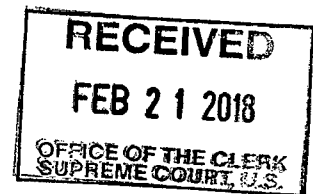


No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JAY LEWIS BIGGS,
Petitioner,
vs.
JOHN D. FERRERO,
Respondent.



On petition for writ of certiorari to the
United States Court of Appeals for the Sixth Circuit
Originating case number 17-3469

PETITION FOR WRIT OF CERTIORARI

Jay L. Biggs #A560289
Toledo Correctional Institution
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Phone: (419) 726-7977

TABLE OF CONTENTS

CAPTION PAGE / COVER PAGE	i
TABLE OF CONTENTS	ii
QUESTIONS PRESENTED	iii
LIST OF PARTIES	v
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE AND FACTS	3
REASONS FOR GRANTING THE PETITION	14
SUMMARY AND CONCLUSION	27

INDEX TO APPENDICES

APPENDIX A

Judgment of the United States District Court for the Northern District of Ohio filed March 24, 2017 (Case No. 5:15-cv-02307 Doc. No. 14)

APPENDIX B

Judgment of the United States Court of Appeals for the Sixth Circuit filed November 29, 2017 (Case No. 17-3469, Doc. No. 19)

QUESTIONS PRESENTED

QUESTION NUMBER ONE:

When a state provides mechanisms for postconviction relief, is a state prisoner constitutionally entitled to postconviction access to previously-produced biological evidence when all of the following applies:

- 1) the biological evidence is in the form of tissue slides cut from tissue blocks procured during the autopsy;
- 2) pretrial testing of said evidence proved inconclusive as to the cause of death;
- 3) testing of said evidence now, due to scientific advancements, could prove conclusively that the state prisoner did not commit homicide, and in fact could prove conclusively that no crime even occurred at all;
- 4) the state is required by state legislation to preserve and store said evidence for thirty (30) years;
- 5) the county coroner has made clear that said evidence can be provided to the Ohio Innocence Project's independent experts without consuming or destroying the tissue blocks being stored by the state, and would be at no risk to the state's case as the state would be able to retain additional tissue;
- 6) the costs involved in accessing, testing, and analyzing said evidence postconviction would be done at the expense of or on behalf of volunteer efforts of the Ohio Innocence Project, who are acting on behalf of the state prisoner;
- 7) the state provides postconviction remedies for convicted persons to have fair opportunity to prove their innocence by utilizing

advances in scientific testing and analysis of material biological evidence, such as DNA;

- 8) the state prisoner has consistently maintained his innocence; and
- 9) the state prisoner has made all reasonable and available efforts to obtain postconviction access to said evidence in order to prove his innocence through advancements in science, however the state tribunals have denied him such access.

QUESTION NUMBER TWO:

When a state provides, at state expense, postconviction testing of biological evidence such as DNA when the testing could prove factual innocence, is that state also required to provide postconviction access to other forms of biological evidence, such as tissue samples, when testing of said evidence (at the prisoner's expense) could also prove factual innocence?

QUESTION NUMBER THREE:

Does the decision render by the Sixth Circuit Court of Appeals in the instant case conflict with the decision rendered by the Second Circuit Court of Appeals in the case *Caswell v. Green*, 424 F. App'x 44 (2d Cir. 2011)? In that case, Caswell sought postconviction access "to certain exhibits admitted at his trial and sentencing for future proceedings." (*Id.* *4). When citing *Skinner v. Switzer*, 131 S. Ct. at 1293, and their case *McKithen v. Brown*, 481 F.3d 89, 102-103 (2d Cir. 2007), the Second Circuit "held that a post-conviction claim for access to evidence is properly brought under § 1983, where success in the suit would merely grant access to evidence that may be exculpatory, inculpatory, or inconclusive." (*Caswell v. Green*, at * 4). Since the

same is true in the instant case, it appears that the Sixth Circuit and the Second Circuit are in direct conflict on the matter at bar. In fact, when dismissing the instant case for failure to state a claim under Fed. R. Civ. P. 12(b)(6), the district court specifically stated that "[t]his Court believes Caswell went too far." (PageID # 413, FN 11, par. 2).

LIST OF PARTIES

Petitioner (Plaintiff-Appellant) Jay L. Biggs is currently incarcerated, due to convictions in the underlying criminal case, at the Toledo Correctional Institution, 2001 East Central Ave., Toledo, Ohio 43608 (Phone: 419-726-7977).

Respondent (Defendant-Appellee) John D. Ferrero is the Prosecuting Attorney for Stark County, Ohio, and maintains an office at 110 Central Plaza South, Suite 510, Canton, Ohio 44702 (Phone: 330-451-7882; Fax 330-451-7225).

TABLE OF AUTHORITIES

Bradley v. Pryor, 305 F.3d 1287 (11th Cir. 2002)	15
Castanon v. Johnson, 2012 U.S. App. LEXIS 27114 (6th Cir.)	15
Caswell v. Green, 424 F.App'x 44 (2d Cir. 2011)	25, 26
Dist. Attorney's Office v. Osborne, 557 U.S. 52 (2009)	15, 20
Grier v. Klem, 2011 U.S. Dist. LEXIS 124053 (WD Pa.)	20
Hardin v. Com. of Kentucky, 396 S.E.3d 909 (2013)	22
Hartman v. Walsh, 2012 U.S. App. LEXIS 27183 (6th Cir.) ...	16, 18
Harvey v. Horan, 285 F.3d 298 (4th Cir. 2002)	15
Imbler v. Pachtman, 424 U.S. 409, 96 S.Ct. 984 (1976)	15
McKithen v. Brown, 481 F.3d 89 (2nd Cir. 2007)	15
Michael v. Ghee, 498 F.3d 372 (6th Cir. 2007)	15
Savory v. Lyons, 469 F.3d 667 (7th Cir. 2006)	15
Skinner v. Switzer, 562 U.S. 521, 131 S.Ct. 1289 (2011) ...	15, 23
State v. Prade, 126 Ohio St.3d 27, 2012-Ohio-1842	24
Herrera v. Collins, 506 U.S. 390 (1993)	28
Morrissey v. Brewer, 408 U.S. 471 (1972)	28

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner (Plaintiff-Appellant) Jay L. Biggs respectfully requests that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from federal courts:

The opinion of the United States Court of Appeals appears at Appendix B to the petition and is

☐ reported at _____;
☐ has been designated for publication but not yet reported;
☒ is unpublished.

The opinion of the United States District Court appears at Appendix A to the petition and is

☐ reported at _____;
☒ has been designated for publication but not yet reported;
☐ is unpublished.

JURISDICTION

☒ For cases from federal courts:

The date on which the United States Court of Appeals decided the case was November 29, 2017.

☒ A petition for rehearing was not timely filed.

☒ An untimely petition for rehearing will be filed along with an instant motion for an extension of time.

☐ A timely petition for rehearing was denied by the United States court of Appeals on _____.

☐ An extension of time to file the petition for a writ of certiorari was granted on _____.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983 (Civil action for deprivation of rights):

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, and Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

AMENDMENT XIV, SECTION 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE AND FACTS

Plaintiff-Appellant Jay Lewis Biggs (hereinafter "Appellant"), an Ohio state prisoner proceeding pro se, initiated a civil action in the appropriate federal district court under 42 U.S.C. § 1983 alleging the deprivation of constitutional rights under color of state law. Said action sought to enjoin Defendant-Appellee John D. Ferrero, the Prosecuting Attorney for Stark County, Ohio (hereinafter "Appellee"), from violating Appellant's federal constitutional rights by denying him access to previously-produced biological evidence for purposes of postconviction forensic testing and analysis. Appellant, represented by the Ohio Innocence Project, sought postconviction access to the previously-produced biological evidence because it was materially relevant, noncumulative, and could prove actual innocence due to advances in scientific testing since trial. Because the Appellant was denied postconviction access to the previously-produced biological evidence, he initiated the instant § 1983 action (pro se) alleging that Ohio's postconviction procedures are fundamentally inadequate to vindicate the substantive rights provided - at least as it pertains to his particular circumstances, the details of which follows.

At approximately 7:00-8:00 p.m. on the evening of June 4, 2006, the Appellant's wife fed their four-month-old daughter Jaydee, and then changed her diaper. At around 9:00 p.m., the Appellant took Jaydee to the bedroom that she shared with her one-year old brother. The Appellant left the bedroom window open, as was typical for a warm summer night. Before leaving for work on the following morning, the Appellant went into the children's bedroom to close the window

as it had become chilly during the night, and discovered Jaydee's lifeless body.

Jaydee was born premature. She had a collapsed lung and had difficulty breathing while still in the hospital after her birth. She suffered from torticollis, which is a weakening of the muscles in the neck. She also had plagiocephaly, a deformity to the skull that affects sinuses. Prior to her death, she had been vomiting more than normal for a child her age. During the autopsy, it was discovered that she had e coli in her system. An e coli infection is the likely cause of the recent excessive vomiting. An e coli infection is also the likely cause of the unusually large amount of gas that was discovered in her intestines during the autopsy.

Nearly two years after the autopsy (on April 16, 2008), the Appellant was indicted on offenses arising from the death of his four-month-old daughter. The Appellant was charged with two counts of aggravated murder with death penalty specifications, two counts of murder, one count of rape, and one count of endangering children. The Appellant professed his innocence throughout plea proceedings, and ultimately refused a proposed plea deal that included a definite prison sentence of fifteen (15) years in exchange for a guilty plea to lesser included offenses. Thus, the matter was set for trial.

Prior to trial, the Appellee provided the biological evidence sought in this action to Dr. Werner Spitz, who was appointed by the Court to review the case for the defense. Said biological evidence is in the form of tissue slides from Jaydee's autopsy. Testing and analysis performed on the tissue slides prior to trial proved inconclusive as to the infant's cause of death. Thus, the State and the

defense looked to other factors in order to theorize cause of death.

The State's theory of the case was that sometime within an hour or two after the Appellant's wife fed his four-month-old daughter, he vaginally raped her, and when she cried out, he covered her mouth to stifle her cries, which resulted in her death from suffocation. The Stark County Coroner testified at trial that Jaydee died from asphyxia caused by smothering, and that based on the amount of milk that was in her stomach at autopsy, he believed she had died within an hour or two after being fed. He also testified in support of the State's theory of vaginal rape.

Dr. Werner Spitz was appointed by the Court as he is a world renowned expert in forensic pathology, has performed over sixty thousand (60,000) autopsies, and has published the recognized treatise on the subject. He testified that Jaydee died from either Sudden Infant Death Syndrome (SIDS) or an accidental obstruction of the airway. The latter, he explained, was based upon the presence of foam around Jaydee's mouth, which was caused by aspirating food prior to death.

Dr. Spitz also stated that the small bruise inside the vagina was likely due to the use of the speculum, and that the use of a speculum in pathology is unusual because it can cause damage. He saw no blood in the vaginal area, no injury to the hymen, and said that the redness visible on the vagina was a symptom of an infection caused by poor hygiene - specifically, the presence of fecal matter. He explained that this was also the cause of the e coli in Jaydee's blood. It was also discovered at trial that Jaydee's clothes and bassinette were subjected to forensic tests and found to contain

vomit stain, but no blood or semen.

On October 14, 2008, the jury returned verdicts of guilty on all charges. At the conclusion of the mitigation phase of the trial, the jury recommended that the Appellant receive a term of life in prison without the possibility of parole. At the sentencing hearing, the trial court merged all counts with Count One (Aggravated Murder), and imposed life imprisonment without parole eligibility. The trial court journalized the sentence in a judgment entry filed December 5, 2008. (Stark County Court of Common Pleas - Case No. 2008 CR 0653).

The Appellant timely appealed to the Fifth District Court of Appeals. (State v. Biggs, 5th Dist. No. 2008 CA 00285, 2009-Ohio-6885). The court of appeals acknowledged that the primary issue at trial was whether a crime had even occurred at all, specifically stating that "[d]espite the seriousness of a death penalty case, the matter came down to the following issues: 1) the cause of the infant's death; 2) whether the infant had been sexually abused (vaginal penetration by another); and 3) whether appellant had committed any offenses." (State v. Biggs, 2009-Ohio-6885, ¶ 17). The Fifth District ultimately confirmed the Appellant's conviction.

The Supreme Court of Ohio declined to accept jurisdiction over the appeal. (State v. Biggs, 125 Ohio St.3d 1438, 2010-Ohio-2212). The Appellant petitioned the United States District Court for the Northern District of Ohio for a writ of habeas corpus under § 2254, which was denied, as was a certificate of appealability. (Biggs v. Coleman, N.D. Ohio No. 5:11-cv-0292). The Appellant appealed to this Court for a certificate of appealability, which was denied. (6th Cir. Cir. No. 13-3259). The United States Supreme Court declined to review

the case on February 23, 2015. (Supreme Court No. 14-7947).

Subsequent to the Appellant's conviction and appeals, the Ohio Innocence Project became involved in the case. It became clear that in order to evaluate the case for actual innocence and determine if postconviction relief was available, the medical evidence material to the case must be evaluated. The materials available for review were the State's initial "death investigation" documents, transcripts of the trial, and Jaydee's prior medical records. The Ohio Innocence Project contacted three separate independent medical experts to review the available materials:

- (1) George R. Nichols, M.D., Forensic Pathologist - The former Chief Medical Examiner for Kentucky and a Professor of Pathology at the University of Louisville, and - most notably, has been qualified as an expert in physical injuries of infants and children;
- (2) Marvin E. Miller, M.D., Professor of Pediatrics, Obstetrics/Gynecology, and Biomedical Engineering at Wright State University School of Medicine, and Director of Medical Genetics at The Children's Medical Center of Dayton; and
- (3) Mark J. Shuman, M.D., Forensic Pathologist for the Miami-Dade County Medical Examiner's Department.

After an initial review of the available materials, Dr. Shuman referred the Ohio Innocence Project to Dr. Charles Hyman because he is a specialist in forensic pediatrics, which would be necessary for a review of the alleged vaginal injuries. Further, Dr. Hyman is a child abuse expert, and is board certified in pediatrics and medical examiners pathology. The Ohio Innocence Project forwarded the available materials to Dr. Hyman for review. The first three experts (Doctors Nichols, Miller, and Shuman) reviewed the available materials and then requested the biological evidence material to the case (i.e., the tissue slides from Jaydee's autopsy) in order to complete their assessments. The three requests for said tissue slides were attached

as Exhibits A, B, and C to the Motion To Release Biological Samples that was later filed with the trial court on November 7, 2012. (See State v. Biggs, Stark County Common Pleas No. 2008 CR 0653).

Dr. Hyman, the fourth expert, informed the Ohio Innocence Project that he would not even begin his review of the available materials until the tissue slides were available. Without tissue slides, these experts cannot complete their reviews, and any assessment for postconviction litigation, including the validity of the Appellant's innocence claim, is completely foreclosed. Furthermore, the tissue slides are essential for the Ohio Innocence Project to be able to determine whether the experts review / testing / analysis would result in newly discovered evidence, or would demonstrate prejudice. The importance of the tissue slides and a complete postconviction review of the scientific evidence presented at trial can only be appreciated in light of the medical standards that should govern determining cause of death and the nature of the injuries, and the problems that result when medical standards fail to be met.

In all deaths occurring in the first few months after birth, obstetric history, sonographic studies of the fetus, and amniotic fluid determinations provide important data to coorelate with autopsy data. See Practice Guidelines for Autopsy Pathology, The Perinatal and Pediatric Autopsy, Kevin E. Bove, M.D., and the Autopsy Committee of the College of American Pathologists, Arch Pathol Lab Med - Vol. 121 at 369, April 2007. "Coorelation is best made in settings where mortality is regularly assessed by a team of pediatricians, obstetricians, radiologists, geneticists, and pathologists." (Ibid). While the guideline discusses a number of items deemed necessary for the

review of an infant death, it specifically discusses the critical role played by the review of tissue slides by microscopy. (Id., Vol. 121 at 372). As it directly relates to the instant case, the guidelines state that a broad representation of tissue slides, including cardiac, lung, pancreas, and liver, are crucial when asphyxia is suspected. (Ibid).

The Ohio Innocence Project's efforts to obtain the previously-produced tissue slides began in 2011 with the Stark County Coroner's Office. The Coroner's Office confirmed that they were in possession of the tissue blocks and an FTD DNA card. The Coroner's Office stated that they could make re-cuts (or tissue slides) for each of the Ohio Innocence Projects experts without consuming or destroying the tissue blocks that they had preserved from Jaydee's autopsy. The Coroner's Office made clear that releasing the tissue slides in question presented no risk of harm to the State's case, as the Coroner would be able to retain additional tissue, and that no evidence would be damaged in the process.

The Ohio Innocence Project advised that the scientific testing and analysis of the tissue slides would be done at the expense of or on behalf of volunteer efforts for the Ohio Innocence Project, thus it would not require the State to expend any resources whatsoever. However, unlike the Franklin County Coroner's Office, which releases tissue slides to experts in exchange for a fee for that service, the Stark County Coroner's Office had no such procedure available. The Coroner's Office advised the Ohio Innocence Project that the tissue slides could only be obtained by filing a Public Records Request.

Therefore, on September 12, 2011, the Ohio Innocence Project

filed the first of two formal Public Records Requests to obtain the tissue slides at issue. Shortly thereafter, the Stark County Coroner's Office contacted the Ohio Innocence Project and stated that the Stark County Prosecutor's Office had advised that the tissue slides would only be released to the Ohio Innocence Project pursuant to a Court Order. When the Ohio Innocence Project subsequently contacted the Prosecutor's Office, it was confirmed that the tissue slides would only be released upon Court Order.

Because all non-litigation efforts to obtain the tissue slides had been thwarted, the Appellant, represented by the Ohio Innocence Project, filed the aforementioned Motion To Release Biological Samples with the trial court on November 7, 2012. The State filed a response in opposition on December 7, 2012, and the trial court denied the motion in a Judgment Entry filed December 12, 2012. (See *State v. Biggs*, Stark County Court of Common Pleas Case No. 2008 CR 0653). The Appellant timely appealed to the Fifth District Court of Appeals, which affirmed the trial court's judgment in an Opinion and Judgment Entry filed July 29, 2013. (See *State v. Biggs*, Fifth District Court of Appeals Case No. 2013 CA 00009).

On appeal, the Fifth District applied the legal standard for postconviction DNA testing as the governing legal standard for release of the tissue slides at issue. (*Id.*, at ¶¶ 13-20). However, the tissue slides are evidence that should already be in the possession of the Appellant's reviewing counsel due to its prior disclosure under Crim. R. 16, as opposed to evidence where new DNA or genetic testing is being requested. Thus, the application of the standard from the DNA statute to the evidence at issue here creates a standard that can

only be met by disclosure of the evidence that the Appellant currently seeks. The appellate court placed the Appellant in a catch-22 predicament. Moreover, the appellate court places the courts in a position where they will ultimately become clogged with briefs proffering recent developments in science and medicine in order for defendants to get evidence that was disclosed to trial counsel, and which could easily answer the court's questions. One such advancement cited by the Ohio Innocence Project in an effort to meet this standard was new means to detect over three thousand five hundred (3,500) genetic disorders since the Appellant's conviction, which includes a new DNA test that can diagnose genetic disorders in newborns in two days.

The Fifth District Court of Appeals having presented the Appellant with an unworkable standard necessitated an appeal to the Supreme Court of Ohio, which was assigned case number 13-1463. The Ohio Innocence Project filed the Memorandum In Support Of Jurisdiction on September 12, 2013. The Innocence Network filed a Brief of Amicus Curiae on the same date, expressing the importance of the case. The Innocence Network is an association of more than sixty (60) organizations dedicated to providing pro bono legal and investigative services to convicted persons seeking to prove their innocence. The sixty-five (65) current members represent hundreds of prisoners with innocence claims in all fifty states and the District of Columbia, as well as Canada, New Zealand, Australia, Ireland, the United Kingdom, and the Netherlands.

Drawing on the lessons from cases in which the system convicted innocent persons, the Innocence Network advocates study and reform designed to enhance the truth-seeking functions of the criminal justice system to ensure that wrongful convictions are prevented. In over

half of the three hundred eleven (311) exonerations secured through postconviction DNA testing, the misapplication of forensic disciplines has played a significant role in convicting the innocent. The Innocent Network sought amicus curiae status in support of the Ohio Supreme Courts review of the Appellant's case because it believed, based on its experience exonerating innocent individuals and examining the causes of wrongful convictions, that because unreliable or improper scientific evidence often played a significant role in producing miscarriages of justice, the ability to access and review such evidence is imperative in any postconviction review.

Nevertheless, the Supreme Court of Ohio declined to accept jurisdiction over the compelling issues presented in the Appellant's case, and issued its determination on December 24, 2013. And despite the dispositive arguments supporting release of the tissue slides proffered by both the Ohio Innocence Project and the Innocence Network, the state tribunal has effectively foreclosed the Appellant from any meaningful postconviction review and relief. As a result, the Appellee has refused, and continues to refuse, to make available the tissue slides from Jaydess Biggs autopsy for the purposes of scientific testing and analysis. Certainly the Appellant has made all reasonable attempts to obtain the tissue slides, albeit to no avail. As such, an action pursuant to 42 U.S.C. § 1983 was initiated as the next appropriate means by which the Appellant could obtain the tissue slides.

The Appellant filed a timely pro se complaint with the United States District Court for the Northern District of Ohio on November 10, 2015 (case no. 5:15-cv-02307). The Respondent filed a motion to

dismiss, proffering six (6) grounds upon which dismissal should be granted. The Appellant filed a response in opposition to the motion to dismiss. On March 24, 2017, the district court dismissed the complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6), however the district court granted a certificate of appealability.

The Appellant timely appealed to the Sixth Circuit Court of Appeals (case no. 17-3469), and filed his pro se brief on June 22, 2017. On July 6, 2017, the Respondent filed a motion to strike the Appellant's brief, arguing that it had been ghostwritten by an attorney and not actually prepared pro se. The Appellant filed a response in opposition to the motion to strike on July 24, 2017. The Respondent then filed his brief on August 2, 2017, which was deemed defective and was rejected. The Respondent filed a corrected brief on August 4, 2017. The Appellant filed a reply brief on September 1, 2017, along with a motion for leave of court to attach an appendix to his reply brief. In an Order filed November 29, 2017, the Sixth Circuit affirmed the district court's judgment dismissing Appellant's complaint for failure to state a claim under Rule 12(b)(6), and denied as moot Respondent's motion to strike Appellant's brief.

The Appellant was precluded from filing a timely petition for a rehearing of the Sixth Circuit's Order because of the short deadline and his conditions of confinement. However, the Appellant does intend to file a petition for a rehearing beyond the deadline along with an instant motion for an extension of time. Because this Court allows ninety (90) days to file a petition for a writ of certiorari, the Appellant was able to file the instant petition timely. Thus, the matter is properly before this Honorable Court.

REASONS FOR GRANTING THE PETITION

PLAINTIFF-APPELLANT STATED A COLORABLE § 1983 CLAIM THAT DEFENDANT-APPELLEE VIOLATED HIS CONSTITUTIONAL RIGHTS BY DENYING POSTCONVICTION ACCESS TO PREVIOUSLY-PRODUCED MATERIAL BIOLOGICAL EVIDENCE FOR THE PURPOSES OF SCIENTIFIC TESTING AND ANALYSIS THAT COULD PROVE ACTUAL INNOCENCE.

The facts of this case are undisputed, and are as follows:

- 1) The Appellant has consistently maintained his innocence;
- 2) the Appellant's pro se § 1983 action seeks access to biological evidence that could prove his innocence due to advances in scientific testing and analysis since his trial;
- 3) the biological evidence was provided to the court-appointed defense expert under Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963), however testing that was available at the time proved to be inconclusive;
- 4) the costs involved in accessing and testing the biological evidence postconviction will be done at the expense of or on behalf of volunteer efforts of the Ohio Innocence Project, acting on behalf of the Appellant, thus the State will not expend any resources;
- 5) the biological evidence can be provided to the Ohio Innocence Project without consuming or destroying the tissue blocks being stored by the State;
- 6) the biological evidence can be provided without any risk of harm to the State's case, as the State would be able to retain additional tissue, and no evidence will be damaged in the process;
- 7) Ohio provides postconviction remedies for defendants to have fair opportunity to prove their innocence utilizing newly discovered evidence;

- 8) Ohio provides postconviction remedies for defendants to have fair opportunity to prove their innocence by utilizing advances in scientific testing and analysis of material biological evidence; and
- 9) the Appellant has made all reasonable efforts to obtain postconviction access to the material biological evidence in order to prove his innocence through advancements in scientific testing and analysis, however the state tribunal has denied him such access.

The controlling law that applies to these undisputed facts follows:

- 1) A postconviction claim for access to material biological evidence is properly brought under § 1983 where success in the suit would merely grant access to evidence which may prove exculpatory, inculpatory, or inconclusive. *Skinner v. Switzer*, 562 U.S. 521, 131 S. Ct. 1289, 179 L. Ed.2d 233 (2011), at paragraph 2 of the opinion of the Court.

The Appellant properly alleged in his pro se § 1983 action that denying him access to this evidence in light of the undisputed facts violated his federal constitutional right to procedural due process. *Dist. Attorney's Office v. Osborne*, supra, 557 U.S. at 69; *Skinner v. Switzer*, supra, at *6; *McKithen v. Brown*, 481 F.3d 89, 98 (2nd Cir. 2007); *Harvey v. Horan*, 285 F.3d 298, 308-09 (4th Cir. 2002); *Savory v. Lyons*, 469 F.3d 667, 669 (7th Cir. 2006); and *Bradley v. Pryor*, 305 F.3d 1287, 1290-91 (11th Cir. 2002). The 6th Circuit has consistently held that, "[t]o establish a procedural due process violation, a plaintiff must show that the state deprived him or her of a constitutionally protected interest in life, liberty, or property without due process of law." *Castanon v. Johnson*, 2012 U.S. App. LEXIS 27114 (6th Cir. No. 12-5497), citing *Michael v. Ghee*, 498 F.3d 372, 377

(6th Cir. 2007) (internal quotation marks omitted).

And in the case *Hartman v. Walsh*, 2012 U.S. App. Lexis 27183 (6th Cir. No. 11-4368) the Court confirmed that a state prisoner's claim for postconviction access to evidence is properly brought "in the context of § 1983[.]" (Id. at *4). However, the Court affirmed the district court's dismissal of Hartman's complaint "in part because he did not make a sufficient showing that he deserved access to the evidence" (Id. at *5), and because "Hartman has not been able to demonstrate a deficiency in the Ohio procedure." (Id. at *7). The instant case is distinguishable from Hartman's case because the Appellant has made a sufficient showing that he deserves access to the evidence. And as to Ohio's procedure, the Appellant has clearly and consistently alleged that the denial of access to the evidence in question has effectively foreclosed him from a threshold assessment as to whether or not postconviction relief will even be available to him.

Ohio's postconviction relief remedies may very well turn out to be constitutionally adequate, however the Appellant has been deprived of the opportunity to access Ohio's postconviction remedies because he first needs access to the biological evidence in order to evaluate whether or not he has cause to raise a claim therein. In other words, the Appellant has been precluded from being able to even ascertain whether or not he has a postconviction claim because he has been denied access to the biological evidence at issue. This is the "deficiency in the Ohio procedure" that distinguishes the Appellant's case from the case *Hartman v. Walsh*. When the Appellant attempted to gain access to the evidence in question, he discovered that the procedure Ohio used to determine whether or not he should gain such access was

"fundamentally inadequate," thus unconstitutional, at least under his particular circumstances. See *Dist. Attorney's Office v. Osborne*, supra, 557 U.S. at 69; *Hartman v. Walsh*, supra, at *5.

This deficiency in Ohio's procedure, as it applied to the Appellant, is most drastically recognizable when considering that the Lucas County Coroner's Office releases tissue slides to postconviction defense experts in exchange for a fee for that service. However, when the Appellant sought tissue slides for his postconviction experts, the Appellee intervened and denied access, and the state judiciary subsequently affirmed the denial of access. The Supreme Court instructs that "after a conviction the prosecutor ... is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction." *Imbler v. Pachtman*, 424 U.S. 409, 427, 96 S. Ct. 984 (1976). The same ethics underlying this instruction should have compelled the Appellee to allow access to the tissue slides under the circumstances. Presumably it is this very 'ethics of the office' consideration that has compelled the Lucas County Prosecutor's Office to establish a procedure whereby tissue slides are provided to postconviction experts simply by covering the costs involved.

"[W]hen absolute proof of innocence is readily at hand, a State should not shrink from the possibility that error may have occurred. Rather, our system of justice is strengthened by recognizing the need for, and imperative of, a safety valve in those rare instances where objective proof that the convicted actually did not commit the offense later becomes available through the progress of science." *Dist. Attorney's Office v. Osborne*, supra, 557 U.S. at 98.

The dispositive factors that distinguish the instant case from

cases like *Hartman v. Walsh* and *Castanon v. Johnson* is that in this action, access to existing and available tissue slides that comprised the material evidence available to trial counsel is sought for expert scientific assessment to review potential postconviction remedies.

A credible scientific review cannot reliably occur without the tissue slides. Such access assures that Ohio's postconviction remedial scheme is meaningful and in accordance with constitutional due process expectations. In denying the requested access, the State tribunal used an inapplicable statute, that being R.C. § 2953.71 et al., Ohio's postconviction DNA testing statute. This statute governs access to DNA testing that was not available at the time of trial. The statute is not applicable to the matter at bar, which is whether postconviction counsel may review/test/analyze evidence provided to trial counsel under Crim. R. 16 and *Brady v. Maryland*. Additionally, the State tribunal accorded undue deference to the role of the State as a custodian of scientific evidence.

The general explanation for denying access to the slides was said to be because the postconviction relief standard for access to DNA was not met. However, clearly the request for access is not an application for postconviction relief. Therefore, the issues of finality and timeliness are not ripe for review. What is sought is simply the biological evidence relied upon by the State's experts at trial. The question, therefore, which has been unaddressed thus far, is when is a defendant entitled to access such evidence as a gateway to litigating a postconviction claim? Furthermore, the scientific evidence at issue here is not DNA and it is not sought to prove whether, through DNA testing, the Appellant is included or excluded as the perpetrator

of the crime. Tissue slides, as part of an autopsy which encompasses multiple pieces of information, are used to determine what happened, not who did it. As such, applying the standard of review for DNA testing is simply inapposite for the scientific evidence at issue.

Where, as here, there is a reasoned question as to whether scientific evidence that is the sole or substantial basis of the conviction was processed in accordance with recognized scientific methodologies or newly recognized scientific methodologies, a postconviction relief assessment will require access to such scientific evidence. In the instant case, the State tribunal's focus on the standard for obtaining and processing DNA should not apply to the Appellant's ability to make a threshold legal assessment of postconviction relief remedies, particularly where the assessment may conclude that no postconviction petition should be pursued because there is not a qualified scientific basis to challenge the conviction. Ohio's DNA testing standard, if deemed to be appropriate, effectively pre-empts the assessment of postconviction relief remedies, and as a result, undermines statutory intent.

The postconviction relief process in Ohio must be interpreted to confer access to the tissue slides if it is to be construed as providing minimal and adequate due process. Access for assessment of trial evidence is a necessity for postconviction review. Denying access to scientific material evidence to prevent the threshold assessment of postconviction remedies thwarts Ohio's remedial scheme and increases the potential of constitutional due process deficiency due to inadequate procedures. It is also inconsonant with the clear trend in criminal trials of scientific evidence as the primary or material evidence

offered in support of convictions. Allowing, as it must, a process for postconviction relief remedies, a state cannot then place unjustified obstacles to the exercise of that right in a category of cases that involve non-DNA material scientific evidence, as has been done in the instant case.

In the case *Dist. Attorney's Office v. Osborne*, the Supreme Court held that a prisoner may have a liberty interest in demonstrating his innocence pursuant to state law governing postconviction relief. (*Id.*, 557 U.S. at 69). See also *Grier v. Klem*, 2011 U.S. Dist. LEXIS 124053, 2011 WL 4971925 (W.D. Pa. No. 05-05 Erie), finding that the defendant had a state created liberty interest in demonstrating his innocence in the context of postconviction proceedings with appropriate evidence. Ohio's R.C. § 2953.21 creates such an interest by allowing a postconviction petition right for a criminal defendant "who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States." (R.C. § 2953.21(A)(1)(a)). "This state-created right can, in some circumstances, beget yet other rights to procedures essential to the realization of the parent right." *Dist. Attorney's Office v. Osborne*, *supra*, 557 U.S. at 68 (internal citations omitted).

The question, therefore, is whether the state procedures, as have been authoritatively construed by the state tribunal for pursuing postconviction rights, violate the Appellant's procedural due process rights. Here there is no state statute or rule specifically governing access of counsel after the jury verdict to those materials that were accessible to trial counsel through Crim. R. 16. (See 5th

Dist. App. Ct. Opinion, decided July 29, 2013, at ¶¶ 12-13). As a result, the Appellant was denied access to the biological evidence for a number of reasons, such as his decision to testify at trial, and the possibility that he may use the evidence to pursue a meritless postconviction petition. (See Trial Court's Judgment Entry of Dec. 12, 2012, at 13, 19). The 5th District Court of Appeals noted that it was "forced by analogy" to review the Appellant's request using the standard for DNA because no other standard exists. (5th Dist. Opinion, July 29, 2013, at ¶ 13). In other words, when faced with the Appellant's request, the state courts determined that they had no clear standard or procedure at all for assessing whether the Appellant was entitled to the biological evidence sought.

The denial of access to the biological evidence that was available at trial inadvertently transforms the state into a hoarder of evidence. Here there is no administrative or logistical impediment to permitting re-cuts of the tissue blocks to allow for appropriate scientific review/testing/analysis for a threshold assessment of postconviction relief remedies. The State's role at this stage is a custodian of evidence. Anticipating all the reasons why postconviction relief should be denied as the justification for denying access essentially presented no more than premature arguments. Because of the unique collection and storage issues associated with biological evidence, access to such evidence in an adversarial postconviction proceeding presents unique issues of fundamental fairness.

It is axiomatic that both the state and the defense increasingly rely on forensic evidence, as is well illustrated by the trial court proceedings in the instant case. It is equally true that post-trial,

the state is best situated to store and preserve biological trial evidence, both favorable and unfavorable to the state. In fact, recently enacted Senate Bill 77 places this responsibility squarely on the state, and defines the parameters involved to comply with this responsibility. The Appellant's case is clearly encompassed within these parameters. For the wrongfully convicted, access to material biological evidence to assess and potentially commence postconviction litigation proceedings must be constitutionally required to meet the due process adequacy standard. No other conclusion can be founded in law, logic, or common sense.

The appropriate approach is to recognize that in determining access for scientific material for the purpose of assessment of postconviction remedies, the state's role is to preserve and protect the integrity of the evidence, not to block a reasonable basis for access by anticipating defenses to the postconviction relief proceeding that may or may not transpire. See *Hardin v. Com. of Kentucky*, 396 S.E.3d 909, 914 (2013) (releasing the biological evidence in non-capital cases in the absence of statutory procedure). As the absence of a specific statutory procedure is not a bar to postconviction DNA testing, there is no principled reason that the absence of a statute specifically addressing the particular circumstances of the instant case should bar access to such material to assess potential postconviction remedies - especially when Crim. R. 16 and Ohio's postconviction statutory scheme demands review and assessment of such evidence.

Similar to *Hardin v. Com. of Kentucky*, the Appellant's request for access to biological evidence must be considered to be distinct from what the testing may reveal. The state's interest in the merits

of any petition that may thereafter be filed can be assessed by an objective judicial process pursuant to well-established procedures already in place. The trial court, in its role as gatekeeper, will surely assume its role if a petition is ever filed in the instant case. However, any postconviction assessment has been completely thwarted by the premature assertion of unripe defenses. Under the particular circumstances of the instant case, this is a clear violation of the Appellant's right to procedural due process.

Nevertheless, the district court held that the Appellant failed to state a claim, finding that "Biggs received the procedural process that he was due because he was given a fair opportunity to assert his rights even in the absence of a specific controlling state statute or mechanism." (Doc. No. 14, PageID #: 415, par. 2). See also PageID #: 414, par. 2, concluding that "the state courts did not deny Biggs procedural due process ... [because] the state trial court liberally evaluated his request for the release of biological samples under every available state statute." However, these conclusions are clearly contrary to the recent controlling and dispositive decisions by the Supreme Court in *Skinner v. Switzer* and *Dist. Attorney's Office v. Osborne*.

Consistent with the Appellant in the instant case, *Skinner* was given an opportunity to assert his rights in the state courts, and the state courts evaluated his request. However, the Supreme Court did not conclude, as did the district court in the instant case, that this "process" was the same as providing *Skinner* "procedural due process" under the Constitution of the United States. The Supreme Court concluded that *Skinner* stated a viable § 1983 claim because he "does

not challenge the adverse [State] decisions themselves; instead, he targets as unconstitutional the [State] statute they authoritatively construed." *Skinner v. Switzer*, supra, at *7. The same is true for the Appellant in the instant case, whose consistent allegation has been that Ohio's postconviction remedial scheme must be construed in a manner allowing him access to the biological evidence if it is to comply with minimal procedural due process requirements.

The district court also stated that "[t]o the extent Biggs is challenging a lacuna in Ohio's postconviction schema ... he is essentially asking this Court to legislate for Ohio[.]" (PageID #: 414, par. 1). However, the Appellant respectfully contends that this conclusion is also erroneous. The Appellant has consistently maintained that Ohio's postconviction schema represents clear legislative intent that a defendant be allowed postconviction access to the biological evidence sought in the instant case. Legislature cannot be expected to foresee all contingencies when drafting and enacting legislation. Certainly the circumstances presented in the instant case are unique, as even the district court noted the state court's finding that ... "[t]his matter presents an issue of first impression to this court." (PageID #: 408, FN 6).

Furthermore, R.C. §§ 2953.71 - 2953.84 provides postconviction access to DNA evidence when "new DNA testing methods are now able to provide new information that was not able to be detected at the time of defendant's trial." *State v. Prade*, supra, at ¶ 23. Additionally, the recent passage of Senate Bill 77 requires Ohio to preserve biological evidence in a case like this "for the express purpose of future scientific testing." Ohio's postconviction schema demonstrates clear

legislative intent that a defendant gain access to biological evidence when such evidence may ultimately be exculpatory. It would be unreasonable to expect legislature to have incorporated the unique circumstances of this case. It would be equally unreasonable to conclude that a federal district court's ruling that is consistent with state legislative intent would be the same as "to legislate" for that state.

Perhaps the pro se Appellant's lack of legal education and training has undermined the presentation of facts and legal tenets in a manner in which the district court could comprehend, even when construing the pleadings liberally. Clearly the Appellant failed to make the crux of his point, as evidenced by the district court's conclusion that ...

"[t]he Court declines to adopt Biggs' suggestion that Skinner stands for the broad proposition that a convicted person has an unfettered procedural due process right, under § 1983, to seek access to every kind of evidence from that person's criminal trial for postconviction re-evaluation of any and every kind." (PageID #: 413, FN 11).

The Appellant intended no such contention. In fact, the Appellant only intended to show that the evidence he sought is precisely the type of evidence for which Skinner stands. Specifically, both are: (1) biological evidence; (2) that is stored by the state; (3) which could prove innocence beyond any doubt; (4) due to advances in scientific testing and analysis since trial.

The district court further added that "[t]he only case this Court has found that applies Skinner as broadly as Biggs would like is *Caswell v. Green*, 424 F.App'x 44 (2d Cir. 2011)." (PageID #: 413, FN 11, par. 2). However, in that case Caswell sought "access to certain exhibits admitted at his trial and sentencing for future proceedings."

Caswell v. Green, at * 4. The Appellant takes no position on Caswell v. Green, suffice it to say that it is clearly distinguishable from the instant case. The district court took the following position:

"This Court believes Caswell went too far, a conclusion that seems supported by the fact that no other circuit has adopted its position. Because DNA is a unique brand of evidence - one that "has an unparalleled ability both to exonerate the wrongly convicted and identify the guilty[,] " Osborne, 557 U.S. at 55, it should be treated differently than every other kind of physical evidence." (PageID #: 413, FN 11, par. 2).

This is precisely the point that the Appellant thought he had made in his (apparently lacking) pro se pleadings - that the tissue slides he sought are a unique brand of evidence as it has an unparalleled ability to exonerate him, thus it should be treated differently than every other kind of physical evidence - as is DNA evidence under similar circumstances.

Of course, it could be that the district court's decision is more about taking issue with Skinner v. Switzer than whether or not the instant case is distinguishable from Skinner on all pertinent factors. Regardless, Skinner is controlling and dispositive, thus the instant case should have advanced beyond a Rule 12(b)(6) dismissal. Nevertheless, the Sixth Circuit affirmed the district court's judgment, citing both Skinner and Osborne in support. (Appendix B, par. 6). However, the Appellant contends that both cases have been misapprehended. Additionally, the Sixth Circuit's decision is in direct conflict with the Second Circuit's decision in Caswell v. Green. Caswell sought "access to certain exhibits admitted at his trial and sentencing for future proceedings," whereas here the Appellant seeks access to previously-produced biological evidence that could prove his innocence.

SUMMARY AND CONCLUSION

Plaintiff-Appellant's claim that the Prosecutor-Appellee violated his federal constitutional rights by refusing postconviction access to previously-produced material biological evidence was legally viable under 42 U.S.C. § 1983. The district court erred by dismissing the Appellant's claims under Fed. R. Civ. P. 12(b)(6). This is so because the district court's judgment is in direct conflict with *Skinner v. Switzer*, in which the Supreme Court held that a post-conviction claim for access to evidence is properly brought under § 1983, where success in the suit would merely grant access to evidence that may be exculpatory, incuplatory, or inconclusive. See *Skinner v. Switzer*, 131 S. Ct. 1289, 1293, 179 L. Ed. 2d 233 (2011).

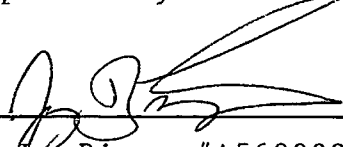
Clearly the biological evidence at issue in the instant case qualifies. Testing of the biological evidence prior to trial proved inconclusive as to cause of death, however Dr. Werner Spitz testified that he believed Jaydee's death was due to "either Sudden Infant Death Syndrome (SIDS) or an accidental obstruction of the airway." (Complaint, ¶ 17). When pursuing the biological evidence for postconviction testing and analysis, the Ohio Innocence Project cited scientific advancements since trial, such as "new means to detect over 3,500 genetic disorders since the Plaintiff's conviction, which includes a new DNA test that can diagnose genetic disorders in newborns in two days." (Complaint, ¶ 25). Because the Sixth Circuit's decision affirming the district court's judgment also misapprehends the Court's instructions in *Skinner* and *Osborne*, and because the Sixth Circuit and the Second Circuit are in direct conflict as to the proper application of *Skinner* and *Osborne*, the Court should accept jurisdiction

over this case. Certainly the exponential progress of the forensic sciences makes this case of great public interest and proffers compelling constitutional questions for this Court to consider and resolve.

Were mere access to evidence denied in circumstances where it is possible to prove the individual's innocence beyond all doubt, the individual would effectively be foreclosed from recourse to the very executive process that this Court has instructed are, collectively and appropriately, the safety net of our criminal justice system - and in precisely the circumstances in which this Court has repeatedly said that such recourse should lie, namely, where the system has failed by convicting the truly innocent. *Herrera v. Collins*, 506 U.S. 390, 411-12 (1993). It is axiomatic that due process is flexible and calls for such procedural protections as the particular situation requires. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

Resting therefore on the foregoing, the Petitioner-Plaintiff-Appellant respectfully requests that this Honorable Court issue a writ of certiorari to review the judgment below.

Respectfully submitted,



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