

Federal 9th Circuit Allows Post-conviction §1983 Civil Rights Lawsuit To Access Evidence

A roadblock to successfully challenging a wrongful conviction can be the prosecution's obstruction to post-conviction access to critical evidence. In 2002 the federal Eleventh Circuit Court of Appeals ruled a 42 U.S.C. §1983 civil rights lawsuit is an avenue to access biological evidence in the possession of a state (or federal) agency for post-conviction testing. (See, *Bradley v. Pryor*, 305 F.3d 1287, 1288 (11th Cir. 2002)) The federal Ninth Circuit has joined the Eleventh Circuit. (See, *Osborne v. District Attorney's Office for the*

Third Judicial RRB District, 423 F.3d 1050 (9th Cir. 09/08/2005))

Although the Ninth and Eleventh Circuit cases specifically concerned a defendant's post-conviction pursuit of access to biological evidence, there is nothing in either decision precluding use of a §1983 suit to obtain access to other types of evidence withheld by a government agency, such as fingerprints, or documents to analyze for handwriting or authentication.

The Ninth Circuit's *Osborne* deci-

sion, and the Eleventh Circuit *Bradley* decision provide valuable precedents for anyone seeking access to evidence by a §1983 suit in the eight federal circuits that have not ruled on the issue. The Fourth (2002) and Fifth Circuits (2002) have barred use of a §1983 suit as a post-conviction method of accessing biological evidence possessed by the government.

A significant aspect of the the Ninth and Eleventh Circuit precedents is that a §1983 suit does not require exhaustion of state remedies, so a defendant in

those Circuits can bypass state procedures that may be unfavorable to accessing the evidence, or that enable the state to use tactics delaying, or at worst, denying access to the evidence.

In May 2006 the Ninth Circuit reiterated *Osborne* by issuing a ruling in an unpublished decision favoring a defendant seeking access to withheld evidence through a §1983 lawsuit. (See, *Jackson v. Clark*, No. 04-55032 (9th Cir. 05/09/2006)). Condensed versions of the *Osborne* and *Jackson* decisions follow.

Osborne v. District Attorney's Office for the Third Judicial RRB District, 423 F.3d 1050 (9th Cir. 09/08/2005)

[1] United States Court Of Appeals For The Ninth Circuit

[3]2005.C09.0003464< <http://www.versuslaw.com>>

[19] Following a March 1994 jury trial in Alaska Superior Court, Osborne was convicted of kidnapping, assault, and sexual assault, and was sentenced to 26 years' imprisonment. The charges arose from a March 1993 incident in which the victim, a prostitute named K.G., after agreeing to perform fellatio on two clients, was driven to a secluded area of Anchorage, raped at gunpoint, beaten with an axe handle, and shot and left for dead.

[20] K.G. later identified, from photo line-ups, Osborne and Dexter Jackson as her assailants. At their joint trial, abundant physical evidence linked Jackson to the crime scene. ... By contrast, aside from K.G.'s ... identification of Osborne as the second assailant, the State tied Osborne to the assault based primarily on its analysis of biological evidence recovered from the crime scene—namely, a used condom, two hairs, and certain bloodied and semen-stained clothing.

[21] The State subjected the sperm found in the used condom to "DQ Alpha" testing, an early form of DNA testing that, like ABO blood typing, reveals the alleles present at a single genetic locus. The results showed that the sperm had the same DQ Alpha type as Osborne; however, this DQ Alpha type is shared by 14.7 to 16 percent of African Americans, and can thus be expected in one of every 6 or 7 black men. The State also recovered two hairs from the crime scene: one from the used condom, and another from K.G.'s sweatshirt. DQ Alpha typing of these hairs was unsuccessful, likely because the samples were too small for analysis. Both, however, were "negroid" pubic hairs

with the "same microscopic features" as Osborne's pubic hair. Tests performed on K.G.'s clothing were inconclusive.

[22] This evidence was submitted to the jury, which rejected Osborne's defense of mistaken identity and convicted him of kidnapping, first-degree assault, and two counts of first-degree sexual assault. His convictions were affirmed on direct appeal. With his application for state post-conviction relief still pending in the Alaska courts, Osborne filed the instant § 1983 claim. His complaint alleges that the District Attorney's Office, District Attorney Susan Parkes, the Anchorage Police Department, and Police Chief Walt Monegan (collectively, the "State") violated his federal constitutional rights by denying him access to this evidence. As relief, he seeks only "the release of the biological evidence" and "the transfer of such evidence for DNA testing."

[24] The magistrate judge recommended dismissing Osborne's § 1983 action, finding that because he seeks to "set the stage" for an attack on his underlying conviction, under *Heck* a petition for habeas corpus is his sole remedy. The district court accepted and adopted this recommendation, and dismissed the action.

[27] DISCUSSION

[28] [1] This case requires us to consider, once again, "the extent to which § 1983 is a permissible alternative to the traditional remedy of habeas corpus." As the Supreme Court has recognized, state prisoners have two potential avenues to remedy violations of their federal constitutional rights: a habeas petition under 28 U.S.C. § 2254, and a civil suit under 42 U.S.C. § 1983. [*Heck v. Humphrey*, 512 U.S. 477, 480 (1994)]. Of course, while a habeas petition may ultimately secure release, habeas relief is often barred by procedural hurdles. By contrast, a § 1983 suit will not result in release, but is generally not barred by a

failure to exhaust state remedies. *Id.* at 480-81.

[29] A. *Preiser, Heck*, and their Progeny

[30] [2] The [Supreme] Court, like this circuit, has attempted to "harmoniz[e] the broad language of § 1983, a general statute, with the specific federal habeas corpus statute." *Id.* at 491 (Thomas, J., concurring) ... These efforts began in *Preiser*, where the Court held that "when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus." [*Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973)] They continued in *Heck*, where the Court enunciated what has become known as the "favorable termination" requirement: Where a prisoner's § 1983 action, if successful, "would necessarily imply the invalidity" of his conviction or sentence, it must be dismissed "unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." *Heck*, 512 U.S. at 487; see also *Docken*, 393 F.3d at 1027-28. And they were refined, in the wake of *Heck*, in cases most commonly involving prisoner challenges to state disciplinary and parole procedures. ...

[31] [3] Most recently, the [Supreme] Court in *Wilkinson v. Dotson*, 125 S.Ct. 1242 (2005), reviewed *Preiser, Heck*, and their progeny, and explained that:

[32] These cases, taken together, indicate that a state prisoner's § 1983 action is barred (absent prior invalidation)—no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings)—if success in that action would necessarily demonstrate the invalidity of confinement or its duration.

Osborne cont. on p. 31