

## Osborne and the Right to Post-Conviction DNA Testing

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The Supreme Court will consider whether an individual convicted of a crime has a constitutional right to obtain a DNA sample that might exonerate him. The case that raises this issue has produced four appellate opinions so far. The one that the Supreme Court will review is *Osborne v. District Attorney's Office for Third Judicial District*, 521 F.3d 1118 (9th Cir. 2008).

The case began in 1994 with a vicious attack on a prostitute. The evidence that led to William Osborne's conviction included semen from a condom that was analyzed with a relatively unrevealing form of DNA testing. While pursuing [-----Page 3-----] other avenues of relief, Osborne filed an action in federal district court under a civil rights statute, 42 U.S.C. § 1983, to force state officials to give him the biological material for more modern DNA testing. Unlike most other states, Alaska has no statute specifically prescribing the conditions under which prisoners can obtain post-conviction DNA testing. After some twists and turns, the district court decided that Osborne had a "limited" due process right to the sample.

The Ninth Circuit affirmed, emphasizing that the crime-scene DNA sample had been introduced at trial as evidence against him, that more definitive testing now is available at no cost to the state, and that Osborne could use an exculpatory finding to obtain post-conviction relief. Although the state of Alaska contends that the Ninth Circuit "created from whole cloth" a new constitutional right, other courts have found that such a constitutional right exists. *E.g.*, *Savory v. Lyons*, 469 F.3d 667 (7th Cir. 2006); *McKithen v. Brown*, 565 F.Supp.2d 440 (E.D.N.Y. 2008).

Although Osborne has been pursuing state habeas corpus relief, he has yet to seek federal post-conviction relief. Given the many limitations of federal habeas corpus and the state court decisions to date, it may be that the only avenues that remain open to him are executive clemency and state or federal relief on the theory that a prisoner has a "freestanding" right to be released because he can show that, despite a fair trial unblemished by any prejudicial errors, he is actually innocent. In *House v. Bell*, 547 U.S. 518 (2006), the Supreme Court recognized that such a right might exist, but the Court determined that even if it did, the proof of actual innocence in that case did not satisfy the "extraordinarily high ... threshold for any hypothetical freestanding innocence claim." *Id.* at 555.

Although a new DNA finding excluding Osborne as the source of the crime-scene DNA would be powerful evidence of actual innocence, the Ninth Circuit conceded that it would not be "conclusive." As in *House*, therefore, the Court conceivably could avoid resolving the "freestanding right" issue by characterizing the evidence here as falling short of the vague, "extraordinarily high" threshold. It also could avoid this question by finding a right of access to DNA evidence just because the evidence would provide support for a petition for a pardon—an issue that the Ninth Circuit chose not to consider. Finally, it could avoid all these issues by holding, as Alaska argued, that a federal court should not issue what is, in effect, a discovery order against the state outside of an actual post-conviction proceeding.

In contrast, unless the Court were to pin the right of access to new testing to executive clemency rather than a judicial proceeding, Osborne cannot prevail unless he establishes two things. First, the Court must agree that regardless of how fair Osborne's trial may have been, he

has a constitutional right to be released if he is factually innocent. Second, he must persuade the Justices that access to the DNA samples would be reasonably likely to produce sufficient evidence of his actual innocence.

In short, this complex case will produce new law about federal rights to DNA testing, but the opinion that emerges could be anything from a narrow, [-----Page 4-----] procedural loss to a sweeping constitutional victory for Osborne, with plenty of permutations in the middle.

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