

No. 19-8607

IN THE
SUPREME COURT OF THE UNITED STATES

DERRICK THOMPSON 10A2753 – PETITIONER

VS.

PATRICK GRIFFIN, SUPERINTENDENT, OF
SULLIVAN CORRECTIONAL FACILITY – RESPONDENT

ON PETITIONER FOR REHEARING OF ORDER DENYING CERTIORARI

SECOND CIRCUIT COURT OF APPEALS

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

DERRICK THOMPSON

EASTERN CORRECTIONAL FACILITY

30 INSTITUTION ROAD-BOX-338

NAPANOCH, NEW YORK 12458-0338

QUESTION PRESENTED

(i) Does the confrontation clause permit the prosecution to introduce testimonial identification statements of a non-testifying forensic analyst through the in-court testimony of a supervisor or other person who did not perform or observe the laboratory analysis described in the statements?

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

1. Petitioner respectfully requests this Court grant rehearing of its order dated October 5, 2020 (received by petitioner October 9, 2020), which denied certiorari, and that the Court now grant certiorari on the grounds of this court's prior decision in the presented question:

2. The petition for certiorari discussed the importance of this question, which clearly shows this Court, that the impact of a denial to confront his accuser, deprived petitioner the fundamental right to a fair trial, and how such denial of a Constitutional right, complained of, impaired the proceedings, thus having a terrible impact upon the administration of justice in all courts.

3. This Court has long since held that an accused defendant has a fundamental constitutional statutory right to confront the witnesses against him *See Art. 1, § 6, e.g.:*

“in all criminal cases, the accused shall enjoy the right ... to be confronted with the witnesses against him.”

Quoting *Pointer v. Texas*, 380 U.S. 400, 406, 85 S.Ct 1065, 13 L.Ed.2d 923 (1965); *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004); *Melendez-Diaz v. Massachusetts*, 577 U.S. 305, 129 S.Ct. 252 (2009); *Bullcoming v. New Mexico*, 564 U.S. 647, 131 S.Ct. 2705, L.Ed.2d 610 (2011)). These cases are all related to the instant matter in that all answer the question of the standard of care to be applied to confrontation.

4. Petitioner believes that *Art. 1, § 6* of the Constitution was put in place for its meaning, that is, to ensure that all accused defendant's have a fundamental constitutional right to confront their accuser'(s), that must be adhered to all over the country. In the States case against petitioner, that right was ignored, thus depriving petitioner due process of a fair trial.

5. At petitioner's trial, the trial Court relied upon the "crucial" DNA evidence "taken" from petitioner by error of the pre trial Court (Hon. P. Griffin) granting an untimely discovery motion pursuant to New York Criminal Procedure Law *CPL § 240.40* filed by the people seeking a DNA Buccal swab from petitioner (hereto attached as *APPENDIX No. 1*) that was filed 8 months after petitioner's arraignment which violated the requirements of *CPL § 240.90* (1) which requires that "all motions for discovery be filed within 45 days of an accused arraignment, absent good cause for any delay." The pre trial Court ignoring *CPL § 240.90*, granted the people's untimely discovery motion, and petitioner refusing as a legal right resulted in petitioner being savagely assaulted and his DNA retrieved by two bloody swab sticks stuck in his mouth, and thereafter used as the people's DNA evidence against him, all done through violations of petitioner's constitutional statutory rights. Equally important, and this must be noted, the people never showed any good cause for their delay in seeking late discovery; to meet the requirements proscribed in *CPL § 30.30 (4) (g)*, and the Court (P. Griffin) nonetheless erroneously granted the attached document *APPENDIX No. 1*, *i.e.*, (the people's untimely discovery motion).

To compound matters worse, the trial Court (Hon. B. Kron) then allowed 'surrogate testimony' of a Supervisor of the *O.C.M.E.* to present hearsay testimony of reports and conclusion of a non-testifying analyst's work product that was never made available to be

examined by the defense at no time, thus depriving petitioner a constitutional right (*Art. 1 § 6*), all explained in petitioner's petition for certiorari.

6. During cross-examination of the people's witness, the people's surrogate Supervisor Dr. Noelle Umback of the O.C.M.E.; informed the jurors that the O. C. M. E. received evidence of two swab sticks sent to the O.C.M.E.; and that the box received was "initialed and dated by the 'analyst' that worked on the actual sample in the lab." See *APPENDIX* attachment No. 2, the trial transcript testimony of Dr. Umback *Page(s) 372-373* stating:

Page 372
Line 6-8, 25

Q. Would you tell us Doctor Umback what was the evidence that yielded that DNA profile?

A. We received two sticks that had been from swabs.

Q. And does that box other than having your lab...

Continued on page 373 lines 1-6

number, does that box have any markings on it indicating that it was received by the O.M.C.E.?

A. Yes. There's an evidence unit number, which is EU-08-M-685. The voucher number is written on it is, P-240533, and also initialed and dated by the analyst that worked on the actual sample in the lab. Here, petitioner believes that defense counsel hearing that the people's surrogate witness Dr. Umback was not the person who actually tested the people's DNA evidence (illegally taken from petitioner) had a legal right to place meaningful objection before the Court, because his client was being deprived a constitutional right to confront that actual analyst who's name was on that box. The Court itself; hearing the people's witness (Dr. Umback) clearly informing the court and jurors alike, that the evidence received by the O.C.M.E. came in a box and had the initials and date of the analyst that actually worked on said

evidence in the lab, indicating it was not Dr. Umback, the Court had the green light to stop the people's witness from giving further testimony because the witness made clear she did not do the actual testing on the people's DNA, and any testimony given would consist of presenting hearsay information; thereby depriving petitioner his Constitutional right to confront that analyst, as that analyst results and reports and conclusions were indeed testimonial statements Prepared for trial and prosecution purposes. *Crawford v. Washington* *supra*.

7. The petition brought forth to this court, of a violation of confrontation clause, which the Second Circuit recognizes; the error(s) of a petitioner being deprived the fundamental constitutional right to confront or be confronted by his accuser'(s), in denying the original petition; did nothing to cure this error, by way of their decision claiming the herein argument has no merit; is contrary to this courts decision(s) in confrontation matters see e.g., (*Pointer v. Texas*, *supra*; *Crawford v. Washington*, *supra*; *Melendez-Diaz v. Massachusetts* ,*supra*; *Bullcoming v. New Mexico*, *supra*).

8. Petitioner humbly states, since there exists a clear conflict of decisions by way of the Second Circuits denial of review; on an important question of both federal and constitutional law; affecting many people besides petitioner in different parts of the country, compelling reasons are evident why the question presented of petitioner being deprived the fundamental right to confront his accuser'(s), should be reviewed and determined by this Court.

CONCLUSION

For the reasons set forth in this petition for rehearing, as well as the petition for certiorari previously filed, rehearing and certiorari should now be granted.

CERTIFICATE IN GOOD FAITH

Pursuant to Rule 44.2, I hereby certify that the foregoing Petition for rehearing is presented in good faith and not for delay, and is, limited to the grounds specified in Rule 44.2

Respectfully submitted


DERRICK THOMPSON 10A2753
Eastern Correctional Facility

APPENDIX NO. 1

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: CRIMINAL TERM: PART: TAP A

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

DERRICK THOMPSON

Defendant(s).

AFFIRMATION IN SUPPORT
OF ORDER PURSUANT TO
CPL 240.40 (2)(v) FOR
OBTAINING DNA FROM
DEFENDANT

Ind. No: 347/2007

X

Maryam N'ha Margo Lipkansky, an attorney duly admitted to practice before the Courts of this State, affirms under the penalties of perjury:

1. I am an Assistant District Attorney, of Counsel to RICHARD A. BROWN, District Attorney of Queens County. I submit this affirmation in support of the People's application, pursuant to Criminal Procedure Law Section 240.40(2), for an Order compelling the above-captioned defendant to provide samples of his buccal (i.e., oral cheek) cells.
2. The defendant is charged with the crime(s) of Burglary in the Second Degree and related charges in connection with the above-captioned Indictment involving a burglary committed in Queens County on or about April 7, 2006, in the dwelling of Doolarie Sooklal.
3. On April 7, 2006, evidence was collected from the burglary scene. Specifically, blood was recovered from inside of the residence by a member of the Evidence Collection Team.
4. I am informed by P.O. Michael Sznurkowski that the blood recovered on April 7, 2006, was swabbed and vouchered under number M810771.
5. I am informed by Criminalist II Nellie Yee at the Office of the Chief Medical Examiner that this evidence was tested and that the results showed that the swab vouchered under number

CCE

M810771 tested positive for the presence of biological material.

6. I am further informed by Nellie Yee that DNA testing has been conducted on this vouchered swab, and a DNA profile has been developed for the donor of the biological material.

7. I am further informed by Nellie Yee that the above-mentioned DNA profile was compared with the data contained in the New York State DNA Index System (SDIS). I am informed that this comparison resulted in a match between that profile and convicted offender sample number 9934423A, donated by DERRICK THOMPSON, NYSID number 4455061H.

8. Nellie Yee informs me that legal bureau policy of the Office of the Chief Medical Examiner requires a sample of the defendant's DNA to corroborate defendant DERRICK THOMPSON's status as the donor of both the biological fluid recovered from the evidence described above and the convicted offender specimen. The criminalist informs me that testing such sample will yield a DNA profile of the defendant which can then be compared to the DNA profile of the donor of the above-mentioned biological material and convicted offender specimen.

9. I am further informed by the criminalist that buccal cheek cells (i.e., those present inside the mouth on the cheeks) contain DNA, and can be obtained by swabbing the inside of the defendant's mouth cavity between the cheek and the teeth with cotton swabs.

10. I am further informed by Criminalist Nellie Yee, that DNA testing and comparison has gained general acceptance in the scientific community. In addition, DNA profiling can achieve a positive degree of scientific certainty such that the DNA profile would be likely to occur once in greater than a billion people; accordingly, a match between the DNA profile of defendant and the jacket recovered in this case would be highly relevant proof of defendant's identity as the perpetrator of the crimes charged. On the other hand, in the unlikely event that the two profiles were not to match, it is possible the defendant could be excluded as the source of the blood as well as the

convicted offender specimen -- to a one hundred percent degree of certainty.

11. It is clear that Section 240.40(2)(v) of the CPL authorizes this Court to issue an order directing defendant to:

Permit the taking of samples of blood, hair, or other materials from his body in a manner not involving an unreasonable intrusion thereof of a risk of serious physical injury thereto.

12. It is also clear that the methods used to take the aforementioned samples are safe and reliable. Nothing more than the rubbing of two cotton swabs on the inner cheek in defendant's mouth for several seconds is required. In re Abe A., 56 N.Y.2d 288, 299 (1982); People v. Trocchio, 107 Misc. 2d 610, 435 N.Y.S.2d 639. Finally, any claim by defendant of Fifth Amendment privilege against self-incrimination has been rejected by the Supreme Court of the United States. See, Schmerber v. California, 384 U.S. 757, 86 S. Ct. 1826.

13. The saliva and cheek cell samples requested herein will be collected by a member of the NYC Police Department, or a Detective or investigator employed by the Queens County District Attorney's Office using a safe, reliable, minimally intrusive procedure, that is, swabbing the inside of defendant's mouth with cotton swabs.

14. I am informed by Senior Assistant District Attorney Denise Howard and by Detective Daniel Svenelid of the 107 Detective Squad that on November 14, 2007, defendant refused to consent to provide an oral swab using the procedure described above, and indicated that he would have to be forcibly restrained for a swab to be taken from him.

15. I am further informed by Senior A.D.A. Howard that on November 19, 2007, this Court signed an Order in the form prepared by your affiant requiring the defendant to submit to the taking of an oral swab in order to obtain a sample of his DNA using the procedure described above.

I am further informed by Senior A.D.A. Howard that following the issuance of this Court's Order, the defendant continued to refuse to provide a DNA swab or to comply with this Court's Order. Therefore, your affiant respectfully requests an Order permitting the New York City Police Department and/or the Department of Corrections to use all necessary and lawful force to compel defendant to comply with this Order. No prior application to use all necessary and lawful force to compel defendant's compliance with the Order has been requested.

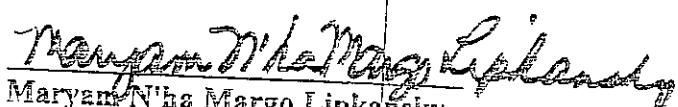
16. For the forgoing reasons, you affiant respectfully requests a Court Order, in the form annexed hereto, authorizing the taking of buccal cheek cell samples by means of oral swabs, using all lawful and necessary force to ensure compliance with this Court's Order.

DATED: Kew Gardens, New York
November 19, 2007

Respectfully submitted,

RICHARD A. BROWN
DISTRICT ATTORNEY
QUEENS COUNTY

BY:


Maryam N'ha Margo Lipkansky
Assistant District Attorney
Career Criminal Major Crimes Bureau
(718) 286-7007

APPENDIX

NO. 2

6 Q Would you tell us Doctor Umback, what was the
7 evidence that yielded that DNA profile?

8 A We received two sticks that had been from swabs.

9 Q And at the OCME, you were able to generate a DNA
10 profile from those swabs; is that correct?

11 A Yes.

12 Q And I will just ask that the witness be shown
13 People's 22 marked for I. D.

16 Q I will ask you, Doctor Umback, do you see a lab
17 number on that item?

18 A Yes, I do.

19 0 What is that lab number?

20 A Tt's FB08-S-0529.

21 Q . Is that the lab number that you just told us was
22 assigned to the case involving the swabs that were
23 submitted to the OCME for analysis?

24 A Yes, it is.

25 Q And does that box other than having your lab

1 number, does that box have any markings on it indicating
2 that it was received by the OCME?

3 A Yes. There's an evidence unit number which is
4 EU-08-M-6850. The voucher number is written on it is, P-
5 240533, and also initialed and dated by the analyst that
6 worked on the actual sample in the lab.

7 MS. BUCHTER: At this time, I am offering
8 that item that evidence.

9 THE COURT: Any objection?

10 MR. MARTIN: No, your Honor.

11 THE COURT: In evidence.

12 (Whereupon, People's Exhibit 22 previously
13 marked for identification, was now marked and
14 received in evidence.)

15 Q Doctor Umback, can you again just be specific
16 about what evidence you actually received for testing?

17 A We received what was described as two plastic
18 sticks.

19 Q And what was the condition of those sticks?

20 A They had been sealed.

21 Q And how were the sticks tested?

22 A They were noted to appear bloody and the area was
23 swabbed off with another swab and that second swab was
24 actually cut and tested.

25 Q And how many loci were tested from that swab?

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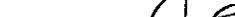
AFFIDAVIT OF SERVICE

STATE OF NEW YORK)) SS.;
COUNTY OF ULSTER)

I, Derrick Thompson 10A2753, swear under penalty of perjury that:

I am the petitioner in the enclosed action.

I have on the __ day of October 2020 placed and submitted within the institutional mailbox located at Eastern Correctional Facility, 30 Institution Road-Box-338, Napanoch, New York 12458-0338, a petition for Rehearing of the order denying certiorari to be duly mailed and delivered by via the United States Postal Service upon, The Clerk of the Court Mr. Scott H. Harris Washington DC, 20543-0001, and a copy of same sent to the Solicitor General of the United States, Room 5616, Department of justice, 950 Pennsylvania Avenue., N.W., Washington, DC 2053-0001.


DERRICK THOMPSON 10A2753
Petitioner

Sworn to before me this
20 Day of October 2020

Cherie Fey
NOTARY PUBLIC

CHRISTINE R FAY
Notary Public, State of New York
No. 01FA6312128
Qualified in Ulster County
My Commission Expires 9/20/2022

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