No. 19-7270

IN THE

SUPREME COURT OF THE UNITED STATES

ORIGINAL

HAZHAR A. SAYED — PETITIONER
(Your Name)

vs.

THE STATE OF COLORADO — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Colorado Supreme Court

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

PETITION FOR WRIT OF CERTIORARI

Hazhar A. Sayed, #133608
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Limon, CO. 80826
(Pro-Se)

QUESTION(S) PRESENTED

1) **Whether the Due Process Clause of the Fourteenth Amendment provide Mr. Sayed with a procedural due process to have exculpatory (DNA) evidence tested, so long as Mr. Sayed meets the threshold for such testing, which Mr. Sayed submits he did ?**

2) **Whether the Evidence was insufficient to convict Mr. Sayed of sexual assault ?**

3) **Whether Mr. Sayed received ineffective assistance of counsel when counsel failed to test the remaining sexual assault kit collected for (DNA) testing ?**

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:

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[ ] reported at _____; or, [ ] has been designated for publication but is not yet reported; or, [ ] is unpublished.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[ ] reported at _____; or, [ ] has been designated for publication but is not yet reported; or, [ ] is unpublished.

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[ ] reported at _____; or, [ ] has been designated for publication but is not yet reported; or, [**X**] is unpublished.

The opinion of the **Colorado Court of Appeals** court appears at Appendix **B** to the petition and is

[ ] reported at _____; or, [ ] has been designated for publication but is not yet reported; or, [**X**] is unpublished.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

[ ] 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).

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

The date on which the highest state court decided my case was **December 9, 2019** .
A copy of that decision appears at Appendix **A** .

[ ] A timely petition for 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 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

United States Constitution, Amendment Sixth

"In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have the compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

United States Constitution, Amendment Fourteenth

"1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; 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".

Colorado Revised Statutes

§ 16-5-402 C.R.S.
§ 18-1-410 C.R.S.
§ 18-1-411 C.R.S.
§ 18-1-412 C.R.S.
§ 18-1-413 C.R.S.
§ 18-3-401 C.R.S.
§ 18-3-402 C.R.S.
§ 18-3-404 C.R.S.

STATEMENT OF THE CASE

In March 5, 2005, Mr. Sayed was arrested and charged with sexual assault under Colorado Revised Statute (C.R.S.), § 18-3-402. These charges stemmed from the victim and several other women voluntarily went to Mr. Sayed's and his room-mate's apartment at the suggestion of one of their companions, even though only the companion who made the suggestion knew any of the people there. While at the apartment, the victim's companion asked to use the victim's jeep to give one of the male occupants of the apartment a ride. The victim voluntarily gave her vehicle to her companion and voluntarily remained at the apartment while the companion gave one of the males a ride. The remaining three women sat together on one of the couches. After a while the victim stated she needed to go the bathroom which was located at the rear of the apartment. Supposedly she left at this point, used the bathroom and her way out (according to the latest versions stated by the victim), where she was grabbed by Mr. Sayed, taken into a bedroom where supposedly she screamed for help, and ultimately was sexually assaulted by Mr. Sayed. Conflicting testimony at the trial indicated both that, the victim initially stated that, Mr. Sayed had not sexually assaulted her (and instead only attempted to by becoming sexually aggressive with her), and that none of the people in the other room (which was only several feet from where the victim was allegedly sexually assaulted), heard the victim scream or took any action to stop said. After several minutes of the victim being gone (according to testimony given at trial), she reappeared telling the other two women that, they needed to leave right now. The women left together and the police were called from a local store. They arrived on scene, eventually arrested Mr. Sayed, however they let the victim leave the scene, return home on her own, and then come to the area hospital with a change of clothes, and the sexual assault kit evidence was collected on the alleged victim by the Broomfield Police Department.

A trial was held in Broomfield County, Colorado. See People v. Sayed, Broomfield County Case No. 05-CR-70. At trial, Mr. Sayed was convicted of the lesser included offense of unlawful sexual contact (as defined by § 18-3-404 C.R.S.). The jury failed to return a verdict on the greater charge of sexual assault. Accordingly, the trial court, over objection,

Statement of the Case (continued):

declared a mistrial on the sexual assault charge and allowed a second trial on that charge only (while retaining the guilty verdict on the lesser included conviction of unlawful sexual contact). At the second trial, Mr. Sayed was convicted of sexual assault.

In 2018, Mr. Sayed filed a motion under § 18-1-411 et seq., C.R.S., in which he sought testing of the genetic material collected by the police following the victim's allegation of sexual assault. Mr. Sayed sought to prove actual innocence of the offense committed (there were statements made by one of the witnesses following Mr. Sayed's trial in which she stated not only that she falsified her testimony at trial but also that the alleged victim had admitted to lying about the sexual assault, something the victim had done previously), by showing that his (DNA) was not present and hence he could not have committed the sexual assault (trial testimony by Colorado Bureau of Investigation Agent Kathleen Labato indicates that, no (DNA) testing was ever performed because there was no indication of semen present, see trial testimony, August 22, 2006, pp. 143-46). Mr. Sayed submits that, had he as alleged by the victim penetrated her in some fashion, there would be (DNA) present that could be deducted by current (DNA) test which have vastly improved over the past years.

On March 4, 2018, the trial Court summarily denied Mr. Sayed's motion without conducting an evidentiary inquiry. Mr. Sayed appealed and a division of the Colorado Court of Appeals affirmed the trial Court's summarily dismissal, and in its decision, See Appendix **B**, pp. 8-11, the lower court finds that: 1) the sexual assault kit was tested for (DNA); and 2) favorable results of any further testing would not demonstrate his actual innocence. See People v. Sayed, 2019 Colo. App. Lexis 1347 (Sept. 5, 2019). Certiorari was sought and denied. See Sayed v. People, 2019 Colo. Lexis 1231 (Colo. 2019). No petition for rehearing was sought and this action is timely filed. (All State decisions in this case are attached as an appendix to this petition as required. See Appendix **A** and **B**).

REASONS FOR GRANTING THE PETITION

1) **Whether the Due Process Clause of the Fourteenth Amendment provide Mr. Sayed with a procedural due process to have exculpatory (DNA) evidence tested, so long as Mr. Sayed meets the threshold for such testing, which Mr. Sayed submits he did ?**

§ 18-1-410 (1) C.R.S., allows all criminal defendants, regardless of whether they took a direct appeal from their conviction(s), the right to seek collateral review in order to ensure their convictions are constitutionally sound. Id, see also, Dooly v. People, 302 P.3d 259, 261, 2013 CO, ¶ 2. This right to post-conviction review of one's conviction also allows the criminal defendant to develop his/her claim(s), so long as he/she sets forth facts in the initial post-conviction application, which is proven true, would entitle the defendant to relief. See People v. Simpson, 69 P.3d 79, 81 (Colo. 2003); Ardolino v. People, 69 P.3d 73, 77 (Colo. 2003).

§ 18-1-411 et seq., C.R.S., is set forth in this same article, and allows generally for all criminal defendants to seek genetic testing of materials collected during the course of the investigation of their case, so long as certain conditions are met. Id, see also, e.g., People v. Young, 412 P.3d 676, 2014 COA 676.

It is Mr. Sayed's respectful contention that, the statutory provisions of § 18-1-411 et seq., C.R.S., create the same procedural due process rights as those created in § 18-1-410 C.R.S. See e.g., People v. Wiedemer, 852 P.2d 424, 433-34, 438 (Colo. 1993) (discussing in detail the constitutional requirement that a writ of habeas corpus not be suspended; that Crim. P. Rule 35(c) replaces for the most part Colorado's writ of habeas corpus; and § 16-5-402 (1)'s limitations as applied to said). In turn Mr. Sayed suggests, this procedural due process right requires that unless the motion, files and record of the case clearly establish that he is not entitled to genetic testing of any remaining potentially exculpatory materials (testing at his own expense under Court direction/supervision), as in Ardolino and Simpson, supras, he must be allowed an opportunity to develop the substance of his claim for such testing at an evidentiary hearing.

§ 18-1-412 C.R.S., requires that a prisoner must seek testing of any remaining genetic materials in the court in which the prisoner was convicted. Id. The motion requesting such testing must set forth sufficient facts to make a prima facie case that the prisoner is entitled to relief under the criteria outlined in § 18-1-413 C.R.S. And, along with other requisites, that unless the motion, files and record of the case show to the satisfaction of the court that the prisoner is not entitled to relief, he should be assigned counsel and allowed the opportunity to prove the substance of his request for genetic testing. Id.

§ 18-1-413 C.R.S.'s requirements include such things as the requested testing of the remaining genetic materials will reasonably demonstrate the prisoner's actual innocence; that there is evidence remaining to allow for such testing; that there was no conclusive testing performed prior to the prisoner's conviction either due to lack of availability or for reasons that demonstrate justifiable excuse/excusable neglect or due to ineffective assistance of counsel; and that the prisoner is willing to provide a biological sample for testing. Id; see also, Young, supra, 412 P.3d at 678, 2014 CO 34, ¶ 12.

Taken collectively, these statutes provide a statutory pathway to allow a wrongfully convicted defendant to prove his/her innocence, if said may be demonstrated through the testing of genetic materials. Innocence, i.e., actual innocence and the liberty lost as an actually innocent convicted felon, is perhaps one of the most basic fundamental principles that may be protected under the Due Process Clause of the Colorado Constitution. Mr. Sayed suggest that, the Colorado General Assembly recognized this when passing these statutes. Consequently he seeks to enforce those principles and be allowed the opportunity to prove his innocence.

In its decision, see Appendix **B**, pp. 8-11, the lower court finds that: 1) the sexual assault kit evidence was tested for (DNA) testing; and 2) favorable results of any further (DNA) testing would not demonstrate Mr. Sayed's actual innocence. Id. However, the problematic with this determination is the fact that, the sexual assault kit was never tested for (DNA), and testing of this evidence will show that, he is actually innocent of the sexual assault charge he was convicted of.

It is well settled that, State law can create a due process right which may be protected under the Due Process Clause of the Fourteenth Amendment. See K.D.O.C. v. Thompson, 490 U.S. 454, 460 (1989). A State created interest, however, may not be enforced under the procedural component of the Due Process Clause of the Fourteenth Amendment unless the individual claiming the protected interest has a legitimate entitlement to said. Id. That said, the Colorado Constitution's Due Process Clause affords a State resident more protection than does the U.S. Constitution's. See People v. Young, 814 P.2d 834, 842 (Colo. 1991). In turn this means that, while a State Court may look to a federal Court's interpretation of an analogous provision of the U.S Constitution, the State Court nonetheless is requires to make an independent analysis of what is required by the Colorado Constitution. Young, 814 P.2d at 842-43 (and the multitude of examples cited therein).

Mr. Sayed respectfully submits that, the factual demonstrations required by §18-1-412 (3) C.R.S., require, under the procedural component of art. II, §25, of the Colorado Constitution, that he be allowed the opportunity to develop his claim of actual innocence in support of the request for genetic testing, unless there is clear proof that, such testing will not demonstrate actual innocence. In Mr. Sayed's case, there are now advanced (DNA) testing procedures which would prove, beyond a reasonable doubt that, he is actually innocent of having ever sexually assaulted the victim in this case. This will be shown by the absence of his (DNA) in the victim, as a critical; element of sexual assault is that, he penetrated or intruded into a body part of the victim. See § 18-3-402 (1) C.R.S.

If you couple the absence of any of Mr. Sayed's genetic materials inside the victim with the recantation of key witness testimony, along with this witness's new statements that, the victim lied, and it is clear that, Mr. Sayed did in fact state a prima facie case which should have allowed for the requested genetic testing. As such, Mr. Sayed respectfully submits that, the lower Court unclear/indecisive decision finding that, the sexual assault kit was tested for (DNA); and further (DNA) testing would not demonstrate his actual innocence was clearly erroneous. See Appendix **B**, pp. 8-11. Mr. Sayed submits that the sexual assault kit was never tested for (DNA), and the testing of such evidence (from the sexual assault kit collected from the victim); which would show that he is actually innocent of the charge of sexual assault he was convicted of. Accordingly, Mr. Sayed respectfully moves this Court to grant Certiorari on this issue.

2) **Whether the Evidence was insufficient to convict Mr. Sayed of sexual assault?**

The Due Process Clause of the United States Constitution confer upon a criminal defendant the right to a jury determination of proof beyond a reasonable doubt on each and every element of the charge offense. U.S. Const., Amends. VI; XIV. see also, Jackson v. Virginia, 443 U.S. 307, 316 (1979). Moreover, it is equally clear that the prosecution is required to prove the existence of each of these elements prior to a valid conviction being able to be entered against a defendant. See In re Winship, 397 U.S. 358, 363-64 (1970).

When considering a challenge to the sufficiency of evidence of a defendant's conviction, the reviewing court is required to determine whether the evidence, viewed as a whole and in the light most favorable to the prosecution is sufficient to support the conclusion by a reasonable person that the defendant is guilty of the charge offense "beyond a reasonable doubt". See Jackson, 443 U.S. at 316. The evidence, whether direct or circumstantial must be both substantial and sufficient to support the determination of guilt. See Dempsy v. People, 117 P.3d 800 (Colo. 2005).

A finder of fact siting as said is free to give equal weight to either direct or circumstantial evidence. Moreover, it is the finder of fact's province to judge the sufficiency, probative effect and weight to be drawn from said. As a result, a reviewing court may not disturb those findings unless they are clearly erroneous and not supported by the record. See People v. Batchelor, 800 P.2d 599 (Colo. 1990).

In this case, Mr. Sayed submits that, the definition set forth in § 18-3-401 C.R.S., concerning sexual assault and unlawful sexual contact necessarily are synonymous with one another, hence there was insufficient evidence to convict Mr. Sayed of sexual assault. See §§ 18-3-401; 18-3-402; 18-3-404 C.R.S., specifically, § 18 3-401 (5) C.R.S., defines "sexual intrusion" as being: "[a]ny intrusion, however slight, by any object or any part of a person's body, except the mouth, tongue, or penis..." § 18-3-402 (1) C.R.S., defines sexual assault as: "Any actor who knowingly inflicts sexual intrusion...on a victim by means of sufficient consequence reasonably calculated to cause submission against the victim's will..." § 18-3-404 C.R.S., defines unlawful sexual contact as: (1) "Any actor who knowingly subjects a victim to any sexual contact commits unlawful sexual contact if: (a) the actor knows that the victim does not consent..."

In this case, Mr. Sayed submits that, there was insufficient evidence to convict him of sexual assault, given the evidence at trial showed only that the victim had some trace of saliva which matched the serology of Mr. Sayed which was found on the victim's belly-button ring (which could have come from incidental contact and not even unlawful sexual contact). Moreover, there was direct testimony given by the victim herself that she not only sat on the couch in Mr. Sayed's apartment, but used the bathroom where he brushes his teeth, etc., she could have inadvertently touched the sink area and then her stomach causing cross contamination, especially is she had dropped her pants to use the bathroom and then raised them following said.

Regardless of how the contamination, i.e., evidence got on the victim, there was insufficient evidence to convict Mr. Sayed of sexual assault. This will be shown by the absence of Mr. Sayed (DNA) in the victim, as a critical element of sexual assault is that, he penetrated or intruded into a body part of the victim. See § 18-3-402 (1) C.R.S., See e.g., McDaniel v. Brown, 558 U.S. 120, 121 (2010).

Mr. Sayed respectfully moves this Court to grant Certiorari on this issue. This as well as all other available relief is respectfully requested.

3) **Whether Mr. Sayed received ineffective assistance of counsel when counsel failed to test the remaining sexual assault kit collected for (DNA) testing.**

All criminal defendants have a Sixth Amendment right to receive the effective assistance of counsel during all critical stage of a criminal proceeding. See Jay Lee v. U.S., 137 S.Ct. 1958, 1968 (2017). In order to demonstrate a violation of this Sixth Amendment right, a defendant must show that counsel's representation " 'fell below an objective standard of reasonableness' and that he was prejudiced as a result." Id, 137 S.Ct. at 1364 (quoting Strickland v. Washington, 466 U.S. 668, 688, 692 (1984)). A criminal defendant may satisfy the prejudice component if he shows that there is a "reasonable probability that but for counsel's errors, the result of the proceeding would have been different'." Id, 137 S.Ct. at 1964 ((quoting Roe v. Flores-Ortega, 528 U.S. 470, 428 (2000)); see also, Strickland supra, 466 U.S. at 694.

In the instant case, Mr. Sayed submits that, the sexual assault kit evidence collected from the victim was never tested for (DNA) testing, due to ineffective assistance of trial counsel. It is also clear that, counsel had an obligation to conduct sufficient investigations into the evidence (including seeing that, such evidence was tested), in order to provide Mr. Sayed with the effective assistance demanded by the Sixth Amendment. See People v. White, 182 Colo. 417, 421-23, 514 P.2d 69, 71-72 (1973) (discussing (ABA) standards for criminal justice). Moreover, Mr. Sayed submit that, there is a reasonable probability that had counsel testing of the remaining evidence which was previously untested will show that, he did not intrude or penetrate the victim in any fashion and hence he is actually innocent of the sexual assault charge he was convicted of. Moreover, why this evidence was not previously tested is a big question, i.e., one that may only be satisfied through evidentiary development. See e.g., Ardolino v. People, 69 P.3d 73, 77 (Colo. 2003) (Citing Massaro v. U.S., 528 U.S. 500 (2003) (allowing that unless the motion, files and record of the case clearly establish that a defendant is not entitled to relief on his/her claim of ineffective assistance of trial counsel, the defendant "must" be allowed the opportunity to prove the substance of such a claim). Here, Mr. Sayed is claiming previously available but untested exculpatory evidence was not tested due to ineffective assistance of counsel, hence he respectfully submits that, he "must" be allowed the opportunity to prove the substance of his claim. Accord Ardolino Massaro supras. Moreover, the interests of justice surely require that, he be allowed such testing. Accordingly, both the deficient performance and prejudice requirements of a claim of ineffective assistance of counsel will be satisfied if this Court allow for evidentiary development and genetic testing of remaining biological evidence in this case, as Mr. Sayed is more that willing to provide a sample.

Mr. Sayed thus respectfully moves this Court to grant Certiorari on this issue, and remand this case back to the Broomfield County District Court for appointment of counsel and allowance of evidentiary development. This as well as any and all other available relief is respectfully requested.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted this 23rd day of December, 2019.

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