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Post-Conviction Access to a State's Forensic DNA Evidence for Probative Testing: Not a Freestanding Constitutional Right

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STUDENT CASE COMMENTARY

**POST-CONVICTION ACCESS TO A STATE'S FORENSIC DNA
EVIDENCE FOR PROBATIVE TESTING:
NOT A FREESTANDING CONSTITUTIONAL RIGHT**

District Attorney's Office v. Osborne, 129 S.Ct. 2308
(2009).

*Dorothea Thompson*¹

I. Summary

In *District Attorney's Office v. Osborne*, the United States Supreme Court addressed the central issue of whether Respondent William Osborne should have a "freestanding and far-reaching constitutional right of access" to the State's deoxyribonucleic acid ("DNA") evidence for the purpose of post-conviction relief.² Osborne asserted this constitutional right of access under the federal civil rights statute, 42 U.S.C. § 1983,³ rather than proceeding through a writ of habeas corpus under 28 U.S.C. § 2254.⁴ The United States District Court for the

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² *District Attorney's Office v. Osborne*, 129 S.Ct. 2308, 2312 (2009) (5-4 decision) (Alito, J., concurring) (Stevens, J., dissenting) (Souter, J., dissenting).

³ This federal statute allows any United States citizen or "other person within the jurisdiction thereof" to pursue a civil action for the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983 (2002).

⁴ Habeas corpus is a writ through which a person can petition for relief from unlawful custody. A federal court will not grant a writ of habeas

District of Alaska initially dismissed the respondent's claims, holding that an application for habeas corpus constituted the proper mechanism for applicants attempting to invalidate their criminal conviction. In its decision to reverse, the United States Court of Appeals for the Ninth Circuit concluded that Osborne was procedurally warranted in invoking 42 U.S.C. § 1983 under the specific circumstances of his case.⁵ On remand, the district court granted Osborne summary judgment, stating that the respondent had "a very limited constitutional right" to access the State's forensic DNA evidence for new testing.⁶ The district court based its decision on three factors: (1) the unavailability of the more precise technique of short-tandem-repeat ("STR") DNA analysis at the time of Osborne's criminal trial; (2) the low cost to the State of permitting such testing; and (3) the likelihood that the results from such an analysis would be material to Osborne's conviction.⁷

The Ninth Circuit affirmed, concluding that the precedent established under *Brady v. Maryland*⁸ of a prosecutor's pretrial duty to disclose material exculpatory evidence also extended to the "government's duty to disclose (or the defendant's right of access) to *post-*

corpus to a state prisoner "unless it appears that (A) the applicant has exhausted the remedies available in the courts of the State; or (B)(i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1)(A)-(B)(ii) (2000).

⁵ Osborne v. District Attorney's Office, 423 F.3d 1050, 1054 (9th Cir. 2005).

⁶ Osborne v. District Attorney's Office, 445 F. Supp. 2d 1079, 1081 (D. Alaska 2006).

⁷ *Id.* at 1081-82.

⁸ 373 U.S. 83 (1963).

conviction proceedings.”⁹ Granting certiorari, the Supreme Court ultimately reversed this decision, holding that Osborne had no freestanding substantive right under the Due Process Clause¹⁰ to obtain post-conviction access to the State’s biological evidence for DNA testing. A dissenting opinion by Justice Stevens argued that principles of fundamental fairness and justice dictate that convicted persons such as Osborne should have a limited federal right to potentially dispositive DNA evidence, and that such a right would serve as a necessary and appropriate safeguard against a State’s arbitrary refusal to permit post-conviction access.¹¹

II. Background

Osborne, who is an African-American male, and another man were convicted by an Alaska state jury of sexual assault and other crimes, which were perpetrated against a female prostitute in March 1993.¹² At the time of Osborne’s trial, polymerase chain reaction (“PCR”)-based DQ Alpha testing and the more discriminating restriction-fragment-length-polymorphism (“RFLP”) DNA testing were typically employed for forensic DNA testing.¹³ In the instant case, the State performed DQ Alpha testing on semen found in a condom at the crime scene, and the results matched Osborne’s genotypic profile, which is found in approximately 16% of the black population.¹⁴ The DNA results conclusively excluded the victim and two

⁹ District Attorney’s Office v. Osborne, 129 S.Ct. 2308, 2315 (2009) (citing Osborne v. District Attorney’s Office, 521 F.3d 1118, 1128 (9th Cir. 2008)) (emphasis in original).

¹⁰ U.S. CONST. amend. XIV, § 1.

¹¹ *Osborne*, 129 S.Ct. at 2335.

¹² *Id.* at 2313.

¹³ *Id.* at 2314.

¹⁴ *Id.* at 2313.

additional suspects in the crime.¹⁵ Osborne's defense attorney stated that RFLP DNA testing was not performed for tactical reasons.¹⁶ Other incriminating evidence against Osborne existed and most notably included his identification by the victim as her attacker.¹⁷

After failing to get his conviction vacated or his sentence mitigated at the appeal stage, Osborne then sought post-conviction relief in the Alaska state court.¹⁸ At the time of the Supreme Court's decision in this case, forty-six states, in addition to the District of Columbia and the Federal government, had enacted statutory laws directly addressing post-conviction access to DNA evidence for probative testing.¹⁹ However, Alaska only had a general post-conviction relief statute, Alaska Statutes section 12.72.010 (2008), which the petitioner could invoke if "there exist[ed] evidence of material facts, not previously presented and heard by the court, that require[d] vacation of the conviction or sentence in the interest of justice."²⁰ To ensure further protections of a prisoner's due process rights, the Alaska Court of Appeals, through judicial decision, invokes a three-pronged test to determine the prisoner's right to DNA testing under the State Constitution.²¹ Osborne stepped outside the procedural

¹⁵ *Id.*

¹⁶ *Osborne*, 129 S.Ct. at 2314.

¹⁷ *Id.* at 2313.

¹⁸ *Id.* at 2314.

¹⁹ *Id.* at 2316.

²⁰ *Id.* at 2317 (citing Alaska's general post-conviction relief provision provided in ALASKA STAT. § 12.72.010(4) (2008)).

²¹ To be entitled to post-conviction DNA testing, a defendant must show that "(1) that the conviction rested primarily on eyewitness identification evidence, (2) that there was a demonstrable doubt concerning the defendant's identification as the perpetrator, and (3) that scientific testing would likely be conclusive on this issue." *Id.* at 2317-18 (quoting *Osborne v. State*, 110 P.3d 986, 995 (Alaska Ct. App. 2005)).

framework of the state criminal justice system and filed his lawsuit under 42 U.S.C. § 1983,²² thus raising federal constitutional questions with respect to post-conviction access to DNA evidence. This action ultimately required resolution by the Supreme Court.

III. Court's Conclusions and Rationale

The Supreme Court granted certiorari to determine whether § 1983 was the proper statutory vehicle for asserting Osborne's claim and whether Osborne was entitled by right under the Due Process Clause to access the State's evidence for DNA testing after criminal conviction.²³ Chief Justice Roberts, who delivered the majority opinion of the Court, dismissed the first issue for resolution.²⁴ The Court assumed that the Alaska Court of Appeals was correct in its conclusion that the applicable law does not bar Osborne's § 1983 claim because permitting Osborne access to the DNA evidence that he seeks would not automatically result in the invalidity of his conviction and his release from custody.²⁵

After declining to resolve the procedural question, the Court turned next to the substantive issue of whether state prisoners have a cognizable constitutional right to access forensic DNA evidence.²⁶ Acknowledging that Osborne has "a liberty interest in demonstrating his innocence with new evidence under state law," the Court proceeded by examining "this asserted liberty interest to determine what process (if any) is due."²⁷ In *Brady*, the Court held that a prosecutor has a due process duty to disclose any

²² *Osborne*, 129 S.Ct. at 2318.

²³ *Id.* at 2316.

²⁴ *Id.* at 2319.

²⁵ *Id.*

²⁶ *Id.* at 2319-23.

²⁷ *Osborne*, 129 S.Ct. at 2319.

exculpatory evidence to the defendant prior to the trial proceedings.²⁸ Distinguishing *Osborne* from *Brady*, Chief Justice Roberts stated that the Court of Appeals “went too far” in extrapolating pre-conviction due process rights to safeguard Osborne’s post-conviction liberty interest.²⁹

The presumption of innocence is removed when a defendant is convicted of a crime through a fair trial process.³⁰ The Court concluded that a valid conviction creates “only a limited interest in post-conviction relief.”³¹ Therefore, as Chief Justice Roberts reasoned, the State justifiably has a degree of latitude in imposing procedural requirements for obtaining post-conviction relief (for example, that the DNA analytical technology requested was not available at trial or that eyewitness identification evidence constituted the basis for conviction).³² Chief Justice Roberts asserted the State’s authority on such matters by stating that the “federal courts may upset a State’s post-conviction relief procedures only if they are *fundamentally inadequate* to vindicate the substantive rights provided.”³³ In dicta, the Court concluded that Alaska’s procedures for post-conviction relief were adequate on their face and the burden was on Osborne to prove otherwise.³⁴

Finally, the Court rejected Osborne’s contention that he has a freestanding constitutional right to access DNA evidence. As the Court stressed, decisions regarding post-conviction rights of access to a State’s genetic evidence are best left in the hands of the state courts and legislatures: “The elected governments of the States are actively

²⁸ *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

²⁹ *Osborne*, 129 S.Ct. at 2319.

³⁰ *Id.* at 2320 (citing *Herrera v. Collins*, 506 U.S. 390, 399 (1993)).

³¹ *Osborne*, 129 S.Ct. at 2320.

³² *Id.* at 2318, 2320-21.

³³ *Id.* at 2320 (emphasis added).

³⁴ *Id.* at 2321.

confronting the challenges DNA technology poses to our criminal justice systems and our traditional notions of finality To suddenly constitutionalize this area would short-circuit what looks to be a prompt and considered legislative response.”³⁵

In concurrence, Justice Alito raised two additional and independent reasons for why the respondent’s constitutional claim should fail.³⁶ First, an application for a writ of habeas corpus, not § 1983, is the proper legal mechanism by which a state convict should aver a federal constitutional right to access DNA evidence for discovery testing. In such a case, 28 U.S.C. § 2254(b)(1)(A) requires the applicant to have “exhausted the remedies available in the courts of the State,”³⁷ which Osborne had not done. Second, Justice Alito concluded that, regardless of the exhaustion provision in § 2254, Osborne’s claim can be rejected on the merits based on § 2254(b)(2), because “a defendant who declines the opportunity to perform DNA testing at trial for tactical reasons has no constitutional right to perform such testing after conviction.”³⁸

In dissent, Justice Stevens (joined in part by Justice Souter and fully by Justices Ginsburg and Breyer) argued that Osborne has a constitutional right to obtain post-conviction access to physical evidence for DNA testing, which Justice Stevens considers as dispositive.³⁹ State-governed procedures for post-conviction relief must comport with due process principles in order to provide those persons petitioning for such relief with “fair opportunity to assert their state-created rights.”⁴⁰ Justice Stevens directly questioned the adequacy of Alaska

³⁵ *Osborne*, 129 S.Ct. at 2322.

³⁶ *Id.* at 2324.

³⁷ 28 U.S.C. § 2254(b)(1)(A) (2000).

³⁸ *Osborne*, 129 S.Ct. at 2324.

³⁹ *Id.* at 2331, 2333.

⁴⁰ *Id.* at 2332.

Statutes section 12.72.010(4) in providing procedural protections to state prisoners seeking access to DNA evidence for exculpatory testing.⁴¹ According to Justice Stevens, Alaska's refusal to allow Osborne access to the State's DNA evidence constituted an arbitrary state government action.⁴² Arguing primarily from the principle of fundamental fairness, Justice Stevens reasoned that the fact that most states sanction a "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."⁴³

IV. Analysis

The Court narrowly interpreted the Fourteenth Amendment's Due Process Clause within the context of post-conviction access to the State's forensic DNA evidence. The Court analyzed the question at issue from a traditional and originalist perspective, properly restricting post-conviction access to a state-created entitlement, which has both statutory and judicially afforded protections. Two arguments are posited in support of this decision. First, the appellate court's attempt to analogize the precedent established in *Brady* to the post-conviction context is invalid.⁴⁴ Second, the state government and courts, not the federal judiciary, are more adequately equipped to address the evolving issues created by the application of modern DNA technology to post-conviction relief in the criminal justice system.⁴⁵ Ultimately, the Court's decision preserves the states' sovereignty in this area of law and will reduce

⁴¹ *Id.* at 2334.

⁴² *Id.* at 2336.

⁴³ *Osborne*, 129 S.Ct. at 2335.

⁴⁴ *Id.* at 2320.

⁴⁵ *Id.* at 2323.

the stream of non-meritorious litigation emanating from the state prisons.

From a substantive viewpoint, the Court correctly rejected the premise that a defendant's due process rights to pretrial disclosure of exculpatory evidence logically extends *ipso facto* to a convicted person's right of access to the State's DNA evidence. While the Court stated that the due process protections afforded to defendants before a final judgment are not (and should not) be the same as for individuals convicted at a fair trial, it recognized the need for corrective measures in certain instances where the incriminating evidence is weak and relies largely on eyewitness identification. Such redress, however, is not precluded by the lack of a freestanding constitutional right to post-conviction DNA testing; such relief is simply limited in a post-conviction context.

In the instant case, Alaska provided both statutory and judicial procedures for accessing post-conviction relief, including providing a substantive right to those inmates seeking to obtain DNA evidence for testing purposes.⁴⁶ At the crux of the disagreement between the majority and the dissent is that these state-created rights are not released without condition of a "sufficiently compelling showing of new evidence that establishes [the convicted person's] innocence."⁴⁷ Policy concerns of judicial economy and efficient administration dictate the necessity for placement of such state limitations on an inmate's access to post-conviction relief. To constitutionalize post-conviction access to DNA evidence would engender an unmanageable influx of litigation in this area, eventually leading to an erosion of notions of finality in the criminal justice system.

⁴⁶ *Id.* at 2317-18.

⁴⁷ *Id.* at 2320.

V. Conclusion

In *District Attorney's Office v. Osborne*, the United States Supreme Court took a crucial step in defining the boundaries of substantive due process rights within the context of post-conviction relief. The Court held that a state prisoner is not entitled to a freestanding constitutional right to access the State's DNA evidence for exculpatory testing purposes. While the Court's decision appears to foreclose the vindication of wrongfully convicted individuals, state legislatures and courts have provided adequate procedural remedies, which permit post-conviction relief in meritorious cases. In the instant case, the Court saw no compelling reason to interfere with a State's post-conviction relief procedures in light of the respondent's failure to demonstrate such state law remedies as insufficient.