

U.S. Supreme Court Rules No Right To DNA Testing

In 1993 two men picked-up a prostitute in Anchorage, Alaska. After the vehicle's passenger raped the woman, she was left on the side of the road. The blue condom worn by the rapist was recovered by police. A man was arrested who admitted to being the car's driver. He identified William Osborne as his passenger who raped the woman.

Osborne insisted he was innocent. Even though DNA testing of the semen in the condom could prove or disprove his claim, neither the prosecution nor his court-appointed lawyer sought the testing.

Osborne was convicted by a jury of kidnapping, assault and sexual assault. He was sentenced to 26 years in prison.

In Osborne's 2004 application for parole he admitted to some of his convicted crimes. After his parole was denied he filed a post-conviction petition claiming he was innocent. He stated he falsely admitted to the crimes because asserting his innocence would have made him ineligible for parole. To prove his innocence Osborne's petition requested DNA testing of the semen by the STR technique that had not been developed at the time of his trial. Alaska's Court of Appeals affirmed the lower court's denial of his petition and DNA testing.

Osborne then filed a federal 42 U.S.C. §1983 lawsuit to obtain access to the semen for DNA testing. In 2007 the 9th Circuit Court of Appeals ruled that Osborne had a due process right to access the semen for DNA testing. The 9th Circuit arrived at its decision by extending Osborne's right to pretrial disclosure of potentially exculpatory evidence under *Brady v. Maryland*, to his post-conviction proceeding. The U.S. Supreme Court granted the State of Alaska's writ of certiorari.

On June 18, 2009 the Supreme Court sided with Alaska, ruling 5-4 that a convicted prisoner does not have a substantive due process right to access evidence for DNA testing that could prove the prisoner's innocence. (*D.A. v. Osborne*, No. 08-6 (USSC, 06-18-09)). Chief Justice Roberts explained the majority's reasoning that Alaska, along with other states and the federal government, have post-conviction procedures that can be pursued for DNA testing. Osborne simply has not yet been successful in his effort to obtain an order for the testing at the state level. Roberts also explained the Court has pragmatic reasons for ruling against Osborne:

"Establishing a freestanding right to access DNA evidence for testing would

force us to act as policymakers, and our substantive-due-process rulemaking authority would not only have to cover the right of access but a myriad of other issues. We would soon have to decide if there is a constitutional obligation to preserve forensic evidence that might later be tested. If so, for how long? Would it be different for different types of evidence? Would the State also have some obligation to gather such evidence in the first place? How much, and when? No doubt there would be a miscellany of other minor directives.

... At the end of the day, there is no reason to suppose that their answers to these questions would be any better than those of state courts and legislatures."

Although Roberts conceded that Osborne might have a right to DNA testing under Alaska's Constitution, the Supreme Court would not create "a new constitutional right" to DNA testing under the federal constitution, and take "over responsibility for refining it."

"It is very likely that Osborne will close the federal courthouse doors to at least some innocent prisoners who cannot get testing under state law - some of whom may spend their lives in prison, or even be executed, as a result."

Nina Morrison, attorney with the Innocence Project in New York.

Justice Stevens wrote for the dissenters:

"The State of Alaska possesses physical evidence that, if tested, will conclusively establish whether respondent William Osborne committed rape and attempted murder. If he did, justice has been served by his conviction and sentence. If not, Osborne has needlessly spent decades behind bars while the true culprit has not been brought to justice. The DNA test Osborne seeks is a simple one, its cost modest, and its results uniquely precise.

... DNA evidence has led to an extraordinary series of exonerations, not only in cases where the trial evidence was weak, but also in cases where the convicted parties confessed their guilt and where the trial evidence against them appeared overwhelming."

Since the Court's ruling was by only a one-vote majority, the Court may eventually reconsider the issue of whether a prisoner has the due process right to access evidence for post-conviction scientific testing that could provide evidence of his or her innocence.

For the complete *Osborne* decision, send \$4 (stamps OK) to: Justice Denied; PO Box 68911; Seattle, WA 98168

Norfolk Four Conditionally Pardoned

Derek Tice, Joseph Dick Jr., Danial Williams and Eric Wilson were four Navy enlisted men convicted in the July 1997 rape and murder of a Navy enlisted man's wife in the couple's Norfolk, Virginia apartment.

The four men who became known as the Norfolk Four, confessed after intense interrogation by the Norfolk PD. However, they all recanted their confessions that did not match the details of the crime, and no physical or forensic evidence linked any of them to the crime. Based on their confessions Tice, Williams and Dick were convicted of rape and murder and sentenced to life in prison without parole. Wilson, was convicted of rape only and sentenced to 8-1/2 years imprisonment.

A fifth man, Omar Ballard, confessed at least five separate times that he acted alone. Only his confessions match the crime scene and only his DNA matches biological evidence recovered from the victim. Ballard was also convicted and sentenced to life in prison.

The case of the Norfolk four became a cause célèbre. Major newspapers editorialized, and former prosecutors, judges and law enforcement officers publicly expressed their belief in the men's innocence and called for Virginia's governor to pardon them. Professor Richard Leo co-authored a book about the case — *The Wrong Guys: Murder, False Confessions, and the Norfolk Four* (2008).

Wilson was released in 2005 after completing his sentence. On August 6, 2009, Virginia Governor Tim Kaine conditionally pardoned Tice, Williams and Dick and ordered their immediate release. A future governor may be willing to revisit the cases of the Norfolk Four and grant them full pardons.

Derek Tice's Habeas Granted

Norfolk Four defendant Derek Tice's murder and rape convictions were overturned by U.S. District Court Judge Richard L. Williams on September 14, 2009. Judge Williams ruled Tice had been provided ineffective assistance of counsel, because his trial "Counsel failed to move to suppress Tice's June 25, 1998 confession on the ground that such confession was made after Tice had invoked his right to remain silent." Judge Williams ruled there is a reasonable probability the jury's verdict would have been different if his confession had been excluded. Many experts, including Professor Richard Leo, have determined Tice made a false confession under police pressure. See, *Derek Tice v Johnson*, No. 08-cv-69 (USDC ED-VA, 09-14-2009) Memorandum Opinion.