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Alaska in the News Again

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CRIMINAL JUSTICE

By Robert Sanger

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ALASKA IN THE NEWS AGAIN

INTRODUCTION

Alaska's Senator Ted Stevens as a convicted felon may have been returned to the United States Senate. And a certain Alaskan politician, who gained brief national fame, is returning to that state under investigation which may result in further legal procedures.[1] But yet another Alaskan, William Osborne, is languishing in prison for kidnapping, assault and sexual assault and he is also claiming that he is innocent. It is Mr. Osborne' case that we will look at in this month's *Criminal Justice* column.

The Ninth Circuit agreed that William Osborne should have access to evidence for DNA testing but the State of Alaska disagreed and petitioned the United States Supreme Court for Certiorari. On Monday, November 3, 2008, the highest court granted the Writ and the case will be briefed this Term. Argument and the decision my come by the end of the Term in July or may be held over until the October 2009-2010 Term. The case presents interesting legal and philosophical issues.

OSBORNE V. THE DISTRICT ATTORNEY'S OFFICE FOR THE THIRD JUDICIAL DISTRICT

On the face of it, it is hard to understand why a person should not be allowed to have access to evidence to have it analyzed if it may prove him innocent. Barry Scheck of the Innocence Project points out that 223 wrongfully convicted people have been exonerated since 1989 based on DNA retesting. Specifically, regarding this case, he told the New York Times, "Why would anyone be afraid to learn the truth in this case? There is no rational reason to deny DNA testing that could prove innocence or confirm guilt."[2] The Ninth Circuit agreed with this rationale in April of 2008,[3] stating that further DNA testing could either exonerate an innocent man and leave authorities free to find the real culprit or confirm the guilt of the truly guilty. It held that Mr. Osborne, who had brought an action under 42 U.S.C. Section 1983, did have a limited Due Process right of access to the evidence for post-conviction DNA testing.

Nevertheless, the District Attorney and the State of Alaska decided to seek certiorari and ask that the United States Supreme Court reverse. Alaska and only six other states that do not require law enforcement to allow post conviction DNA testing. The remaining forty three states, including California,[4] have enacted specific legislation allowing such testing. The statutes differ in scope and approach. The California statute, passed in 2000, provides a motion procedure for the testing or retesting of evidence in any case where a person is convicted of a felony and can make a

threshold showing, among other things, that the evidence is available, that there is a *prima facie* showing that the evidence to be tested presents a material issues and that there is a reasonable probability that the verdict or sentence would have been more favorable.[5].

So, in light of the apparent logic of the Ninth Circuit decision -- the desirability of seeking the truth, of convicting the guilty and of exonerating the innocent – one would wonder what is up in Alaska. Despite what we all may have learned about Alaskan politics recently, it seems a questionable use of oil revenues to pursue this case to the United States Supreme Court. But, even more perplexing is the decision of the Court, itself, to hear the case. Why not simply allow the Ninth Circuit opinion to stand? What important matter of Constitutional law requires that his case be heard? In a Court recently taken by citing state legislators as the barometer of Constitutional meaning, is there a reason to question an 86% "mandate?" To take a shot at understanding the Court's grant of *cert*. we can look to the Ninth Circuit opinion, the Petition for Certiorari, the Opposition and Reply and try to divine the meaning of the brief Order itself.

WHY WAS CERTIORARI *GRANTED?*

As we all know, it takes at least four votes to grant *cert*. There is not necessarily an institutionally coherent basis for the four votes. *Cert*. is sometimes dismissed as improvidently granted. And, the justices voting to grant *cert*. often find that their rationale for granting it is not borne out in the final opinion of the Court.

At the time of this writing, the Court has granted certiorari but has not delineated specific questions. It appears that the general question at issue is whether or not a convicted felon can use 42 U.S.C. Section 1983 to secure access to evidence for post conviction DNA testing. The grounds relied upon by the Ninth Circuit were that *Brady v. Maryland*[6] and the Fourteenth Amendment create a civil right interest that is enforceable under that statute and that it may be invoked post-conviction. That string of propositions has not been decided by the United States Supreme Court.

Heretofore, it has been the case that a defendant has the right to have the government provide exculpatory evidence while his or her case is pending but the Court has not extended that to a case where the defendant has been convicted and the case is over. In addition, the Civil Rights Act, in particular 42 U.S.C. Section 1983 *et seq.*, has not been authorized as a vehicle to do this kind of discovery in such cases where the conviction has already occurred.

The Supreme Court, in its Order Granting Certiorari, does not specify. However, it seems from the briefing that both of these major issues are at play. Underneath it all, however, is the concept that there may be a case where DNA can be tested or retested and where it may resolve guilt or innocence. The Supreme Court seems poised to say whether or not the person convicted in such a case will be allowed to put that evidence to the ultimate test.

SHOULD THE COURT HEAR THE CASE ON THE MERITS?

When looked at as a case of first impression, which it clearly is, it is easier to understand how the Court – or four Justices thereof – decided to grant *certiorari*. It is also true that the Circuits are in conflict over both issues. The Ninth Circuit in this and preceding cases is at odds with two or three of the other federal circuits on each issue. So, it makes some sense that the Supreme Court would decide the both issues: 1) Whether a civil rights action can be brought independent of any pending litigation to obtain discovery on a yet to be asserted innocence claim; and 2) Whether the Due Process Clause and *Brady v. Maryland*[7] provide for a requirement that the government (law enforcement and the prosecution) provide exculpatory evidence after a case is over.

Alaska made a number of arguments in favor of overturing the Ninth Circuit, some of which were related to the case itself. They argue that the DNA tests would not be dispositive on guilt or innocence, that the plaintiff confessed during a request for parole and that there was other evidence of guilt. These arguments were rejected by the Ninth Circuit which, in essence, found that the type of evidence -- uncertain cross-racial eyewitness identification, circumstantial evidence that was inconclusive

at best and the subsequent “confession” made in a showing of remorse to obtain release -- created just the sort of situation where wrongful convictions resulted in other cases. And many of those wrongful convictions were discovered as a result of further DNA testing.

Alaska then went on to argue that a person in Osborne’s position should be required to file his habeas corpus petition and to make a showing that he was likely to prevail in order to get the discovery. The Ninth Circuit had little trouble with the argument. A convicted but innocent person may not be able to make a showing of innocence without the evidence and he may not be able to get the evidence any other way. They point out that the scientific evidence linking Mr. Osborne to the crime was such that one out of every six or seven African American subjects could have left the trace evidence. This, taken with other evidence that he may not have been at the scene, that other trace evidence clearly was not his and the weakness of cross-racial identifications was sufficient to make it over the threshold to require that the DNA testable evidence be made available.

The government also argues for the finality of decisions. This has a certain “law and order” appeal and also avoids the messy truth that hundreds of people have been exonerated – the wrong person was convicted and the real criminal remained free. It is an inconvenient truth but a truth nonetheless. It make no doctrinal sense to not allow release of potentially exculpatory evidence just because there is a “final” decision even though the government cites the disturbing line of cases which purports to hold that claims of actual innocence are not legally cognizable in habeas unless coupled with a constitutional violation.

In the Reply Brief, Alaska argues that this also violates the principles of federalism. Even though forty three other states have enacted legislation requiring that the government allow DNA testing, they argue that a Supreme Court decision upholding a limited right to post-conviction testing would interfere with the states’ rights to “experiment” with legislation defining when such a right would attach. This deference to state rather than constitutional authority, of course, is only applied depending on whose ox is being gored – as we found out when soon to be judicially appointed candidate Bush’s ox was being Gored.[8] Either there are constitutional principles or there are not. It does not seem appropriate to determine that constitutional principles only apply occasionally.

CONCLUSION

It seems that the Supreme Court could make an interesting jurisprudential decision in this case. It is probably true that law enforcement cannot be required to produce evidence in closed cases on whim. On the other hand, it seems that there is a constitutional right to obtain evidence for retesting where a colorable claim of actual innocence suggests that the wrong person may be in prison or even facing death. Justice is expensive. We really cannot have it any other way if we want to minimize the conviction of the innocent and maximize the apprehension and conviction of the guilty.

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[1]As of the time of this writing, Alaska Senator Ted Stevens holds a majority of the votes in his race for re-election to the United States Senate and is expected to win the election. Alaska Gov. Sarah Palin faces ethics charges and her approval rating in her home state has dropped considerably. See, e.g., Yareth Rosen, "Sarah Palin Returns to a Changed Alaska," *Christian Science Monitor*, November 9, 2008.

[2]David Stout, "Supreme Court to Review DNA Testing," *New York Times*, November 3, 2008.

[3]*Osborne v. District Attorney's Office II,* __ F3d__ (9th Cir., 2008). Note that there was a prior federal appeal in this matter, *Osborne v. District Attorney's Office I,* 423 F3d 1050 (9th Cir., 2005). The prior appeal dealt with the threshold issue of whether a civil rights case could be brought on these grounds since it might result in a challenge to a criminal conviction. The Ninth Circuit determined in *Osborne I* that it could be and remanded the case to determine if a civil right had been violated.

[4]California Penal Code Section 1405.

[5]California Penal Code Section 1405(f).

[6]*Brady v. Maryland*, 373 U.S. 83 (1963) holding that a defendant in a *pending* criminal case has a right to the production of exculpatory evidence by the government..

[7]*Supra*.

[8]Bush v. Gore 531 U.S. 98 (2000)