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* decision, 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In May 2006 the Ninth Circuit reiterated *Osborne* by issuing a ruling in an unpublished decision favoring a defendant seeking access to withheld evidence through a §1983 lawsuit.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 Anchor-age, raped at gunpoint, beaten with an axe handle, and shot and left for dead.

[20] K.G. later identified, from photo lineups, 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

Osborne cont. from p. 30

[33] *Id*. at 1248. *Dotson* thus erases any doubt that *Heck* applies both to actions for money damages and to those, like this one, for injunctive relief, and clarifies that *Heck* provides the relevant test to determine whether § 1983 is a permissible avenue of relief for Osborne.

[34] B. Osborne's Claim

[35] Although the district court recognized that Osborne raises "a direct challenge to [neither] the fact nor duration of imprisonment," it ruled that his claim was *Heck*-barred because he seeks to "set the stage" to attack his underlying conviction. [T]hree circuits – the Fourth, Fifth, and Eleventh – have previously confronted the very question we now face.

[36] [4] The State argues that Osborne seeks to use § 1983 as a discovery device for a later habeas petition, and that allowing him to do so would circumvent habeas procedural requirements and undermine the principles of comity and federalism that *Heck* protects. … Put simply, the State contends that if a claim can be brought in habeas, it must be brought in habeas. Accordingly, it urges us to adopt the reasoning of the Fourth Circuit in *Harvey v. Horan* (Harvey I), 278 F.3d 370, 375-79 (4th Cir. 2002), in which a split panel held, for much the same reasons, that § 1983 actions by prisoners seeking post-conviction access to biological evidence are barred by *Heck*. …

[37] [5] Osborne argues, by contrast, that the appropriate question under *Heck* is not whether he seeks to "set the stage" to attack his underlying conviction, but rather whether success on his § 1983 claim "necessarily implies" the invalidity of his conviction. This question must be answered in the negative, he submits, because success on his § 1983 claim guarantees only access to the DNA evidence. Though he concedes that he ultimately hopes to establish his innocence, he points out that additional DNA testing may inculpate him, exculpate him, or be inconclusive. And, even if the testing exonerates him, release would come through an entirely different proceeding, either habeas or clemency. Osborne thus suggests we adopt the reasoning of the Eleventh Circuit in *Bradley v. Pryor*, 305 F.3d 1287, 1288 (11th Cir. 2002) … which held, for these reasons, that a § 1983 action seeking post-conviction access to DNA evidence is not *Heck*-barred. …

[38] [6] We agree with Osborne, and join the Eleventh Circuit in holding that *Heck* does not bar a prisoner's § 1983 action seeking post-conviction access to biological evidence in the government's possession. It is clear to us, as a matter of logic, that success in such an action would not "necessarily demonstrate the invalidity of confinement or its duration." *Dotson*, 125 S.Ct. at 1248. First, success would yield only access to the evidence-nothing more. … Second, further DNA analysis may prove exculpatory, inculpatory, or inconclusive; thus, there is a significant chance that the results will either confirm or have no effect on the validity of Osborne's confinement. … And third, even if the results exonerate Osborne, a separate action – alleging a separate constitutional violation altogether-would be required to overturn his conviction. …

[39] C. *Dotson*

[40] [7] Any remaining doubt as to the propriety of this approach is removed, we believe, by the Court's recent opinion in *Dotson*, which reads "necessarily" to mean "inevitably" and rejects the notion that a claim which can be brought in habeas must be brought in habeas. 125 S.Ct. at 1246-48. In *Dotson*, the Court considered the § 1983 claims of two Ohio prisoners who alleged ex post facto and due process violations at their parole hearings, and who sought injunctive relief in the form of new, constitutionally proper parole hearings. *Id*. at 1245. Ohio argued that these claims were *Heck*-barred because the prisoners "believe that victory on their claims will lead to speedier release from prison," and thus the suits, "in effect, collaterally attack the duration of their confinement." *Id*. at 1245-46. The Court rejected this argument, saying:

[41] The problem with Ohio's argument lies in its jump from a true premise (that in all likelihood the prisoners hope these actions will help bring about earlier release) to a faulty conclusion (that habeas is their sole avenue for relief).

[42] *Id*. at 1246. This confirms our prior understanding … that § 1983 and habeas are not always mutually exclusive. It also fatally undermines the State's insistence that a claim which can be brought in habeas must be brought in habeas...

[43] The Court in *Dotson* … repeatedly emphasized that to be barred under *Heck*, a § 1983 claim must, if successful, necessarily demonstrate the invalidity of confinement or its duration. *Id*. at 1247-48 … These statements undercut considerably the State's argument that Osborne's claim is *Heck*-barred even if he seeks only to "facilitate" or "set the stage" for a future attack on his conviction.

[44] Moreover, in response to Ohio's argument that allowing *Dotson* to sue under § 1983 would contravene principles of comity and federalism, the Court said: Our earlier 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. ...

[46] Ultimately, the *Dotson* court found it key that neither prisoner sought an injunction ordering "immediate or speedier release"; at most, success meant a new parole hearing, at which the prisoners might-or might not-receive reduced sentences. *Id.* at 1248. … This reasoning applies with equal force and dictates the outcome here.

[47] … Thus, for the reasons … embraced by the Eleventh Circuit in *Bradley*, we hold that *Heck* does not bar a prisoner's § 1983 action seeking post-conviction access to biological evidence in the government's possession.

[48] CONCLUSION

[49] [8] For the above reasons, Osborne's § 1983 action "should be allowed to proceed, in the absence of some other bar to the suit." *Heck*, 512 U.S. at 487 … Accordingly, we reverse the judgment of the district court and remand for further proceedings.

Ninth Circuit reiterates *Osborne* and use of §1983 to access evidence in May 2006 unpublished decision

Jackson v. Clark, No. 04-55032 (9th Cir. 05/09/2006); 2006.C09.0002083<http://www.versuslaw.com>

[7] NOT FOR PUBLICATION

[11] Arthur Duane Jackson ("Jackson"), convicted in state court of carjacking and attempted murder, appeals *pro se* the district court's *sua sponte* dismissal of his 42 U.S.C. § 1983 action. Jackson seeks to compel the defendants to provide him with, or account for, various evidence pertaining to his state conviction. Based on intervening authority not available to the district court when it dismissed, we reverse and remand.

[12] The district court determined that Jackson's action was barred under *Heck v. Humphrey*, 512 U.S. 477 (1994), concluding that providing Jackson with allegedly withheld evidence would "necessarily imply the invalidity" of his state court conviction. An intervening decision, however, held that *Heck* does not preclude a § 1983 action seeking to compel the state to release certain evidence because success would only yield access to evidence, which, in and of itself, "would not 'necessarily demonstrate the invalidity of confinement ...'" *Osborne v. District Attorney's Office for the Third Judicial District*, 423 F.3d 1050, 1054 (9th Cir. 2005). Because Jackson, much like the prisoner in *Osborne*, only seeks the release, or accounting, of potentially exculpatory evidence, success on the merits would not necessarily imply the invalidity of his conviction.

[13] Accordingly, we reverse the district court and remand for further proceedings.