19-6294

Docket No:

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Alexander Mattei — PETITIONER

VS.

MASSACHUSETTS — RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

The United States District Court for the District of Massachusetts

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether there is ability to cross-examine a surrogate analyst at a jury trial who had used another's certified and testimonial DNA results ipse dixit, affecting a material change in the evidence presented, and when the original analyst's report is unadmissible to impeach.

LIST OF PARTIES

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

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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:

The opinion of the United States District court appears at Appendix A to the petition and is reported at 320 F.Supp. 3d 231 (1st cir. 2018)

JURISDICTION

The date on which the United States Court of Appeals decided my case was June 13, 2019, and attached as Appendix B hereto. Jurisdiction is invoked under 28 USC § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Amendement VI: "In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him..." [Full text appears in Appendix C].

STATEMENT OF THE CASE

Petitioner underwent two trials charged with home invasion, breaking and entering with the intent to commit a felony, assault with intent to rape, indecent assault and battery, two counts of assault by means of a dangerous weapon, and assault and battery. At the first trial, Petitioner was convicted of six of the seven offenses. During this jury

trial, a DNA analyst presented evidence that the DNA of the petitioner did not match DNA samples collected as evidence; however, she could not excluded Petitoner as a potential contributor. Petitioner appealed and was awared a new trial on the ground that the analyst's exclusion results ought not been admitted without a statistical explanation.

At the second jury trial, a surrogate, using the materials created by the original analyst for the first trial, testified the DNA profiles matched the petitioner's. As there was no statistical explanations added to the original analyst's report, it could not be entered into evidence without triggering another new trial. On appeal, petitioner argued that it was impossible to cross-examine the surrogate and impeach him on his ipse dixit testimony. Petitioner was convicted on assault with intent to rape and assault and battery, and was acquitted of the remaining charges. Without the material change to the DNA evidence, there is no evidence placing the Petitioner in the victim's home.

REASONS FOR GRANTING THE PETITION

On April 2, 2004, Petitioner was convicted of six out of seven offenses based on the results given by, Stacy Edwards, a DNA analyst. However, she emphatically stated, the "results here were not 'matches'...because either not enough DNA was available to test all thirteen allele sites or it was not possible to distinguish the major from the minor profile at one allele site;" Commonwealth v. Mattei, 455 Mass. 840, 849 (2010).

The state's Supreme Judicial Court granted the petitioner a new trial stating Edwards's testimony should have included a statisitcal explanation.

At the second jury trial, surrogate analyst Brian Cunningham offered opinion testimony that the DNA samples matched the petitioner's. While the Petitioner was acquitted of most of the charges, the new DNA results placed him in the victim's home. Therefore he was convicted of assault and battery and assault with intent to rape. Petitioner appealled.

The Massachusetts State Appeals Court ruled, "[a]n expert witness may testify as to his or her independent opinion, even if based on a nontestifying analyst's test results," Commonwealth v. Mattei, 90 Mass App Ct 577, 579 (2016). The Petitioner avers the formulation of this rule, as it applies to his case, goes far and above the holding in Williams v. Illinois, 567 U.S. 50 (2012), upon which the rule is based; and the precedents established in Bullcoming v. New Mexico, 564 U.S. 647 (2011), and Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009).

The Honorable District Judge Young, in his thoughtful decision denying relief stated, "the role of the Confrontation Clause in this area needs refinement and explication on a sound analytic base," and issued a certificate of appealability, Mattei v. Medeiros, 320 F.Supp3d 231, 238 and fn. 4 (D. Mass. 2018). He also expressed concern that Massachusetts evidentiary rules actually prohibit the inclusion of the kind of expert

testimony used in the Petitioner's case, id. at 237 fn.2, referring to Commonwealth v. Greineder, 464 Mass 580 (2013) (DNA expert's testimony violative of confrontation, although harmless error in this case); and Massachusetts Guide to Evidence 703.[1] See also, Commonwealth v. Tassone, 468 Mass. 391, 399 (2014) (a defendant must be provided a "meaningful opportunity to cross-examine the expert about h[is] opinion and the reliability of the facts or data that underlie h[is] opinion").

During the Petitioner's first trial, an analyst tested DNA from several sources to prove whether the Petitioner was a guilty party to a sexual assault. She then testified and presented her findings concerning a mixture of source DNA testifying that "[t]here were no 'matches' between the defendant and DNA from any samples taken from inside the victim's apartment, and there were no matches between the victim and DNA from samples taken from the defendant's clothes when apprehended," Mattei, id. 455 Mass. at 847. However, the analyst could not exclude the defendant as a potential contributor of the DNA. Her certified and testimonial record was presented to the jury and was available for cross-examination.

The Supreme Judicial Court found the evidence inadmissible without any statistical explanations that would make the results meaningful to a jury and awarded the Petitioner a new trial. Mattei, id. 455 Mass. at 851-852.

In Mattei's second jury trial, the certified DNA results from

the first trial were reexamined by a surrogate who testified that the source DNA MATCHED the samples. No testing was performed, no evidence was presented to the jury, no record was created. Further, the surrogate was not employed by the laboratory when the testing was being done, and was not allowed to test his own samples until Petitioner's evidence was being peer-reviewed prior to trial. However, the surrogate was able to testify as to how the DNA samples could have been tested the year before he was employed at the lab. And, the surrogate used the original analyst's certifed report she had used to testify at the first trial in forming his new, "independent" opinion. This report still did not have the statistical explanations required by the Supreme Judicial Court so it could be entered into evidence; or, in this case, used to impeach the surrogate.

The Sixth Amendment guarantees the right of an accused to be confronted with the witnesses against him, Pointer v. Texas, 380 U.S. 400 (1965). This is more than just a physical confrontation, but is also the right to cross-examine adverse witnesses in which the right of confrontation is principally embodied. See, Crawford v. Washington, 541 U.S. 36, 61 (2004) (The Confrontation Clause "commands, not that the evidence be relieable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination").

Because, "[a] forensic analyst responding to a request from

a law enforcement official may feel pressure—or have an incentive—to alter the evidence in a manner favorable to the prosecution", the defendant must be allowed "the opportunity to show that a witness is biased, or that the testimony is exaggerated or unbelievable," Melendex-Diaz v. Massachusetts, 557 U.S. 305, 318 (2009), Pennsylvania v. Ritchie, 480 U.S. 39, 51-52 (1987); see also Davis v. Alaska, 415 U.S. 308, 315 (1974), and Williams v. Illinois, 567 U.S. 50, 112 (2012) ("The purpose of disclosing the facts on which the expert relied is to allay these fears...and that the weight of the expert's opinion does not depend on factual premises unsupported by other evidence in the record—not to prove the truth of the underlying facts").

There were no underlying facts given in Petitioner's second jury trial, no independent corroborating evidence. Only the expert's ipse dixit to support his material change from being "no matches" in the first trial, to a "match" in the second.

Cross-examination was likewise impossible. While it is usually permitted to enter the previous analyst's certifed record and waive confrontation in order to impeach a surrogate, United States v. Holmes, 620 F.3d 836, 842-843 (8th Cir. 2010), this was impossible in Petitioner's case.

The Supreme Judicial Court had ruled the original analyst's certified record was inadmissible without the statistical explanations that would make the results meaningful to a jury. Since the surrogate changed the results, the original results still had none of these statistical explanations. There would be no meaningful way, absent the original analyst, to interpret

the results and impeach the surrogate. "Absent an evaluation of the risk of juror confusion and careful jury instructions, the testimony could not have gone to the jury", Williams, id. at 108; and Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986) (limits on testimony proper if based on concerns of confusion, et al.).

The First Circuit's decision also conflicts with the Seventh's as well as this Honorable Court's holding in Williams v. Illinois, id. In the Seventh Circuit, U.S. v. Turner, 709 F.3d 1187 (2012) on remand from this court after Williams, a standard for review was adopted: 1) Was the purpose of the report to accuse?

2) Was there a trial before a jury?

3) Was a testimonial report used as a basis for the opinion?

A testimonial report being a certified or sworn testimony.

4) Was the violation harmless?

If the Petitioner were to apply his case with the Seventh Circuit's standard, he would find that 1) the original analyst knew that the petitioner was being accused of a sexual assault and created her report accordingly. This was not a matter in which an ongoing police investigation was attempting to find a perpetrator as in Williams. 2) Both the original analyst and surrogate testified before a jury in seperate trials. Unlike the bench trial in Williams. 3) The original analyst created her report and testified to its contents at the first trial.

The surrogate used these materials to formulate his opinion. Further, the surrogate was not the orginal analyst's supervisor, as in Bullcomming supra., nor had the surrogate had any involvment with the testing, review, or presentation of the DNA report prior to his review prior to the second trial. This is in opposite to Williams wherein a report was created by an outside laboratory then compared to results created by the accusing laboratory. 4) The petitioner objected to the surrogate's testimony at trial. Further, without the change to the DNA evidence, the Petitioner can not be placed in the victim's apartment, which, in turn, would have created further doubt in the minds of the jury of his guilt.

The First Circuit oversimplified Williams to the detriment of the Petitioner's Sixth Amendement Right to cross-examine a surrogate witness concerning his change to the material evidence in his case.

Wherefore:

The Petition for a writ of certiorari shouldbe granted.

Respectfully Submitted,

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September 9, 2019

FOOTNOTE

1 Massachusetts Guide to Evidence

Section 703. Bases of Opinion Testimony by Experts

"The facts or data in the particular case upon which an expert witness bases an opinion or inference may be those perceived by or made known to the witness at or before the hearing. These include (a) facts observed by the witness or otherwise in the witness's direct personal knowledge; (b) evidence already in the record or that will be presented during the course of the proceedings, which facts may be assumed to be true in questions put to the witness; and (c) facts or data not in evidence if the facts or data are independently admissible in evidence and are a permissible basis for an expert to consider in formulating an opinion."