US Supreme Court promotes wrongful imprisonment and age discrimination

Decisions on prisoner DNA testing and older workers' right to sue

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Last Thursday, the Supreme Court issued two highly reactionary rulings, holding in one case that convicted prisoners have no constitutional right to test DNA evidence that could establish their innocence, and in another making it more difficult for workers to press claims of age discrimination.

Both were decided by identical 5-4 votes, with Associate Justice Anthony M. Kennedy joining the extreme right-wing bloc of Chief Justice John G. Roberts, Jr., and Associate Justices Antonin Scalia, Clarence Thomas and Samuel A. Alito, Jr. The principal dissents in both were written by Associate Justice John Paul Stevens, joined by moderates David H. Souter, Stephen G. Breyer and Ruth Bader Ginsburg.

The DNA testing decision, *District Attorney's Office v. Osborne*, is particularly cold-hearted, even by the miserable standards of the current Supreme Court.

William Osborne was convicted for the grisly sexual assault and attempted murder of an Alaskan prostitute in 1993. A condom worn by the perpetrator was recovered at the scene. Relatively crude DNA testing available at the time of Osborne's trial was not conclusive, and other evidence of his guilt less than certain. Examining the condom with newer DNA technology, known as short-tandem-repeat (STR) testing, can establish Osborne's guilt or innocence to a virtual certainty.

Osborne filed a federal civil rights lawsuit claiming that Alaska's blocking access to STR testing of the condom violated his right under the Fourteenth Amendment of the United States Constitution not to be denied liberty without due process of law. The Ninth Circuit Court of Appeals agreed.

Osborne had the constitutional right to access the biological evidence "used to secure his conviction," the Ninth Circuit wrote, where "the DNA testing is to be conducted using methods that were unavailable at the time of trial and are far more precise than the methods that were then available, such methods are capable of conclusively determining whether Osborne is the source of the genetic material, the testing can be conducted without cost or prejudice to the State, and the evidence is material to available forms of post-conviction relief."

Roberts wrote the decision overturning this ruling, forever denying Osborne and untold other convicted prisoners access to evidence that might establish their innocence.

While acknowledging that "DNA testing has an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty," Roberts rejected any "constitutional right of access to this new type of evidence."

Roberts's convoluted and intellectually dishonest reasoning is epitomized by the following passage: "Osborne seeks access to state evidence so that he can apply new DNA-testing technology that might prove him innocent. There is no long history of such a right, and the mere novelty of such a claim is reason enough to doubt that substantive due process sustains it."

Stevens noted the obvious in his dissent, "Of course courts have not historically granted convicted persons access to physical evidence for STR...testing," as the technology did not exist. But nevertheless, "courts have recognized a residual substantive interest in both physical liberty and in freedom from arbitrary government action," which justify "the Court of Appeals' decision to grant [Osborne] access to the State's evidence for purposes of previously unavailable DNA testing."

Throughout his opinion, Roberts elevated the interest of the state in its criminal processes above the individual's

right to be free from a false conviction. “The availability of technologies not available at trial cannot mean that every criminal conviction, or even every criminal conviction involving biological evidence, is suddenly in doubt,” Roberts wrote, while musing over “how to harness DNA’s power to prove innocence without unnecessarily overthrowing the established system of criminal justice,” as if proving a miscarriage of justice through DNA testing threatens the fabric of society.

Roberts’s view is that Osborne has no right “to prove his innocence...after a fair trial has proved otherwise,” even if the result of that “fair trial” can be proven wrong. Roberts even wrote that Osborne’s reliance “on an asserted federal constitutional right to be released upon proof of ‘actual innocence’...is an open question.”

Anyone familiar with the operation of the US criminal justice systems is well aware of its flaws. Class oppression and racial prejudice (Osborne is black) coupled with widespread judicial acceptance of police and prosecutorial misconduct not infrequently combine to convict the innocent of heinous crimes. According to the Innocence Project, headquartered in New York City, the advent of DNA technology has led to the exoneration of at least 240 prisoners, more than 25 percent of whom were reported to have falsely confessed to their guilt.

Peter Neufeld of the Innocence Project, who argued the case for Osborne in the Supreme Court, denounced the decision. “It’s unquestionable that some people in some states who are factually innocent will not get DNA testing and will languish in prison,” he said.

After the Supreme Court accepted the case for review, the Bush administration intervened on behalf of the prosecution, urging reversal of the Ninth Circuit decision. Demonstrating once again there to be no “change we can believe in,” Obama Principal Deputy Solicitor General Neal K. Katyal continued to press the Bush administration position, agreeing with Scalia during oral argument that “there is no constitutional right to DNA testing.”

Attorney General Eric Holder rationalized the Obama administration’s support for the decision by pointing out that the federal government and 46 states have laws allowing convicted prisoners access to DNA testing. Alaska is one of four states that do not. Many of the states that do allow for testing, however, place various limits on access that would have prevented someone in Osborne’s circumstances from testing the condom.

In *Gross v. FBL Financial Services*, the same five justices ruled in an opinion by Clarence Thomas that workers claiming to have been victims of age discrimination must prove not only that age played a role in the employer’s adverse actions, but that it was the “key factor.” That is a much higher standard than previously recognized for other federal employment discrimination claims, where evidence of “mixed motives” shifted the burden to the employer to establish lawful reasons for the employment decision.

The ruling overturned a $47,000 jury verdict in favor of Jack Gross, a 54-year-old insurance claims adjuster from Iowa. He was demoted and his job was given to a woman in her 40s.

In dissent, Stevens denounced the majority opinion for ignoring a 45-year-old precedent construing identical language in an analogous federal anti-discrimination statute more favorably for workers, accusing Thomas of “an unabashed display of judicial lawmaking.”

The line-up of justices demonstrates that Souter’s impending replacement by Sonia Sotomayor, a former prosecutor whose judicial record is not particularly liberal, will have little immediate impact on the current court. The failure of the Democrats to block the nominations of right-wing ideologues Roberts and Alito, despite having more than adequate votes for filibusters, means that the reactionary bloc will continue to dominate the high court indefinitely.

The Supreme Court is expected to issue 10 more rulings, including decisions on strip searching high school students, “preclearance” requirements of the federal Voting Rights Act, and funding for non-English-speaking school programs, before the traditional conclusion of its current term on June 29.