

IN THE SUPREME COURT OF THE UNITED STATES

No. ___

RODNEY REED,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

**APPLICATION TO THE HON. SAMUEL A. ALITO, JR.
FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE
A PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF
CRIMINAL APPEALS OF TEXAS**

1. Petitioner hereby moves by his undersigned counsel, pursuant to Rule 13(5) of the Rules of this Court, for an extension of time of 30 days, to and including February 1, 2018, for the filing of a petition for a writ of certiorari to review a decision of the Court of Criminal Appeals of Texas (the “CCA”) dated April 12, 2017 (Exhibit 1). The CCA subsequently denied Mr. Reed’s motion for rehearing on October 4, 2017 (Exhibit 2). The jurisdiction of this Court is based on 28 U.S.C. § 1257(a).

2. Absent an extension, a petition for a writ of certiorari is due by January 2, 2018. This period includes multiple federal and other holidays, including Christmas and New Year’s Day. Respondent does not oppose Petitioner’s request for an extension through and including February 1, 2018.

3. Petitioner's lead attorney in the CCA is Bryce Benjet, an attorney with the Innocence Project, and local counsel is Andrew MacRae, an attorney in private practice in Texas. Both were previously appointed as CJA counsel. Mr. Benjet will serve as counsel of record in this case if certiorari is granted.

4. In addition to the ordinary demands of their law practices, Messrs. Benjet and MacRae are currently engaged in other pressing matters on behalf of Mr. Reed. In particular, they are preparing detailed findings of fact and conclusions of law for submission to a Texas state court following a recent four-day evidentiary hearing on *Brady* and false testimony claims in Mr. Reed's state habeas proceedings. Over the course of four days, twelve witnesses testified and dozens of items of evidence were admitted in connection with Mr. Reed's *Brady* and false testimony claims remanded for hearing by the CCA. The transcripts from these proceedings are voluminous, and only became available after the Thanksgiving holidays. The proposed findings and conclusions are due on or before December 22, 2017.

5. Mr. Benjet also has a previously scheduled vacation away from his law practice from December 26-31, 2017.

6. Mr. Reed's case presents substantial and unresolved issues of law as to whether Article 64 of the Texas Code of Criminal Procedure ("Article 64"), Texas's post-conviction DNA testing statute, provides constitutionally adequate access to DNA testing that is capable of proving Mr. Reed's innocence. Mr. Reed contends that the CCA's interpretation and application of Article 64 violate the

“fundamental fairness” standard articulated by this Court in *Dist. Attorney’s Office for Third Judicial District v. Osborne*, 557 U.S. 52, 69 (2009), and denies him his constitutional right to due process.¹ In *Skinner v. Switzer*, 562 U.S. 521 (2011), this Court remanded a similar claim challenging the constitutionality of Texas’s limited statutory right to post-conviction DNA testing.

7. Additional time for research is particularly important because the Due Process standard discussed by this Court in *Osborne* involves the comparison of Texas’s application of its DNA statute with the scope of DNA testing afforded in other jurisdictions around the nation. *Osborne*, 557 U.S. at 70 (comparing Alaska’s right to DNA testing with that provided “by federal law and the law of other states”). Mr. Reed’s petition will present Texas’s limited interpretation of Article 64 as an outlier in which Texas courts are compelled to deny DNA testing on evidence that is unquestionably capable of establishing innocence.

8. For example, Article 64—like most jurisdictions—requires the movant to show that exculpatory DNA testing results would have impacted the results of the trial. *See* Tex. Crim. Proc. Code Ann. art. 64.03(a)(2)(A). The CCA’s construction of this element, however, categorically limits the anticipated “exculpatory results” to those that merely exclude the convicted party as the source of the DNA. *See* Exhibit 1 at 26. Texas courts may not consider the

¹ In *Osborne*, this Court held that although states are not required to offer specific forms of post-conviction relief, if a state chooses to do so, those procedures must be imbued with “fundamental fairness.” *Osborne*, 557 U.S. at 69.

realistic possibility² that DNA testing will also identify the source of the DNA, even implicating a known offender using the CODIS DNA database. *See id.* This limited construction of Article 64 is inconsistent with both the federal DNA law and the prevailing standards in other states, which recognize that exculpatory DNA test results routinely identify third parties as the source of relevant biological evidence. *Compare* 18 U.S.C. § 3600(e) (requiring all test results to be compared to national DNA database); *Powers v. Tennessee*, 343 S.W.3d 36, 55 (Tenn. 2011); *State v. Denny*, 2016 WI App 27, ¶ 57, 368 Wis. 2d 363, 393, 878 N.W.2d 679, 693 (Ct. App. Wis. 2016), *rev'd on other grounds*, 2017 WI 17, ¶ 57, 373 Wis. 2d 390, 891 N.W.2d 144 (Wis. 2017); *Hardin v. Commonwealth*, 396 S.W.3d 909, 915 (Ky. 2013) (non-statutory post-conviction DNA motion); *Ohio v. Noling*, 992 N.E.2d 1095, 1105 (Ohio 2013); *State v. Butler*, 21 A.3d 583, 588 (Conn. App. Ct. 2011); *Commonwealth v. Conway*, 14 A.3d 101, 114 (Pa. 2011); *New Jersey v. DeMarco*, 904 A.2d 797, 807 (N.J. Super. Ct. App. Div. 2006); *see also* Miss. Code Ann. § 99-39-11(10) (West Supp. 2014); N.Y. Crim. Proc. Law § 440.30(1-a)(c) (McKinney Supp. 2015). Texas's limited interpretation of "exculpatory results" under Article 64 is just one example of the constitutionally inadequate proceedings below. The CCA has also adopted an inconsistent and irrational standard for "chain of custody" in which evidence that would be admissible if offered by the State at trial is deemed unsuitable for post-conviction

² In roughly half of cases where DNA evidence proved innocence, the DNA testing also identified a third party as responsible. *See Exonerated by the numbers, CNN, <http://www.cnn.com/2013/12/04/justice/prisoner-exonerations-facts-innocence-project/index.html>* (last visited Dec. 11, 2017).

DNA testing. *See* Exhibit 1 at 17-18 (chain of custody of trial exhibits not proven even though evidence was admitted at trial and never left custody of the court clerk's office).

9. Petitioner's counsel requires the additional requested time to fully research these and other legal issues raised in the case and to prepare an appropriate petition for consideration by this Court.

10. Petitioner was arrested in 1997, tried in 1998 and sentenced to death. He remains incarcerated in Texas and is serving his sentence at the Polunsky Unit of the Texas Department of Corrections, 3872 FM 350 S., Livingston, Texas, a high security facility for Texas death row inmates. No death warrant is extant at this time, and the Texas courts are currently considering other post-conviction matters. Consequently, an extension of time will not delay execution of his sentence or otherwise prejudice Respondent.

11. For all of the foregoing reasons, Petitioner hereby requests that an extension of time, to and including February 1, 2018, be granted within which Petitioner may file a petition for a writ of certiorari.

Respectfully submitted,

s/Bryce Benjet
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