

18-8295 ORIGINAL
No. _____

FILED
MAR 02 2019

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

RAYMOND LUMSDEN — PETITIONER
(Your Name)

VS.

THE STATE OF TEXAS — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

SECOND DISTRICT COURT OF APPEALS FORT WORTH, TEXAS

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

RAYMOND LUMSDEN

(Your Name)

899 FM 632

(Address)

Kenedy, Texas, 78119

(City, State, Zip Code)

(Phone Number)

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QUESTION(S) PRESENTED

1. Did the Court of Appeals commit err by affirming the trial court's erroneous denial of additional funds for the defense's DNA Expert to testify at trial as to exculpatory and mitigating findings and critical evidence in violation of this Court's rulings in Ake?
2. Did the Court of Appeals commit err by affirming the trial court's conviction by holding the numerous and cumulative errors of trial counsel did not violate the petitioner's constitutional right to the effective assistance of counsel under the Sixth Amendment, when it provided that relief was denied because of those failures of counsel?
3. Was trial counsel ineffective under the Strickland standard of this Court where the Court of Appeals revealed its denial of possible relief due to the failures of counsel at trial, which violated the petitioner's Sixth amendment right to effective assistance of counsel under the United States Constitution?
4. Did the cumulative errors detailed by the Court of Appeals violate the cumulative-error doctrine by "fatally infecting the trial" and depriving the petitioner of a fundamentally fair trial and synergistically achieving the critical mass to cast a shadow upon the integrity of the verdict?
5. Is the three consecutive LIFE sentences imposed by the trial court disproportionate to the crime and does it violate the Eighth Amendment of the United States Constitution against Cruel & Unusual punishment since the allegations were alleged in a single event arising out of the same criminal act?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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~~APPENDIX F~~ • Proof state DNA expert LIED, and that Court of Appeals falsely weighed the alleged DNA as "proof of contact."

My DNA expert could have changed the outcome of my trial, had she been allowed to testify

TABLE OF AUTHORITIES CITED

CASES	PAGE(S)
<u>Ake v. Oklahoma</u> , 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed. 2d 53 (1985).....	6,7,13
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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the Second District Court of Appeals court appears at Appendix A to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___ A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was 11-28-2018. A copy of that decision appears at Appendix A.

A timely petition for rehearing was thereafter denied on the following date: 2-13-2019, and a copy of the order denying rehearing appears at Appendix C.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___ A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment of the United States Constitution provides:
"No person shall be ...deprived of life, liberty, or property without due process of law."
2. The Sixth Amendment of the United States Constitution provides:
"In all criminal prosecutions, the accused shall enjoy the right to...be informed of the nature and cause of the accusation;... and to have the assistance of counsel for his defense."
3. The Fourteenth Amendment of the United States Constitution provides:
"Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
4. The statutes involved are, Texas Constitution, Art I, §10; Code of Criminal Procedure Art. 26.05.

STATEMENT OF THE CASE

In September of 2016, a jury in Denton County, Texas found the petitioner guilty of aggravated sexual assault of a child, indecency with a child, and criminal solicitation of a minor and assessed his punishment at LIFE in the Texas Department of Criminal Justice, and the trial court ordered the three life sentences to run consecutively. See **Tex. Penal Code Ann. §§ 15.031, 21.11, 22.01 (West Supp. 2018)**. In fourteen issues, petitioner appealed the conviction and sentence. The Second Court of Appeals, then affirmed the conviction

Prior to trial, the state declared its intent to use evidence alleged as "TOUCH DNA" at trial. Upon that intent, trial counsel filed a motion to suppress the alleged "TOUCH DNA" evidence, and filed a subsequent motion requesting funds for an expert witness to assist in the defense pertaining specifically to DNA issues. The trial court approved the requested funds for the defense expert to investigate the state's alleged DNA evidence, and to assist the defense in obtaining exculpatory and mitigating evidence.

Trial counsel also filed pre-trial motions to suppress the alleged "Outcry" statements, as well as the forensic video interview. Just prior to trial, another pre-trial hearing was had in which trial counsel made an additional request for expert funds so that the previously approved DNA expert could both travel and testify at the trial, where her findings were critical. Upon that request for additional funds, made verbally by the trial counsel, the trial judge responded, "I'm not going to make any of a dispositive ruling on that now, but will take it under advisement and...go from there." Trial counsel failed to file any proper motion for additional funds for the expert, or obtain a ruling on the issue, and so the highly exculpatory evidence of the expert was not provided at trial.

This was critical, being the jury specifically asked about the alleged "TOUCH DNA" findings in their deliberations.

During trial, and over the objections of trial counsel, the state was allowed to enter into evidence highly prejudicial inadmissible hearsay in an attempt to overcome the critical damage to the state's case when the complainant failed to identify the petitioner as her alleged abuser. Twice, the complainant was asked to "look around the courtroom and identify her alleged abuser." On both instances, she looked around, looked at the very closely seated petitioner, and testified, "I don't see him. He's not here."

In the above described instances, the petitioner's trial counsel flat-out failed to make objection's to the inadmissible evidence and testimony, and to request a hearing outside of the jury to request a running objection to preserve the abuse of discretion in allowing such inadmissible hearsay.

After the jury found the petitioner guilty, it assessed punishment as LIFE in the Texas Department of Criminal Justice. The state then moved to cummulate the sentences, in which the judge agreed and did. Petitioner is now serving three (3) consecutive LIFE SENTENCES.

A. COURSE OF PROCEEDINGS BEFORE THIS COURT.

On August 11, 2017, petitioner filed an appeal of his conviction and sentence, which was subsequently affirmed by the Second Court District Court of Appeals.

On December 19, 2018, petitioner then filed a Petition for Discretionary Review in the Court of Criminal Appeals of Texas, which was refused.

On February 18, 2019, petitioner filed a motion for rehearing, which was also refused.

REASONS FOR GRANTING THE PETITION

A. THE COURT OF APPEALS HAS DECIDED FEDERAL QUESTIONS IN DIRECT CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT ON THE SAME ISSUES, WHICH HAVE VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS AND HAVE SIGNIFICANT EFFECT ON THE PUBLIC.

1. The Second District Court of Appeals erred in affirming the district court's denial of petitioner's right to have the assistance of his expert witness at trial, when it failed to provide the requested funds for travel and testimony at his trial. At the time, the district court found the petitioner to be indigent. Trial counsel filed a pretrial motion requesting approval of funds for the assistance of a DNA expert where there was, "A compelling need for the assistance of experts to address significant issue at trial, one of which is DNA testing and test results." Trial counsel then stated, "The Defendant will be irreparably harmed if he is unable to consult with experts in the preparation of this case for trial."

The trial court approved this motion, and provided \$3,000 dollars, "without prejudice for additional fund requests if necessary." However, just prior to trial at another pretrial hearing, petitioner made another request for additional funds so that the previously approved DNA expert could travel and testify at trial. In reposnse to that additional request for funds, and though the Defendant was still indigent, the trial court said, "I'm not going to make any dispositive ruling on that now, but will take it under advisement and....go from there." This conflicts with this Court's decision in Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed. 2d 53 (1985). The petitioner had made a threshold showing of need prior to trial of having his expert DNA expert, where he asserted that the defense would be "irreparably harmed" without the assistance of the expert. The fact that the trial court initially approved funds for the expert to then

assist the defense at trial with DNA issues, proves that it agreed as to the critical need of the expert to assist the petitioner at his trial. To then not approve additional funds for that expert to travel to, and give her expert testimony and exculpatory findings at trial, directly violated petitioner's Constitutional right to a fair trial, as well as this Court's decision in Ake, Id.

Had the trial court approved funds for the expert to travel to and present her exculpatory and mitigating expert findings at trial, the whole outcome of the trial would have been different. The expert could have directly impeached the false testimony of the state's expert witness, and provided direct evidence to answer the question of the jury during their deliberation, "Was there DNA testing done on the anus, and if so, what were the results?". (See Appendix E). This question from the jury proves that they were not yet convinced by the other testimony and evidence of the state, and specifically gave very high prejudicial value to the alleged DNA evidence of the state, in which the defense expert, Suzanna Ryan, could have provided vast testimony had the trial court approved the requested funds for her to testify at trial.

"The motivating principle of Ake is to assure a proper functioning of the adversary process." Ake v. Oklahoma, 470 U.S. at 77 (emphasis added). Because the petitioner's expert witness was effectively denied funds for her to be at his trial, there was no adversarial challenge to the state's alleged "TOUCH DNA" evidence, and the state expert was allowed to testify with false evidence the state should have known was false, but failed to correct.

The very same considerations this Court concluded in Ake, in providing for due process and adversarial challenge related to indigent defendant's, specifically applies to the petitioner.

2. At the petitioner's trial, and over the objection of his trial counsel, the state was allowed to admit into evidence and play for the jury, the prejudicial and hearsay forensic interview video of the complainant. Upon their review, the Second District Court of Appeals agreed that this was error, however proceeded to a harm analysis where it found the erroneous admission of the inadmissible hearsay evidence did not violate a substantial right.

The Sixth and Fourteenth Amendments to the United States Constitution assures of a fair and impartial trial, as well as due process. When a trial court judge abuses its discretion and allows into evidence highly prejudicial and inadmissible evidence, it directly violates the very guarantees of the Constitution. This erroneously admitted hearsay, had such an impact on the jury, that they requested to see the forensic video for a second time during their deliberations. This indicates that at least a few of the jurors were unconvinced by the other evidence, and the forensic interview video weighed very heavily in deciding their verdict. Why else would they request to watch it again for a second time, after the claimant had already testified. This abuse of discretion, violated this Court's ruling in **Tome v. United States**, 513 U.S. 150, 156-58, 115 S.Ct. 696, 130 L.Ed. 2d 574 (1995)). That means that the trial court violated petitioner's substantial rights, and violated his Constitutional right to a fair trial and due process, which should not be subject to a harm analysis.

There is an absolute certainty that the outcome of the trial would've been different had that inadmissible and prejudicial evidence not been admitted into evidence and allowed to prejudice the jury.

B. THE COURT OF APPEALS ERRED BY DETERMINING THAT PETITIONER'S TRIAL COUNSEL FAILED TO PROPERLY REQUEST EXPERT FUNDS, OBJECT TO HEARSAY EVIDENCE, REQUEST A HEARING OUTSIDE OF THE JURY TO OBTAIN A STANDING OBJECTION, FAILED TO PRESERVE ERROR, AND FAILED TO OBTAIN A RULING ON HIS HEARSAY OBJECTION, WITHOUT FINDING INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL AND REVERSING FOR A NEW TRIAL OR EVIDENTIARY HEARING.

The United States Constitution Sixth Amendment assures that:

"In all criminal prosecutions, the accused shall....have the assistance of counsel for his defense."

Over 25 years ago, this Court in its seminal Strickland v. Washington, 466 U.S. 668, 104. S.Ct. 2052, 80 L.Ed.2d 674 (1984) decision, provided the framework for handling claims of ineffective assistance of counsel, as well as requirements of counsel with its familiar two-prong test. (1) deficient performance and (2) a reasonable probability that but for counsel's errors the result of the proceeding would have been different.

In the instant, the Second District Court of Appeals in its decision specifically detailed the numerous instances of "failures" made by trial counsel in his representation of petitioner, that would have moved them to grant relief, if, the counsel had done his job effectively. In most of their decision throughout, they justices continually assert that relief would have been assured, but the trial counsel failed to do this or that.

Regardless of their findings, the Court of Appeals has a judicial duty to uphold the Constitution as well as the rulings of this Court. In its findings in Murray v. Carrier, 477 U.S. 478, 496, 106 S.Ct. 2639, 2649-50, 91 L.Ed.2d 397 (1985), this Court determined that, "A miscarriage of any justice excuses "cause" for procedural default. See also Swayer v. Collins, 494 U.S. 108, 108 L.Ed.2d 93, 110 S.Ct. 974 (1990), where petitioner isn't making a claim of mere technical violations but, rather, error committed of a constitutional magnitude that denied his right to effective assistance of counsel at his trial in violation of Strickland.

How can a Court of Appeals uphold a conviction that it knows happened

due to ineffective assistance of trial counsel that would have changed the outcome of the trial? Where is the justice in ignoring that violation of petitioner's constitutional rights? The fact that the Court of Appeals makes **numerous** mentions of the counsel's failures during trial that had a direct impact on the outcome of the trial, speaks to the fact that they in fact **KNEW** it was unjust and caused the contrary outcome.

How, can the Court of Appeals use the failures of trial counsel to justify their reason for not providing relief, without then finding that the same failures of the trial counsel violated the Sixth Amendment of the United States Constitution, and critically impacted the outcome of the trial requiring reversal and a new trial? If the Second District Court of Appeals isn't obliged to protect the constitutional rights of defendant's in its court's, then what is their duty and obligation? Why even have the constitution if nobody will enforce it even on **sua sponte** determinations?

The Second District Court of Appeals has a duty to protect the civil and constitutional rights of defendant's in its courts, especially those of indigent defendant's, which it failed to do in this case after it made repeated reference to the numerous failures of counsel throughout its Opinion. Had petitioner had effective assistance of counsel, as the Court of Appeals continually "hinted" to, the petitioner most likely wouldn't have been found guilty at trial. Effectively, "**Cumulative Error**".

C. THE COURT OF APPEALS ERRED BY DETERMINING THAT THE PETITIONER'S THREE CONSECUTIVE LIFE SENTENCES DOESN'T VIOLATE THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION'S CRUEL & UNUSUAL PUNISHMENT AND IN ORDERING THE SENTENCES TO RUN CONSECUTIVELY.

In Blockburger v. U.S., 284 U.S. 299, 152 S.Ct. 180, 76 L.Ed.2d 306 (1932) this Court addressed the issue of double jeopardy for multiple convictions. "If the offense is a single continuous act, with a single impulse, then the offenses merge and the defendant may be punished only

once." Additionally, the first part of the Blockburger test asks whether each criminal act is a separate and distinct one, separated by time. If the offense is a single continuous act, with a single impulse, in which several different statutory provisions are necessarily violated along the continuum, the offenses merge together. This is called the "merger doctrine." This, is even the view of the Texas Court of Criminal Appeals in Evans v. State 299 S.W.3d 138 (2009), "The principles of double jeopardy prohibit the State from obtaining a conviction for indecency with a child and aggravated sexual assault of a child based on a single act of said molestation because indecency with a child is a lesser-included offense of aggravated sexual assault of a child when both offenses are predicated in the same act."

The Eighth Amendment to the United States Constitution provides:

"Excessive bail shall not be required, nor excessive fines be imposed, nor cruel and unusual punishment inflicted."

See also, Texas Constitution, Art I, §113.

In Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), This Court provides exception to the rule that punishment assessed within the statutory limits is not excessive, cruel, or unusual punishment where the sentence is grossly disproportionate to the offense. In a disproportionality analysis, the court initially makes a threshold comparison of the gravity of the offense against the severity of the sentence. Upon the determination that the sentence is grossly disproportionate to the offense the court will consider the remaining factors enunciated in Solem.

In this case, the allegation was of digital penetration of the anus, and vaginal touching without penetration. The **only** evidence of the entire allegation, was the allegation itself. At trial, the complainant failed to

identify the petitioner as her alleged abuser when asked to do so. The complainant also testified that the allegation was a "one time" event, happened "at the same time without interruption." If, the allegation had in fact occurred, it would have constituted a continuous action without pause, where the single act merged the offenses into one for punishment and conviction purposes as stated in Blockburger & Solem. Furthermore, indecency with a child, is a lesser-included offense of aggravated sexual assault of a child where the happened in the same act.

The three consecutive life sentences imposed by the trial court, and upheld by the Second District Court of Appeals, violates established Federal rulings, as well as that of this very Court. It reflects cruel and unusual punishment and disproportionate sentencing. Especially where the child complainant did not identify petitioner as her alleged abuser in the trial testimony, and there was no physical evidence to support any of the allegations, period. (See Appendix E).

The sentence issued to petitioner, who was 44 years old at the time, is equivalent to a death sentence, as he will never be released from his incarceration under Texas law. He will effectively die in prison for the crimes he never committed, and the alleged victim failed to identify him as being responsible for. If that's not cruel and unusual, or considered disproportionate considering a Federal Court would have sentenced him to only 12 years in prison, then petitioner doesn't know what is.

D. THE COURT OF APPEALS COMMITTED ERR BY DEEMING THE CUMULATIVE ERRORS HARMLESS DENYING PETITIONER DUE PROCESS AND A FAIR TRIAL IN DIRECT VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION

In Issue Eleven, the Second District Court of Appeals deemed that the cumulative errors at trial were "harmless and did not violate any of the petitioner's constitutional rights." However, this Court as well as

most all other Federal Circuit Courts have ruled that "even plain error can yield a result that amounts to the denial of a constitutional right to a fair trial, which calls for reversal." Additionally, because all of the individual errors involved matters of constitutional law and state law, it specifically violated the petitioner's constitutional right to a fair trial and due process. See Derden v. McNeel, 978 F.2d 1453, 1457 (5th Cir. 1992)(en banc), cert. denied, 508 U.S. 960 (1993).

Looking at the specific facts in this case, and taking into account the very findings of error related to the failures of trial counsel to do a plethora of things that "would have" eliminated (1) the forensic video (2) the testimony of the Nurse Carriker, (3) Inadmissible hearsay in the binder, (4) the alleged DNA evidence, (4) testimony of tampering with government documents, (5) all other hearsay and inadmissible evidence, and "would have" allowed the petitioner's DNA expert to testify as to her exculpatory and mitigating findings and evidence. Their "harmless error" reflected in the Court of Appeals decision changed the entire outcome of the trial, where the state wouldn't have been able to prove the allegation but for, those errors. It was only because of those "harmless errors" that the state's DNA expert was allowed to provide knowingly false and perjured testimony, and the state was allowed to patch critical holes in its case where the plaintiff failed to identify petitioner as her abuser during trial.

The Court of Appeals so much as said in its decision related to the erroneous denial of funds for the petitioner's DNA expert to testify at his trial, that it was flat-out the failure of trial counsel to make a "proper request" for funds, or it would have had to reverse. Therefore, the Court of Appeals knew it was of constitutional dimension under Ake v. Oklahoma, because it specifically cited the case.

The Court of Appeals committed err in its finding "harmless" the very numerous error's at trial that were matters of constitutional law, and directly violated petitioner's right to due process and a fair trial under the Fourteenth and Sixth amendment of the United States Constitution.

The Second District Court of Appeals should have reversed petitioner's conviction and remanded the case back for a new trial and proceedings.

E. NOT ONLY IS THE DECISION OF THE LOWER COURTS ERRONEOUS BUT THE NATIONAL IMPORTANCE THAT EFFECTS THE PUBLIC DEMANDS HAVING THE SUPREME COURT OF THE UNITED STATES DECIDE THE QUESTIONS INVOLVED.

The United States Constitution itself, is a very clear notion of the expectations and wants of the American public. They are not only sworn to by every President, Supreme Court Justice, Federal Court Justice, all member's of the United States Military, Member's of Congress and Senate, and even the justices sitting on the Second Distict Court of Appeals that decided the petitioner's case, but also depended upon by society to ensure equality in our government. That very sentiment is defined in the words of the constitution itself, "We hold these truths to be self-evident, that all men are created equal...". In all virtues worn by society, justice is the highest of them. Without justice, there is only **injustice**.

The Sixth and Fourteenth Amendments to the U.S. Constitution are so deeply rooted in our society, that without them, society would cease to exist under the oppression of government. They are what prevents the very idea of governmental oppression, and assures every American the rights to due process and a fundamentally fair trial in the event the government rises against them. This, is the sole purpose of the Constitution itself.

If courts are allowed to abuse its discretion, allow inadmissible hearsay and evidence, ignore ineffective attorney's, use false testimony,

ignore a plaintiff's inability to identify their alleged abuser, and whatever else is used to falsely convict innocent people, while then just being able to find those errors "harmless"...there is no justice to be had in this Country, and Democracy has failed the people.

All of the above things happened in this case, and in most cases, were recognized by the Court of Appeals in its decision. It is happening in a vast majority of courtroom's across this Country every single day, in spite of this Court's rulings on these very issues. Where does it end? When does it end? Until it does, more and more innocent people will be convicted of crimes they didn't commit, as reflected by the Innocence Project, who uncovers these same issues in every exoneration it achieves.

The American people deserve better, and the petitioner deserves better. The United States Supreme Court has a Justice, who himself was falsely accused of an allegation he didn't commit just recently. He was able to use his great status to prove that innocence with the media coverage, and with the help of the United States Senate. The petitioner in this case, is not Justice Kavanaugh, and doesn't have the same resources to prove his innocence. Only the hopes of a fair trial, and due process guaranteed to him under the United States Constitution. Guarantees that didn't happen in this case, and led to his wrongful conviction. Guarantees that this very honorable Court should now establish for him by granting his Writ of Certiorari, and reversing for a new trial where his innocence will be then proven.

Petitioner so prays.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "R. E. L. Farnsworth". The signature is fluid and cursive, with a horizontal line underneath it.

Date: 2/20/2019