No. 19-8362

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

HENRY M. MITCHELL, JR., aka HENRY C. HAYES, — PETITIONER
(Your Name)

vs.

JIM ROBERTSON, Warden, — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

PETITION FOR WRIT OF CERTIORARI

HENRY M. MITCHELL, JR., #V16058
(Your Name)

P.O. BOX 7500 [D6-118]
(Address)

CRESCENT CITY, CA 95532-7000
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

WHETHER THE POLICE MAY RELY OF UNSUBSTANTIATED EVIDENCE TO ABSOLVE THEM OF BAD FAITH INTENTIONAL DESTRUCTION OF POTENTIALLY USEFUL EVIDENCE?

WHETHER STATE COURT CAN DISAPPROVE OF CROSS-EXAMINATION TESTIMONY THAT BORE ON GUILT OR PUNISHMENT?

LIST OF PARTIES

[X] all parties appear in the caption of the case on the cover page.

RELATED CASES

- In re HENRY M. MITCHELL, JR., No. S260650, California Supreme Court. Judgment entered April 1, 2020.
- In re HENRY M. MITCHELL, JR., No. B301945, California Court of Appeal. Judgment entered Jan. 21, 2020.
- In re HENRY M. MITCHELL, JR., No. BA197149, California Superior Court. Judgment entered Sept. 30, 2019.
- HAYES v. RUNNELS, No. CV 05-6683 PA (RZ), U.S. District Court for the Central District of California. Judgment entered April 2, 2007.
- HAYES v. CALIFORNIA, No. 06-8366, U.S. Supreme Court. Cert. Denied Feb. 20, 2007
- PEOPLE v. HAYES, No. B171374, California Court of Appeal. Judgment entered Aug. 2, 2006.
- PEOPLE v. HAYES, No. BA197149, California Superior Court. Judgment entered Nov. 7, 2003.

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OTHER

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[ ] is unpublished.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[ ] is unpublished.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 C 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 State trial 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 Apr. 1, 2020. A copy of that decision appears at Appendix C.

[ ] 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 Fourteenth Amendment

> "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;

STATEMENT OF THE CASE

On November 13, 2018, the Post Conviction Assistance Center was appointed by the presiding judge of the Criminal Writ Center, Los Angeles County Superior Court, pursuant to Cal. Penal Code section 1405(b)(3)(A), which provides for the appointment of counsel "to investigate and, if appropriate, to file a motion for DNA testing under this section."

In petitioner's in pro per First Amended Motion for DNA Testing and Appoint ment of Counsel filed on or about February 21, 2018, it is indicated on page 2: "Defendant seeks to have tested and such evidence obtained are: under-garments worn by Teanna Hayes, that according to the medical examiner's office held vaginal discharge material that was never tested."

After consultation with appointed counsel, the Post Conviction Assistance Center filed a Supplemental Motion pursuant to Penal Code section 1405(c). Where petitioner was also seeking evidence, to wit, sexual assault kit collected from Teanna Hayes, along with fingernail kit that was also collected with the white panty underwear by Senior Coroner's Criminalist Mark S. Schuchardt on August 30, 1999.

The Supplemental Motion filed on May 8, 2019, pursuant to Penal Code section 1405(c) was seeking a court order for the information detailed in section 1405(c) related to Los Angeles Police Department case DR #99-12-25668, and second DR number assigned to this investigtion, as well as Coroner Case No. 1999-05851, the case number assigned by the Los Angeles County Coroner's Office to victim Teanna Hayes.

Subdivision (c) of Penal Code section 1405 provides: "Upon request of the convicted person or convicted person's counsel, the court may order the prosecutor to make all reasonable efforts to obtain, and police agencies and law enforcement laboratories to make all reasonable efforts to provide, the following documents that are in their possession or control, if the documents exist:

> (1) Copies of DNA lab reports, with underlying notes, prepared in connection with the laboratory testing of biological evidence from the case, including presumptive tests for the presence of biological material, serological tests, and analyses of trace evidence.
>
> (2) Copies of evidence logs, chain of custody logs and reports, including, but not limited to, documentation of current location of biological evidence, and evidence destruction logs and reports.
>
> (3) If the evidence has been lost or destroyed, a custodian of record shall submit a report to the prosecutor and convicted person or convicted person's counsel that sets forth the efforts that were made in an attempt to locate the evidence. If the last known or documented location of the evidence prior to its loss or destruction was in an area controlled by a law enforcement agency, the report shall include the results of a physical search of this area. if there is a record of confirmation of destruction of the evidence, the report shall include a copy of the record of confirmation of destruction in lieu of the results of a physical search of the area."

On May 16, 2019, the presiding judge of the Criminal Writ Center ordered the District Attorney's Office of Los Angeles County, the Los Angeles Police Department, and the Los Angeles County Coroner's Office to provide the information detailed in Penal Code section 1405(c) above.

On June 23, 2019, the Los Angeles County District Attorney, Deputy-in-Charge, Forensic Science Section submitted to Post Conviction Assistance Center, a two-page cover letter and attachements that were Bates stamped pages HH-0201 through HH-0279.

As noted above, Petitioner sought to have the sexual assault kit, the fingernail kit, and the underwear collected from victim Teanna Hayes subjected to DNA testing.

From the court ordered 1405(c) materials, petitioner obtained Senior Coroner's Criminalist Mark S. Schuchardt's report dated November 24, 1999, that on August 30, 1999, he was notified by Supervising Criminalist D. Anderson "that the collection of sexual assault evidence was requested on a female child [Teanna Hayes, at the Department of Coroner's] Forensic Science Center." According to Criminalist Schuchardt's report, of November 24, 1999, he 'collected a Sexual Assault Kit (SAK) and a Fingernail Kit" from victim Teanna Hayes. In addition, Schuchardt noted in this report that he "retrieved the panty underwear that had been collected prior to [his] involvement and included it in the SAK." This report constitutes only the collection of physical evidence by the Coroner's Office.

Of the physical evidence collected on August 30, 1999: 2. Sexual Assault Kit (modified to include item 3). 3. One white panty underwear, (included in item 2), and 1. Fingernail Kit, none of these items were ever subjected to DNA testing or analysis by the Coroner's Office of any other agency.

Page HH-0277 of the June 23, 2019 section 1405(c) packet was the declaration of Debra K. Gibson, Supervising Criminalist regarding the above collected physical evidence by Schuchardt. She indicated the following in her declaration: "The evidence log for the above coroner case has been reviewed and per that documentation the following is a summary of the disposition of the evidence collected

by coroner personnel;...fingernail kit, hair kit, sexual assault kit, white t-shirt, and white underwear were all authorized for disposal by LAPD on 10/7/1999. However, per the log, the white underwear may not have been disposed of on 10/7/199 as the log shows it being released to LAPD on 11/17/1999." None of the above evidence remains in the custody or control of the Coroner's Office.

The white panty underwear, which were taken from the freezer evidence locker of the Coroner's Office on November 17, 1999 by LAPD detectives was never booked into evidence of their respective agency.

As for Los Angeles Police Department Report DR #99-12-25667 and DR #99-12-25668, of the thirty-eight (38) items that were booked into LAPD evidence, on or after November 17, 1999, the white panty underwear worn by Teanna Hayes were never placed there for investigative purposes of the case by detective. This was affirmed by Sandra M. Russell, Polce Administrator, Commanding Officer, Evidence and Property Management Division on May 30, 2019, as part of the 1405(c) discovery packet materials. A full search of the evidence lockers for the requested item came up with negative results by LAPD officials.

On review of the LAPD Chronological Records, detectives do not show activity for 11/17/199 to retrieve the white panty underwear from the Coroner's Office. Nor provide any record as to the whereabouts of that critical collected evidence.

With all of the potentially useful evidence for DNA testing being shown to no longer exist, the Post Conviction Assistance Center concluded their 1405 DNA investigation and closed their

involvement with the case.

Based on the postconviction discovery materials pursuant to Penal Code section 1405(c) and the original trial materials, petitioner filed a petition for writ of habeas corpus with the Superior Court of California [Appendix B] on July 25, 2019. The trial court acknowledged the 1405 proceedings as the source of the supporting documents for each of his claims [App. B, p. 3].

Pursuant to this Court's Rule 14.1(g)(i), the federal question was timely and properly raised with the superior court on July 25, 2019 [App. B, p. 3]; PETITION ALLEGING THE BAD FAITH DESTRUCTION OF POTENTIALLY USEFUL EVIDENCE. [See Discussion Id. at 4 through 6]

Petitioner did argue this claim under Arizona v. Youngblood, 488 U.S. 51 (1988) holding: "[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." Id. at 58.

The courts below contend that "BECAUSE THERE WAS NO EVIDENCE OF ASSAULT FOUND BY THE CORONER OR CRIMINALIST." [App. B, at p. 5]. As noted above, there is not a single report generated by the criminalist on the issue of no evidence of sexual assault not being found. None of the collected physical evidence was ever tested by the criminalist of the Coroner's Office to make such a finding. Therefore, under Penal Code section 1405(c) neither the LAPD, or the Coroner can support this statement.

The lower courts further assert: "FURTHERMORE, THERE IS NO EVIDENCE THE DECISION TO DESTROY THE KIT WAS MADE IN BAD FAITH. THE DESTRUCTION OF THE SEXUAL ASSAULT KIT DID NOT VIOLATE PETITIONER'S RIGHT TO DUE PROCESS." [App. B, at p. 6].

What is grossly flawed with this ruling is that neither the state trial court [Appendix B], the Court of Appeal [Appendix A] or the State supreme Court [Appendix C] acknowledged that this petitioner laid out the factual record supported by declarations of the Office of the Coroner and LAPD that on November 17, 1999, detectives took possession of the frozen white panty underwear from the evidence locker of the Coroner. That evidence was never turned over to the detective's agency for testing or analysis. It was never officially logged into LAPD evidence inventory system. A fact supported by LAPD's own rank and file Evidence and Property Management Division, through the Los Angeles County District Attorney's Office.

As demonstrated above, there was never any testing to determine the absence of sexual assault by any criminalist. That fact was not an oversight or error on the part of the LAPD detectives. That raises the question presented;

> WHETHER THE POLICE MAY RELY ON UNSUBSTANTIATED EVIDENCE TO ABSOLVE THEM OF BAD FAITH INTENTIONAL DESTRUCTION OF POTENTIALLY USEFUL EVIDENCE?

The Court of Appeal reasoned that petitioner "has failed to demonstrate a prima facie case for habeas relief." [Appendix A]. This in spite of the fact that petitioner included numerous supporting documents, along with the factual matters that the evidence concealed by LAPD from the November 17, 1999 taking of the frozen white underwear was not used for any investigative purpose.

In addition, the statement that LAPD detectives relied on the unsubstantiated evidence from the doctor is also flawed. "THE

DOCTOR DID NOT TESTIFY CONCLUSIVELY THAT THERE WAS NO SEXUAL ASSAULT, ONLY THAT THERE WAS NO EVIDENCE OF SEXUAL ASSAULT." [App. B, p. 10]. The evidence used by the doctor was that there was no "obvious trauma to external genitalia." This fails on a medical-legal determination as "sexual assault," and "sexual abuse" are defined as a matter of law.

Subdivision (b) of Penal Code section 11165.1 states in relevant part:

> (b) Conduct described as "sexual assault" includes, but is not limited to, all of the following:
>
> (1) Penetration, however, slight, of the vagina or anal opening of one person by the penis of another person, whether or not there is an emission of semen.
>
> (2) Sexual contact between the genitals or anal opening of one person and the mouth or tongue of another person.
>
> (3) Intrusion by one person into the genitals or anal opening of another person, including the use of an object for this purpose.
>
> (4) The intentional touching of the genitals or intimate parts, including the breast, genital area, groin, inner thighs, and buttocks, or clothing covering...them of a child...for the purpose of sexual arousal or gratification."

As defined above, the doctor never made a conclusion on the elements concerning "slight penetration," "sexual contact from the use of a person's mouth," nor the "intentional touching to intimate parts, or through such clothing" worn by a victim. It was such clothing that was destroyed in bad faith. Physical evidence that potentially was testable.

The medical examiner who conducted the autopsy, testified on cross-examination to the following:

> Q. At some point when your were discussing the issue of the time of death with the investigating officers in the case, did they request you order a sexual assault kit or sexual abuse kit for Teanna Hayes?
>
> A.Yes.
>
> Q. And was that done in this case?
>
> A. Abbreviated sexual assault work-up was done, due to the fact the body the previously been washed.
>
> Q. And in this particular case was there any evidence of sexual abuse?
>
> A. No.

(Reporter's Transcript, Vol. 14 at p. 4044).

The doctor raised his observation that because there was no obvious trauma to external genitalia, there was no "sexual abuse" to Teanna, when in fact the answered based on the evidence and the law should have been, "undetermined."

Being "undetermined" raise the question presented on the basis of "unsubstantiated evidence." Given the testimony by the doctor at time of trial, petitioner raised a claim of false evidence from that cross-examined testimony.

The state trial court [App. B, at pp. 8-11] opined:

> PETITIONER FAILS TO ESTABLISH THAT THE DOCTOR'S TESTIMONY THAT THERE WAS NO EVIDENCE OF SEXUAL ASSAULT IS FALSE. THE DOCTOR DID NOT TESTIFY CONCLUSIVELY THAT THERE WAS NO SEXUAL ASSAULT. IT WAS ELICITED BY PETITIONER'S TRIAL COUNSEL ON CROSS-EXAMINATION OF A PROSECUTION WITNESS.

Petitioner at both the court of appeal and the supreme court review noted that because the testimony was elicited on cross-examination does not absolve the prosecution from the duty to see that testimony is correct. Thus, the doctor should have stated that the sexual abuse or sexual assault evidence is undetermined based on the definition under the law.

Accordingly, the state court disapproved that petitioner held a right to have cross-examination testimony as a ground for relief, where the cross-examination testimony bore on the guilt and punishment of petitioner. Thus, the second question presented was raised below.

REASONS FOR GRANTING THE PETITION

Petitioner is respectfully requesting this Court to grant certiorari because a state court has decided an important federal question in a way that conflicts with relevant decisions of this Court, as well as with other appellate courts on this issue.

While the question presented raise the issue of whether the police can absolve themselves of bad faith, a question this Court has not addressed. The question has been addressed on the merits by the Fouth Circuit Court of Appeal in Jean v. Collins, which held

> "Of course the bad faith manipulation of evidence on the part of the police cannot be countenanced, [tolerated, supported, sanctioned, patronised or approved.]" Constitutional absolution for the consealment, doctoring, or destruction of evidence would fail to protect the innocent, fail to assist the apprehension of the guilty, and fail to safeguard the judicial process as one ultimately committed to the ascertainment of truth." (emphasis added) 221 F.3d 656, 663 (4th Cir. 2000)(en banc)

It was evidently clear that the police in this case had taken the physical evidence some 45 days after they had requested other material evidence be destroyed. Why on November 17, 1999 it was relevant for LAPD to take such evidence, if as the state court's opined was in essence innocuous. Based upon the unsubstantiated findings and false assumptions, the frozen white panty underwear was never fully investigated, tested, or analyzed by LAPD after they took possession of the potentially useful evidence.

Petitioner showed that beyond the reliance of the LAPD to others claiming the evidence showed no sexual assault, petitioner showed there was a conscience effort to suppress the evidence.

The Sixth Circuit announced "A defendant [m]ust prove official animus or a conscious effort to suppress exculpatory evidence." Wilson v. Sheldon, 874 F.3d 470, 479 (6th Cir. 2017).

When petitioner provided the factual elements of bad faith, that included documentary evidence from law enforcement agencies, the state court's failed to accept that petitioner met the burden. The Tenth Circuit announced that:

> "We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interest of justice most clearly require it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form the basis for exonerating defendant." United States v. Backstead, 500 F.3d 1154, 1159 (10th Cir. 2007) (citing Youngblood, 488 U.S. at 57-58; also Illinois v. Fisher, 540 U.S. 544, 547-548 (2004)(per curiam).

This case reaches the leval of national interest to others who are similarily situated as petitioner. Here, petitioner's collected evidence was destroyed months before he or anyone else was arrested and charged. Because petitioner was the husband and father of the victims, he was duly targeted for prosecution. others, like petitioner may have to rely on post-conviction remedies to discover bad faith of police before being able to seek relief.

> "In essence, the concept of due process requires that the government treat its citizens in an evenhanded and neutral manner; thus targeting of specific individuals with the purpose of frustrating the exercise of their lawful rights contridicts the basic premise of the constitutional guarantee." Harvey v. Horan, 278 F.3d 370, 387 (4th Cir. 2002)

Certiorari should be granted to resolve the issue of whether there can be a reliance on unsubstantiated evidence by police in a bad faith claim. However, this Court never provided a direct definition

of bad faith. The United States District Court for South Carolina gave a clear guideline adoptable by this Court for consideration on certiorari. The Distric Court announced:

> "[T]he concept of Constitutional deprivation... requires that the officer have intentionally withheld the evidence for the purpose of depriving the plaintiff of the use of that evidence during his criminal trial. This is what is meant by bad faith."
> Trapp v. Tolbert, 2012 U.S. Dist. LEXIS 89331 (Dist. S.C. 6/27/2012)(citing Jean v. Collins, 221 F.3d 656, 663 (4th Cir. 2000)(en banc).

In Arizona v. Youngblood, this Court held that in cases where the evidence is potentially useful, "[u]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." 488 U.S. 51, 58 (1988).

The issue of bad faith arises in civil as well as criminal cse law for resolution. Whether the police can rely on such unsubstantiated evidence before destroying evidence or in this case taking evidence requires the question; can the police have confidence that such action against evidence is constitutionally permissible?

In the instant case, it was proven that the criminalist did not report that there was no discovery of sexual assault through any independent testing of the collected evidence. Likewise, the doctor was not fully forthcoming on the issue of what constituted sexual abuse or sexual assault. Certiorari is requested to resolve the question presented from the due process inquiry, does such actions constitute absolution grounds for the police?

The state court of last reason held that because the matter was raised by trial counsel of aprosecution witness, no violation.

Petitioner, and through counsel of his case provided an exceptional and sufficient investigation to develop and present in state habeas corpus proceedings all the facts and supporting exhibits and declaration that raised a prima facie showing for relief.

A grant of certiorari is warranted because the state court's decision were "contrary to, and involved an unreasonable application of, clearly established law, as determined by this Court.

Petitioner at the courts below raised a constitutional due process violation in accord with Arizona v. Youngblood, 488 U.S. 51 (1988)("[u]nless a criminal defedant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." Id. at 58)

The evidence in petitioner's case was taken by LAPD on November 17, 1999. It was never used for investigative purposes. Thus, it was intentionally withheld. The purpose of depriving can be inferred by the conduct of police. Most alarming is not placing the evidence into LAPD Evidence and Property Division system for accountability.

The state court reasoned because police relied upon the unsubstantiated opinions of others, absolved the police of any liability for the conduct noted above. The state court decided "a case different than the Supreme court has done on a set of materially indistinguishable facts." Bell v. Cone, 535 U.S. 685, 694 (2002). Further, the state court did not apply the facts which constituted the limited requirements of whether bad faith was presented by petitioner. The state court extended the legal principle to a new context to which it should not apply. Williams v. Taylor,

529 U.S. 362, 405 (2000). [Appendix B, pp. 5-6]

A grant of certiorari is warranted because the state court's decision were "contrary to, and involved an unreasonable application of, clearly established law, as determined by this Court."

Petitioner at the courts below raised a constitutional due process violation in accord with Napue v. Illinois, 360 U.S. 264 (1959). (prosecutor failed to correct false testimony elicited on cross-examination).

In fact, outright falsity need not be shown if the testimony taken as a whole gave the jury a false impression. Alcorta v. Texas, 355 U.S. 28, 31 (1957). Thus, a denial of due process can result if the prosecution, although not soliciting false evidence, allows a misleading or false impression to go uncorrected when it appears. It matters little that the false impression goes only to the credibility of a prosecution witness or that the prosecutor's silence was not the result of guile or a desire to prejudice. Napue v. Illinois, 360 U.S. 264, 269-270 (1959).

The state reasoned that becasue the testimony was elicited on cross-examination by petitioner's trial counsel, made the claim for relief moot. [Appendix B, pp. 8-10] The state court decided "a case different that the Supreme court has done on a set of materially indistinguishable facts." Bell v. Cone, 535 U.S. 685, 694 (2002)

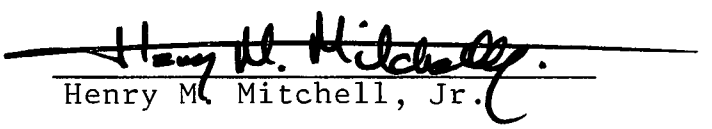
Certiorari is warranted because of "fundamental defects which inherently results in a complete miscarriage of justice" and were "inconsistent with the rudimentary demands of fair procedure." See Hill v. United States, 368 U.S. 424, 428 (1962).

Violation of 14th Amendment due process clause is fundamental defect.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Henry M. Mitchell, Jr.

Date: April 14, 2020