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## Innocents Lost

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A Supreme Court decision increases the risk that the wrongly convicted could be kept behind bars.

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A MAJORITY OF the Supreme Court ruled last week that prisoners do not have a constitutional right to post-conviction DNA testing. The decision was based in large part on the assertion that federal judicial intervention was unnecessary because the great majority of state legislatures already had passed laws to give prisoners adequate access to the revolutionary technology. The majority's argument has merit, but the decision in *District Attorney's Office v. Osborne* was nonetheless wrong.

The decision sprang from the case of William G. Osborne, who was convicted of the brutal 1993 kidnapping, rape and assault of an Alaska woman. A rudimentary DNA test performed on semen found at the crime scene excluded two suspects but not Mr. Osborne. Mr. Osborne's trial lawyer declined a more advanced DNA test for fear that the results could definitively implicate her client.

On appeal, Alaskan courts denied Mr. Osborne's request for further DNA testing, concluding that eyewitness accounts and other evidence against him were so strong that DNA tests would likely not be dispositive. A federal appeals court ultimately ruled that Mr. Osborne was entitled to further testing; the Supreme Court by a 5 to 4 majority overturned this decision last week.

The federal government and 46 states have laws outlining prisoners' rights to DNA testing. Alaska is one of the four states that does not. Yet even some jurisdictions that recognize prisoner rights to testing put strict limits on that access. For example, some states allow post-conviction testing only for those on death row; those serving life sentences are excluded from the potentially exonerating benefits of DNA testing. Other states do not allow defendants who declined more advanced DNA tests at trial to seek such testing post-conviction.

Mr. Osborne is not a sympathetic character. He was released after serving 14 years and after telling a parole board he was guilty of the rape. Not long after his release, he was charged with kidnapping, armed robbery and burglary for a home invasion in which he allegedly duct-taped and pistol-whipped four people. It is easy to understand why many prosecutors and judges get fed up with prisoners, especially those convicted of violent crimes, who try to game the system. Yet DNA testing, in the words of Chief Justice John G. Roberts Jr.'s majority opinion, has an "unparalleled ability both to exonerate the wrongly convicted and to identify the guilty." Indeed, it has been credited with freeing some 240 innocent people convicted after what appeared to have been fair and thorough proceedings.

Access to DNA evidence should not be based on the luck of the draw. All states should enact laws guaranteeing ample access to DNA testing to prisoners, especially those facing capital punishment or lengthy sentences. The Constitution's promise of due process demands no less.

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