

No. 17-8535

IN THE SUPREME COURT OF THE UNITED STATES

JAY LEWIS BIGGS,

Petitioner,

vs.

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

PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION
TO A PETITION FOR A WRIT OF CERTIORARI

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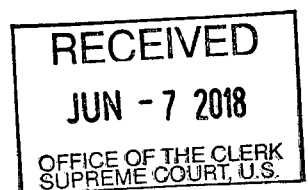


TABLE OF CONTENTS

Cover page / Title page	i
Table of contents	ii
Table of authorities	iii
I. Regarding Respondent's factual history	1
II. Regarding Respondent's procedural history	7
III. Regarding Respondent's argument that this case is not	9
procedurally or factually well postured for this Court's review.	
IV. Regarding Respondent's argument that Petitioner overstates ..	11
the conflict between the Sixth and Second Circuits.	
V. Conclusion	15
Proof of service (attached)	

TABLE OF AUTHORITIES

28 U.S.C. § 1915(a)(3)	9
42 U.S.C. § 1983	12, 13, 14
Federal Rule of Civil Procedure 12(b)(6)	8, 9, 11
Ohio Revised Code § 2953.21	6, 8, 10
Ohio Revised Code § 2953.23	10
Ohio Revised Code § 2953.71	8
Ohio Rules of Criminal Procedure 33(A)(6) and (B)	10
Supreme Court of the United States Rule 15.6	1

Biggs v. Ferrero, Sixth Circuit No. 17-3469	5, 18
Biggs v. Ferrero, N.D. of Ohio No. 5:15-cv-02307	2, 5, 7, 9, 14
Caswell v. Green, Second Circuit No. 10-1259	11, 13
McKenzie v. Smith, 326 F.3d 721 (6th Cir. 2003)	1
Rycoline Prods. v. C & W Unlimited, 109 F.3d 883 (3d Cir. 1997) ..	9
State v. Biggs, Stark County Common Pleas No. 2008-CR-0653 .	2, 7, 12
State v. Biggs, Fifth District, 2009-Ohio-6885	2
State v. Biggs, Fifth District, 2013-Ohio-3333	6, 8
State v. Biggs, Ohio Supreme Court No. 2013-1463	7, 8, 15

District Attorney's Office For the Third Judicial District v.	
Osborne, 557 U.S. 52, 129 S. Ct. 2308 (2009)	11-15
Skinner v. Switzer, 562 U.S. 521, 131 S. Ct. 1289 (2011)	11-15

I. REGARDING RESPONDENT'S FACTUAL HISTORY

In Section I of the Opposition to the Petition for a Writ of Certiorari, the Respondent offers his version of the charges of (and convictions for) rape and aggravated murder, as well as the biological evidence at issue. Because the Petitioner's understanding of each is contrary to that of the Respondent, this reply is warranted pursuant to Supreme Court Rule 15.6. The Petitioner does, however, agree with the Respondent on one significant point relative to both offenses, which is that the jury was "[f]aced with two competing opinions at Petitioner's criminal trial." (Opposition, pg. 3, par. 2 and par. 5).

The Respondent's concession is significant to the biological evidence at issue because pretrial testing of said evidence proved inconclusive as to Jaydee's cause of death. Thus, the State's three (3) experts, and the court-appointed defense expert, were left to engage in pure speculation as to cause of death, which necessitated the State's theory of rape. It became clear at trial that the State's witnesses performed the autopsy, while Biggs' defense expert only reviewed their work after being appointed by the trial court over two (2) years later. No doubt this weighed heavily in the minds of the jury, especially when considering that the very nature of the allegations against Biggs (compounded by the autopsy photos, etc.) likely inflamed the passions of the jury. As Biggs' federal circuit court of appeals aptly recognizes:

"[I]t is in just these circumstances, when the crime itself is likely to inflame the passions of the jurors, that courts must be vigilant in ensuring that the demands of due process are met." *McKenzie v. Smith*, 326 F.3d 721, 728 (6th Cir. 2003).

Testing of the biological evidence at issue in the postconviction context must be deemed protected under the demands of due process - not only because there was "competing opinions" at trial - but also because of the many advancements in scientific testing and analysis of said evidence since trial. After all, it is undisputed that Jaydee was very ill just prior to her death, and also had a host of medical problems since her premature birth four months prior. (Complaint, ¶ 15). See also, Motion to Release Biological Samples, in which the Ohio Innocence Project advised the trial court that ...

"there is evidence that Jaydee was incredibly sick prior to death. As such, there is a strong reason to believe that she died from underlying medical conditions, and that Mr. Biggs has been convicted of a crime that never occurred." (Motion to Release Biological Samples, filed 11/07/2012, pg. 10, par. 3).

The state appellate court recognized these significant facts in Biggs' direct appeal of his criminal conviction and sentence:

"Despite 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; and 3) whether appellant had committed any offenses." State v. Biggs, 2009-Ohio-6885, ¶ 17 (5th Dist. No. 2008-CA-00285).

Testing and analysis of the biological evidence now, due to scientific advancements since trial, could prove conclusively that the cause of death was not homicide. This would instantly exonerate Biggs of the aggravated murder conviction, and contrary to the Respondent's contention in Section I, this would also simultaneously undermine the confidence in the verdict on the rape offense as well. In other words, if it is proven that Biggs is factually innocent of

aggravated murder due to postconviction testing of the biological evidence at issue, there must automatically emerge a reasonable probability of a different outcome at trial on the rape offense. This is so because the verdicts were based solely, as the Respondent states (and the Petitioner agrees), on "competing opinions" at trial. After all, Jaydee's clothing, bedding, and bassinette were subjected to forensic testing and analysis, but did not contain any blood or semen (only her vomit). Likewise, the rape test kit results showed that no semen was present.

"[I]f the underlying cause of [Jaydee's] death was determined to be from natural causes or an undiagnosed disease/genetic defect, and not homicide, it would call into question the conclusion that Mr. Biggs murdered her to cover up a rape. In addition, Dr. Shuman's findings call into question the rape charge." (Ohio Innocence Project's Motion to Release Biological Samples, filed 07/13/2012, FN 1).

Dr. Mark Shuman is a world renowned forensic pathologist with the Miami-Dade Medical Examiner Department, and is one of the four (4) independent experts who agreed to review the scientific evidence in Biggs' criminal case for the Ohio Innocence Project. Exhibit D to the Motion to Release Biological Samples is a correspondence from Dr. Shuman, which states that his findings, along with the findings of all of the forensic pathologists at the Miami-Dade County Medical Examiner Department, call into question the rape charge and conviction. This provides further compelling argument as to why postconviction access to the biological evidence at issue is appropriate in this case. It is also in direct conflict with the Respondent's contention throughout his Opposition that this case is not well postured for

this Honorable Court's review because the evidence at issue could only exonerate Biggs of aggravated murder without disturbing the rape conviction.

In fact, the Respondent concludes his argument in Section I with the statement that ...

"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." (Opposition, pg. 4, par. 3).

However, this is in direct conflict with the facts of the criminal case, and in direct conflict with the Respondent's own concessions regarding "competing opinions" at trial. It certainly is in direct conflict with the State's position in all of the proceedings thus far, which has been that the rape and murder offenses are inextricably linked. To be sure, the State's position has always been that Jaydee was suffocated in an attempt to stifle her cries that occurred as a direct and proximate result of her being raped. In fact, when reviewing the case record, it becomes clear that the State's house of cards was built on this very premise. The question here then is: where does the rape scenario fit the State's "opinion" at trial if Jaydee was not suffocated to stifle her cries - if testing of the biological evidence proves conclusively that she died of SIDS or some other underlying medical condition?

The Respondent also incorrectly states that Biggs brought the instant action so that his "new panel of experts can re-examine" the biological evidence, and that the "record is not clear" what information

could be obtained from this review or "how any such information could impact on [Biggs'] convictions." The Respondent then incorrectly summarizes that "the critical fact ... is that the biological evidence sought by the Petitioner is not dispositive." Here it is clear, Biggs' lawsuit seeks postconviction access to previously-produced biological evidence for the purposes of scientific testing and analysis that could prove actual innocence as to the aggravated murder charge and conviction. (Complaint, pg. 1; Appeal Brief, pgs. 21-22). Innocence could be proven due to advances in scientific testing and analysis since Biggs' trial. (Id.). Biggs seeks an order requiring the Respondent to release the evidence "under a reasonable protocol regarding chain of custody and preservation of the evidence, in order that [he] can have the evidence tested at his own expense." (Id.).

Thus, contrary to the Respondent's contentions noted above, the federal court record is clear as to what is being sought in the suit, how it could impact the convictions, and that it is indeed dispositive. The state court record, admittedly, is not as clear, but fault does not lie with Biggs, the Ohio Innocence Project, or the four (4) new independent experts. Fault falls squarely upon the state courts. This is so because at every stage of the state court proceedings, the bar was continuously set higher. As Biggs cleared the bar and met the standard set by the state court, the bar was raised and a different standard demanded. The practice was continued until Biggs had no more state courts with which to plead his case. Ultimately, Biggs was never provided access to the biological evidence that should have immediately been deemed fundamental to vindicate the substantive rights provided for in Ohio's postconviction remedial scheme, as it

is in other counties in Ohio. Had Biggs been tried and convicted in Lucas County, Ohio, for example, the biological evidence he seeks could have been obtained directly from the coroner's office simply by paying the minimal costs involved in preparing the samples.

The Respondent relies on the unclear state record created by the state courts' mishandling of Biggs' request for access to the biological evidence, when citing that Biggs' 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." (Opposition, pg. 4, par. 1).

This is a perfect example, because here the state appellate court is denying the appeal based on criteria and a standard that was not requested by any of the state courts. If the state appellate court wanted to review the scientific advancements before rendering a decision, the state appellate court should have remanded the case to the trial court for briefing on the issue. Instead, the state appellate court denied the appeal on grounds that Biggs had never been required to provide. Certainly the issue was not raised by the trial court, as the trial court (remarkably) construed the Motion to Release Biological Samples as an untimely petition for postconviction relief under R.C. § 2953.21. Review of the motion shows that it is clearly and convincingly not a petition for postconviction relief, and that the arguments therein clearly aligns with the title of the pleading.

Nevertheless, in response to the new criteria and standard from the state appellate court regarding advancements in science since

Biggs' trial, the Ohio Innocence Project cited that there was, as but one example ...

"a new mean to detect over 3,500 genetic disorders since [Biggs'] conviction, which includes a new DNA test that can diagnose genetic disorders in newborns in two days." (Complaint, ¶ 25, Appeal Brief, pg. 18).

However, this response to the state appellate court's statement was only able to be proffered in Biggs' Memorandum in Support of Jurisdiction to the Ohio Supreme Court, who declined jurisdiction over the case.

Biggs has been clear throughout all proceedings that he seeks access to the biological evidence to prove his innocence due to advancements in scientific testing and analysis since his trial. He does rely on the Ohio Innocence Project and the four (4) new independent world renowned leading experts - but not to offer new "competing opinions" in a postconviction petition based on a review of the evidence - as the Respondent argues. The experts could already offer "competing opinions" in a petition for postconviction relief if that were the goal here. The intent here is to perform testing to prove conclusively if the new experts "competing opinions" are accurate, which is best summarized by forensic pathologist Dr. Mark Shuman, who stated that he ...

"discussed the case with Dr. Davis and all the forensic pathologists at the Miami-Dade Medical Examiner Department. None think that there is any vaginal injury or any findings to support the opinion of homicidal suffocation." (Motion to Release Biological Samples, filed 11/07/2012 with the trial court, Exhibit D).

II. REGARDING RESPONDENT'S PROCEDURAL HISTORY

In Section II of the Opposition to the Petition for a Writ of

Certiorari (pgs. 5-8), the Respondent offers a brief history of this case, including a history of the underlying criminal case. However, the Respondent incorrectly states that "[t]he state trial court ... considered the motion to release biological samples under Ohio Rev. Code § 2953.71, et seq., Ohio's statutory framework for postconviction DNA testing." (Opposition, pg. 6, par. 3). The analysis under the DNA testing statute was actually performed for the first time by the state appellate court. (See *State v. Biggs*, 2013-Ohio-3333, ¶¶ 13-20). To be clear, the state trial court (quite egregiously) barred consideration of the merits of the motion to release biological samples because it construed the motion as an untimely petition for postconviction relief under R.C. § 2953.21.

Additionally, the Respondent overlooked the fact that, in addition to the Ohio Innocence Project's Memorandum in Support of Jurisdiction filed with the Ohio Supreme Court, the Innocence Network filed a Brief of Amicus Curiae on September 12, 2013 (Case No. 13-1463). (Opposition, pg. 7, par. 2). The Innocence Network is an association of sixty-five (65) organizations dedicated to providing pro bono legal and investigative services to convicted individuals seeking to prove their innocence. The Innocence Network stated that they sought amicus curiae status in support of the Ohio Supreme Court's review of Biggs' case because it believed, based on its experience exonerating innocent individuals and examining the causes of wrongful convictions, that the ability to access, test, and review scientific evidence is imperative in any postconviction review.

As to the district court's granting of the Respondent's motion to dismiss Biggs' Complaint under Fed. R. Civ. P. 12(b)(6), it should

be noted that the district court certified, pursuant to 28 U.S.C. § 1915(a)(3) "that an appeal from this decision could be taken in good faith." (Biggs v. Ferrero, N.D. Ohio No 5:15-cv-02307, PageID #: 415). The final oversight/omission in Respondent's procedural history is in regards to a motion filed with the Sixth Circuit Court of Appeals, in which the Respondent moved to strike Biggs' appeal brief. The Respondent contended, as cause to strike Biggs' brief, that it was ... "readily apparent that Appellant's brief was prepared by or with substantial involvement of an attorney[.]" (Doc. 7-1, pg. 1, par. 1). Biggs filed a memorandum in opposition (Doc. 9), which proved conclusively that the allegation was false.

III. REGARDING RESPONDENT'S ARGUMENT THAT THIS CASE IS NOT PROCEDURALLY OR FACTUALLY WELL POSTURED FOR THIS COURT'S REVIEW

The Respondent first contends that this case is not well postured procedurally because the Complaint was dismissed for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6), yet any one of the five other grounds raised in his motion to dismiss could require dismissal on remand. (Opposition, pgs. 9-10). However, it is well established that dismissal under Fed. R. Civ. P. 12(b)(6) precludes dismissal on other affirmative defenses. See Ryco-line Prods. v. C & W Unlimited, 109 F.3d 883 (3d Cir. 1997), holding that if the statute of limitations, res judicata, or some other affirmative defense is not apparent on the face of a complaint, then such defense may not afford basis for dismissal of a complaint under Rule 12(b)(6). In other words, in order for a district court to dismiss a case for failure to state a claim under Rule 12(b)(6), it must have considered and rejected all other grounds for dismissal on affirmative

defenses or that otherwise renders the complaint facially invalid.

The Respondent also suggests that this case is not well postured procedurally "given the multitude of civil actions and appeals" relative to the case. (Opposition, pg. 11, par. 1). However, none of said actions or appeals overlap or interfere with the issue at bar in any meaningful context whatsoever. Further, Biggs' underlying intent in all actions and appeals is to prove his innocence because he is innocent. Certainly in all instances where the convicted is innocent and seeks to restore his good name and standing, he has filed any and all actions and appeals that could reasonably accomplish this goal.

The Respondent also alleges that this case is not well postured procedurally because Biggs "did not timely avail himself of relief pursuant to Ohio Rev. Code § 2953.21, Ohio's postconviction relief statute[.]" (Id.). It should be crystal clear at this point that Biggs Motion to Release Biological Samples was not a petition for postconviction relief under R.C. § 2953.21, as erroneously construed by the state trial court. The biological evidence at issue is sought for testing due to scientific advancements that were not available at trial. Thus, if new science proves innocence conclusively, Ohio's postconviction remedial scheme has provisions that will allow attack on the conviction to be considered timely, similar to newly discovered evidence. See Crim. R. 33(A)(6) and (B); and R.C. § 2953.23.

And finally, the Respondent contends that this case is not well postured factually because there is no "absolute proof of innocence" available here, and that the biological evidence is being sought ... "so that further testing can be performed even though there has been no change or advancement of the relevant scientific fields." (Opposit-

ion, pg. 11, par. 3). The Respondent again argues that Biggs "does not - and cannot - claim" that the testing "will demonstrate that he neither raped Jaydee, nor murdered Jaydee[.]" (Opposition, pg. 12, par. 2). It should be crystal clear at this point that Biggs has claimed all along that testing of the biological evidence now - due to advancements in the relative scientific fields - could lead to objective exoneration of the offense of aggravated murder, which would instantly undermine the verdict of the already questionable offense of rape.

IV. REGARDING RESPONDENT'S ARGUMENT THAT PETITIONER OVERSTATES THE CONFLICT BETWEEN THE SIXTH AND SECOND CIRCUITS

Here the Respondent contends that Biggs' overstates the degree and significance of the conflict between the Sixth Circuit's decision in his case, and the Second Circuit's decision in *Caswell v. Green*, 424 F.App'x 44 (2d Cir. 2011). Biggs had noted that both he and Caswell's § 1983 had been dismissed without prejudice by the federal district court because each "fails to state a claim on which relief may be granted [under Rule 12(b)(6)]." (*Caswell v. Green*, Case 10-1259, Doc. 98-1, pg. 3, par. 3). The Second Circuit vacated the district court's judgment and remanded the case, citing:

"Both this Court and the Supreme Court have held 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. *Skinner v. Switzer*, 131 S. Ct. 1289, 1293 (2011); *McKithen [v. Brown]*, 481 F.3d [89,] at 102-03 [(2d Cir. 2007)]." (*Caswell v. Green*, Case 10-1259, Doc. 98-1, pg. 4, par. 1).

Had the Sixth Circuit applied this holding to Biggs' appeal, it

would have resulted in the same remand as in Caswell's appeal, because "success in the suit [in both cases] would merely grant access to evidence that may be exculpatory, inculpatory, or inconclusive." (Id.). This is clearly a significant conflict. Who can deny this? Additionally, the Respondent fails to mention that when Caswell's case was "remanded for further proceedings" consistent with the Second Circuit's order (Doc. 98-1, pg. 5, par. 1), the Defendants provided Caswell with the "trial and sentencing evidence" that Caswell sought in his complaint, thus rendering that portion of his action moot. In the instant case, Biggs has yet to be provided the trial evidence he sought in his complaint.

The Respondent next attempts to distinguish Caswell v. Green from the instant case by citing the Sixth Circuit's erroneous finding that Biggs "asserts that the State of Ohio has no statutory scheme applicable to [his] claims[.]" (Opposition, pg. 13, par. 2). The truth of the matter is that Biggs has contended all along that the deprivation of postconviction access to the biological evidence at issue has deprived him of any and all postconviction remedies available in Ohio.

"Because an inmate has a right to file a postconviction petition, it follows that an inmate should not be foreclosed from accessing evidence to form the basis of such a motion." (Motion to Release Biological Samples, filed with the trial court on 11/07/2012, pg. 12, par. 1).

The Respondent also cites from the Third, Fourth, Fifth, Ninth, and Eleventh Circuits that have applied Skinner and Osborne to § 1983 cases seeking access to various forms of evidence in state criminal cases. The Respondent contends that these cases foreclose Biggs from the relief he seeks. However, meaningful scrutiny of these cases,

applied to the facts relevant to Biggs § 1983 action, clearly demonstrates that Biggs is entitled to postconviction access to the evidence he seeks.

The Respondent is basing his contention on the Sixth Circuit's erroneous conclusion that Biggs "argued that there is no statute applicable to his request, and [therefore] he is challenging the state court's decision denying his motion." (Opposition, pg. 14, par. 2). Review of the proceedings in Biggs' case clearly shows that he is not challenging the state court's decision, and instead shows that Ohio's procedures have been shown to be fundamentally unfair and constitutionally inadequate as it has foreclosed him from the only evidence of any value in the postconviction context - that being biological evidence that could prove his innocence through advancements in scientific testing and analysis.

"[P]ermitting access to evidence potentially containing biological material for DNA testing and not for other methods of scientific testing would be a distinction without a difference, as scientific advancements are not limited to the field of DNA. Indeed, initial expert review of the slides in question may reveal a need to conduct DNA testing on the tissue." (Motion to Release Biological Samples, filed with the trial court on 11/07/2012, pg. 11, par. 2).

In the Memorandum Opinion and Order filed March 24, 2017 (Doc. No. 14), District Court Judge Sara Lioi stated that ...

"The 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), where a state prisoner convicted of burglary sued his prosecuting attorney under § 1983 to obtain two exhibits (a surveillance video and a Persistent Violent Offender Statement) that had been used at trial, but were not admitted into evidence. The district court dismissed the claim on the strength of

Heck, supra; but the Second Circuit reversed citing Skinner, inter alia. After remand, Caswell's claims were actually rendered moot because the evidence he sought was voluntarily produced... Skinner cannot, and should not, be applied broadly to cover all kinds of evidence, as Biggs urges, and Caswell permitted." (Biggs v. Ferrero, N.D. Ohio Case No. 5:15-cv-02307, PageID #: 406).

The conflict noted by the district court judge is ripe for resolution by this Honorable Court. The question before this Court, therefore, is as follows:

- 1) Does Skinner apply only to DNA biological evidence, where said evidence may be exculpatory, inculpatory, or inconclusive; or
- 2) does Skinner apply to other forms of biological evidence, such as in Biggs' § 1983, where success in his suit would merely grant access to evidence that may be exculpatory, inculpatory, or inconclusive; and/or
- 3) does Skinner apply to evidence such as a surveillance video and a Persistent Violent Offender Statement, such as in Caswell's § 1983, where success in the suit would merely grant access to evidence that may be exculpatory, inculpatory, or inconclusive?

Had Biggs been convicted in Lucas County, Ohio - or many other counties in Ohio - instead of Stark County, Ohio, he would already have gained postconviction access to the biological evidence at issue by merely paying the minimal costs related to the coroner's preparation of the evidence. And had Biggs' § 1983 suit been filed in the jurisdiction of the Second Circuit Court of Appeals, he would already have gained postconviction access to the evidence at issue. However, because Biggs was convicted in Stark County, Ohio, and because his § 1983 suit is in the jurisdiction of the Sixth Circuit Court of

Appeals, it appears that he may never be permitted access to evidence that can prove his innocence. If this procedural and factual posture does not offend fundamental principles of justice, and transgresses recognized principles of fundamental fairness in operation, what does?

"In this proceeding, 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 accord with constitutional due process expectations." (Brief of Amicus Curiae, filed by the Innocence Network with the Ohio Supreme Court on the 12th day of September, 2013, pg. 1, par. 3).

V. CONCLUSION

This case is well postured for review by this Honorable Court, both procedurally and factually. Additionally, the Second Circuit and the Sixth Circuit are in direct conflict with the application of both Skinner and Osborne, which is not only demonstrated by a comparison of Biggs' case and Caswell's case, but was clearly stated to be so by Biggs' federal district court. For these reasons, and the reasons in the foregoing, this Court should grant Biggs' petition.

Respectfully submitted,



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