

Understanding the U.S. Supreme Court's Decision on Post-Trial DNA Testing in Osborne

*Christopher Mallios, JD**

In *District Attorney v. Osborne*, 128 S.Ct. 2308 (June 19, 2009), the United States Supreme Court held that criminal defendants do not have a federal due process right to post-trial DNA testing. This decision disappointed many inmates and members of the criminal defense bar — particularly those involved in innocence projects -- who have been trying to greatly expand access to post-trial DNA testing and who have proven to be very effective in getting their message out in the mainstream media. The arguments of Osborne's supporters, who favor recognizing a new right to post-trial DNA tests, could be succinctly summarized as follows: "If there is evidence that could conclusively show whether the defendant committed the crime, then why not just test it?"

After the decision, much of the media coverage and commentary was critical. News reports of the decision ignored the fact that the *Osborne* case involved a brutal gunpoint rape in which there was overwhelming evidence of the defendant's guilt. The reports further ignored Osborne's trial counsel's strategic decision to not request more specific pre-trial DNA testing because she did not want to further incriminate her client. There are many valid reasons why these tests should not be done in Osborne's case, and why the Supreme Court's decision to deny the existence of a federal due process right to post-trial DNA testing -- a position supported by the U.S. Department of Justice -- was a victory for victims and for prosecutors. To fully understand the decision, however, a review of the facts of the case is necessary.

FACTS

The evidence in the record from Osborne's trial established the following. On March 22, 1993, Osborne and his codefendant met the victim, who agreed to perform sex acts in exchange for money. The defendants took her to a secluded area and raped her in their car at gunpoint and stole her money and Swiss army knife. They beat and strangled her, causing her to lose control of her bowels and defecate in their car. Osborne rubbed feces in the victim's face, hair, and clothing. When she tried to flee, the defendants beat her severely with a wooden axe until she pretended to be dead. They shot at the victim and the bullet grazed her head. Finally, they buried her in the snow and left her for dead.

The victim survived the attack. When Osborne and the codefendant left the scene, the victim managed to get out of the snow, started walking home and stopped a passing car. She did not report her assault to the police at that time. At approximately the same time the victim was making her way home, witnesses saw Osborne and the codefendant together. Some of these witnesses observed that Osborne's clothes were bloody. The next day, someone who heard about the crime from the people who drove the victim home reported it to the police. The police contacted the victim and she gave a statement describing her assault and turned over her soiled clothes.

Five days later, police stopped Osborne's codefendant driving the car used to commit the rape. Upon searching the car, police recovered a .380 caliber semi-automatic pistol, the victim's Swiss army knife, a bottle of the victim's perfume, and blood determined to be consistent with the victim's based upon an early form of DNA testing called DQ alpha; it established that DNA from blood in the car had a DNA characteristic shared by 5% of white women. The codefendant told the police that he committed the crime with Osborne, but that statement was not admissible against Osborne because he and the codefendant were tried jointly. Testing of the victim's clothes revealed fibers matching the carpeting in the car, as well as a pubic hair that was later found to have the same characteristics as the defendant's pubic hair. The victim later identified the defendant and his codefendant from photo arrays. She also identified the car they used.

When the police processed the crime scene, more than 24 hours after the rape, they found a spent shell casing that ballistics testing determined to have been fired from the codefendant's gun, an axe handle, some of the victim's bloody clothes, and tire

tracks that matched the codefendant's car. Police also recovered a used blue condom containing semen and a pubic hair that had the same characteristics as Osborne's pubic hair. DQ Alpha DNA testing on sperm revealed that it had a characteristic shared by approximately 15% of the African-American population. Osborne, who is African-American, also shares this characteristic.

At the time of his trial, newer and more specific types of DNA testing were available. After consulting with DNA experts, Osborne's lawyer made a strategic decision not to seek more precise DNA testing because she believed that such testing would have incriminated her client. She also wanted to take advantage of the lack of certainty associated with the earlier type of DNA testing to argue the existence of reasonable doubt.

Osborne and the co-defendant were tried together. At the trial, the victim identified both Osborne and the co-defendant as her rapists. A jury convicted both defendants of rape, kidnapping and assault based upon the victim's testimony, testimony from other witnesses, physical evidence, medical evidence and the results of forensic testing. Osborne was sentenced to 26 years in prison, with 5 years suspended.

In 2002, Osborne filed a parole petition in which he confessed to the crimes for which he was convicted. He admitted forcing sexual penetration of the victim at gunpoint, as well as beating her and burying her in the snow. He repeated this confession when he testified before the parole board. He was eventually granted mandatory parole in 2007 after serving 14 years incarceration. Six months after his release, Osborne committed a home invasion robbery. He pled guilty and was sentenced to 10 years for robbery and an additional 6 years for violating parole in the rape case. Osborne filed his civil rights claim seeking post-trial DNA testing after he returned to prison.

HOLDING

According to Alaska's post conviction relief statute and relevant case law, a defendant who seeks post-conviction DNA testing must show: (1) that the conviction rested primarily on eyewitness identification evidence; (2) that there was a demonstrable doubt concerning the defendant's identification as the perpetrator; and, (3) that scientific testing would likely be conclusive on this issue. Osborne had previously filed a post-conviction petition claiming ineffective assistance of counsel, but did not file a petition pursuant to his state's laws regarding post-trial DNA testing. Instead, he took the unique approach of filing a civil rights lawsuit pursuant to Title 42, Section 1983 of the United States Code seeking testing of the evidence in his case. To prevail in such a claim, he would have had to show that he had a constitutional due process right to post trial DNA testing. The U.S. Supreme Court rejected this claim.

The Court held that Alaska's law and procedures relevant to post-conviction DNA testing are fair and do not violate the due process clause. The Court also held that Osborne should have used those laws to seek testing. Osborne likely will not prevail under Alaska law because of the overwhelming evidence of his guilt, but the court nevertheless sent the case back to the Alaska state courts.

In a concurring opinion, Justice Alito articulated the concerns of many prosecutors, victim advocates, and victims. He pointed out the potential dangers of recognizing a due process right to post-trial DNA testing and discussed the danger of creating a precedent that would encourage criminal defense attorneys to "sandbag" in sexual assault cases, i.e., not requesting DNA testing before the trial, and then getting a second bite of the apple by requesting such testing in post-conviction proceedings, as Osborne did. He also noted that DNA evidence is not always dispositive because it might be degraded or of insufficient quantity.

Justice Alito also noted that forensic samples often constitute a mixture of multiple persons, such that it is not clear whose profile is whose, or even how many profiles are in the sample at all. During pre-trial proceedings, sexual assault prosecutors can often address the issue of DNA mixtures or genetic profiles that do not match the defendant by working with the victim to ascertain any consensual partner(s) and, in some instances, obtaining DNA samples from them. It is much more difficult, however, for prosecutors to respond to these issues during post-trial litigation due to faded memories and the unavailability of witnesses and evidence. Justice Alito also noted the substantial amount of resources needed to conduct post-trial DNA testing as well as the substantial backlogs for DNA testing in many jurisdictions. He concluded that allowing broad post-conviction testing would place undue burden on already overburdened resources.

IMPACT OF THIS CASE

If the Supreme Court had ruled in Osborne's favor, it would have created a new avenue for thousands of convicted sex offenders, murderers and other offenders to subvert state law and go straight to federal court seeking testing and retesting of all of the evidence in their cases. Current law requires that defendants exhaust all of the remedies available to them in state courts pursuant to state law before they can go to federal court by filing a petition for a writ of habeas corpus¹. If Osborne has prevailed in the Supreme Court, defense attorneys would have been permitted to engage in the type of strategic sandbagging to which Justice Alito referred. It also would have encouraged post-conviction criminal defense attorneys to engage in even more "fishing expeditions" and, in a significant number of cases, may have potentially led to the granting of post-trial relief, not because the defendant is actually innocent, but due to ambiguous results and inevitable prejudice to the prosecution resulting from the passage of time.

Most states have laws that govern when inmates may obtain post-trial DNA testing of the evidence in their cases, and prosecutors' offices have developed policies to respond to these requests as well. In many cases, prosecutors agree to such testing when their review of the evidence and applicable state law suggests that the interests of fairness require testing. Prosecutors should strive to have policies that are fair and open-minded and place the interests of justice ahead of a desire to simply fight to preserve all convictions. But when a prosecutor's office conducts a detailed examination of the case and determines that the evidence of guilt is so overwhelming that such testing is neither advisable in the interests of justice nor required pursuant to state law, an inmate's only option is to seek a court order to obtain testing. By rejecting Osborne's claim, the Court has essentially told defendants that they must follow the existing laws of their states and exhaust all of their state remedies before they can go to federal court pursuant to the filing of a habeas corpus petition. This ruling preserves the status quo and fundamental principles of federalism by requiring defendants to meet the standards for testing set by state law.

**Christopher Mallios is an Attorney Advisor for AEquitas: The Prosecutors' Resource on Violence Against Women.*

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ENDNOTES

¹ The federal habeas corpus statute, 28 U.S.C. § 2241, applies to inmates in state custody seeking post-trial relief in federal courts and mandates that they commence federal court proceedings by filing a petition for a writ of habeas corpus. Federal law further requires state inmates to exhaust all state remedies before filing a petition in federal court. See 28 U.S.C. § 2254. It is rare for a defendant to launch a post-trial attack on their criminal conviction by filing a civil rights lawsuit pursuant to Section 1983, which is a much more general statute that provides procedures for any citizen to file lawsuits alleging violations of civil rights.

This project was supported by Grant No. 2009-TA-AX-K024 awarded by the U.S. Department of Justice, Office on Violence Against Women (OVW). The opinions, findings, conclusions, and recommendations expressed in this publication are those of the author(s) and do not necessarily reflect the views of OVW.

1100 H Street NW, Suite 310 • Washington, DC 2005

P: (202) 558-0040 • F: (202) 393-1918

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