No. 19-7875

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

BYRON KYLE GAY— PETITIONER

Vs.

SCOTT DAFFENBACH, Warden, Fremont Correctional Facility:

THE ATTORNEY GENERAL OF THE STATE OF COLORDO —

RESPONDENT(S)

ON PETITION FOR A WRIT OF CERIORARI

LAST RULED ON BY:

United States Court of Appeals for the Tenth Circuit

BYRON GAY
BOX 999
CANON CITY, CO, 81215

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QUESTION(S) PRESENTED:

1. THE UNITED STATES SUPREME COURT HAS NOT ESTABLISHED IN THE FEDERAL COURTS OR THE STATE COURTS ANY CASE LAW INSTRUCTING JUDGES THAT THEY MUST EMPHASIZE: TO CONSTITUTE A JUDICIAL ADMISSION THE STATEMENT MUST BE TAKEN IN CONTEXT. IT MUST BE DELIBERATE, DECLARATORY IN NATURE, UNEQUIVOCAL,UNAMBIGUOUS, CLEAR, AND FORMAL DISPENSING WITH PROOF OF FACTS.

2. HAS THE UNITED STATES SUPREME COURT DETERMINED WHAT AMOUNT OF TEMPLATE DNA IS NEEDED TO RECEIVE RELIABLE RESULTS CONSISTENT AND, ACCEPTABLE IN THE SCIENTIFIC COMMUNITY DURING TESTING?

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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

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

The opinion of the United States court of appeals 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[X] is unpublished.

The opinion of the United States district court 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[X] is unpublished.

[] For cases from state courts:

The opinion of the highest state court to review the merits 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[ ] reported at _____; or, [ ] has been designated for publication but is not yet reported; or, [] is unpublished.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_____court appears at Appendix____to the petition

[ ] reported at _____; or, [ ] has been designated for publication but is not yet reported; or, [ ] is unpublished.

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JURISDICTION

[X] For cases from federal courts:

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

JULY 15, 2019

[X] 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

[X] An extension of time to file the petition for a writ of certiorari was granted to and including: December 12, 2019 on August 16, 2019 in Application No. 19A176

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 . A copy of that decision appears at Appendix .

[ ] 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. .

The jurisdiction of this Court is invoked under:

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CONSTITUTIONAL AND STATUTIORY PROVISIONS INVOLVED:

FOURTEENTH AMENDMENT: Due Process

FIFTH AMENDMENT: Self-Incrimination

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STATEMENT OF THE CASE

On April 29, 2009, Mr. Gay was charged by complaint filed in the Arapahoe County District Court with second degree burglary[1], theft[2], criminal mischief[3] and Five counts of habitual criminal.[4] The charges arose out of an incident alleged to have occurred on April 15, 2008.

A jury trial was held on June 28-29, 2010. The jury convicted Mr. Gay of all three of the substantive offense.

On January 10, 2011, the habitual criminal counts were tried to the court. The court found that the five habitual criminal counts had been proven beyond a reasonable doubt, despite the missing Rule 11 advisements in 4 of the counts. The court acknowledge she could not find 4 of the Rule 11 advisements, but, concluded that the missing Rule 11 advisements would have to be litigated in post-conviction proceedings. The court then sentenced Mr. Gay to 48 years in the department of corrections.

On the State Direct Appeal Mr. Gay challenged the sufficiency of the evidence. A division of the Court of Appeals found that the sufficiency question was "close" but nevertheless affirmed the judgment. The State Appellate court rejected Mr.

---

[1] Section 18-4-203 (1) (2) (a), C.R.S. 2013, a class three felony.
[2] Section 18-4-401(1), (2) (c), C.R.S. 2013, a class four felony.
[3] Section 18-1-504, C.R.S. (2013) a class one misdemeanor.
[4] Section 18-1.3-801, C.R.S. (2012), a sentence enhancer.

Gay's arguments concerning the reliability of the DNA evidence because it concluded that a statement made by defense counsel during closing argument constituted a judicial admission. This conclusion reflects a misinterpretation of the doctrine of judicial admission, application, and the erroneous standard applied by the Colorado Courts.

Furthermore, the departure from long standing U.S. Supreme Court precedent was ignored by the Tenth Circuit Court of Appeals denying my petition for COA. The Tenth Circuit ruled that:

> "Mr. Gay has not identified any Supreme Court case law restricting state courts from deeming defense counsel's concessions as binding on the client."

Therefore, the sufficiency of *evidence claim* filed in the original Direct Appeal, and all other pleadings following, has never been addressed by any court. Instead, every State Court decision has misinterpreted what the doctrine of judicial admission means, and thereby completely ignoring the only critical issue put before the trial court.

The facts recited by my defense attorney in closing arguments regarding the DNA found on the window were irrelevant to the legal issues of who committed the crime on the night in question. These facts remained in question when presented to the jury for deliberation. These facts recited by my defense never relieved the prosecution of its duty to prove the elements of the crime in which I was charged. On the contrary, the closing arguments presented to the jury brought

into question the validly of Mr. Gay being charged with the crime of burglary. Thus the misinterpretation of the doctrine began.

REASONS FOR GRANTING THE PETITION

QUESTION:

HAS THE U.S. SUPREME COURT SET A PRECEDENT TO INSTRUCT FEDERAL AND STATE COURTS ON APPLYING THE DOCTRINE OF JUDICIAL ADMISSION?

ARGUMENT:

In the interest of justice and equity this matter must be addressed. The issues before this High Court deal with a matter of great importance. One that has continued to plague not only the Colorado State Courts, but, also the Federal, along with the surrounding jurisdictions for decades. What constitutes a judicial admission/ admission of fact?

We all know the generic term/definition:

> [A] judicial admission is a formal, deliberate declaration which a party or his attorney makes in a judicial proceeding for the purpose of dispensing with proof of formal matters or of facts about which there is no real dispute."

How is it that Colorado judges, state and Federal, in criminal settings, surrounding criminal matters, are unable to apply this term to their rulings. One could infer that there is no guidance for them to follow. Colorado law instructs: that a statement considered a "judicial admission" should be read as a whole, and considered in its

entire context. . Indeed, the Colorado Supreme Court has ruled in *People v. Bergerud*, 223 P.3d 686, 700 (Colo. 2010):

> [In] assessing whether a disputed statement constitutes a judicial admission, the statement should be read as a whole and understood in light of [its] context.

The Colorado Courts have failed to consider the entirety of the term "judicial admission." Why, and how?

The appellate court ruled that the "reliability and the sufficiency of the DNA evidence" need not be addressed; (although this was the sole evidence relied upon to convict the applicant) based on the defendants attorney making a judicial admission and conceding to the defendant's guilt. This finding has prejudiced the applicant for over a decade, and allowed for the determination of my guilt to remain unfounded. Indeed, The U.S. Court of Appeals for the 10th Cir. announced in their denial for COA dated July 15, 2019 p. 3-4, that:

> "To prevail on habeas relief, however, Mr. Gay must show that the state appellate courts rational was contrary to or an unreasonable application of clearly established federal law as determined by the U.S. Supreme Court."

Although it is not incumbent on the U.S. Supreme Court to act as a "thirteenth juror" it is their duty to correct an erroneous finding when it exist. See *Ayestas v. Davis*, 138 S. Ct. 1080 (2018).[5]

[5] When lower courts deny a COA and the court concludes that their reason for doing so was flawed, the court may reverse and remand so that the correct legal standard may be applied. See also Cutter v. Wilkinson, 544 U.S. 709, 718, n. 7, 125 S. Ct. 2113, 161 L. Ed. 2d 1020 (2005) "we are a court of review"

The Colorado Appeals Courts' have repeatedly departed from the established precedent of the United States Supreme Court concerning the "doctrine of judicial admission" in its *generic form*. What is more troubling than this fact is that the Colorado Supreme Court has refused to address the issue. In doing so, it has left the task up to The Tenth Circuit Courts' and they have erroneously ruled against habeas applicants misapplying 28 U.S.C. § 2254 (d) (1) and (2).

Each Colorado reviewing court has failed to consider what a "judicial admission/ admission of fact is." How?

When defense counsel began his arguments concerning the alleged DNA substance found on the window, he in no way *stripped* the prosecution of its burden to prove every element of the crime beyond a reasonable doubt. This standard is what the doctrine of judicial admission embodies.

At the beginning of Closing Arguments, defense counsel makes two very pivotal statements:

> Well, Mr. Gay's partial DNA profile was found at the scene of the crime. Case closed. End of Story:
>
> (1) "Ignore the fact that two eyewitnesses that saw him and chased him describe the suspect as a white male and gave a pretty vivid description of this person."
>
> (2) "Ignore the fact that there's absolutely nothing linking Byron Gay to any of these crimes."
>
> (3) "The prosecution is relying solely on the fact that there is a piece of – a partial profile of DNA evidence on a window in the home. And the

> prosecution is asking you to make one giant leap, a gigantic leap that doesn't even make logical sense.

This controverting of the State's evidence would continue throughout the entirety of his argument/ closing statement.

At no time did counsel say "I stipulate." At no time during the course of the trial did defense counsel either intentionally, or **un-intentionally** make a waiver, releasing the opponent from proof of fact that my DNA was placed there during the course of the crime. See *Martinez* v. *Bally's La., Inc.*, 244 F.3d 474 (5th Cir. 2001).

In a more recent case *People v. Galvan, 2019 COA 68* (2019) (citing *People v. Curren,* 228 P.3d 253 (2009), a division of the appeals court correctly ruled that:

> "[The] prosecutor was not "dispensing with proof of [a] formal matter[]," id., but instead was commenting on the evidence presented at trial for the purposes of crafting a jury instruction. Such a comment does not meet the requirements of a judicial admission."

The Colorado Supreme Court held in *Curren*, supra:

> [Here], the prosecution clearly stated its position that defendant did not make the allegation, and, without an allegation, there could be no potential or actual conflict. While the prosecution acknowledged that if the allegation had been made, there would have been a conflict, it did not address whether the allegation would have created a potential or an actual conflict. However, the trial court concluded the allegation was made, and that the allegation, even though not true, yielded an actual conflict of interest. **We conclude the prosecutor's statements in closing argument were not formal, deliberate declarations for the purpose of dispensing with proof of facts. Rather, the prosecution's closing argument was predicated on the singular ground that the allegation was not made.** Consequently, we reject defendant's assertion that the prosecution's statement was a judicial admission that would preclude the alternative argument on appeal."

These Colorado precedent makes clear that under Colorado law, the standard for determining whether a statement is a judicial admission requires a court to consider (1) the context of the statement, (2) the character of the statement, and (3) the purpose of the statement. A statement is a judicial admission only when the statement, taken in context, was a deliberate and unequivocal assertion made for the purpose of dispensing with proof of undisputed facts.

The Tenth Circuit Court of Appeals has failed to consider all my filings when deciding to grant the COA. Why?

The applicant clearly presented not only the COA Court, but, I have presented this issue to every State Court with U.S. Supreme Court case law with not only an argument that is clearly debatable based on the *generic term* of a judicial admission, but, also with U.S. Supreme Court precedent that determines the *generic definition* state and federal court' view to be a judicial admissions. See *United States v. Sission* 399 U.S. 267, (1970); Christian *Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661 (2010). See also, Petitioners Writ of habeas Corpus Petitioners Pre-Response.

The United States Supreme Court has **not** set a precedent for applying the determination to be reviewed within the context, character, and intent requirements to the definition of what constitutes a judicial admission. The standard set by the U.S. Supreme Court, and the Colorado Supreme Court, the standard applied in this

decision by (Division III of the Colorado Court of Appeals and the decisions of both the Habeas Court and the COA court) does not require consideration of a statement's context, character, and intent; nor does it require that the statement be deliberate, declaratory and unequivocal in nature or that it be made for the purpose of dispensing with proof of facts about which there is no real dispute.

Instead, the standard applied here requires merely that the statement contain language that might be construed as a concession. Application of the proper standard compels the conclusion that counsel's statements in closing argument did not constitute a judicial admission that my DNA was on the window. First, the context of the statements makes clear that counsel was conceding nothing.

The statements were preceded by multiple assertions that there was no evidence—"absolutely nothing"—linking Mr. Gay to these crimes. (See counsel's entire closing argument Appendix)

The statements cited in the decision, as well as the omitted portions, repeatedly emphasized that the prosecution's evidence consisted only of a "partial profile "of my DNA. These statements were followed by counsel's recitation of the weaknesses of the DNA evidence that suggested it was not reliable:

> The States DNA expert found a partial profile. It did not match at all locations. This expert also indicated that the DNA found was a very small sample. It was 0.05 nanograms. So we're talking about a very miniscule amount of DNA found on the window.

Defense counsel would go on to reiterate that there was "nothing" tying Mr. Gay to this crime outside of the tiny fragment of DNA which was a partial profile. See (Appendix). Thus, if the court considered the context of the entire closing argument, it is clear that the selected statements cited in this decision do not constitute an unequivocal and deliberate declaration that my DNA was on the window.

There can be no doubt that the DNA evidence was disputed. Defense counsel's cross examination of the DNA expert and his closing argument challenged both the reliability and the sufficiency of the DNA evidence.

In addition, the prosecutions responsibility to prove that the substance allegedly found on the victim's window was in fact placed there during the crime remains in contention. The sufficiency of evidence claim presented to the appellate court has never been addressed. The evidence and arguments presented to the trial court and the jury by my attorney, never excused the prosecutor from meeting their burden of proof with respect to the elements of the crime charged. See *Jackson v. Virginia*, 443 U.S. 307 (1979):

> Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."

This component is essential to the doctrine of judicial admission/admission of fact. The party *must* make statements oral or written, that are "stipulations of fact" to constitute a judicial admission.

Furthermore, in Colorado', *People v. McKimmy*, 2014 CO 76 (2014), the State's Highest Court maintains that:

> [The] doctrine of judicial admission "has been applied in very limited contexts" .....

Prior to the ruling in *McKimmy*, a division of the Colorado Court of Appeals went on to characterize the doctrine "judicial admission." See, *Miller v. Brannon*, 207 P.3d 923 (2009).

> [The] judicial admissions doctrine, does not apply to propositions of law.

The history of the doctrine is relevant to the case at bar. The U.S. Supreme Court has characterize admissions as "Factual stipulations." This doctrine is imprinted in the history of the courts for over 100 years. See *H. Hackfeld & Co. v. United States,* 197 U.S. 442, 447 (1905).

The U.S. Supreme Court addresses the same doctrine in *Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, supra. In that case the term "judicial admission" is used. However, the context of the term remains the same. The factual stipulations referenced in cases over 100 years ago, have not changed the applicability.

The state of Colorado has allowed its courts the latitude of restricting what is required when considering the statement deemed to be a "judicial admission." These limits are found in U.S. Supreme Court precedent cited in *Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, supra.* This has caused a wide range of confusion in the state and federal courts.

There is no U.S. Supreme Court case law that instructs Federal or State judges, that they ***must*** take into consideration the entire context of a statement made to constitute a judicial admission. The generic term has led the courts astray, and allowed them to limit the definition. In my research I have found only 7, U.S. Supreme Court Cases that address the issue of "judicial admission." Of those 7, there is none that express the language "taking into context the entire statement."

1. United States v. Fruehauf, 365 U.S. 146 (1961)
2. United States v. Sisson, 399 U.S. 267 (1970)
3. Lefkowitz v. Newsome, 420 U.S. 283 (1975)
4. Henderson v. Morgan, 426 U.S. 637 (1976)
5. Reed v. Ross, 468 U.S. 1 (1984)
6. Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 561 U.S. 661 (2010)
7. Std. Fire Ins. Co. v. Knowles, 568 U.S. 588 (2013)

On the contrary, there are plenty of "stipulation of facts" cases that this High Court has determined to give those below instruction and guidance. This is not the case with the judicial admissions. And, because of the lack of guidance, there have been

many who have suffered based on the erroneous determination/interpretation of what constitutes a judicial admission.

QUESTION:

IS THERE A "LCN THRESHOLD" SET BY THE U.S. SUPREME COURT DETERMING THE AMOUNT OF TEMPLATE DNA NEEDED TO OBTAIN RELIABLE RESULTS WHEN TESTING CRIME SCENE DNA?

ARGUMENT:

The United States Supreme Court has yet to inform the States what amount of "template DNA or other biological substance" needed to begin testing in order to obtain reliable results. Most of the Federal Circuits have made their own determination, however, there reasoning is not incumbent on other circuits.

This has led to the States implementing stochastic thresholds that vary, resulting in a myriad of controversial decisions. The Court in *United States v. Gissantaner*, 2019 U.S. Dist. LEXIS 178848, has recently made a ruling that touches on the need for the U.S. Supreme Court' guidance. While they have stated that their hope is to:

> "Bring to light the shortcomings or, at the very least, points of inquiry necessary in evaluating this advancing technology as a tool in forensic DNA analysis."

The need for the High Court' guidance is imperative.

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CONCLUSION

In the interest of justice and equity, the petition for a writ of certiorari should be granted. State and Federal Courts receive their guidance from the U.S. Supreme Court. There is no temp-plate to follow in determining what constitutes a judicial admission in the lower courts. This problem persists and allows, unjust rulings, unjust convictions, and unjust settlements. The language needed to uphold a judicial admission must be an unequivocal, deliberate assertion made for the purpose of dispensing with proof of undisputed facts, while taken into context with the entire statement. The standard applied to the case at bar resulted in the application of an erroneous standard and, consequently, the incorrect conclusion that defense counsel's statements in closing argument constituted a judicial admission that Mr. Gay's DNA was on the window. Based on this erroneous conclusion, all of the reviewing courts have summarily rejected my challenge to the reliability of the DNA evidence, which was the only evidence linking me to the crime charged. Accordingly, the petitioner prays that this High Court either grant this writ, or return the case back to the Tenth Circuit to make a determination concerning the reliability of the DNA evidence presented in my habeas petition.

Respectfully submitted,

Date: 12-12-19