appeal

69. *See, e.g.*, Darr v. Burford, 339 U.S. 200, 204–07, 210 (1950) (explaining the rule that a habeas petitioner must generally first exhaust state remedies).

70. 339 U.S. 200.

71. *Id.* at 201–04. The Court stated the requirement that a petition for review of the state denial of habeas corpus be made first in the Supreme Court, explaining:

> This Court has evolved a procedure which assures an examination into the substance of a prisoner's protest against unconstitutional detention without allowing destructive abuse of the precious guaranty of the Great Writ. Congress has specifically approved it. Though a refusal of certiorari have no effect upon a later application for federal habeas corpus, a petition for certiorari here ordinarily should be required.

Id. at 216.

72. *Id.* at 204–05, 210. In *Darr*, the Court explained the policy reasons for this requirement, observing that the State should have the opportunity to pass on the matter. *Id.* at 204. According to the Court, "[t]he petitioner has the burden . . . of showing that other available remedies have been exhausted or that circumstances of peculiar urgency exist." *Id.* at 218–19.

73. 408 U.S. 471 (1972).

74. *Id.* at 474, 481 (quoting Graham v. Richardson, 403 U.S. 365, 374 (1971)).

75. *Id.* at 481 (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)).

76. *Id.* (internal quotation marks omitted); *see* U.S. CONST. amend. XIV, § 1 (providing that "nor shall any State deprive any person of life, liberty, or property, without due process of law").

77. 469 U.S. 387 (1985).

78. *Id.* at 390.

was to determine whether the prisoner had been lawfully convicted.[79] The Court held that the defendant was entitled to effective assistance of counsel as a matter of right, finding that "when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution."[80] In *Herrera v. Collins*,[81] the Court denied a habeas petitioner's claims that he should be able to present new evidence despite exceeding Texas's thirty-day time limit for filing new trial motions.[82] The Court stated that habeas review is traditionally limited to claims of underlying constitutional violations, as habeas courts do not exist to serve as finders of fact.[83]

A liberty interest in state post-conviction procedures can also be brought under Section 1983. In *Wolff v. McDonnell*,[84] the Court found that the Section 1983 petitioners were entitled to a declaratory judgment with regard to the restoration of their good-time credits, holding that where the State had created a right to such credits, the prisoner had a liberty interest in such rights not being arbitrarily abrogated.[85] In *Wilkinson v. Austin*,[86] Section 1983 petitioners sued over a state policy governing placement in the State's "supermax prison."[87] The Court recognized the prisoners' liberty interests in avoiding assignment to the prison, but found that the state procedure was adequate because the prisoners received notice, an opportunity for rebuttal, and review.[88]

B. In Challenging State Post-Conviction Procedures, a Prisoner Who Challenges the Fact of Her Conviction Must Proceed by a Writ of Habeas Corpus, While a Prisoner Challenging the Conditions of Her Confinement May Proceed Under Section 1983

While the Court recognizes a prisoner's right to challenge state post-conviction procedures in federal court, it places limits upon this

79. *Id.* at 390–92.

80. *Id.* at 401.

81. 506 U.S. 390 (1993).

82. *Id.* at 404–07.

83. *Id.* at 400, 416–17 ("[F]ederal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact.").

84. 418 U.S. 539 (1974).

85. *Id.* at 555, 557.

86. 545 U.S. 209 (2005).

87. *Id.* at 213, 218. Supermax institutions are "maximum-security prisons with highly restrictive conditions, designed to segregate the most dangerous prisoners from the general prison population." *Id.* at 213.

88. *Id.* at 225–28.

right in order to protect the interest in comity.[89] The Court has held that a state prisoner who challenges the fact of her conviction must proceed by a writ of habeas corpus, while a state prisoner challenging the conditions of her confinement may proceed under Section 1983.[90] Because proceeding under habeas requires a prisoner to first exhaust state remedies, the Court's requirement that a prisoner who wishes to invalidate her conviction proceed under habeas ensures that a federal court will not invalidate a state court conviction until the state court has had an opportunity to pass on the matter.[91] Since challenges to the conditions of a prisoner's confinement do not necessarily implicate the overturning of a state court conviction, the Court has stated that such claims may be brought under the less stringent avenue of Section 1983 without exhausting state procedures.[92]

While the Supreme Court has clearly held that Section 1983 is an improper vehicle for claims seeking to invalidate a conviction,[93] the Court has not announced whether a claim to access DNA post-conviction falls within that class of claims. Several federal circuit courts of appeals have split on the issue, with the most recent decisions holding that such a claim would be cognizable under Section 1983.[94]

1. Section 1983 as an Improper Vehicle for Claims to Invalidate a Conviction Under Preiser *and* Heck

In order to file a lawsuit under Section 1983, a petitioner must allege two things: (1) that the defendant deprived her of a federal constitutional right, and (2) that the defendant acted under color of state law in so doing.[95] In *Preiser v. Rodriguez*,[96] where state prisoners

89. *See, e.g.*, Wilkinson v. Dotson, 544 U.S. 74, 79 (2005) (explaining that "habeas corpus actions require a petitioner fully to exhaust state remedies, which § 1983 does not" and that "considerations of linguistic specificity, history, and comity led the Court to find an implicit exception from § 1983's otherwise broad scope for actions that lie 'within the core of habeas corpus'" (quoting Preiser v. Rodriguez, 411 U.S. 475, 487 (1973))); Darr v. Burford, 339 U.S. 200, 204–05 (1950) ("Since habeas corpus is a discretionary writ, federal courts had authority to refuse relief as a matter of comity until state remedies were exhausted. Through this comity, the doctrine of exhaustion of state remedies has developed . . . .").

90. *Compare Preiser*, 411 U.S. at 486–89 (holding that the writ of habeas corpus serves as the proper instrument to seek release from unlawful confinement, rather than § 1983), *with Dotson*, 544 U.S. at 82 (holding that prisoners challenging the constitutionality of state parole procedures may proceed under § 1983).

91. *Darr*, 339 U.S. at 204.

92. *Dotson*, 544 U.S. at 81–82.

93. *See infra* Part II.B.1.

94. *See infra* Part II.B.2.

95. Gomez v. Toledo, 446 U.S. 635, 640 (1980); *see also* 42 U.S.C. § 1983 (2006).

96. 411 U.S. 475 (1973).

sought injunctive relief to compel restoration of good-conduct-time credits that would result in their immediate release, the Court established that Section 1983 cannot be used to challenge the fact or duration of confinement.[97] Rather, Section 1983 provides a separate vehicle for a prisoner seeking to challenge the conditions of her confinement.[98] The Court further explained in *Heck v. Humphrey*[99] that a state prisoner cannot use Section 1983 to pursue a claim that would necessarily imply the invalidity of the prisoner's sentence or conviction.[100]

2. Dotson *and the Circuit Split with Regard to Accessing DNA Post-Conviction*

While the Supreme Court has not reached the issue of access to DNA evidence post-conviction under Section 1983, the federal circuit courts of appeals that have reached the question are split. Following the *Preiser* and *Heck* decisions, the United States Courts of Appeals for the Fourth, Fifth, and Sixth Circuits each held that a suit seeking post-conviction access to evidence for DNA testing to challenge a conviction is not cognizable under Section 1983 because such a lawsuit is tantamount to a direct attack on the conviction.[101] In contrast, the Second, Seventh, Ninth, and Eleventh Circuits have held that Section 1983 may be the appropriate vehicle for such a claim, although the petition for release must be pursued in a separate habeas corpus suit.[102] At least two district courts have fallen in line with this latter set of circuits.[103]

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97. *Id.* at 476–77, 490.

98. *Id.* at 499.

99. 512 U.S. 477 (1994).

100. *Id.* at 481–82. In *Heck*, an inmate sought damages under § 1983 for allegedly unlawful acts that he claimed led to his arrest and conviction. *Id.* at 478–79. The Court held that the suit was properly dismissed because the damages claims challenged the legality of his conviction, and such a suit could not be brought under § 1983. *Id.* at 489–90.

101. *See* Harvey v. Horan, 278 F.3d 370, 372–73 (4th Cir. 2002); Kutzner v. Montgomery County, 303 F.3d 339, 340–41 (5th Cir. 2002); Boyle v. Mayer, 46 F. App'x 340, 340–41 (6th Cir. 2002).

102. *See* McKithen v. Brown, 481 F.3d 89, 98, 103 (2d Cir. 2007); Savory v. Lyons, 469 F.3d 667, 669 (7th Cir. 2006); Osborne v. Dist. Attorney's Office for the Third Judicial Dist., 423 F.3d 1050, 1056 (9th Cir. 2005); Bradley v. Pryor, 305 F.3d 1287, 1290 (11th Cir. 2002).

103. *See* Wade v. Brady, 460 F. Supp. 2d 226, 237–38 (D. Mass. 2006); Derrickson v. Del. County Dist. Attorney's Office, No. 04-1569, 2006 WL 2135854, at *7–8 (E.D. Pa. July 26, 2006).

The decisions of the Second, Seventh, and Ninth Circuits[104] were likely a reaction to the Supreme Court's ruling in *Wilkinson v. Dotson*,[105] where the Court held that prisoners' claims challenging their parole denials were cognizable under Section 1983.[106] In *Dotson*, prisoners sought declaratory and injunctive relief when they challenged the constitutionality of state parole procedures.[107] The Court held that a challenge to the procedures used in parole-eligibility hearings is cognizable under Section 1983 because a violation would lead to a new parole hearing, rather than earlier release from custody.[108] The *Dotson* Court clarified that a prisoner's Section 1983 suit would not be barred if the outcome of the suit would not necessarily lead to the prisoner's release.[109] Even if the prisoner's suit would put him in a better position to launch future attacks on his conviction or sentence, he could proceed under Section 1983.[110] The Second, Seventh, Ninth, and Eleventh Circuits have stressed that a prisoner's Section 1983 suit seeking access to DNA evidence would comport with *Preiser* and its progeny in that the success of the action would not necessarily invalidate the prisoner's conviction—the evidence could be inculpatory or exculpatory—and the suit to access the evidence could at most supply the evidence.[111]

C. The Court Uses the Medina *Test, Rather Than the* Mathews *Test, to Review Claims Based on State Rules of Criminal Procedure*

In addition to recognizing and placing limits on a prisoner's due process right to vindicate a liberty interest created by state post-conviction procedures, the Court uses different standards in reviewing such claims depending upon the nature of claim being brought.[112] The

104. The Eleventh Circuit case *Bradley v. Pryor*, 305 F.3d 1287, was decided in 2002, and was not influenced by *Wilkinson v. Dotson*, 544 U.S. 74 (2005), which was decided in 2005.

105. 544 U.S. 74.

106. *Id.* at 82.

107. *Id.* at 76.

108. *Id.* at 82.

109. *Id.* at 81–82.

110. *See id.* at 82 (explaining that success under § 1983 could result in a new parole hearing or consideration of a new parole application).

111. *See* McKithen v. Brown, 481 F.3d 89, 102–03 (2d Cir. 2007); Savory v. Lyons, 469 F.3d 667, 671–72 (7th Cir. 2006); Osborne v. Dist. Attorney's Office for the Third Judicial Dist., 423 F.3d 1050, 1054–55 (9th Cir. 2005); Bradley v. Pryor, 305 F.3d 1287, 1290–91 (11th Cir. 2002).

112. *See* McKithen v. Brown, 565 F. Supp. 2d 440, 452 (E.D.N.Y. 2008) (explaining that a deferential standard prescribed in *Medina v. California*, 505 U.S. 437, 443 (1992), is used to review rules of criminal procedure, while a balancing-of-interests approach derived from *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), is applied in most other contexts).

Court's choice of standard seeks to strike a balance between concerns of federalism, comity, finality, and truth-seeking and justice.[113]

For claims based on a liberty interest deriving from state post-conviction policies, the Court uses a balancing test that evolved over the course of several decisions prior to the establishment of the test in the 1976 civil case *Mathews v. Eldridge*.[114] Four years before *Mathews*, the Court applied a version of the test in *Morrissey v. Brewer*,[115] where habeas petitioners sought release following revocation of parole without a hearing.[116] In deciding the minimal due process requirements for parole revocation, the Court explained that "due process is flexible and calls for such procedural protections as the particular situation demands."[117] Where the claim involves revocation of parole, a process arising after the end of the criminal prosecution and supervised by an administrative agency, less than the full panoply of rights due in a criminal prosecution would apply—considerations should include the nature of the government function involved and the private interest affected by governmental action.[118]

Two years later, in *Wolff v. McDonnell*,[119] the Court applied a similar balancing test in a Section 1983 suit for restoration of good-time credits.[120] The Court explained that even though the discovery procedure is normally part of the criminal prosecution, the prisoner in this situation was not entitled to the full panoply of rights, as there must be a mutual accommodation between the institution's needs and the prisoner's interests.[121]

In *Mathews*, a person whose social security benefits had been terminated challenged the constitutionality of the federal administrative procedures used for assessing whether a disability exists.[122] The Court, in holding that an evidentiary hearing was not required prior to the termination of such benefits and that the procedures were lawful, outlined a standard for due process challenges that takes into consideration: (1) the private interest that will be affected by the action, (2) the risk of erroneously depriving such interest and the likely value

113. *See, e.g.*, *Medina*, 505 U.S. at 443–45 (discussing the policy reasons underlying its standard, including judicial fairness and federalism); *Mathews*, 424 U.S. at 335 (evaluating the constitutionality of state procedures by weighing private and governmental interests).

114. 424 U.S. 319.

115. 408 U.S. 471 (1972).

116. *Id.* at 472–74.

117. *Id.* at 481.

118. *Id.* at 480–81.

119. 418 U.S. 539 (1974).

120. *Id.* at 560.

121. *Id.* at 556, 566.

122. Mathews v. Eldridge, 424 U.S. 319, 323–25 (1976).

of additional procedural safeguards, and (3) the government's interest in light of the function involved and fiscal administrative demands that additional procedural requirements would require.[123] Following the *Mathews* decision, the Court in *Wilkinson v. Austin* held that the *Mathews* test is adequate to evaluate the sufficiency of particular procedures post-conviction.[124]

For claims based on a liberty interest derived from state rules of criminal procedure, the Court applies the deferential standard presented in *Medina v. California*.[125] The Court articulated a variation of the standard five years prior to *Medina* in *Pennsylvania v. Finley*.[126] In *Finley*, the Court denied a petitioner's due process claim for ineffective assistance of counsel post-conviction, finding that, considering the source of the prisoner's right and the nature of the proceedings, the prisoner's appointed counsel did not violate the "fundamental fairness exacted by the Due Process Clause."[127] In *Medina*, when the petitioner challenged a statute allocating the burden of proof in a criminal proceeding, the Court upheld the statute, declaring that state legislative judgments are entitled to substantial deference in the area of criminal procedure, and that the criminal process will be found lacking only where "'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"[128] The Court also considered whether the procedure in question "transgress[ed] any recognized principle of fundamental fairness in operation,"[129] but found that it did not. The Court explained that "because the States have considerable expertise in matters of criminal procedure and the criminal process is grounded in centuries of common-law tradition, it is appropriate to exercise substantial deference to legislative judgments in this area."[130]

Following the decision in *Medina*, the Court applied its fundamental fairness test in *Herrera v. Collins*,[131] finding that Texas's time limit for filing new trial motions did not violate the petitioner's due process rights in light of the Constitution's silence on the subject of

123. *Id.* at 335, 349.

124. 545 U.S. 209, 228–29 (2005) (explaining that informal and nonadversary procedures satisfy the *Mathews* test).

125. 505 U.S. 437 (1992).

126. 481 U.S. 551 (1987).

127. *Id.* at 555–56.

128. *Medina*, 505 U.S. at 442, 445 (quoting Patterson v. New York, 432 U.S. 197, 202 (1977)).

129. *Id.* at 442, 448 (citation and internal quotation marks omitted).

130. *Id.* at 445–46.

131. 506 U.S. 390 (1993).

new trials, the historical availability of new trials based on newly discovered evidence, a federal criminal procedure rule establishing a time limit for filing new trial motions based on newly discovered evidence, and the fact that only nine states did not have time limits for filing such motions.[132] The Court explained that federal courts may upset state post-conviction procedures only if they are inadequate to vindicate some fundamental right, thus violating traditional principles of justice.[133]

III. THE COURT'S REASONING

In *District Attorney's Office for the Third Judicial District v. Osborne*,[134] the Supreme Court reversed the judgment of the Ninth Circuit, holding that the prosecutorial duty to disclose exculpatory evidence announced in *Brady v. Maryland*[135] does not apply in the post-conviction context and that Alaska's law governing procedures for post-conviction relief did not violate Osborne's due process rights.[136]

Writing for the majority, Chief Justice Roberts began by explaining that the Federal Government and the States have developed methods, usually through legislation, to ensure that DNA testing is properly incorporated into criminal procedure so that it can be utilized to exonerate the innocent without leading to the collapse of the criminal justice system.[137] The Court explained that a number of features are commonly found in both federal and state legislation, including a demonstration of materiality, a sworn statement that the applicant is innocent, and diligence requirements such as showing that the testing was impossible at trial or that the defendant did not decline testing at trial for tactical reasons.[138] In Alaska, where legislation specific to the issue has not yet been enacted, state courts are addressing how to apply existing laws to DNA testing.[139]

To determine the validity of Osborne's claim that he was entitled to access DNA samples, the Court confronted the questions of whether the suit was properly brought under Section 1983, whether Alaska's post-conviction relief procedures violated Osborne's due process rights, whether Osborne could claim a federal constitutional right

132. *Id.* at 407–11.
133. *Id.* at 407–08.
134. 129 S. Ct. 2308 (2009).
135. 373 U.S. 83 (1963).
136. *Osborne*, 129 S. Ct. at 2315–16, 2319–20, 2323.
137. *Id.* at 2316.
138. *Id.* at 2317.
139. *Id.*

to be released upon proof of actual innocence, and whether Osborne could claim a substantive due process right to DNA evidence separate from his liberty interest.[140]

The Court first stated that although it granted certiorari on the issue of whether Section 1983 is a valid route for Osborne's action, it need not resolve the issue in order to rule on Osborne's claims.[141] The Court thus assumed without deciding that *Heck v. Humphrey*[142] did not bar Osborne's suit.[143]

In examining whether Alaska's post-conviction relief procedures violated Osborne's due process rights, the Court began by dismissing Osborne's claim that he could rely on the Governor's constitutional authority to grant clemency, clarifying that noncapital defendants do not have a liberty interest in state executive clemency.[144]

The Court found that Osborne does have a liberty interest in showing his innocence under Alaska law, however.[145] The Court reasoned that *Brady* did not govern the case, as the Court of Appeals had suggested, because a defendant does not have the same rights post-conviction as he had before and during trial, and is no longer presumed innocent.[146] Nevertheless, a defendant may have a limited liberty interest post-conviction.[147] The relevant rule, according to the Court, is one derived from *Medina v. California*[148]: "Federal courts may upset a State's postconviction relief procedures only if they are fundamentally inadequate to vindicate the substantive rights provided."[149] Applying the rule to the facts of the case, the Court examined Alaska's law, which provides that defendants who use new evidence to prove their innocence by clear and convincing evidence may obtain vacation of their conviction or sentence and may also obtain possible rights to procedures vital to the realization of that right.[150] Although these rights are qualified by certain requirements, namely that the evidence

140. *Id.* at 2316, 2321–22.

141. *Id.* at 2319.

142. 512 U.S. 477 (1994).

143. *Osborne*, 129 S. Ct. at 2319.

144. *Id.*

145. *Id.*

146. *Id.* at 2319–20.

147. *See id.* at 2320 (explaining that even though *Brady* does not apply, the State's procedures still must be scrutinized).

148. 505 U.S. 437 (1992).

149. *Osborne*, 129 S. Ct. at 2320 (interpreting the rule set forth in *Medina*, 505 U.S. at 446, 448).

150. *Id.* at 2319; ALASKA STAT. § 12.72.020(b)(2) (2008). The right to be released from confinement, the Court added, is exempt from normally applicable time limits, and Alaska has discovery procedures governing access to DNA evidence. *Osborne*, 129 S. Ct. at 2320.

must be newly available, must have been diligently pursued before trial, and must be sufficiently material, the Court decided that they are not inconsistent with the *Medina* rule.[151] In addition, the Court noted that the Alaska Court of Appeals suggested that the state constitution provides a separate right of access to DNA evidence for those who cannot satisfy the aforementioned statutory requirements, by invoking the three-part test used by other states.[152] In light of these procedures available to Osborne, the Court held that Alaska's post-conviction relief procedures were adequate, adding that Osborne had not used the process provided to him by the State and thus had not met his burden of showing how the procedures are inadequate.[153]

Finally, to determine whether Osborne could claim a freestanding, substantive due process right to DNA evidence separate from his liberty interest, the Court looked to the implications such a right would have.[154] Noting the problems associated with expanding the concept of substantive due process, the Court stated that "[t]here is no long history of such a right," and pointed out that the establishment of such a right would disrupt the ongoing work of states in the process of developing legislation to deal with the issue.[155] Moreover, the Court explained that constitutionalizing a right to DNA access would lead to questions best answered by state courts and legislatures.[156] The Court added that such a right would also raise a host of troublesome policy implications, including whether there is an obligation to preserve forensic evidence and the difficulties inherent in such preservation.[157] The Court thus held that under the circumstances of the case, Alaska's law governing procedures for post-conviction relief did not violate Osborne's due process rights.[158]

Justice Alito wrote a concurring opinion, in which Justice Kennedy joined and Justice Thomas joined in part, asserting that two additional grounds existed for rejecting Osborne's constitutional

151. *Osborne*, 129 S. Ct. at 2320–21.

152. *Id.* at 2321; *see supra* text accompanying notes 38–39 (describing the three-part test). R

153. *Osborne*, 129 S. Ct. at 2320–21. In response to Osborne's claim to a federal constitutional right to be released upon proof of actual innocence, the Court declined to decide the issue but proceeded on the assumption that the right exists. *Id.* at 2321–22. The Court stated that such a claim would be brought in habeas, and that under federal procedural rules, discovery would only be permitted for good cause. *Id.* The Court reiterated that Osborne could not show that the procedures available to him were inadequate. *Id.*

154. *Id.* at 2322.

155. *Id.*

156. *Id.* at 2323.

157. *Id.*

158. *Id.*

claim.[159] First, according to Justice Alito, a state prisoner claiming a federal constitutional right to access state evidence must exhaust state remedies, and thus must proceed by filing a petition for a writ of habeas corpus rather than a Section 1983 claim.[160] This is particularly true, he explained, because Osborne sought access to "exculpatory evidence" that would, by definition, undermine his conviction, and such claims must be brought in habeas under *Heck*.[161] Second, Justice Alito asserted, a defendant who forgoes DNA testing at trial for tactical reasons does not have a constitutional right to perform such testing post-conviction because such a right would spur defendants to engage in strategic trickery.[162] Justice Alito also disagreed with Justice Stevens's dissenting argument that the State would have nothing to lose by allowing the testing, explaining that DNA testing often fails to provide absolute proof, evidence can be contaminated, and the costs associated with collecting and preserving such evidence can be burdensome.[163] According to Justice Alito, a prisoner should challenge the State's procedures under the habeas statute, which "accounts for the interests of federalism, comity, and finality."[164]

In a dissent joined by Justices Breyer and Ginsburg, and in part by Justice Souter, Justice Stevens disagreed with the majority's holding that Osborne failed to demonstrate his right of access to the DNA evidence.[165] As Justice Stevens explained, Osborne claimed that the DNA results would qualify as new evidence under the meaning of Alaska's statutory procedure, but the testing results could not be obtained without first gaining access to the DNA evidence in state custody.[166] Thus, Justice Stevens argued, the State's procedures did not provide Osborne with a fair opportunity to assert his state-created rights and, as such, did not meet the requirements of due process under the *Medina* standard.[167]

Justice Stevens also pointed out that the Alaska Court of Appeals's conclusion that the testing Osborne requested had been availa-

159. *Id.* at 2324 (Alito, J., concurring).

160. *Id.* (citing 28 U.S.C. § 2254(b)(1)(A) (2006)).

161. *Id.* at 2325 (internal quotation marks omitted).

162. *Id.* at 2324–25 ("The rules set forth in our cases . . . would mean very little if state prisoners could simply evade them through artful pleading. . . . [U]nder 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.").

163. *Id.* at 2327–28.

164. *Id.* at 2330–31.

165. *Id.* at 2331–32 (Stevens, J., dissenting).

166. *Id.* (citing ALASKA STAT. § 12.72.010(4) (2008)).

167. *Id.* at 2332 (citing Medina v. California, 505 U.S. 437 (1992)).

ble at the time of trial was incorrect, since Osborne requested Short Tandem Repeat ("STR") DNA testing, which was not yet in use at the time of trial.[168] Further, Justice Stevens criticized the state trial court's application of the three-part test,[169] asserting that the first two prongs are essentially balancing tests that should be satisfied by the power of exculpatory DNA evidence, and that the third, whether testing would be conclusive of guilt or innocence, should also be met, particularly in light of the State's concession in that regard.[170] For these reasons, Justice Stevens contended that Osborne properly availed himself of all possible avenues for relief in state court.[171] Because he found that Osborne had exhausted his options in the state courts and that the government action so lacked justification that it could be described as "'arbitrary, or conscience shocking,'" Justice Stevens felt that Osborne had adequately demonstrated his entitlement to the State's evidence and that the State's refusal to provide him access to the evidence violated due process.[172]

In a separate dissent, Justice Souter argued that Alaska's procedure for vindicating the liberty interest in demonstrating innocence, recognized by state law, did not comport with the Due Process Clause.[173] Unlike Justice Stevens, Justice Souter would not have decided whether due process required the recognition of a substantive right of access to evidence for DNA testing, reasoning that Osborne's claim could be addressed by procedural due process.[174] He agreed with Justice Stevens that the State failed to provide Osborne with effective post-conviction relief procedures, finding that Osborne intended to bring new evidence as required by the statute, and that he could not have previously claimed factual innocence, also required by the statute, if he wanted to get parole.[175] This failure, Justice Souter contended, was enough to justify a Section 1983 remedy and relief in this case.[176]

168. *Id.* at 2333.

169. *See supra* text accompanying notes 38–39 (explaining the test). R

170. *Osborne*, 129 S. Ct. at 2333.

171. *Id.* Moreover, Justice Stevens argued that the Court should have recognized a limited federal right to DNA evidence; he noted that the same concerns that led to the *Brady* rule, which established an accused's right of access to evidence during trial, exist in the post-conviction context. *Id.* at 2335. Such a right serves the interest of truth and comes at little cost to the State. *Id.* at 2336.

172. *Id.* at 2333, 2336 (quoting Collins v. City of Harker Heights, 503 U.S. 115, 128 (1992)).

173. *Id.* at 2340 (Souter, J., dissenting).

174. *Id.* (citing Evitts v. Lucey, 469 U.S. 387, 393 (1985)).

175. *Id.* at 2342–43.

176. *Id.* at 2342.

IV. ANALYSIS

In *District Attorney's Office for the Third Judicial District v. Osborne*, the Supreme Court assumed without deciding that a state prisoner's claim to a due process right to access evidence could be pursued under Section 1983, and held that the State's post-conviction procedures did not violate the prisoner's due process rights.[177] It appears that the Court declined to criticize the way the procedures worked in practice for two reasons. First, it accepted the State's erroneous finding that Osborne had not sought a form of testing that had been unavailable at his trial, as required by the state post-conviction statute, and found that Osborne thus failed to fulfill a procedural predicate for relief.[178] Second, the Court concluded that Osborne failed to demonstrate that the post-conviction procedures were inadequate in practice, despite the fact that a Section 1983 claimant is not required to exhaust state procedures.[179]

By declining to decide the Section 1983 question, the Court left prisoners and courts to wonder whether claims to access DNA evidence may properly be brought under the statute.[180] Further, by evading a due process analysis of the State's post-conviction procedures based on two faulty predicates, the Court failed to protect prisoners' due process rights.[181] The Court could have defined the right to access such evidence and remained consistent with precedent by deciding the Section 1983 question and conducting a warranted due process review of Alaska's post-conviction procedures.[182]

A. The Court Should Have Recognized Section 1983 as an Avenue to Seek Post-Conviction Access to Evidence for DNA Testing

In assuming that Osborne's Section 1983 due process claim for access to evidence for DNA testing was cognizable, the *Osborne* Court missed an opportunity to decide an important issue. The Court could have established the logical extension of *Preiser v. Rodriguez*,[183] *Heck v. Humphrey*,[184] and *Wilkinson v. Dotson*[185] recognized by the Second, Seventh, and Ninth Circuits[186] and rejected the State's argument that *Dot-*

177. *Id.* at 2319, 2321 (majority opinion).
178. *Id.* at 2321.
179. *Id.*
180. *See infra* Part IV.A, C.
181. *See infra* Part IV.B–C.
182. *See infra* Part IV.C.
183. 411 U.S. 475 (1973).
184. 512 U.S. 477 (1994).
185. 544 U.S. 74 (2005).
186. *See supra* Part II.B.

son did not apply in Osborne's case.[187] Doing so would not have violated the policies underlying the *Preiser* and *Heck* decisions. While the State argued that "[s]tripped to its essence . . . Osborne's [Section] 1983 action is nothing more than a request for evidence to support a hypothetical claim that he is actually innocent[, which] sounds at the core of habeas corpus,"[188] Osborne argued that allowing him access to the evidence would not necessarily imply the invalidity of his conviction, since even if the DNA testing exonerated him, he would have to bring a separate suit or petition for clemency to achieve reversal of the conviction.[189] Had the Court accepted Osborne's claim, it would have comported with *Preiser*,[190] as Osborne's claim for access to evidence cannot be characterized as a direct attack on his conviction, but more closely resembles a challenge to the conditions of his confinement; even if the evidence, once tested, proved to be exculpatory, the suit could at most supply the evidence, and Osborne would still need to bring a separate suit or petition for clemency to invalidate his conviction.[191] His claim thus complies with *Heck*, where the Court held that a state prisoner cannot use Section 1983 to pursue a claim that would necessarily imply the invalidity of the prisoner's sentence or conviction.[192]

In addition, the Court recognized that "[e]very Court of Appeals to consider the question since *Dotson* has decided that because access to DNA evidence similarly does not 'necessarily spell speedier release,' it can be sought under Section 1983."[193] However, the Court also ac-

187. *See* Dist. Attorney's Office for the Third Judicial Dist. v. Osborne, 129 S. Ct. 2308, 2318–19 (2009) (explaining how the State tried to distinguish *Dotson*).

188. Brief for Petitioners at 19, *Osborne*, 129 S. Ct. 2308 (No. 08-6).

189. Brief for the Respondent at 21, *Osborne*, 129 S. Ct. 2308 (No. 08-6).

190. *See* Preiser v. Rodriguez, 411 U.S. 475, 490 (1973) (establishing that § 1983 cannot be used to challenge the fact or duration of confinement, but provides a separate vehicle for a prisoner seeking to challenge the conditions of his confinement).

191. *Osborne*, 129 S. Ct. at 2318 (citing Brief for the Respondent, *supra* note 189, at 21); **R** *see also* David A. Schumacher, Comment, *Post-Conviction Access to DNA Testing: The Federal Government Does Not Offer an Adequate Solution, Leaving the States to Remedy the Situation*, 57 CATH. U. L. REV. 1245, 1263–64 (2008) (endorsing the theory that a § 1983 suit seeking DNA testing is proper because such a suit does not necessarily lead to a direct attack on the prisoner's confinement).

192. *See* Heck v. Humphrey, 512 U.S. 477, 481–82 (1994) (stating when a prisoner cannot use § 1983).

193. *Osborne*, 129 S. Ct. at 2318 (quoting Wilkinson v. Dotson, 544 U.S. 74, 82 (2005)); *id.* (citing McKithen v. Brown, 481 F.3d 89, 103 n.15 (2d Cir. 2007); Savory v. Lyons, 469 F.3d 667, 672 (7th Cir. 2006)). The Eleventh Circuit also held similarly in *Bradley v. Pryor*, 305 F.3d 1287, 1290–91 (11th Cir. 2002). Following the *Preiser* and *Heck* decisions, the Fourth, Fifth, and Sixth Circuits each held that a suit seeking post-conviction access to evidence for DNA testing to challenge a conviction is not cognizable under § 1983 because such an action is equivalent to a direct attack on the conviction. *See supra* text accompany-

knowledged the State's argument that "*Dotson* is distinguishable because the challenged procedures in that case did not affect the ultimate 'exercise of discretion by the parole board,'" and that "*Dotson* does not set forth 'the *exclusive* test for whether a prisoner may proceed under Section 1983.'"[194]

Whether or not *Dotson* presents the only test for whether a prisoner may seek relief under Section 1983, the State did not point to another test that would preclude Osborne from so proceeding.[195] Although the State argued that the challenged procedures in *Dotson* would not affect the ultimate exercise of discretion by the parole board,[196] presumably because the prisoners challenged the constitutionality of the procedures themselves, Osborne, too, challenged the procedures that have resulted in a denial of access to evidence.[197] *Dotson* suggests that Osborne has a cognizable Section 1983 claim because, like the prisoner challenging parole-eligibility hearing procedures whose successful suit could at most lead to a new parole hearing, Osborne's suit, if successful, would at most have supplied him with evidence and would not necessarily have invalidated his conviction.[198]

Had the Court recognized Section 1983 as an avenue to seek post-conviction access to evidence for DNA testing, it would not have violated the principles of comity and federalism protected by *Preiser*

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ing note 101. These decisions came before the Supreme Court's ruling in *Dotson*, however, and the decisions of the Second, Seventh, and Ninth Circuits were likely a reaction to that decision. Eric Despotes, Comment, *The Evidentiary Watershed: Recognizing a Post-Conviction Constitutional Right to Access DNA Evidence Under 42 U.S.C. § 1983*, 49 SANTA CLARA L. REV. 821, 834–35 (2009). R

194. *Osborne*, 129 S. Ct. at 2318–19 (quoting Brief for Petitioners, *supra* note 188, at 32). R

195. According to the State, *Dotson* sets forth only that "a § 1983 action is barred *if* success in that action would necessarily imply the invalidity of confinement[; i]t does *not* say that a § 1983 action is barred *only if* success in the action would necessarily imply the invalidity of confinement." Brief for Petitioners, *supra* note 188, at 32–33 (citing *Dotson*, 544 U.S. at 81–82). The State did not explain what other test barred Osborne's § 1983 claim, however, relying instead on factual differences among the cases and policy arguments derived from its interpretation of the purpose underlying the bar. *Id.* at 32. R

196. *Osborne*, 129 S. Ct. at 2318–19.

197. *Id.* at 2315.

198. In *Dotson*, the Court held that the prisoner's challenge to the constitutionality of state parole procedures was cognizable under § 1983, since, if successful, the suit would lead to a new parole hearing, rather than to earlier release from custody, and thus would not necessarily lead to the prisoner's release. 544 U.S. at 82. Even if the prisoner's suit would put him in a better position to launch future attacks on his conviction or sentence, he could proceed under § 1983. *Id.* This approach should be extended to lawsuits seeking DNA testing, such as Osborne's. *See* Schumacher, *supra* note 191, at 1264 (finding that *Dotson* "strongly suggests that the use of § 1983 suits to obtain DNA testing is proper because such suits do not necessarily lead to any direct attack on imprisonment"). R

and *Heck*. Underlying the *Preiser* Court's limitation on claims cognizable under Section 1983 was the principle that a state prisoner should exhaust state remedies before seeking federal relief.[199] Because proceeding under habeas requires a prisoner to first exhaust state remedies, the Court's requirement that a prisoner who wishes to invalidate her conviction proceed under habeas ensures that a federal court will not invalidate a state court conviction without the state having the opportunity to first pass on the matter.[200] As the *Dotson* Court explained, allowing petitioners who seek only to challenge the conditions of their confinement, rather than their conviction, to sue under Section 1983 would not contravene principles of comity and federalism:

> [E]arlier cases . . . have already placed the States' important comity considerations in the balance, weighed them against the competing need to vindicate federal rights without exhaustion, and concluded that prisoners may bring their claims without fully exhausting state-court remedies so long as their suits, if established, would not necessarily invalidate state-imposed confinement.[201]

In other words, challenges to the conditions of a prisoner's confinement do not implicate the overturning of a state court conviction, and such claims thus may be brought under the less stringent avenue of Section 1983 without unduly impeding upon state court judgments.[202]

B. The Court Properly Invoked the Medina *Standard for Review of Alaska's Post-Conviction Procedures, but the Court Should Have Seriously Considered Whether the Procedures As Applied Violated the* Medina *Standard*

The Court, recognizing that Osborne had a liberty interest in access to the post-conviction procedures provided by the State,[203] examined the procedures under the standard articulated in *Medina v.*

199. Preiser v. Rodriguez, 411 U.S. 475, 490–91 (1973).

200. *See id.* at 489 ("Congress has passed a more specific act [the federal habeas corpus statute] to cover the situation, and, in doing so, has provided that a state prisoner challenging his conviction must first seek relief in a state forum, if a state remedy is available. It is clear to us that the result must be the same in the case of a state prisoner's challenge to the fact or duration of his confinement, based, as here, upon the alleged unconstitutionality of state administrative action. Such a challenge is just as close to the core of habeas corpus as an attack on the prisoner's conviction, for it goes directly to the constitutionality of his physical confinement itself . . . .").

201. *Dotson*, 544 U.S. at 84.

202. *Id.*

203. Dist. Attorney's Office for the Third Judicial Dist. v. Osborne, 129 S. Ct. 2308, 2319 (2009).

California,[204] which dictates that a federal court may upset state post-conviction procedures only if they "offend[ ] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," or "transgress[ ] any recognized principle of fundamental fairness in operation."[205] While the Court has applied the balancing test articulated in *Mathews v. Eldridge*[206] to review challenged state procedures under due process claims, it has emphasized that the deferential *Medina* standard is appropriate for the review of state rules of criminal procedure.[207] The Alaska statute at issue[208] is more akin to a state rule of criminal procedure than to the policies to which the Court has applied a version of the *Mathews* balancing test, which include a parole revocation policy,[209] a policy governing the restoration of good-time credits,[210] and a policy governing placement in supermax prisons.[211] These policies fall further outside the ambit of the criminal process than does the Alaska statute governing post-conviction procedure. The Court's deferential review of Alaska's post-conviction statute thus fell in line with precedent.[212]

In applying the *Medina* standard to hold that Alaska's post-conviction procedures were adequate, however, the Court improperly sup-

204. 505 U.S. 437 (1992).

205. *Id.* at 446, 448 (citations and internal quotation marks omitted).

206. 424 U.S. 319 (1976).

207. *Medina*, 505 U.S. at 443–46.

208. ALASKA STAT. § 12.72.020 (2008).

209. *See* Morrissey v. Brewer, 408 U.S. 471, 480–81 (1972).

210. *See* Wolff v. McDonnell, 418 U.S. 539, 560 (1974).

211. *See* Wilkinson v. Austin, 545 U.S. 209, 224–25 (2005). The Court has applied the *Medina* test to a statute governing the time limit for filing new trial motions and, prior to *Medina*, the Court applied a similar standard to the state law governing appointment of counsel in post-conviction proceedings. Herrera v. Collins, 506 U.S. 390, 406–08 (1993); Pennsylvania v. Finley, 481 U.S. 551, 556–57 (1987). In *Medina*, the Court applied the test in reviewing a statute allocating the burden of proof in a competency hearing. 505 U.S. at 445–48. The Court explained that the statute fell within the criminal process, although "[t]here are significant differences between a claim of incompetence and a plea of not guilty by reason of insanity." *Id.* at 448. Where the statute governing the competency proceeding fell within the category of a state rule of criminal procedure for purposes of applying the *Medina* standard, it is probable that Alaska's statute governing state post-conviction procedure would as well. *See* ALASKA STAT. § 12.72.010.

212. *See* Tung Yin, Comment, *Not a Rotten Carrot: Using Charges Dismissed Pursuant to a Plea Agreement in Sentencing Under the Federal Guidelines*, 83 CAL. L. REV. 419, 446–47 (1995) (explaining that a due process challenge to sentencing procedures would likely be examined under *Medina*, and noting that the *Medina* standard is appropriate to the criminal realm because its "more narrow inquiry intrude[s] less on states' extensive expertise in and common-law traditions of criminal procedure"). *But see* McKithen v. Brown, 481 F.3d 89, 107 (2d Cir. 2007) (finding that the *Mathews* test is the proper framework to evaluate requests for post-conviction access to evidence); Harvey v. Horan, 285 F.3d 298, 315 n.6 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing en banc) (arguing that the *Mathews* test should be applied in the case of claims to access evidence post-conviction).

ported its conclusion that Osborne failed to follow Section 12.72 of the Alaska statute. First, the Court relied upon the state court's finding that Osborne had failed to seek a form of testing unavailable at the time of trial, as required by the post-conviction statute.[213] It appears that Osborne sought STR DNA and mitochondrial DNA ("mtDNA") testing in his petitions for access to the DNA evidence,[214] however, neither of which were available during his trial, and the State apparently conceded as much.[215]

Second, the Court appeared to also rest its due process holding on Osborne's failure to exhaust the state procedures.[216] The Court noted that Osborne sought federal relief while the state proceedings were ongoing, and found that he could not criticize the manner in which the state procedures worked in practice when he had not fully used them.[217] As Justices Stevens and Souter each asserted in their dissents, however, Osborne did seek relief under Alaska's procedures prior to filing his Section 1983 suit.[218] Further, even if Osborne "side-

213. *See* Dist. Attorney's Office for the Third Judicial Dist. v. Osborne, 129 S. Ct. 2308, 2321 (2009) ("When Osborne *did* request DNA testing in state court, he sought RFLP testing that had been available at trial, not the STR testing he now seeks, and the state court relied on that fact in denying him testing under Alaska law." (citing Osborne v. State, 163 P.3d 973, 984 (Alaska Ct. App. 2007); Osborne v. State, 110 P.3d 986, 992 (Alaska Ct. App. 2005))).

214. *Id.* at 2333 (Stevens, J., dissenting) (citing Osborne v. Dist. Attorney's Office for the Third Judicial Dist., 521 F.3d 1118, 1123 n.2 (9th Cir. 2008)); *see also* Opening Brief of Appellant Osborne at 6, 12, 20–21, *Osborne*, 110 P.3d 986 (No. A-8399).

215. *See Osborne*, 521 F.3d at 1123 n.2 ("The State's concessions that the RFLP DNA testing available pre-trial is 'not quite as discriminating as' the STR and mitochondrial DNA testing Osborne now seeks, and that these methods were not available pre-trial, is an apparent reversal of the State's representation to the state court . . . ."); *see also* Brief of Appellee at 21, *Osborne*, 110 P.3d 986 (No. A-8399) (explaining how the superior court denied Osborne's request that the evidence be retested with methods "*that were unavailable at the time of Osborne's trial*" (emphasis added)).

216. The Court's apparent basis for upholding the procedures—that Osborne had not fully used them because he interrupted state proceedings by filing his § 1983 suit—is tantamount to mandating exhaustion of state procedures. *See Osborne*, 129 S. Ct. at 2321 (majority opinion) ("His attempt to sidestep state process through a new federal lawsuit puts Osborne in a very awkward position. If he simply seeks the DNA through the State's discovery procedures, he might well get it. If he does not, it may be for a perfectly adequate reason, just as the federal statute and all state statutes impose conditions and limits on access to DNA evidence. It is difficult to criticize the State's procedures when Osborne has not invoked them. This is not to say that Osborne must exhaust state-law remedies . . . . But it is Osborne's burden to demonstrate the inadequacy of the state-law procedures available to him in state post-conviction relief."); *see also* Myrna S. Raeder, *Postconviction Claims of Innocence*, CRIM. JUST., Fall 2009, at 14, 17 ("The majority also faulted Osborne for shortcutting Alaska's remedies by filing the section 1983 action, which it found defeated his ability to claim that they did not work in practice.").

217. *Osborne*, 129 S. Ct. at 2321.

218. *See id.* at 2333 (Stevens, J., dissenting) ("Osborne made full use of available state procedures in his efforts to secure access to evidence for DNA testing . . . . He was rebuffed

step[ped the] state process,"[219] exhaustion of state procedures is not required of a Section 1983 claimant.[220]

The Court should not have dismissed Osborne's due process challenge of the State's post-conviction procedures based on the misconception that he failed to seek new testing.[221] Further, the Court should not have faulted Osborne for filing his federal claim before awaiting the results of his appeals in the Alaska court system when exhaustion of state remedies is not required in bringing a Section 1983 claim.[222] The Court claimed that the *Medina* standard was satisfied, as the procedures did not offend some fundamental principle of justice or transgress some fundamental fairness;[223] however, in light of the Alaska courts' arbitrary denial of relief, the Court should have seriously considered the possibility that Alaska's application of Section 12.72 violated *Medina*.

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at every turn."); *id.* at 2342 (Souter, J., dissenting) ("Alaska has presented no good reasons even on its own terms for denying Osborne the access to the evidence he seeks, and the inexplicable failure of the State to provide an effective procedure is enough to show a need for a § 1983 remedy, and relief in this case."). Only upon being denied relief by the Alaska Superior Court did Osborne file suit in federal court under § 1983. *See Osborne*, 521 F.3d at 1124–25.

219. *Osborne*, 129 S. Ct. at 2321 (majority opinion).

220. *See* Wilkinson v. Dotson, 544 U.S. 74, 84 (2005) (explaining that "prisoners may bring their claims without fully exhausting state-court remedies so long as their suits, if established, would not necessarily invalidate state-imposed confinement"); *see also* Despotes, *supra* note 193, at 824 ("A § 1983 plaintiff can bypass the state courts and proceed directly to federal court; he is not required, as in habeas proceedings, to exhaust other state remedies before a federal court can hear his § 1983 action." (citing Preiser v. Rodriguez, 411 U.S. 475, 489–90 (1973))). The Court itself posits that it is not reasonable to require a § 1983 petitioner to exhaust state procedures, yet this is precisely the grounds upon which the Court faults Osborne. *See Osborne*, 129 S. Ct. at 2321 ("This is not to say that Osborne must exhaust state-law remedies. . . . But it is Osborne's burden to demonstrate the inadequacy of the state-law procedures available to him in state postconviction relief. . . . These procedures are adequate on their face, and without trying them, Osborne can hardly complain that they do not work in practice." (citations omitted)). Osborne sought relief under the state post-conviction statute, and when he was denied, he pursued federal relief. *Id.* at 2314–15. The Court appeared to equate this fact with Osborne "not invok[ing]" the State's procedures. *See id.* at 2321. R

221. *See supra* notes 213–15 and accompanying text. R

222. *See supra* notes 216–20 and accompanying text. R

223. *See Osborne*, 129 S. Ct. at 2320 (explaining the *Medina* test and then stating that the Court "see[s] nothing inadequate about the procedures").

C. *Had the Court Recognized Section 1983 and Subjected the State Post-Conviction Procedures to Meaningful Due Process Review, It Could Have Achieved the Right Policy Balance, Provided Notice to Prisoners, and Lent Adequate Guidance to Lower Courts*

The Court should have decided the important Section 1983 question and reached the issue of whether Alaska's procedures violated due process in practice. This natural extension of the Court's precedent is not only warranted under the circumstances of the case,[224] but would have aligned with the Court's policy objectives and provided significantly greater guidance to prisoners and courts as the rapidly growing area of DNA technology develops.

Recognition of a post-conviction right to seek access to evidence for DNA testing under Section 1983 would promote fairness and justice in a variety of ways. It would provide prisoners with an avenue to access evidence material to their guilt or innocence, which is important to state prisoners in light of the many procedural limitations on seeking federal habeas relief.[225] Ultimately, the Court recognized the vital interest of a defendant in a fair criminal process.[226] Providing a separate avenue for a prisoner to seek access to evidence, particularly where the alternative avenue is often time-barred,[227] furthers the Court's interests in truth-seeking and fairness.[228]

Additionally, conducting meaningful review of state post-conviction procedures when their application is challenged on procedural due process grounds would further important policy objectives. While the deferential *Medina* standard accords due weight to the freedom of the states in designing criminal procedure,[229] application of the stan-

224. *See supra* Part IV.A.

225. *See Preiser*, 411 U.S. at 489 (detailing the habeas corpus exhaustion requirement); Schumacher, *supra* note 191, at 1250 (same); *see also* Despotes, *supra* note 193, at 823 (detailing the stringent time limitations and the requirement of showing actual innocence); Raeder, *supra* note 216, at 20–21 (same). R R

226. *See Osborne*, 129 S. Ct. at 2323 (explaining that the criminal justice system has historically accommodated new types of evidence and respected individual rights).

227. *See supra* note 225 and accompanying text. R

228. *See* Despotes, *supra* note 193, at 823–24 (advocating the recognition of a constitutional right to access evidence post-conviction for DNA testing under § 1983). While the Court has also expressed concerns that recognition of rights to access evidence for DNA testing could be costly for the court system, *Osborne*, 129 S. Ct. at 2323, solutions exist to alleviate this concern. For example, cost-shifting is possible, the mechanisms of which are already incorporated in many state DNA procedures. *See, e.g.*, MD. CODE ANN., CRIM. PROC. § 8-201(h) (West Supp. 2009) (providing that the petitioner shall pay the costs of testing, although the court shall pay if the results are favorable to the petitioner). R

229. *See supra* Part II.C.

dard must allow for genuine review of state procedures in order to further the Court's interest in ensuring justice and fundamental fairness. The prospect of meaningful federal review would encourage states to perform their procedures fairly.[230]

Moreover, the Court's determination on these two issues would have provided notice to prisoners and better guidance to lower courts. Had the Court ruled on the Section 1983 issue, it would have resolved the circuit split over the proper avenue for such claims, pre-empting further debate over the meaning of *Dotson* for petitioners seeking post-conviction access to evidence.[231] Had the Court properly analyzed the fairness of Alaska's post-conviction procedures as applied in this case, its opinion would have both assured prisoners of their rights to access state post-conviction procedures, where they are provided, and held states accountable for the fairness of their procedures.[232] These considerations have become increasingly significant as DNA technology continues to develop and as the issue of access to evidence for DNA testing emerges as a national issue of criminal justice.[233]

V. CONCLUSION

In *District Attorney's Office for the Third Judicial District v. Osborne*, the Supreme Court assumed without deciding that a state prisoner's claim to a due process right to access evidence could be pursued under Section 1983, and held that Alaska's post-conviction procedures did not violate the prisoner's due process rights when the prisoner did not

230. *See, e.g.*, Evitts v. Lucey, 469 U.S. 387, 393 (1985) (explaining that where a State recognizes a right, due process requires it to provide an effective procedure for accessing relief under that scheme); *see also* Stephen B. Bright, *Is Fairness Irrelevant?*, 54 WASH. & LEE L. REV. 1, 27 (1997) (discussing the importance of federal review in the context of a habeas claim: "The failure to correct errors found in post-trial review sends the message that constitutional violations are inconsequential. It tells judges, prosecutors, and law enforcement officials that departures from constitutional standards in the quest for convictions and death sentences will be tolerated. The short shrift that the Supreme Court, Congress, and the President have given habeas corpus reaffirms the notion voiced so often by politicians: that the Bill of Rights is nothing more than a collection of 'technicalities' that get in the way of convicting the accused and carrying out their sentences. The underlying assumption, of course, is that because those accused are guilty, the denial of process does not matter."); Daniel J. Meador, *Straightening Out Federal Review of State Criminal Cases*, 44 OHIO ST. L.J. 273, 274 (1983) (emphasizing the importance of meaningful federal review of state criminal cases to ensure observance of the Constitution).

231. *See supra* Parts II.B, IV.A.

232. *See supra* Part II.A (discussing a prisoner's liberty interest in access to post-conviction procedures where they are provided).

233. The increasing importance of DNA testing is evidenced by the fact that the federal government and at least forty-six states have procedures in place for accessing evidence for DNA testing. *See Osborne*, 129 S. Ct. at 2316.

make full use of those procedures before pursuing a Section 1983 claim.[234] In so holding, the Court disappointed prisoners and courts in two respects. First, the Court left them to wonder whether claims to access DNA evidence may properly be brought under Section 1983.[235] Second, it failed to provide clear guidance on the process due to prisoners who attempt to use state post-conviction procedures to seek such evidence.[236] The Court could have defined the right to access evidence for DNA testing and rendered a decision consistent with precedent by deciding the important Section 1983 question and conducting a meaningful procedural due process review of Alaska's post-conviction procedures.[237] Doing so would have furthered policies of truth-seeking and fairness, provided notice to prisoners, and defined the contours of this important issue for the benefit of both defendants and courts.[238]

234. *Id.* at 2319, 2321.
235. *See supra* Part IV.A.
236. *See supra* Part IV.B–C.
237. *See supra* Part IV.A–B.
238. *See supra* Part IV.C.