No. 19-6322

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

KELVIN MILES — PETITIONER

VS.

STATE OF FLORIDA — RESPONDENT

UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF FLORIDA, GAINESVILLE DIVISION

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

PETITION FOR A WRIT OF CERTIORARI

KELVIN MILES #913166
SOUTH BAY CORR. FACILITY
P.O. BOX 7171
SOUTH BAY, FL. 33493

QUESTION(S) PRESENTED

1. DID THE PRE-TRIAL DESTRUCTION OF EVIDENCE BY THE STATE DENY THE PETITIONER HIS RIGHT TO DUE PROCESS AND A FAIR TRIAL, THUS DENYING HIM THE ONLY EVIDENCE THAT WAS AVAIABLE TO PROVE HIS INNOCENCE?

2. DID TESTIMONY OF THE DNA EVIDENCE THAT WAS DESTROYED PRIOR TO TRIAL CONSTITUTE INADMISSIBLE HEARSAY DENYING PETITIONER HIS CONSTITUTIONAL RIGHT TO CONFRONTATION?

3. DID THE STATE TRIAL COURT RELY ON IMPERMISSIBLE FACTORS TO INCREASE THE SENTENCE IN THIS CASE?

4. DID THE TRIAL COURT VIOLATE THE DICTATES OF *ALLEYNE* AND *APPRENDI* BY INCREASINIG THE SENTENCE WITHOUT A SPECIFIC SENTENCING ENHANCEMENT FACTOR FOUND BY THE JURY?

LIST OF PARTIES

[X] 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:

TABLE OF CONTENTS

INDEX OF APPENDICES

TABLE OF AUTHORITIES CITED

CASES **PAGE NUMBER**

STATUTES

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 "A" to the petition and is

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[X] is unpublished.

Eleventh Circuit Court denial of C.O.A appears at Appendix "C"

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

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[X] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix "E" 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[ ] is unpublished.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 District court appears at Appendix _____ to the petition and id

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[X] is unpublished.

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was: MAY 23, 2019

[] No petition for rehearing was timely filed in my case.

[X] A timely petition of rehearing was denied by the United States Court of Appeals on the following date: MAY 23, 2019, and a copy of the order denying rehearing appears at Appendix "B".

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

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: OCTOBER 13, 2014.

[ ] A timely petition of rehearing was thereafter denied 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 an including _____ (date) on (date) in Application No. _____.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petitioner's right to due process, the effective assistance of counsel, and to be insulated from inadmissible hearsay; all rights guaranteed by the 5th, 6th and 14th Amendment to the United States Constitution.

STATEMENT OF CASE AND FACTS

The Petitioner was found guilty after a jury trial of sexual battery and kidnapping with a weapon. The State Court sentenced the Appellant to two consecutive life sentences. The Prosecutor informed the jury that the DNA evidence had been destroyed prior to trial, without any notice to the defense which denied the Petitioner his right to test, prove his innocence and argue against the State's results and present exculpatory evidence due to the inability to do an independent DNA test to present evidence to the jury that would exonerate him.

The fact is, **ALL** of the DNA evidence was destroyed, not some of it as the District Court alleged, in violation of §*775.15* Florida Statute, and due process, before the defense had a chance to perform its own testing. If only some of it was destroyed, the defense would have still been able to conduct independent testing to verify or challenge the "results" as testified to by the State at trial.

The simple fact remains that if the DNA evidence was not to be presented at trial, then the Prosecutor had no right to introduce the DNA evidence or testimony to that effect in this case as it served no purpose to prove or disprove any material fact of the case. It left the jury to infer that the DNA evidence had to have included the Petitioner or else why was it mentioned.

REASONS FOR GRANTING THE PETITION

DID THE PRE-TRIAL DESTRUCTION OF EVIDENCE BY THE STATE DENYING THE PETITIONER HIS RIGHT TO DUE PROCESS AND A FAIR TRIAL AND THE ABILITY TO PROVE HIS INNOCENCE?

The District Court created a heightened standard for the Appellant to meet when it claimed that he must prove "bad faith" on the part of the police, along with the Eleventh Circuit adopting that reasoning and denying relief on the same. This "proving bad faith" is a virtual impossibility for one who is incarcerated and to demand that standard is in and of itself an unreasonable determination of the facts. Law enforcement did not just take it upon themselves to destroy **some** of the DNA evidence; they purposely destroyed **ALL of the DNA** evidence to deny the right of the Petitioner to do an independent test to show that the results would exonerate him of the crime charged. See, *Thompson v. Rundle* 393 Fed. Appx. 675 (11th Cir 2010) where the Eleventh Circuit found that: "the threshold question for a procedural due process claim is whether the record demonstrates that access to samples for DNA testing could theoretically raise questions about a defendant's guilt. If there is no possibility that DNA evidence could exonerate the prisoner, no procedural due process right has been violated."

As the Magistrate found in the Report and Recommendation , "that the DNA evidence was only potentially useful", takes away from the fact of the defenses inability to conduct its own independent testing and suggests that there was a distinct possibility as to the usefulness of the DNA evidence in proving Petitioner's innocence. It further is nothing more than a guess on behalf of any Court as to the usefulness of the DNA evidence as the defense did not have the ability to verify through independent testing, exculpatory evidence that would prove Petitioner's innocence.

Any potential evidence that the Petitioner was entitled to prior to trial in an attempt to establish his innocence, whether declared potential or actual in a proceeding after the fact, is irrelevant as to the Petitioner's right to access of that evidence, thus lies the due process violation. See, F.S. *775.15(15) (a)* "In addition to the time periods prescribed in this section, a prosecution for any of the following offenses may be commenced within 1 year after the date on which the identity of the accused is established, or should have been established by the exercise of due diligence, through the analysis of deoxyribonucleic acid (DNA) evidence, **if a sufficient portion of the evidence collected at the time of the original investigation and tested for DNA is preserved and available for testing by the accused:**

1. An offense of sexual battery under chapter 794". (emphasis added)

The District Court relied strictly upon State cases to support the denial of this ground, not Federal Court cases/rules that are controlling in a Federal Habeas proceeding. See, *Richardson v. Lemke* 745 F.3d 258 (7th Cir. 2014) (given what a petition for habeas corpus is, the substantive merit of a legal claim contained therein is bound to be governed by Federal law).

The Petitioner avers that the intentional destruction of the DNA evidence denied him the right to establish his defense which denied him his right to due process and a fair trial. Reversal on this ground alone is required, alternatively, for the Court to issue an order requiring a full briefing on the ground for a factual determination.

DID TESTIMONY OF THE DNA EVIDENCE THAT WAS DESTROYED PRIOR TO TRIAL CONSTITUTE INADMISSIBLE HEARSAY DENYING PETITIONER HIS CONSTITUTIONAL RIGHT TO CONFRONTATION?

Any evidence or testimony that was admitted pertaining to the DNA in this case was inadmissible unauthenticated hearsay due to the fact that the State destroyed all of the DNA in the case prior to the defense having the ability to perform independent testing. The defense was left with no opportunity to verify any testing process or the results gleaned from the "testing".

The Defense was unable to challenge any DNA findings, whether inculpatory or exculpatory due to the destruction of the evidence without the chance to perform their own test. This constituted inadmissible hearsay on behalf of the State and its witnesses pursuant to *Crawford v. Washington* 124 S.Ct. 1354 (2004); *Bullcoming v. New Mexico* 131 S. Ct. 2705 (2011).

A Defendant has the constitutional right to test the evidence that it presented to find him guilty in a criminal trial. *Melendez-Diaz v. Massachusetts* 129 S.Ct. 2527 (2009) (The Confrontation Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with a jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes). Thus, pursuant to the above cited controlling case law, reversal should be granted on this ground or in the alternative, that a full briefing be ordered for the Court's factual determination.

DID THE STATE TRIAL COURT RELY ON IMPERMISSIBLE FACTORS TO INCREASE THE SENTENCE IN THIS CASE?

This case did not involve any physical injury to support additional points for injury, nor did the jury making a specific finding of injury, a requirement that needs to be met to rely on that factor to support enhancement.

The State presented no evidence of injury, no medical opinion that there was any type of injury, nor did the jury make the specific finding of an injury for the sentencing Court to rely upon to add to the sentence.

The record did not refute the claim in State Court, or in the District Court, that the same sentence would have been given absent the score sheet error. The requirement is that the Judge **would have given** the same sentence, **not that it could have**, for this enhancement to be a valid one, and that a defendant is to be sentenced under the law at the time of sentencing. Again, this issue was *per curiam affirmed* without an opinion, thus no explanation was given as to the denial of relief and no record attachment to demonstrate that the same sentence would have been given absent the error.

The additional points that were added to the sentence, thus increasing it, that were not specifically found by the jury violated *Apprendi* v. *New Jersey* and *Alleyne v. United States*.

The District Court declared that a habeas court may only grant relief to a state prisoner "only on the ground that he is in custody in violation of the constitution or laws or treaties of the United States."

Pursuant to established Supreme Court precedent, *Apprendi, Alleyne, supra*, the sentence in this case is in violation of the constitution, and the custody as a result thereof, violates the findings of the United States Supreme Court and the Constitution. The enhancement was not a result of an admitted prior conviction, nor was it a result of a jury finding of a fact necessary to enhance the sentence; thus making the sentence illegal.

The District Court additionally found that the issue is not of a constitutional question just because the Petitioner declared (couched it in terms of) it to violate due process and equal protection rights. According *to Apprendi, Alleyne, supra*, the Appellant should be accorded the same relief that the Supreme Court found to be in error previously decided by that Court and applied to the State Courts.

Also, in Karchesky *v. State* 591 So. 2d 930 (1992) the laws in effect at the time of sentencing control. See, also *Peugh v. United States* 133 S. Ct. 2072 (2013) it was also found to violate equal protection and due process under Federal Law to not follow the law that was applicable at the time of sentencing. Reversal on this ground is required or for a full briefing to be ordered for the Court's determination of the constitutional violation.

REASON FOR GRANTING PETITION

The Petitioner avers that due to the denial of the constitutional rights to a fair trial and the effective assistance of counsel at trial and the lack of counsel in post-conviction proceedings denied him his ability to prove his innocence and establish his innocence before the jury.

Additionally, the supporting case law establishes the facts presented; the denial of a fair trial and the effective assistance of counsel that is constitutionally guaranteed by the United States constitution.

CONCLUSION

The petition for a writ of certiorari should be granted due to the denial of a fair trial and the ability of the defense to test the DNA evidence to demonstrate an actual innocence claim; combined with the additional constitutional violations should accord the Petitioner relief.

Respectfully Submitted,

/s/ Kelvin O. Miles

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CERTIFICATE OF MAILING

I certify that I, KELVIN MILES, DC# 913166 placed this petition for a writ of certiorari in the hands of South Bay Correctional Facility officials for mailing to: Attorney Generals; Office, The Capitol, PL-01, Tallahassee, Florida 32399-1050 on this 19 day of August, 2019.

/s/ K. Miles

Kelvin Miles # 913166

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APPENDIX

KELVIN MILES # 913166
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APPENDIX - A