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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

MICHAEL W. MORTON) Docket No. A 08-CA-597 SS
PATRICIA A. STAPLETON)
)
vs.) Austin, Texas
)
JOHN BRADLEY, ET AL) December 30, 2008

TRANSCRIPT OF ALL PENDING MATTERS
BEFORE THE HONORABLE SAM SPARKS

APPEARANCES:

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14:48:41 1 THE COURT: 08-C A-597, Morton and Stapleton vs.
14:48:45 2 Bradley, Wilson.

14:49:23 3 Make your announcements, please.

14:49:26 4 MR. RALEY: Yes, your Honor.

14:49:26 5 John Raley and Diana Faust of Cooper & Scully here on
14:49:30 6 behalf of the plaintiffs, Michael Morton and Patricia Stapleton.

14:49:34 7 THE COURT: Thank you.

14:49:35 8 MR. ACKLEY: Stephen Ackley and Brent Webster from the
14:49:38 9 Williamson County Attorney's Office and Doug Arnold from the
14:49:41 10 Williamson County District Attorney's Office for John Bradley and
14:49:44 11 James Wilson.

14:49:47 12 THE COURT: Welcome.

14:49:49 13 MR. RALEY: Thank you, your Honor.

14:49:55 14 THE COURT: I have two motions pending, the motion to
14:50:01 15 dismiss and the motion to abate. As I understand, the abatement
14:50:07 16 is that the Supreme Court may have granted certiorari in the
14:50:12 17 case, but I'm under the obligation at this point in time on Fifth
14:50:18 18 Circuit precedent. So I thought I would allow you, to keep you
14:50:24 19 from having to come here twice, just kind of merge those two
14:50:30 20 ideas when you make your presentation, and I'll hear the motion
14:50:34 21 to dismiss first.

14:50:36 22 MR. ACKLEY: Thank you, your Honor.

14:50:38 23 MR. RALEY: One housekeeping note on that, your Honor.

14:50:42 24 We are here to address the abatement and dismiss if the
14:50:45 25 Court requires it obviously, but the defendants have no

14:50:49 1 opposition to us having an opportunity to fully brief the motion
14:50:52 2 to dismiss if the matter is not abated. And we would make that
14:50:57 3 request for the Court.

14:51:02 4 Quite frankly, my co-counsel on the case is heavily
14:51:05 5 involved in briefing for the Osborne matter, which is going to be
14:51:08 6 heard by the U.S. Supreme Court by oral argument in March of this
14:51:13 7 year.

14:51:16 8 THE COURT: I'll let you speak to that, but the motion
14:51:20 9 to hold the matter in abeyance is ripe.

14:51:24 10 MR. RALEY: Yes, your Honor. Absolutely. But the --
14:51:26 11 I'm talking about the motion to dismiss.

14:51:29 12 THE COURT: Well, it's ripe, also.

14:51:31 13 MR. RALEY: Yes. But the defense has no objection.

14:51:34 14 And we do request the Court an opportunity to fully
14:51:38 15 brief all of the issues involved in the motion to dismiss.
14:51:45 16 That's why we filed the motion to abate, because so many of those
14:51:48 17 issues are going to be decided by the U.S. Supreme Court this
14:51:51 18 spring.

14:51:52 19 THE COURT: Well, I don't know that so many of them are
14:51:55 20 or not. I've got Rooker-Feldman. I've got a case directly on it
14:52:05 21 on Heck vs. Humphrey, whether is I think it's correct or not, the
14:52:10 22 Fifth Circuit has so held on that. I've got Younger. And then,
14:52:14 23 I've got -- notwithstanding all of that, y'all have already
14:52:18 24 litigated this case in the state court and it's on appeal.

14:52:21 25 MR. RALEY: May we address the motion to abate first,

14:52:24 1 then, your Honor?

14:52:25 2 THE COURT: Well, I want -- you know, I don't get to
14:52:30 3 get my choice very often here or at home. I've got six kids and
14:52:34 4 all sorts of grandkids. I like to run it myself.

14:52:38 5 Motion to dismiss.

14:52:39 6 MR. ACKLEY: Thank you, your Honor.

14:52:43 7 Your Honor, the sum and substance of this case is not
14:52:46 8 about access to evidence, but it's about the limits to the access
14:52:50 9 which the plaintiffs in this case seek. As the Court pointed
14:52:55 10 out, that in the state court proceeding below, in the 26th
14:53:00 11 District Court of Williamson County, they've had a Chapter 64
14:53:03 12 hearing in relation to postconviction DNA access to the Morton
14:53:08 13 crime.

14:53:09 14 THE COURT: What is the depository of the DNA access?

14:53:13 15 MR. ACKLEY: The Williamson County Sheriff's Department
14:53:15 16 has the physical objects, and I believe that's why they're a
14:53:20 17 party defendant in this case.

14:53:21 18 THE COURT: Well, that doesn't tell me much, object.
14:53:26 19 We've got two murders, as I understand?

14:53:27 20 MR. ACKLEY: That's correct.

14:53:28 21 THE COURT: Or two deaths, in any event.

14:53:30 22 MR. ACKLEY: They were approximately six years apart.

14:53:32 23 THE COURT: All right. And you have the evidence still
14:53:35 24 for both cases.

14:53:36 25 MR. ACKLEY: That's correct, your Honor.

14:53:37 1 THE COURT: And the plaintiff wants DNA from what?
14:53:40 2 What objects?

14:53:41 3 MR. ACKLEY: He wants the bandana from -- Michael
14:53:44 4 Morton, who's convicted of murder, wants a bandana that was not
14:53:48 5 admitted into evidence at the trial court, was not seized by the
14:53:51 6 police department as part of the crime scene. He also wants to
14:53:54 7 get evidence from an unrelated murder that happened six years
14:53:58 8 prior to the Morton murder in relation to physical evidence and
14:54:03 9 DNA evidence involving the deceased's body, you know, basically
14:54:09 10 the evidence that was collected by the sheriff's department in
14:54:11 11 relation to that homicide.

14:54:13 12 THE COURT: You said the body. Does he want to bring
14:54:15 13 the body up?

14:54:16 14 MR. ACKLEY: No, your Honor.

14:54:16 15 I think because we've maintained there's semen samples
14:54:20 16 of the bedsheets, there was a sexual assault. There's DNA
14:54:24 17 evidence that exists.

14:54:25 18 THE COURT: So you have it, but you don't want to give
14:54:27 19 it up?

14:54:27 20 MR. ACKLEY: That's correct, your Honor.

14:54:31 21 THE COURT: What happened to being fair, taking an
14:54:34 22 oath, the district attorney upholding the law by being fair?

14:54:40 23 MR. ACKLEY: Your Honor --

14:54:41 24 THE COURT: You don't have to answer that question, but
14:54:43 25 you might later on in this courtroom.

14:54:44 1 Now, let's go to the -- all right. Now I know where
14:54:47 2 we're coming from.

14:54:48 3 MR. ACKLEY: Yes.

14:54:48 4 THE COURT: Just make me -- well, tell me what -- as I
14:54:52 5 understand it, the state court has ruled and it's on appeal.

14:54:55 6 MR. ACKLEY: That's correct, your Honor.

14:54:56 7 THE COURT: All right. To the court of appeals here at
14:54:58 8 the --

14:54:59 9 MR. ACKLEY: In Austin.

14:55:00 10 THE COURT: Third Court?

14:55:01 11 MR. ACKLEY: Yes, your Honor.

14:55:02 12 THE COURT: All right. Now, the second question is,
14:55:06 13 why should I not get involved?

14:55:09 14 MR. ACKLEY: Well, your Honor, because the state court
14:55:12 15 has given them everything possible except for the bandana under
14:55:17 16 Chapter 64 of the Code of Criminal Procedure, the state Code of
14:55:22 17 Criminal Procedure. And there's been no court to date that has
14:55:24 18 found within the Fifth Circuit, whether it be a district court or
14:55:28 19 the Court of Appeals in New Orleans has found that there's a
14:55:31 20 constitutional right to access evidence postconviction. It just
14:55:37 21 doesn't simply exist.

14:55:38 22 And so, their arguments of due process --

14:55:40 23 THE COURT: I read in the paper all the time that
14:55:42 24 people are getting off under DNA who had been in the penitentiary
14:55:47 25 for years. As a matter of fact, one just got off of death row.

14:55:51 1 So what do you mean there's no case, no court's gone beyond --

14:55:55 2 MR. ACKLEY: That's under Chapter 64 of the Texas Code
14:55:58 3 of Criminal Procedure. There's a specific -- the Texas
14:56:00 4 legislature has put together the specific parameters of going
14:56:05 5 through that process and --

14:56:07 6 THE COURT: And they excluded red bandanas?

14:56:10 7 MR. ACKLEY: Well, your Honor, again, the issue has
14:56:12 8 been litigated ad nauseam in the state district court. I mean
14:56:16 9 the issue with the bandana was that it was -- there's no chain of
14:56:20 10 custody. It was not used in the criminal trial against Mr.
14:56:25 11 Morton. It was never collected as evidence by the sheriff's
14:56:28 12 department. It was brought in by the deceased's brother.

14:56:33 13 So even if you give them everything you want and you
14:56:37 14 order us to test the bandana, order us to disclose the results of
14:56:40 15 the testing of the bandana, it could not overturn the conviction.

14:56:44 16 THE COURT: Okay. Is that the basis of the trial judge
14:56:51 17 that's going to --

14:56:51 18 MR. ACKLEY: Yes, your Honor, it is. And that's why I
14:56:53 19 asked Mr. Arnold -- Mr. Arnold is the counsel for the district
14:56:56 20 attorney in the state court of appeals.

14:56:57 21 THE COURT: But you're still not breaching any
14:57:00 22 defenses.

14:57:02 23 MR. ACKLEY: Well --

14:57:02 24 THE COURT: There are many, many times, notwithstanding
14:57:07 25 the desire of either judge, there are parallel cases going up in

14:57:15 1 state and federal. What is the reason that there shouldn't be a
14:57:17 2 parallel case coming here?

14:57:21 3 MR. ACKLEY: Your Honor, it's a direct attack on the
14:57:23 4 state court judgment. As a matter -- I mean as I included in our
14:57:28 5 brief, it's identical and so, it's -- you know, it's a waste of
14:57:33 6 judicial resources. I understand that, you know, there may be
14:57:37 7 some independent rights. I'm not really sure of them. I mean
14:57:41 8 that's the answer that the U.S. Supreme Court may answer
14:57:44 9 ultimately is whether or not there is a liberty or property
14:57:47 10 interest into evidence that was collected at the scene in
14:57:51 11 relation to the crime.

14:57:52 12 THE COURT: Apparently they're interested.

14:57:54 13 MR. ACKLEY: Well, they are.

14:57:55 14 And if I may focus on that case for just a moment, the
14:57:58 15 issue in that case was there was a -- it was also a rape assault,
14:58:01 16 and there was a blue condom and some pubic hairs that were used
14:58:05 17 to convict the person, and that's what's gone up. In this case
14:58:08 18 we're going way outside those parameters.

14:58:10 19 THE COURT: I'm familiar with the case.

14:58:13 20 Okay, sir. Since you made the trip all the way to
14:58:21 21 Austin, do you have anything you want to say?

14:58:22 22 MR. ARNOLD: No, your Honor.

14:58:23 23 THE COURT: Okay. Smart man.

14:58:28 24 MR. RALEY: Thank you, your Honor.

14:58:29 25 THE COURT: Yes, sir.

14:58:33 1 MR. RALEY: I am here, your Honor, pro bono to
14:58:35 2 represent two plaintiffs who want the same thing. They want to
14:58:38 3 find the truth. That's all this case is about. They're
14:58:43 4 searching for the truth. There were two murders with an almost
14:58:46 5 identical modus operandi.

14:58:48 6 THE COURT: You're indicating you can't get the truth
14:58:50 7 from the state court?

14:58:53 8 MR. RALEY: We have been fought by the state for the
14:58:55 9 last three, now four years, your Honor. I anticipate they will
14:58:58 10 continue to fight. We have been very frustrated in those
14:59:03 11 efforts. We think a 1983 action is appropriate. And I would be
14:59:06 12 prepared to discuss those issues with you, your Honor.

14:59:11 13 What counsel referred to is a bandana was a bandana
14:59:15 14 found near the crime scene containing blood and human hair. It
14:59:20 15 was recorded as evidence by the sheriff's department. It has
14:59:23 16 never been subjected to DNA testing. The state will not have to
14:59:27 17 pay for this testing. The Innocence Project, my co-counsel has
14:59:31 18 agreed to pay for the testing. It will cost the state nothing.

14:59:33 19 THE COURT: We're getting into the merits.

14:59:36 20 MR. RALEY: Yes, your Honor. I just wanted you to know
14:59:38 21 the background.

14:59:39 22 The other things we're requesting, as the Court
14:59:41 23 inquired of opposing counsel, were fingerprints of both crime
14:59:46 24 scenes that are yet unidentified. They could be run through the
14:59:50 25 computer databanks, we understand, in a matter of minutes and

14:59:53 1 could reveal hits on potentially millions of --

14:59:56 2 THE COURT: Isn't this really a collateral attack on
14:59:59 3 the state court judgment?

15:00:01 4 MR. RALEY: No, your Honor. It's a parallel track
15:00:03 5 which has been recognized in many cases. And if you want me to
15:00:06 6 respond --

15:00:07 7 THE COURT: Can you give me a case where it became
15:00:13 8 parallel after the state court ruled, and thereafter, the federal
15:00:20 9 court was filed?

15:00:21 10 MR. RALEY: As the Court acknowledged, some of this
15:00:23 11 argument is going to blend with the abeyance motion, but I am
15:00:28 12 aware that the Osborne case, which is a Ninth Circuit decision,
15:00:32 13 was a frustrated effort at a state court action that was then
15:00:37 14 filed as a federal action.

15:00:41 15 There are currently pending in three federal circuits,
15:00:44 16 the Second, the Third and the Eleventh, three 1983 DNA actions,
15:00:49 17 all of which have been stayed pending the Osborne decision. But
15:00:55 18 to answer your question directly, your Honor, it had been my hope
15:00:58 19 that we could deal with the abeyance today, and I don't want to
15:01:02 20 belabor the Court with that.

15:01:04 21 THE COURT: I'll let you do that.

15:01:05 22 MR. RALEY: I can respond briefly to the motion to
15:01:07 23 dismiss issues. First, that Heck does not apply here because
15:01:12 24 this suit seeks only access to evidence for DNA testing, it does
15:01:16 25 not seek to vacate the conviction. Once the DNA is tested --

15:01:21 1 THE COURT: Have you read Kutzner vs. Montgomery
15:01:24 2 County?

15:01:24 3 MR. RALEY: I'm aware of that case, your Honor.

15:01:26 4 THE COURT: It simply says under -- quote, under Heck,
15:01:31 5 no 1983 claim exists for injunctive relief to compel DNA testing,
15:01:36 6 end quote. I didn't write that.

15:01:39 7 MR. RALEY: I know, your Honor.

15:01:41 8 The Fifth Circuit decision in the Kutzner case precedes
15:01:44 9 the U.S. Supreme Court decision in Dotson. Every federal circuit
15:01:48 10 that has considered this issue since Dotson has ruled the way
15:01:53 11 that the plaintiffs in this case --

15:01:54 12 THE COURT: You said every.

15:01:56 13 MR. RALEY: Every one since Dotson that has ruled on
15:01:59 14 this issue.

15:01:59 15 THE COURT: Every one? Give me a Fifth Circuit case.

15:02:02 16 MR. RALEY: As I shared with the Fifth Circuit decision
15:02:04 17 precedes Dotson.

15:02:06 18 THE COURT: Right.

15:02:07 19 MR. RALEY: So at issue is whether or not --

15:02:08 20 THE COURT: Has the Fifth Circuit since Dotson changed
15:02:11 21 the precedent?

15:02:12 22 MR. RALEY: No, your Honor.

15:02:12 23 THE COURT: That's the point.

15:02:13 24 MR. RALEY: The answer to your question is no, it has
15:02:15 25 not addressed the issue since Dotson.

15:02:18 1 The federal circuits are divided on this issue. The
15:02:21 2 Second, Ninth and Eleventh Circuit have all ruled that Heck is
15:02:24 3 not a bar to a 1983 action. The Fourth and the Fifth Circuit in
15:02:28 4 pre-Dotson rulings said that it is. So there is a split, as your
15:02:32 5 Honor recognizes, in authority which will be dealt with by the
15:02:35 6 U.S. Supreme Court in Austin.

15:02:37 7 All right. It is our position that Heck doesn't apply
15:02:39 8 because it only -- this suit seeks only access to evidence for
15:02:44 9 DNA testing, does not seek to vacate the conviction. Second,
15:02:50 10 it's our position that the Rooker-Feldman doctrine is
15:02:53 11 inapplicable because that applies only in rare cases to prevent
15:02:57 12 federal courts from reviewing injuries caused by state court
15:03:02 13 judgments.

15:03:02 14 THE COURT: Let me ask you this. You're doing your
15:03:09 15 best.

15:03:10 16 MR. RALEY: Thank you, your Honor.

15:03:11 17 THE COURT: And you're going to persuade me that it
15:03:16 18 should happen.

15:03:17 19 MR. RALEY: I'm sorry?

15:03:17 20 THE COURT: Should happen. I'm going to order the DNA
15:03:22 21 from the red bandana. And this fellow's client tells me the
15:03:30 22 district attorney says we're not giving it to you. The state
15:03:33 23 court has ruled that you're not entitled to it. And the state
15:03:42 24 appellate court will decide we're right, jump in the lake.

15:03:49 25 Now, what recourse do I have? Do I take an elected

15:03:55 1 official, stick him in jail? How is this not an interference
15:04:01 2 with the state court? That's my question to you.

15:04:04 3 MR. RALEY: I understand, your Honor.

15:04:07 4 Issues between state and federal courts were addressed
15:04:09 5 in these other cases to my knowledge. I do strongly request the
15:04:16 6 Court's permission to brief the motion to dismiss fully before
15:04:21 7 the Court, and answer that specific question in the case law.

15:04:26 8 THE COURT: Well, I'm in no rush. But I'm at a loss to
15:04:32 9 know why you haven't already done it.

15:04:35 10 MR. RALEY: Well, as I shared with the Court, my
15:04:38 11 co-counsel that I work with on this issue is heavily involved in
15:04:41 12 briefing the Osborne decision before the U.S. Supreme Court,
15:04:45 13 which should resolve or speak to a lot of these state-federal
15:04:49 14 issues. And so, you know, I offer the Court my humble apology
15:04:53 15 for that. It was my hope we could consider the abeyance. And as
15:04:57 16 I shared with the Court, the defense counsel is not opposed to us
15:05:03 17 having an opportunity to brief the motion to dismiss for the
15:05:07 18 Court fully so the Court could consider all the case law.

15:05:10 19 I will do my best here to advocate but --

15:05:18 20 THE COURT: I just want you to understand, though, when
15:05:20 21 you come into federal court -- when you come into a federal
15:05:31 22 court, I'm set through March of 2010. I'm setting cases right
15:05:35 23 now for April of 2010. Not everybody gets to come in on their
15:05:40 24 motions. Most of the motions are written and without oral
15:05:46 25 argument. When I see a motion I want oral argument, I invite you

15:05:50 1 to come in. And I'm not being critical because I know you're
15:05:53 2 doing this pro bono, but the truth of the matter is, I don't have
15:05:56 3 a lot of time. I happen to have some time right now because I'm
15:06:03 4 going to be out for a month. So I'm not opposed to the other.
15:06:09 5 But normally I wouldn't give you the time.

15:06:11 6 MR. RALEY: Thank you, your Honor.

15:06:12 7 THE COURT: Because I just don't have it.

15:06:13 8 And no matter which way I rule, the other's going to
15:06:19 9 appeal it. My job is to get it up to where it's an important
15:06:23 10 court, not just ol' Sparks.

15:06:25 11 MR. RALEY: Yes, your Honor.

15:06:26 12 THE COURT: All right.

15:06:28 13 MR. RALEY: To finish what I was saying about
15:06:30 14 Rooker-Feldman, it only applies when the injury is caused by the
15:06:35 15 state court judgment. It's our position here, citing McKithen in
15:06:39 16 the Second Circuit case, your Honor, that the exact injury of
15:06:43 17 which we're complaining of in this case existed prior to the
15:06:47 18 state court proceedings. The injury itself was the district
15:06:52 19 attorney and the sheriff refusing to allow these things to be
15:06:56 20 subjected to DNA testing.

15:06:57 21 THE COURT: But my problem is enforcement.

15:07:02 22 MR. RALEY: Yes, your Honor.

15:07:03 23 THE COURT: How does the federal arm go in over the
15:07:06 24 state when it's been litigated? I can see and do frequently have
15:07:12 25 problems before there's a decision one way. I've actually had

15:07:16 1 cases, and I know that you probably had, too, where you had
15:07:20 2 judgments in the state and federal court and may not even be the
15:07:23 3 same with the same facts that are going up parallel, but one
15:07:28 4 doesn't confront the other, like your 1983 case. You want an
15:07:37 5 injunction that demands that I reverse the state district judge
15:07:45 6 judgment.

15:07:46 7 MR. RALEY: It is my understanding, your Honor, that
15:07:47 8 the law is well settled that proceedings simultaneously in state
15:07:52 9 and federal court is not the sort of interference that is
15:07:56 10 contemplated by the Younger doctrine. In fact, the --

15:08:00 11 THE COURT: No. They're usually just talking about
15:08:03 12 money, counsel.

15:08:03 13 MR. RALEY: Right.

15:08:04 14 THE COURT: They're not -- or some legal issue that's
15:08:09 15 not even esoteric, a legal issue. They're not talking about the
15:08:13 16 interference with the Court process.

15:08:15 17 MR. RALEY: That is the very issue that I request the
15:08:17 18 opportunity to brief before the Court of --

15:08:19 19 THE COURT: Well, I want you to brief it before January
15:08:21 20 the 20th. I'm going to rule on this the first week in February,
15:08:27 21 God willing. So if you want me to read your brief.

15:08:30 22 MR. RALEY: Yes, your Honor.

15:08:31 23 THE COURT: Get it in by January 20th.

15:08:33 24 And no person can spend all their time even writing for
15:08:40 25 the Supreme Court. Now, you may have to write for nine separate

15:08:42 1 judges. I mean you may have to have nine separate briefs, but
15:08:46 2 that's not my fault. You just have one here.

15:08:48 3 MR. RALEY: Yes, your Honor.

15:08:49 4 Shall we address the abate -- the request for
15:08:53 5 abatement?

15:08:53 6 THE COURT: I'm going to give you abatement until I
15:08:56 7 read your brief.

15:08:56 8 MR. RALEY: All right.

15:08:57 9 THE COURT: And I'll carry the abatement.

15:09:00 10 MR. RALEY: But the abatement motion, then, will not be
15:09:04 11 addressed orally today? Because we had some points we wanted to
15:09:06 12 make.

15:09:06 13 THE COURT: Then go ahead, sir.

15:09:08 14 MR. RALEY: All right. Thank you, your Honor.

15:09:10 15 The points we wanted to make to the Court briefly was
15:09:12 16 that the Osborne case versus district attorney's office, it comes
15:09:19 17 out of Alaska in the Ninth Circuit, is a 1983 action seeking DNA
15:09:25 18 testing brought by a convicted person, just like Michael Morton
15:09:28 19 who sought to use DNA testing that wasn't available at the time
15:09:31 20 of trial on evidence that is still in the state custody to prove
15:09:36 21 his claim for innocence. Three federal circuits, the Second, the
15:09:40 22 Third and the Eleventh, hearing DNA access actions like this have
15:09:46 23 stayed those cases pending Osborne, and we know of none, your
15:09:48 24 Honor, that has declined to grant a stay.

15:09:51 25 Osborne started as an unsuccessful bid in a state court

15:09:58 1 to get testing and then, a suit filed under 1983. He argued, as
15:10:04 2 Mr. Morton argued, that the due process clause prevents the state
15:10:07 3 from refusing to release the evidence for testing at his own
15:10:12 4 expense, and he prevailed in the district court in the Ninth
15:10:15 5 Circuit and now, cert has granted.

15:10:19 6 The Osborne case will decide two constitutional
15:10:21 7 questions that will be controlling regarding Mr. Morton's claims.
15:10:26 8 First, whether his claims can be brought as 1983 suits or must,
15:10:30 9 instead, under Heck vs. Humphrey be brought as part of a federal
15:10:34 10 habeas corpus action.

15:10:37 11 The second question is, even if a 1983 is a permissible
15:10:40 12 vehicle, are the underlying constitutional claims cognizable?
15:10:46 13 Does it violate the Constitution for a prosecutor to release
15:10:50 14 evidence for postconviction DNA testing? Both of those will be
15:10:55 15 before the Supreme Court. As to issue number one, whether Heck
15:11:00 16 is a bar, the Second, Ninth and Eleventh Court of Appeals have
15:11:06 17 held that Heck is not a bar. The Fourth and Fifth Court of
15:11:10 18 Appeals have held that it is a bar. Both of those decisions
15:11:13 19 precede the U.S. Supreme Court's decision in Dotson.

15:11:16 20 We anticipate that the United States Supreme Court will
15:11:19 21 tell us the law that they recognize on this issue within a few
15:11:24 22 months. The oral argument is in early March of this next year,
15:11:28 23 your Honor, of 2009. The Osborne case will, also, regarding the
15:11:34 24 second issue I raised, will define the scope of the
15:11:37 25 constitutional right; and it will provide either Mr. Morton

15:11:42 1 grounds for a summary judgment motion or the defense grounds for
15:11:48 2 a summary judgment motion and a motion to dismiss on that basis.

15:11:52 3 As to Ms. Stapleton's claims, she is asking the exact
15:11:57 4 same relief as Mr. Morton, forensic testing. So the ruling in
15:12:01 5 Osborne will make a ruling on the defendant's motion to dismiss
15:12:08 6 her action unnecessary, as well. And we would submit, your
15:12:15 7 Honor, that since the United States Supreme Court is going to
15:12:20 8 give guidance on these claims in a few months, the point we would
15:12:27 9 like to make about Ms. Stapleton's claim is it's really a case of
15:12:31 10 first impression. We're not aware of any other crime victim that
15:12:34 11 has filed this sort of action, and we just request that the Court
15:12:37 12 withhold judgment on that issue until the U.S. Supreme Court
15:12:40 13 deals with it. So that's the bottom line on what we're
15:12:44 14 requesting in the abeyance.

15:12:45 15 Yes, your Honor.

15:12:47 16 THE COURT: There's not going to be any money damages
15:12:49 17 in this case.

15:12:50 18 MR. RALEY: We're not seeking money damages.

15:12:50 19 THE COURT: I understand.

15:12:51 20 MR. RALEY: That was an issue.

15:12:52 21 THE COURT: You wouldn't be able to do it, anyway,
15:12:54 22 because the Supreme Court hadn't ruled it's a violation of the
15:12:57 23 constitutional rights. So that's out.

15:13:00 24 And if the Supreme Court rules as you indicate that you
15:13:06 25 hope it will, there's no reason that the state court is not going

15:13:12 1 to go along with the United States Supreme Court. Only the Ninth
15:13:15 2 Circuit does that.

15:13:19 3 MR. RALEY: One thing that we would like to point out
15:13:21 4 to the Court, your Honor, is we absolutely have no idea how long
15:13:24 5 these state court proceedings are going to take. We've been
15:13:27 6 fighting tooth and nail with our opponents for four years just to
15:13:30 7 get one bloody bandana tested.

15:13:33 8 THE COURT: Are you asking them to stay?

15:13:36 9 MR. RALEY: No, your Honor, we are not. We are asking
15:13:38 10 this court to stay because the U.S. Supreme Court is going to
15:13:40 11 deal with this very 1983 issue, which is the substance of this
15:13:45 12 complaint. But Mr. Morton has been in prison since 1986, and the
15:13:52 13 DNA evidence for his case has never been tested. This is what so
15:13:57 14 many people that I know that are prosecutors can't understand
15:14:00 15 that why this isn't a joint motion, why we don't just try to find
15:14:04 16 the truth.

15:14:05 17 THE COURT: You're not going to get to the --

15:14:08 18 MR. RALEY: Yes, your Honor. But that's why I'm so
15:14:10 19 passionate about what I'm trying to do here.

15:14:12 20 THE COURT: I appreciate you doing it. I'm just very
15:14:14 21 sensitive not only to following precedent, the majority of which
15:14:21 22 I may or may not think are right, but that's the job I took and
15:14:28 23 that's what I do. And unless the Supreme Court reverses an
15:14:34 24 express case that gives precedent, notwithstanding when it was
15:14:38 25 decided, it says expressly that Heck does apply. I don't really

15:14:44 1 think Heck applies, but that's what the Fifth Circuit says. I
15:14:51 2 don't think the Fifth Circuit --

15:14:51 3 MR. RALEY: But our point here --

15:15:03 4 THE COURT: But the point is, all you're asking for is
15:15:05 5 injunctive relief. Any injunctive relief I give is an
15:15:10 6 interference with the Texas judicial system, and that's what
15:15:15 7 you'd better concentrate on your brief.

15:15:18 8 MR. RALEY: Absolutely, your Honor.

15:15:19 9 THE COURT: All right. Thank you.

15:15:19 10 MR. RALEY: Regarding the stay, the point is since Heck
15:15:22 11 precedes the U.S. Supreme Court decision in Dotson and since
15:15:25 12 Osborne will resolve these disputes among the circuits, we think
15:15:29 13 it would be the best use of resources to simply wait until the
15:15:34 14 Supreme Court announces its decision, which should be spring of
15:15:38 15 this year and then --

15:15:39 16 THE COURT: It's a good idea for the federal court to
15:15:41 17 wait but not the state court, who's already ruled.

15:15:43 18 MR. RALEY: Well, we're in a 1983 action here, your
15:15:47 19 Honor, in federal court. We're desperately trying to do anything
15:15:49 20 we can to get the bloody bandana tested, as I'm sure that the
15:15:53 21 Court is aware. So if our state court proceedings should go
15:15:55 22 forward, there is a state statute right on point that in our
15:15:58 23 perspective should ensure this testing of this bandana. So we
15:16:03 24 don't want that to slow down.

15:16:04 25 THE COURT: So the state decision could be based on --

15:16:09 1 solely on state law and not be a constitutional decision?

15:16:15 2 MR. RALEY: Yes, your Honor.

15:16:16 3 THE COURT: Be sure and put that in your brief.

15:16:17 4 MR. RALEY: Yes, your Honor.

15:16:18 5 Thank you, your Honor.

15:16:19 6 THE COURT: Do you want to respond?

15:16:21 7 MR. ACKLEY: May I respond just briefly, your Honor?

15:16:22 8 THE COURT: Yes, sir, you may.

15:16:23 9 MR. ACKLEY: Your Honor, first, I need to point out
15:16:32 10 that there is a dangerous presupposition here. They're assuming
15:16:37 11 that the police department, that the DA's office haven't done
15:16:42 12 their jobs.

15:16:43 13 THE COURT: No, no, no.

15:16:47 14 Ms. Sims, do you see any jurors over there?

15:16:50 15 THE CLERK: No, sir.

15:16:51 16 THE COURT: Now, there are not any jurors over there.
15:16:55 17 Just talk to the Judge.

15:16:56 18 MR. ACKLEY: Your Honor, I mean the bottom line is that
15:17:00 19 even if --

15:17:00 20 THE COURT: They're saying that you have evidence that
15:17:03 21 you convicted people and you placed them in the penitentiary, and
15:17:08 22 now, as contrasted to when they were convicted, they have
15:17:13 23 scientific methods that might prove that they're innocent.

15:17:18 24 Now, you're not for keeping innocent people in the
15:17:22 25 penitentiary, are you?

15:17:23 1 MR. ACKLEY: Absolutely not, your Honor.

15:17:24 2 But what if that evidence turned out that it wasn't
15:17:27 3 exculpatory? What if it was inculpatory? What if it just had
15:17:32 4 nothing to do with it? What if it was just a --

15:17:34 5 THE COURT: I would expect a judge to so rule.

15:17:37 6 MR. ACKLEY: And I think that's what occurred, in fact,
15:17:39 7 I know that's what occurred in state court in relation to the
15:17:41 8 bandana.

15:17:42 9 THE COURT: No, no. According to what he says, he so
15:17:45 10 ruled without any DNA testing. Can you look at it one eye like
15:17:50 11 that for a while? (Displaying crystal ball) No.

15:17:52 12 The truth of the matter is they didn't have it, they
15:17:56 13 didn't think it would prove anything. That may be what the
15:18:01 14 Judge's finding is, and it may be dispositive. I don't know.
15:18:04 15 Right now, my big concern is involving the United States district
15:18:10 16 court in a state judicial system that has ruled and that this
15:18:18 17 lawsuit was filed subsequent to that.

15:18:21 18 MR. ACKLEY: Yes, your Honor.

15:18:22 19 THE COURT: And give you ten days to respond on -- to
15:18:27 20 his brief, which means that all that briefing will be done before
15:18:31 21 the end of January.

15:18:32 22 MR. ACKLEY: Yes, your Honor.

15:18:33 23 THE COURT: And I thank you for bringing this up. I'm
15:18:38 24 going to get something out promptly in February.

15:18:40 25 MR. ACKLEY: Thank you.

15:18:41 1 THE COURT: Anything else?

15:18:42 2 MR. ACKLEY: Your Honor, I had a procedural question
15:18:43 3 that's really unrelated to a case in a way in terms of the
15:18:48 4 electronic filing. I've run into an issue that whenever -- like,
15:18:52 5 for example, in this case I filed a motion for leave to exceed
15:18:56 6 the page limitation. The Court graciously granted my motion for
15:19:00 7 leave.

15:19:00 8 THE COURT: I never saw that.

15:19:01 9 MR. ACKLEY: Okay. But what I'm asking you --

15:19:02 10 THE COURT: The computer.

15:19:03 11 MR. ACKLEY: The computer saw it. But I guess what I'm
15:19:05 12 asking is that whenever I attach my actual physical document that
15:19:09 13 I want to file to it, it doesn't allow me the ability to attach
15:19:12 14 exhibits to that attachment.

15:19:14 15 THE COURT: That's right. You have to file it
15:19:16 16 manually.

15:19:16 17 MR. ACKLEY: Okay. So I asked --

15:19:18 18 THE COURT: Anything over 50 pages, unless they've
15:19:20 19 changed the rule, and I don't like to read them. So they may
15:19:24 20 have changed them. But Ms. Sims can show you where the clerk's
15:19:28 21 office, you get a full explanation. But usually you have to file
15:19:31 22 the exhibits manually by hand.

15:19:34 23 MR. ACKLEY: The exhibits I'm speaking of are like
15:19:37 24 paper, I mean, you know, documents, not physical exhibits. And I
15:19:41 25 called the clerk's office.

15:19:42 1 THE COURT: It's usually just a page connotation.

15:19:46 2 MR. ACKLEY: Yes, your Honor. I just wanted to get
15:19:48 3 some clarification because I've seen the issue arise in several
15:19:52 4 of my cases.

15:19:53 5 THE COURT: Well, before you go, go to the end of the
15:19:55 6 hall, ask to see a clerk, and they will explain it to you far
15:19:58 7 better than I can.

15:19:58 8 MR. ACKLEY: They suggested that I talk to you.

15:20:00 9 THE COURT: It's all black magic to me. I don't
15:20:03 10 understand how that happens.

15:20:04 11 MR. ACKLEY: Thank you. May I be excused?

15:20:07 12 THE COURT: You may, sir.

15:20:07 13 (End of proceedings.)

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UNITED STATES DISTRICT COURT)
WESTERN DISTRICT OF TEXAS)

I, LILY I. REZNIK, Official Court Reporter, United States District Court, Western District of Texas, do certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

I certify that the transcript fees and format comply with those prescribed by the Court and Judicial Conference of the United States.

WITNESS MY OFFICIAL HAND this the 9th day of January, 2009.

/s/Lily I. Reznik
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