

No. 17-8535

IN THE
Supreme Court of the United States

JAY LEWIS BIGGS,

Petitioner,

v.

JOHN D. FERRERO, STARK COUNTY
PROSECUTING ATTORNEY,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

**OPPOSITION TO A PETITION FOR A
WRIT OF CERTIORARI**

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QUESTIONS PRESENTED

- 1) Whether a state prisoner is entitled to postconviction access to biological samples used at his trial under *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 129 S. Ct. 2308, 174 L. Ed. 2d 38 (2009) and *Skinner v. Switzer*, 562 U.S. 521, 131 S. Ct. 1289, 179 L. Ed. 2d 233 (2011) when the biological evidence sought will neither objectively exonerate the prisoner, nor identify the perpetrator, and such biological evidence is not in the possession or custody of the named defendant.

- 2) Whether there is a direct conflict between the Second Circuit and the Sixth Circuit under *Caswell v. Green*, 424 F. App'x 44 (2d Cir. 2011) when the District Court merely cited to *Caswell* in a footnote, indicating that, in its view, *Caswell* “went too far” *Biggs v. Ferrero*, No. 5:15-CV-2307, 2017 WL 1113347, at *4 (N.D. Ohio Mar. 24, 2017).

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STATEMENT OF THE CASE

The key events that frame the issues presented in Jay Lewis Biggs's ("Petitioner") petition for a writ of certiorari occurred June 5-6, 2006 when Petitioner's four-month old daughter, Jaydee, was killed. Petitioner was charged with raping and murdering Jaydee. At Petitioner's trial, the State of Ohio enlisted an expert witness to testify to, among other matters, certain biological evidence in the form of tissue samples taken from Jaydee's body. Petitioner also enlisted an expert to examine the same biological evidence and to rebut the testimony of the State's expert. Petitioner was subsequently convicted by a jury of raping and murdering Jaydee.

Petitioner brought this action, pursuant to § 1983, to obtain re-cuts of the tissue samples for the purpose of allowing a second panel of defense experts to analyze them and opine on whether Jaydee was raped, and also on the cause of her death.

I. Factual History

A. The charge of, and Petitioner's conviction for, rape.

Sometime between June 5, 2006 and June 6, 2006, Petitioner's four-month old infant daughter was killed. Upon subsequent visual inspection of the infant by the Stark County (Ohio) Coroner P.S.S. Murthy, M.D. (the "Coroner"), the Coroner observed blood surrounding the infant's genital area. The Coroner then ceased further examination and enlisted the assistance of a second physician, Dr. Anthony P. Bertin, D.O., a urologist, who had experience in assessing rape cases. Further

inspection revealed “blood coming from the vaginal opening” and “clotted blood within the vaginal vault.” Dr. Bertin also testified at trial that the infant’s vaginal tissue was “purplish in hue” and “bruised.” All of these observations were made prior to the use of a nasal speculum for the internal examination. *State v. Biggs*, 2009-Ohio-6885, ¶ 21.

“The internal examination revealed the infant's ‘hymenal area [was] torn apart. [It was] wide open.’ The speculum was inserted into the infant ‘very easily’ which was not natural, and clotting and fluid blood were observed in the vaginal vault where the hymen would have been. Dr. Bertin also observed two long abrasions inside the vaginal vault which was the source of the bleeding.” *Id.* at ¶ 22. Dr. Bertin testified that the physical findings were caused by “blunt forced trauma” as a result of penetration of the infant’s vaginal area. *Id.* at ¶ 23.

A third physician, Dr. Lisa Kohler, M.D., the Summit County, Ohio, Chief Medical Examiner, and a board certified forensic pathologist, was also enlisted to examine photographs, microscopic slides and investigation reports. Dr. Kohler testified at trial that the vaginal redness was “not consistent with infection, occurred prior to death, and the speculum used by Dr. Bertin did not cause” the internal injuries. *Id.* at ¶ 26.

At trial, Petitioner enlisted Dr. Werner Spitz, a forensic pathologist, to opine as to the cause and nature of the injuries present. Dr. Spitz did not conduct a physical examination of the victim. Dr. Spitz testified that the “speculum caused the redness

and injuries to the vaginal vault” and further that “observed redness was caused by infection and not trauma, and there was no injury to the genital area.” *Id.* at ¶ 27.

Faced with two competing opinions at Petitioner’s criminal trial, the jurors chose to believe Drs. Murthy, Bertin and Kohler. Petitioner was accordingly convicted of raping his infant daughter before killing her.

B. The charge of, and Petitioner’s conviction for, aggravated murder.

At Petitioner’s trial, the State of Ohio presented evidence of asphyxiation at the hands of another. The State alleged that the infant, upon being raped, began to cry which resulted in Petitioner smothering the infant. The basis for this evidence was “pallor or blanching on the infant's face that indicated [pressure] was applied on the infant's nose, lips, and chin prior to death.” *State v. Biggs*, 2009-Ohio-6885, ¶ 32.

In his testimony for the defense, Dr. Spitz stated that, while he could not conclude that death was not caused as a result of Petitioner’s hands on the infant’s air passage, the markings on the infant’s body were not consistent with strangulation. *Id.* at ¶ 34. Petitioner advanced a theory that the death was the result of natural causes.

Faced with the competing evidence, the jury determined that the death was caused by asphyxiation and not natural causes. Petitioner was accordingly convicted of the aggravated murder of his infant daughter.

C. The tissue samples at issue.

In his complaint, Petitioner asserted that he had identified a new panel of experts who, unlike those called to his defense at his criminal trial, will examine the tissue samples to conclude that Petitioner neither raped nor murdered his infant child. This new panel of experts did “not even infer that the science now available was new, innovative or more advanced than the science utilized by Biggs' expert at trial” *State v. Biggs*, 2013-Ohio-3333, ¶ 16.

Importantly, the tissue samples at issue do not constitute exculpatory evidence that was withheld from Petitioner at his criminal trial. These tissue samples “had previously been provided to his trial counsel but were lost by his expert” *Id.* at ¶ 9. Petitioner brought the instant lawsuit seeking release of the biological evidence so that his new panel of experts can re-examine them.

The record is not clear on what specific information any expert retained by Petitioner would obtain from the tissue slides or how any such information could impact on Petitioner’s convictions. Petitioner is not seeking DNA testing and the critical fact regarding the relief Petitioner seeks is that the biological evidence sought by Petitioner is not dispositive. That is, if Petitioner attempts to claim that the evidence exculpates him from criminal liability for killing his daughter, the child was still raped, and if he attempts to claim that the evidence exculpates him from criminal liability for rape, the child was still murdered.

II. Procedural History

Following Petitioner's criminal conviction, he was sentenced on December 5, 2008 to life in prison without the possibility of parole. Petitioner never sought timely relief pursuant to Ohio's postconviction relief statute, Ohio Rev. Code § 2953.21.

On December 10, 2008, Petitioner appealed his conviction to the Ohio Fifth District Court of Appeals. On December 28, 2009, the state appellate court affirmed Petitioner's criminal convictions and sentences. *State v. Biggs*, 2009-Ohio-6885, ¶ 44. On February 11, 2010, Petitioner appealed that decision to the Ohio Supreme Court and filed a memorandum in support of jurisdiction. On May 26, 2010, the Ohio Supreme Court denied leave to appeal and dismissed Petitioner's appeal as not involving any substantial constitutional question. *State v. Biggs*, 2010-Ohio-2212, 125 Ohio St. 3d 1438, 927 N.E.2d 10.

On February 10, 2011, Petitioner filed a petition, pursuant to 28 U.S.C. § 2254, for a writ of habeas corpus in the United States District Court for the Northern District of Ohio. On January 15, 2014, the District Court denied Petitioner's habeas petition. *Biggs v. Coleman*, No. 5:11CV00292, 2014 WL 185893, at *1 (N.D. Ohio Jan. 15, 2014).

On February 7, 2014, Petitioner filed a notice of appeal and request for a certificate of appealability to the Sixth Circuit. On February 12, 2014, the Sixth Circuit denied Petitioner's request for a certificate of appealability. On November 18,

2014, Petitioner filed a petition for a writ of certiorari with this Court, which was denied on February 23, 2014. *Biggs v. Jones*, 135 S. Ct. 1464, 191 L. Ed. 2d 411 (2015).

While Petitioner's petition for habeas corpus was pending before the federal district court, on July 13, 2012, Petitioner filed with the state trial court a motion to release biological samples. This motion was the first attempt by Petitioner since his criminal conviction to seek a court order to obtain such additional and duplicative tissue samples. Petitioner included a procedural due process violation claim and this claim was premised upon state and federal case law, including *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 129 S. Ct. 2308, 174 L. Ed. 2d 38 (2009). On December 12, 2012, the state trial court denied Petitioner's motion to release biological samples.

In denying Petitioner's motion to release the biological samples, the state trial court considered Petitioner's motion as a belated motion for postconviction relief. The state trial court also considered the motion to release biological samples under Ohio Rev. Code § 2953.71, et seq., Ohio's statutory framework for postconviction DNA testing.

Petitioner appealed that decision to the Ohio Fifth District Court of Appeals on January 7, 2013. On July 29, 2013, the state appellate court issued an opinion and order affirming the state trial court's denial of Petitioner's motion for release of biological samples. *State v. Biggs*, 2013-Ohio-3333. In affirming the state trial court,

the appellate court engaged in analysis pursuant to Ohio Rev. Code § 2953.71 and applied the requisite two-stage standard.

On September 12, 2013, Petitioner appealed the state appellate court's decision affirming the denial of his motion to release biological samples to the Ohio Supreme Court. On September 26, 2013, the Ohio Supreme Court declined jurisdiction of the appeal. *State v. Biggs*, 137 Ohio St. 3d 1441, 2013-Ohio-5678, 999 N.E.2d 696.

Thereafter, on October 28, 2015, Petitioner filed with the state trial court a motion for a *Remmer* hearing, pursuant to *Remmer v. United States*, 347 U.S. 227, 74 S. Ct. 450, 98 L. Ed. 654 (1954), alleging juror misconduct at his criminal trial and, on December 7, 2015, Petitioner filed with the state trial court a motion for resentencing. On January 6, 2016, the state court denied both motions. Petitioner then appealed both denials to the Fifth District Court of Appeals and the Fifth District later overruled Petitioner's assignments of error and affirmed the judgment of the state trial court. *State v. Biggs*, 2016-Ohio-5305, appeal not allowed, 2017-Ohio-261, 147 Ohio St. 3d 1507, 67 N.E.3d 824.

On November 10, 2015, Petitioner filed his complaint against Respondent John D. Ferrero, Stark County Prosecuting Attorney ("Respondent") relying upon 42 U.S.C. § 1983 to support his claim that Respondent has improperly withheld previously produced biological samples from Petitioner. On April 7, 2016, Ferrero filed his motion to dismiss and brief in support pursuant to Fed. R. Civ. P. 12(b)(1), Fed. R. Civ. P. 12(b)(6), and Fed. R. Civ. P. 12(b)(7).

On March 24, 2017, the District Court granted Respondent’s motion and dismissed Petitioner’s complaint on the basis that Petitioner had failed to state a claim under § 1983 for a violation of his constitutional right to procedural due process under the United States Constitution. In rendering its decision, the District Court cited in a footnote to *Caswell v. Green*, 424 F. App’x 44 (2d Cir. 2011), an unreported Second Circuit decision, and stated that *Caswell* was “[t]he only case this Court has found that applies *Skinner* as broadly as [Petitioner] would like” and that “[t]his Court believes *Caswell* went too far, a conclusion that seems supported by the fact that no other circuit court has adopted its position.” *Biggs v. Ferrero*, No. 5:15-CV-2307, 2017 WL 1113347, at *4 (N.D. Ohio Mar. 24, 2017).

On April 25, 2017, Petitioner appealed the District Court’s decision to the Sixth Circuit and, later in his brief, raised 12 issues on appeal. After briefing had closed, in a unanimous decision by the panel, the Court of Appeals for the Sixth Circuit affirmed the District Court’s judgment dismissing Petitioner’s complaint. Petitioner now seeks review of that decision by this Court.

REASONS FOR DENYING THE PETITION

I. This Case Is Not Procedurally Or Factually Well Postured For Review Of The Questions Presented

This Court’s “power is to correct wrong judgments, not to revise opinions.” *Camreta v. Greene*, 563 U.S. 692, 717, 131 S. Ct. 2020, 2037–38, 179 L. Ed. 2d 1118 (2011) quoting *Herb v. Pitcairn*, 324 U.S. 117, 125–26, 65 S. Ct. 459, 463, 89 L. Ed. 789 (1945). “The question before an appellate Court is, was the judgment correct, not the ground on which the judgment professes to proceed.” *McClung v. Silliman*, 19 U.S. 598, 603, 5 L. Ed. 340 (1821). When certiorari is sought in cases lacking in procedural or factual precision, the questions raised “can await a day when the issue is posed less abstractly.” *The Monrosa v. Carbon Black Exp., Inc.*, 359 U.S. 180, 184, 79 S. Ct. 710, 713, 3 L. Ed. 2d 723 (1959). This case presents both procedural and factual impediments that warrant denial of review.

Procedurally, Respondent sought dismissal of Petitioner’s complaint below on six separate grounds, including: 1. The un rebutted fact that Respondent is not in possession or custody of the tissue samples for which Petitioner has sought “a preliminary and permanent injunction requiring [Respondent] to produce”; 2. Petitioner’s complaint is barred by the applicable statute of limitations given that Petitioner was denied access to the tissue slides on September 10, 2012 and waited over three years before filing his complaint, pursuant to § 1983, premised upon such denial; 3. Petitioner’s complaint seeks review of identical matters already determined

by state courts; 4. Petitioner's complaint is barred under the doctrine of *res judicata* as Petitioner has previously fully adjudicated the same procedural due process violation claim that forms the basis of his complaint here in state courts; 5. Petitioner was not denied procedural due process such that his complaint fails under Fed. R. Civ. P. 12(b)(6); and 6. Petitioner improperly pled the basis for injunctive relief.

In passing upon Respondent's motion to dismiss, the District Court held that "a number of the grounds asserted by defendant [in Respondent's motion to dismiss] have merit" and proceeded to focus only on the procedural due process argument. It is thus likely that Petitioner's complaint is subject to dismissal on grounds apart from those before this Court. As such, review by this Court of Petitioner's procedural due process violation claim may not change the ultimate outcome of Petitioner's complaint.

Likewise, the basis of the distinct alternative grounds Respondent raised warranting dismissal of Petitioner's complaint implicate the applicable statute of limitations, the doctrine of *res judicata*, and the *Rooker-Feldman* doctrine. If this Court determines to review a single alleged defect, that being procedural due process under Ohio law, by granting certiorari here, it could open a procedural Pandora's box as courts below grapple with interpreting any resulting opinion in context of the alternative grounds warranting dismissal. Multiple appeals could then flow from the lower court's adjudication of any one or more of the alternative grounds warranting dismissal of Petitioner's complaint.

This case is also not postured well for review given the multitude of civil actions and appeals Petitioner has brought in various state and federal courts. Additionally, Petitioner did not timely avail himself of relief pursuant to Ohio Rev. Code § 2953.21, Ohio’s postconviction relief statute, yet now appears to be challenging, in part, the adequacy and constitutionality of that statute. To the extent this Court considers review of the questions presented by Petitioner appropriate, it should await a less abstract and more procedurally well postured case warranting review.

Apart from the procedural lack of clarity this case presents, the facts herein are likewise nebulous. Petitioner relies on *Osborne*, which contemplated “absolute proof of innocence” being readily available to a state and held, in part, that “a State should not shrink from the possibility that error may have occurred.” *Dist. Attorney’s Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 98, 129 S. Ct. 2308, 2337, 174 L. Ed. 2d 38 (2009). Similarly, Petitioner relies on *Skinner* for the broad proposition that an inmate may use § 1983 as a vehicle for any evidence he or she wishes to obtain, when *Skinner* was deciding only a conflict between “the Circuits that currently allow § 1983 claims for DNA testing” and those that did not. *Skinner v. Switzer*, 562 U.S. 521, 535, 131 S. Ct. 1289, 179 L. Ed. 2d 233 (2011).

No such “absolute proof of innocence” is possible here, and Petitioner acknowledges that he only seeks samples of the same tissues originally provided to him so that further testing can be performed even though there has been no change or advancement of the relevant scientific fields. This will not lead to objective

exoneration of Petitioner, but will instead result in the State of Ohio enlisting its own panel of experts to rebut the subjective findings of Petitioner's experts. Matters that have long since been adjudicated will then be subject to re-adjudication, with appeals sure to follow.

At trial, there was no dispute that blood was discovered in the victim's vagina, but there was competing testimony as to the cause of that blood. Petitioner does not – and cannot – claim that a tissue slide will demonstrate that he neither raped Jaydee, nor murdered Jaydee, and if Petitioner could establish that he did not murder his infant daughter, the State of Ohio is still left with an infant who was raped, as the jury found. Factually, this case is therefore not well postured for review by this Court.

II. Petitioner Overstates The Degree And Significance Of Any Difference Between The Sixth And Second Circuits

To support the conflict Petitioner alleges to exist between the Second and Sixth Circuit, Petitioner relies only upon *Caswell v. Green*, 424 F. App'x 44 (2d Cir. 2011), disapproved of by *Biggs v. Ferrero*, No. 5:15-CV-2307, 2017 WL 1113347 (N.D. Ohio Mar. 24, 2017). *Caswell* was dismissed following an initial review by the district court pursuant to 28 U.S.C. § 1915(e)(2) and was later disposed of at the summary judgment stage. Following a grant of summary judgment by that district court against the inmate, Caswell sought a further appeal. The Second Circuit dismissed that appeal prior to briefing.

Additionally, in deciding *Caswell*, the Second Circuit was applying *Skinner* and *McKithen v. Brown*, 481 F.3d 89 (2d Cir. 2007) to determine whether Caswell was seeking evidence that would “necessarily invalidate his conviction” under *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994). *Caswell*, 424 F. App'x at 46. The Sixth Circuit engaged in no such analysis in the present case and both the Sixth Circuit decision in this case and *Caswell* are unreported, with minimal precedential value.

In adjudicating Petitioner’s appeal below, the Sixth Circuit held that “[t]he State’s statutory scheme for requesting DNA testing may be challenged under 42 U.S.C. § 1983 but not a court decision denying such a request.” In acknowledging that Petitioner asserts that the State of Ohio has no statutory scheme applicable to Petitioner’s claims, the Sixth Circuit held that Petitioner’s complaint was properly dismissed by the District Court. This analysis is inapposite to the Second Circuit’s decision in *Caswell* under *Skinner*.

Moreover, the Third Circuit, Fourth Circuit, Fifth Circuit, Ninth Circuit, Eleventh Circuit have joined the Sixth Circuit in identifying the jurisdictional impediment an inmate faces when he brings a § 1983 claim seeking biological evidence under *Skinner*. See *Spuck v. Pennsylvania*, 456 F. App'x 72, 73 (3d Cir. 2012) (“As made clear by *Osborne* and *Skinner*, a procedural due process claim will only lie where a State's procedures for postconviction relief—and in particular those procedures in place for consideration of DNA-testing requests—are so flawed as to be

‘fundamentally unfair or constitutionally inadequate.’” (Citation omitted.)); *LaMar v. Ebert*, 681 F. App'x 279, 287 (4th Cir. 2017) (“In *Skinner*, the Supreme Court differentiated between challenges to the state court's decision itself and challenges to the constitutionality of the state statute as construed by that court.”); *Abdulkadir v. Sadler*, 605 F. App'x 433, 434 (5th Cir. 2015) (“To state a claim for relief under § 1983 as to that state law, [the inmate] must show that the Texas statutory scheme, as applied to him, violated his due process rights.”); *Tarkington v. Smith*, 584 F. App'x 736 (9th Cir. 2014) (a claim that challenges application of a statute as opposed to the DNA testing statute itself is not cognizable under § 1983); *Van Poyck v. McCollum*, 646 F.3d 865, 869 (11th Cir. 2011) (“But we need not decide today whether Plaintiff's procedural due process rights have been violated; Plaintiff has not contended in this appeal that Florida's statutory procedure for access to DNA evidence is inadequate as a matter of federal law.”)

Unlike *Caswell* where the inmate's claim was allowed because “his claims, if successful, would not necessarily demonstrate the invalidity of either his conviction or the duration of his sentence” under *Heck* (*Caswell*, 424 F. App'x at 45), the Sixth Circuit here dismissed Petitioner's claim because he “argued that there is no statute applicable to his request, and he is challenging the state court's decision denying his motion.” Thus, it is entirely possible the Second Circuit might reach the same conclusion as the Sixth Circuit when applying that aspect of *Skinner*, just as other appellate courts have done across the country.

Regardless, Petitioner does not present a genuine conflict on a profoundly important issue and, to the extent he has, this Court should await review until case law relative to Petitioner's position has developed beyond a single, unreported case. See *Arizona v. Evans*, 514 U.S. 1, 24 n.1 (1995) (Ginsburg, J., dissenting) ("We have in many instances recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court.").

CONCLUSION

Procedurally and factually this case is not well postured for review by this Court and, to the extent this Court is persuaded that the questions raised by Petitioner warrant review, the Court should await a less abstract presentation of those questions.

Petitioner also overstates the degree and significance of any conflict between the Second Circuit and the Sixth Circuit. *Caswell*, an unreported case, was decided on a different aspect of *Skinner* by the Second Circuit than was this case by the Sixth Circuit and five other Circuits have followed the same *Skinner* analysis set forth here by the Sixth Circuit.

For these reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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