

No. 21-1371

ORIGINAL

In The
Supreme Court of the United States

Supreme Court, U.S.
FILED

APR 20 2022

OFFICE OF THE CLERK

PATRICIA MORRISON,
Administratrix for THE ESTATE of TOMMY MORRISON,

Petitioner,

v.

QUEST DIAGNOSTICS INCORPORATED, JOHN HIATT,
DR. MARGARET GOODMAN, NEVADA STATE
ATHLETIC COMMISSION, and MARC RATNER,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

For two years, Petitioner has sought access to HIV/DNA testing on newly discovered biological evidence, that could prove TOMMY "THE DUKE" MORRISON, *aka* TOMMY GUNN from ROCKY V, was innocent on *February 10, 1996* of having "HIV". The February 10, 1996, "HIV" test is the injury traceable to the immediate cancellation of the boxing fight that night, indefinite, worldwide, medical suspension from boxing, and cancellation of a multi-million-dollar fight contract to fight Mike Tyson, and \$110 million dollars in damages in this case. The 1996 Nevada Legislature's boxing license regulation (NAC 467.027) required Legislative approval to enforce HIV testing. It was not until August 07, 1997, HIV testing was *proposed*, later *adopted* by the Legislature, and *effective* for the first time on *December 02, 1997* (NAC 467.027 section (3)(b)). In 2012 and 2013 TOMMY was repeatedly tested for AIDS by various physicians and laboratories, including HIV specialists, using different HIV testing methods-all of which confirmed ***negative results*** for any AIDS diseases. TOMMY died September 01, 2013, his September 17, 2013 postmortem pathology report "Final Diagnosis" lists: **"No viral particles seen. No viral particles were found. No retroviral budding is present. No Retroviral inclusions present. No viral particles were seen."** The 3 Questions Presented are:

(1) May a Petitioner from an Estate seek access to HIV/DNA testing on ***newly discovered***, preserved, biological exculpatory evidence, belonging to decedent

QUESTIONS PRESENTED – Continued

in a civil case – and, if so, under what time limit circumstances?

(2) Whether the courts' orders conform to the requirements at the time the injury took place: NAC 467.027 (1996); Fourth Amendment; the Administrative Procedures Act NAC 233B.010; 45 CFR §164.506(2)(i); and during this case, under Due Process Clause; Nevada Constitution Art. 1, §10, cl.1 and Art.1, §9, cl.3; NRS 48.015; NRS 48.075; DNA Act 18 USC §3600(B)(ii); Innocence Protection Act Title 1.

(3) Whether under the *Exclusionary Rule*, evidence collected or analyzed from an unlawful search and seizure of blood cannot be used in a **civil** case against the victim of illegal search and seizure.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner/Appellant/Plaintiff: Patricia Morrison, Administratrix for the Estate of Tommy Morrison, ("TOMMY").

Respondents/Appellees/Defendants: Quest Diagnostics Incorporated, ("QUEST"), Clinical Laboratory; Nevada State Athletic Commission, ("NSAC"), boxing licensing commission; Dr. Margaret Goodman, ("GOODMAN"), Chief Medical Advisor; Marc Ratner, ("RATNER"), Executive Commissioner; John Hiatt, ("HIATT"), Employee, Quest Diagnostics Incorporated.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner has no parent corporation and no publicly held corporation owns ten percent or more of stock in the Estate of Tommy Morrison.

STATEMENT OF RELATED CASES

The proceedings directly related to this case are:

Patricia Morrison v. Quest Diagnostics Inc.; United States Court of Appeals for The Ninth Circuit, DktEntry:32-1 No. 21-15277 Order on March 30th, 2022 denying a Rehearing and rehearing *en Banc*.

Patricia Morrison v. Quest Diagnostics Inc.; United States Court of Appeals for The Ninth Circuit, DktEntry:30-1, No. 21-15277 Memorandum denying Appeal on December 21, 2021.

STATEMENT OF RELATED CASES – Continued

Patricia Harding Morrison, vs. Quest Diagnostics Inc., et al., United States District Court, District of Nevada, dkt#347, No. 2:14-cv-01207-RFB-BNW Order granting an extension of time to appeal pursuant to Federal Rule of Appellate Procedure 4(a)(5) on June 21, 2021.

Patricia Morrison v. Quest Diagnostics Inc.; United States Court of Appeals for The Ninth Circuit, DktEntry:30-1, No. 21-15277 Order granting an extension of time to appeal pursuant to Federal Rule of Appellate Procedure 4(a)(5) on June 21, 2021.

Patricia Harding Morrison vs. Quest Diagnostics Inc., et al., United States District Court, District of Nevada, dkt#346, No. 2:14-cv-01207-RFB-BNW Order granting Plaintiff Morrison's Notice of Errata requesting an extension of time to appeal this case on June 14, 2021.

Patricia Harding Morrison vs. Quest Diagnostics Inc., et al., United States District Court, District of Nevada, dkt#335, No. 2:14-cv-01207-RFB-BNW Minute Order in Chambers of the Hon. Judge Richard F. Boulware II on 1/12 denying basis to reopen this case based on what was argued in the instant motion on January 12, 2021.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner asks this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit Court in this case.

OPINIONS BELOW

The Ninth Circuit Court issued a Memorandum denying Appeal on December 21, 2021. (App.1); an Order granting an extension of time to appeal pursuant to Federal Rule of Appellate Procedure 4(a)(5) on June 21, 2021. (App.3) for DNA/HIV testing on newly discovered biological evidence belonging to Tommy Morrison; and issued an Order on March 30, 2022 denying a rehearing and rehearing en banc (App.9).

The District Court of Nevada issued an Order granting Plaintiff Morrison's Notice of Errata requesting an extension of time to appeal this case on June 14, 2021. (App.5); and issued a Minute Order in Chambers on January 12, 2021 denying HIV/DNA testing on newly discovered preserved (biological evidence) belonging to Tommy Morrison (Dkt #335 – no written or signed order distributed).

Notice: The Opinions have not been released for publication in the permanent law reports. Until released, they are subject to revision or withdrawal.

JURISDICTION

On March 30, 2022 the Ninth Circuit issued its Opinion denying petitioner's timely petition for rehearing and rehearing en banc. (App.9). This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- **The Fourth Amendment to the U.S. Constitution** provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."
- **The Fourteenth Amendment to the U.S. Constitution** provides in part: "...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."
- **45 CFR §164.506** for which an authorization is required for medical release provides in part: "(2) *Defective authorizations.* An authorization is not valid, if the document submitted has any of the following defects: (i) The expiration date has passed or the expiration event is known by the covered entity to have occurred."

- **The ADMINISTRATIVE PROCEDURES ACT – NAC233B.010** (NRS 233B.0603). NOTICE OF INTENT TO ACT UPON A REGULATION provides in part: “The following information is provided pursuant to the requirements of NRS 233B.0603:(1).The need for and the purpose of the proposed regulation or amendment . . . (3). If the proposed regulation is a permanent regulation, a statement explaining how to obtain the approved or revised text of the proposed regulation . . .”
- **The NEVADA CONSTITUTION.** The prohibition of ex post facto laws appears twice in the United States Constitution and provides in part: “Article I, section 10, Clause 1, forbids the states from passing any “ex post facto Law.” Article I, Section 9, Clause 3, prohibits Congress from passing any ex post facto law. i.e. The Constitution of the State of Nevada also applies limitations, i.e. “No . . . ex-post-facto law . . . shall ever be passed.” See N.V. Const., art I, §15.”
- **NAC 467.027 (1996) Boxing License Regulation** provides in part: “(1). Any boxer who has applied for a license or a renewal of his license must be examined by a physician certified by the commission, to establish the boxer’s physical and mental fitness for competition.”
- **NRS.48.015 “Relevant evidence”** provides in part: “As used in this chapter, “relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. (Added to NRS by 1971, 780).”

- **NRS 48.075 Transactions and conversations with or actions of deceased person.** "Evidence is not inadmissible solely because it is evidence of transactions or conversations with or the actions of a deceased person. (Added to NRS by 1981, 411)."
- **18 U.S.C. §3600 – The DNA ACT(a)** provides in part: – "the court that entered the judgment of conviction *shall* order DNA testing of specific evidence if the court finds that all of the following apply: – The applicant asserts, under penalty of perjury, that the applicant is actually innocent of –."
- **The INNOCENCE PROTECTION ACT of 2000 – Title. I. Exonerating the Innocent through DNA Testing** – provides in part: "Bars a State from relying upon a time limit or procedural default rule to deny a person an opportunity to present non-cumulative, exculpatory DNA results in court, or in an executive or administrative forum in which a decision is made in accordance with procedural process."

INTRODUCTION

Quest Diagnostic's Testing On TOMMY Was Not Regulated By The FDA And Was Not The Standard Of Care For HIV Testing In 1996.

QUEST admit its tests do not detect the *retrovirus HIV* and no retrovirus has been found in TOMMY. (Retrovirus is the scientific term for the HIV virus.)

Petitioner: **"Please state with specificity, and describe in detail, YOUR methodology for detecting retroviruses."**

Counsel for QUEST: **"Quest Diagnostics cannot answer the interrogatory because no specific retrovirus has been identified."**

Quest's responses to Plaintiff's Interrogatory No.22
Page.15:5-9.

It takes a whole live viral particle (a retrovirus) to infect another cell for humans to be infectious. **Carl Dieffenbach, Ph.D.**, Director of Division of AIDS at NIH's National Institute of Allergy and Infectious Diseases (NIAID) 22nd International AIDS Conference said:

"RNA and DNA aren't infectious. They're only genetic material, and not the whole virus. You need the whole virus in order for HIV to infect a living cell. It's like finding a human leg on the ground and thinking it can walk. You need the whole body, not just a leg to walk."

Experts cleared TOMMY of any whole virus particles in his body including his blood, sputum, macrophages, sperm, and cerebral spine fluid.

Evidence on the record shows several infectious disease specialists and physicians cleared TOMMY of HIV/AIDS and this weighs heavily against QUEST.

QUEST'S testing was an "LDT" (Laboratory Developed Test) and LDT's were not regulated by the FDA in 1996 and not even today in 2022. No proof of efficacy of QUEST'S 1996 LDT is available. QUEST was not operating under the FDA approved standard of care for HIV testing in Las Vegas, Nevada, in 1996 because LDT's are not FDA approved.

It is not the first time QUEST has withheld evidence from the Government, Courts, medical establishment and general public. The Department of Justice, ("DOJ") took the following similar case seriously, as should this Court in TOMMY'S civil case:

The DOJ settlement with QUEST *et al.*, in 2009 entered into a \$302 million-dollar-settlement to resolve a False Claims Act related to five home-brew, laboratory-developed tests, (LDT's) manufactured by QUEST *et al* that provided inaccurate and unreliable results, and confirmed QUEST did not follow proper procedures. QUEST *et al* were manufacturing, distributing, and using faulty home-made (LDT) Vitamin D tests for 8 years and physicians were prescribing unnecessary treatments to unsuspecting patients based on QUEST'S faulty results. QUEST were found guilty of Felony misbranding charges in violation of the Food, Drug, and Cosmetic Act, ("FDA") 21 U.S.C. §§301 et seq. (See <https://www.justice.gov/opa/pr/quest-diagnostics-pay-us-302-million-resolve-allegations>).

QUEST has failed to present any competent evidence to support the test used on TOMMY was ever FDA approved for antibodies, nor infection, specifically

and solely related to the Human Immunodeficiency Virus (HIV). QUEST is in violation of 42 CFR 493.1253 (b)(2)(iv) for failure to provide the methods used in 1996 on how QUEST measure(ed) the cut-off between a *positive* result and a *negative* result to determine anyone's HIV status.

QUEST failed to present any competent evidence – not even the Western Blot *test strips* which would be required rather than its lab report. QUEST'S Exhibit QDI-1 lab report is no proof of “antibodies” specific to the retrovirus HIV, because autoimmune disorders also produce antibodies. Antibodies are not contagious.

QUEST cited to operating under CLIA (Clinical Laboratories Improvement Act) but omitted to tell the courts CLIA does not address the clinical validity of any test – the FDA does that.

Further proof, QUEST listed the marker “*p.31*” on its lab report but, “*p.31*” was discontinued by the FDA back in 1993. It would take 25 days to get a “*p.31*” result in those days, not 24 hours as QUEST falsely claim on its 1996 lab report ***Exhibit QDI-1***.

Court records confirm no virus and no infection from the retrovirus “HIV” was ever found in TOMMY in Las Vegas in 1996 by anyone, including QUEST.

QUEST attempts to cover up its gross misconduct by pointing to lab reports in other states *after* February 10, 1996, but this does not excuse the company of its faulty February 10, 1996, “HIV” test result that is the injury traceable to the immediate cancellation of

the boxing fight that night, indefinite, worldwide, medical suspension from boxing, and cancellation of a multi-million-dollar fight contract to fight Mike Tyson, and \$110 million dollars in damages in this case.

Even the District Court Judge Richard F. Boulware II made it clear to Respondents from the Bench at the Sep. 08, 2016 Hearing:

THE COURT: "Certainly, if there's subsequent confirmation, that may address some of the issues as relates to Nevada State Athletic Commission, but I think for Quest it really comes down to the report that was actually - the test was actually done, the report that was provided, and whether or not in the context of that report there was any sort of fraud or misrepresentation."

Hon. Richard F. Boulware II. *Hearing Transcript.*
Sep. 8, 2016 P.16.

THE COURT: "... I want you to focus not on subsequent tests. I'm well aware of how many other tests were done subsequent, but that doesn't really matter legally with respect to your clients because really the claims asserted with respect to your clients are based upon what they would have known when they reported the results from that test. And that's why I want you to sort of focus on that."

Hon. Richard F. Boulware II. *Hearing Transcript.*
Sep. 8, 2016 P.16.

Respondents knowingly misrepresented to TOMMY at the time, and continued, fraudulently misrepresenting the law and facts, to Petitioner and **all** the Judges and Justices in this case:

(1). That the Nevada Boxing Licensing law regulations in NAC 467.027(3)(b) (1997) were applicable to TOMMY in 1996, and in this case, *when they were not* passed or effective by the Legislature until 22 months later on December 02, 1997.

(2). That the search and seizure of TOMMY'S blood was approved by the Legislature in 1996, *when it was not* passed or effective by the Legislature until 22 months later on December 02, 1997.

(3). That QUEST testing used on TOMMY in 1996 was FDA Approved, *when it was not* FDA approved and was a laboratory developed test (LDT) using *p.31* as markers of HIV when *p.31* had been discontinued in FDA test kits in 1993.

(4). That the QUEST test was viewed as definitive proof of infection from the HIV virus *without any further testing* that would be required to rule out **autoimmune disorders** that make their own antibodies, and will trigger *false positives* even if the test had been FDA approved, *which it was not*.

The last test result is Sep. 17, 2013 – the postmortem pathology report proving QUEST’S test and reporting was faulty and inaccurate, and this case was timely filed within the statute of limitations on Jul. 24, 2014. Experts in the field of virology and microbiology have confirmed TOMMY did not have the HIV Virus, and did not have any AIDS diseases.

Newly discovered preserved tissue/biological evidence belonging to TOMMY has been presented into this case and Petitioner seeks access to HIV/DNA testing on this exculpatory evidence, that will ultimately once and for all prove QUEST’S test in 1996 was knowingly, intentionally and with intent to mislead, and sold to the public, was unreliable and provided significantly inaccurate results.

STATEMENT OF THE CASE

A. The Tommy Morrison Story

TOMMY died September 01, 2013 after fighting 21 months of septic shock, septicemia, heart issues, and a botched surgery where **12 feet** of tightly packed surgical gauze was “mistakenly” left in his chest for 8 days to rot following a surgery on December 01, 2011. TOMMY’S blood was drawn and at Petitioner’s request a blood autopsy was performed. On September 17, 2013 **P. Smith, MD**, head of the Infectious Disease Department at the University of Nebraska Medical Center, (“UNMC”), called Petitioner to inform her of the results – Final Diagnosis – **negative for HIV**. The

postmortem pathology report was written up with the methodology used and signed as authentication by Pathologist **S. Hinrichs, MD**, and faxed to Petitioner and has been on the record since the inception of this case. The UNMC' legal department informed Petitioner that Respondents were sent the postmortem together with an Affidavit of Records in response to QUEST'S subpoena.

As a note: Dr. Steven Hinrichs was Professor and Chair in the Department of Pathology and Microbiology at the University of Nebraska Medical Center (UNMC); previously Director of the Nebraska Public Health Laboratory (APHL) and Biosecurity; responsible for the development program for the rapid identification of biological agents of *mass destruction*; was principal investigator of multiple national awards from APHL and the CDC and the Department of Defense for the development in programs for early recognition of biological warfare agents; published over 182 papers in science and medical journals, and was Board certified in Anatomical and Clinical Pathology. Dr. Hinrichs was also the head of the Crime Lab at UNMC performing testing on evidence for admittance in to the court of law.

Prior to TOMMY'S death:

Also, in July 2012, TOMMY'S blood was tested by another independent, infectious disease accredited laboratory, and the findings were the same as the postmortem report – **"No viral inclusions, fungi or bacterial forms are identified."** This antemortem

pathology report was authored and signed by board certified pathologist **Gunnlaugur Petur Nielsen, MD** at Boston Massachusetts General Hospital's Infectious Disease Department and has also been on the record throughout this case.

Between 2012 and 2013, TOMMY was tested by various labs and physicians, including HIV specialists, for AIDS defining diseases that would occur if the Virus HIV was present.

All AIDS tests came back **negative for** Pneumocystis Carinii Pneumonia (PCP); Kaposi Sarcoma; Cryptococcus; HIV-2; HTLV-1; HTLV-2;

Even Histoplasmosis Nov. 04, 2012 was negative by **Michele Steckelberg, MD**; negative for Cytomegalovirus (CMV) May. 08, 2013 by **Scott Heasty, MD**; negative for J.C. Polyoma Virus by **Rick Pesano, MD, PhD** on May 20, 2013.

The CDC and Dr. Anthony Fauci classified an AIDS diagnosis in 1984 as someone testing positive for PCP (Pneumocystis Carinii Pneumonia) and KP (Kaposi Sarcoma). TOMMY'S test results came back **negative** for both those AIDS diseases.

Negative for PCP (Pneumocystis Carinii Pneumonia) on Jun. 11, 2013 by **William R. Bauman, MD**, negative again for PCP on Aug. 05, 2013 by **Subodh M. Lele, MD**. Negative for KP (Kaposi Sarcoma) on Jul. 11, 2013 by **Jessica A. Kozel, MD**.

This Petition is based on solid evidence from: two independent accredited, renowned laboratories and

pathologists and specialists in the field of HIV, AIDS, EBOLA, COVID-19, authoring TOMMY'S antemortem and postmortem reports both confirming no Virus; TOMMY'S negative results for AIDS diseases; recantation in testimonies made under oath during the case by Respondents Nevada State Athletic Commission, Marc Ratner, *Margaret Goodman, MD*, and John Hiatt; TOMMY'S personal physician *A. Osio, MD's* medical opinion of no HIV or AIDS in his patient of over three years; and:

(1). No diagnosis of HIV was ever made on February 10, 1996, filed by Respondents Dkt#174 P.7:2-4 **"... neither the State Defendants nor the Quest Defendants ever diagnosed Mr. Morrison as carrying the HIV Virus."** (CD #105-1,10-13).

(2). No law in Nevada required a blood test for HIV. Respondents' Counsel/Attorney General's Office filed Dkt#306 P.5:2 finally admitting to *over 150* of Respondents' motions filed under Oath contained false misrepresentations of the law: **"... the regulation was not adopted into the form cited in Defendants' motions until 1997."**

(3). Even QUEST'S own 1996 CEO in its Las Vegas laboratory at the time of testing and reporting wrote in his Affidavit memorialized in court records: **"I conclude that Mr. Morrison was never infected with HIV virus."** *Henry Soloway, MD*. (Dkt#136-1 P.9:27-28).

(4). Even as District Judge Richard Boulware II read the gravamen in the complaint, he knew

Petitioner had a substantial claim against Respondents after he reviewed all the subsequent "lab reports" on tests TOMMY was submitted to between 1996 and 2012, and said from the Bench:

"We wouldn't even be having this discussion if the test was specific for the existence of the virus or not. That's obviously why there's even the possibility of a claim. The tests didn't test for the virus."

Hon. Richard F. Boulware II. Hearing Transcript Sep. 08, 2016.

(5). Respondents produced Exhibit TM0015 dated July 11, 2006 showing they secretly lifted the "medical suspension" imposed on TOMMY on February 10, 1996, by removing the 1996 testing medical report without any knowledge to TOMMY, the family, media or fans until Exhibit TM0015 was presented for the first time in court records in 2014 – after TOMMY had died.

(6). Former FBI Special Agent, head of the Nevada State Athletic Commission, Robert Bennett, swore Under Oath on behalf of NSAC for the first time since the 1996 indefinite suspension on TOMMY and wrote as if nothing had ever happened: **"Morrison was not indefinitely suspended on February 10, 1996."** (Dkt#140 P.7.19-20).

(7). Respondents admitted clinical laboratory reports are now not a diagnosis or condition of HIV in response to Petitioner's Request for Interrogatory #12

P.10:20-23; Nov. 18, 2015, Elizabeth Iole for QUEST, and in response to Request for Interrogatory #5:

Petitioner: "Please cite YOUR reasons why the QUEST laboratory report is a definitive diagnosis of the virus/HIV and infected by HIV in MORRISON."

QUEST: "Responding party has never claimed that Quest laboratory report is definitive diagnosis of the virus/HIV and infected by HIV in Morrison."

(8). In 2020 Respondents were caught having used *ex post facto* laws on TOMMY on February 10, 1996, and throughout this case. These *ex post facto* statutes coerced Judge Richard F. Boulware II to grant Respondents' 2016 MSJ. Respondents' *Ex post facto* statutes were used in Federal, Appellate Courts and in this U.S. Supreme Court and included: (NRS. 469.1005 did not exist at all); (NRS. 467.100(2) did not exist *until* 1999, not in 1996); (NRS.467.1005 did not exist *until* 1999, not in 1996); (NRS. 467.100(3) did not exist *until* 2003, not in 1996) (NAC.467.027(3) did not exist *until* 1997, not in 1996); (NAC.467.027(3b) did not exist *until* 1997, not in 1996). If not reversed and remanded, this case sets a precedence for civil cases to violate The Constitution and The Administrative Procedures Act.

(9). In 2020 Petitioner unearthed Respondents had withheld hundreds of pages of medical records when QUEST transferred data from original medical DISCS from healthcare providers on to QUEST'S home-made Discs they presented to the courts. The

contents of QUEST'S "court filed discs" included Affidavits of Record from medical facilities with page counts that did not match up with the page count of data scanned on to QUEST'S home-made Discs – hundreds of pages were missing off these discs.

(10). In October 2020 Magistrate Judge Weksler filed Petitioner's EXHIBIT "X" in District Court in Las Vegas, Nevada, showing whereabouts of the newly discovered, preserved tissue belonging to TOMMY.

Petitioner has always presented competent evidence to support her factual allegations and claims and all issues were raised throughout this case. Respondents on the other hand withheld exculpatory evidence, lied by omission, misrepresented the facts and law, and mislead Petitioner, the Estate and Judges and Justices involved in this case.

Footnote *1 Petitioner was in Las Vegas on February 10, 1996, has personal knowledge of the fight cancellation, the media reporting an immediate, indefinite worldwide medical suspension, and claims of TOMMY failing QUEST'S HIV test. Petitioner met Tommy Morrison in 2009 and were married in 2011.

B. Legal Background

The appeal, and Petition, arises from QUEST'S blood test performed in February 1996 when blood was unlawfully seized by Respondents under false and fraudulent pretense that the Nevada Legislature had passed a law requiring the search and seizure of blood

for HIV testing as part of an application to obtain a Nevada professional boxing license. Respondent's improperly bypassed notice and comment requirements in imposing their search and seizure of blood rule and concealed this for over 20 years.

The Nevada State Athletic Commission is an Agency of the Nevada Department of Business & Industry and is bound by *The Administrative Procedures Act-NAC233B.010* before enforcing a rule and cannot avoid notice and comment, *inter alia*.

The Nevada State Athletic Commission cannot by law conceal any public records including the 1996 boxing law *NAC 467.027. NRS Chapter 239, NRS 467.1005.*

Now 20 years later, undisputed in court records, Respondents admit no state law required the *search and seizure* of blood for HIV testing when they forced TOMMY in 1996 to a warrantless blood test against his constitutional rights under the *Fourth Amendment* and *Due Process Clause*. Docket #306 (not docket #1) Respondents admit their motions filed under Penalty of Perjury: "**... the regulation was not adopted into the form cited in Defendants' motions until 1997.**" Dkt:#306.P.6.

At that point in this case, the trial court was obligated to follow the duly enacted and valid statute *NAC 467.027* in obtaining a license in 1996 which did not lawfully require blood draws. The courts' order violates *The Nevada Constitution* prohibiting *ex post facto* laws such as (*NAC 467.027(3)(b) 1997*) from being

introduced in 1996. *Article I, section 10, Clause 1* of the United States Constitution forbids the states from passing any "ex post facto Law." And *Article I, Section 9, Clause 3*, prohibits Congress from passing any *ex post facto* law. The Constitution of the State of Nevada also applies such limitations, i.e. "No . . . *ex-post-facto* law . . . shall **ever** be passed." See *N.V. Const., art. I, §15*.

TOMMY was at all times compliant with the 1996 Nevada boxing licensing law and was examined by **R. Voy, MD**, and **Berlinger, MD**, both physicians certified by the commission and whom completed the medical forms stating TOMMY was physically and mentally fit to receive a license as required by *NAC 467.027 (1996) Boxing License Regulation* which provides in part: (1). Any boxer who has applied for a license or a renewal of his license must be examined by a physician certified by the commission, to establish the boxer's physical and mental fitness for competition.

NSAC made it publicly clear in interviews in both print and on nationwide and international television, (committing wire fraud) (and throughout this case), it still would not let TOMMY apply for a license unless his blood was seized and searched for evidence of the *absence of HIV* citing it was *Nevada Law*. TOMMY was publicly stripped of the affirmative right to not consent when voicing his religious beliefs in 1996, (all the time *not* knowing that it was not a Nevada Law) and was placed in a *Hobson's choice* of either being forced to take the blood/genetic test or be deprived of his *Fourteenth Amendment* rights to earn a living and receive

equal protection of the laws. Respondents forced TOMMY to sign a waiver to release medical results. However, this waiver is defective in many ways and expired on February 09, 1996, and violated 45 *CFR* §164.506 for which an authorization is required for medical release and provides in part: "(2). *Defective authorizations*. An authorization is not valid, if the document submitted has any of the following defects: (i). The expiration date has passed or the expiration event is known by the covered entity to have occurred." Even though there is no chain of custody and no indication in the record or briefing who drew TOMMY'S blood, TOMMY was submitted to a blood test after NSAC told him *Nevada Law* required his submission. QUEST used its own instruments, performed, tested, and analyzed TOMMY'S alleged blood and guaranteed the boxing commission, and TOMMY, either a result of the presence/*positive* for HIV, or, a result of absence/*negative* for HIV. QUEST'S test was developed in its own lab with no evidence supporting the record it even complied with FDA regulations. Without evidence of FDA approval QUEST'S test and results did not meet the standard of care for HIV testing in 1996.

In *Birchfield* 579 U.S. ____ (2016); *Birchfield v. North Dakota*, No. 14-1468, Opinion of Court P.37 VII "Unable to see any other basis on which to justify a warrantless test of Birchfield's blood, the court concluded that Birchfield was threatened with an unlawful search and that the judgment affirming his conviction must be reversed." The judgment in TOMMY'S case must be reversed.

In *Cady v. Dombrowski*, 413 U.S. 433 the Court of Appeals relied, and now respondent relies, primarily on *Preston v. United States*, 376 U.S. 364*444 (1964), to conclude that the warrantless search was unconstitutional and the seized items inadmissible. TOMMY'S warrantless search was unconstitutional and the seized blood/result is inadmissible.

QUEST reported results over the phone to the boxing commission (against *CDC MMWR/Vol.57*, where: "Oral reports of prior laboratory test results are not acceptable.") and authored a partial "lab report" *Exhibit QDI-1* (containing multiple deficiencies) years later making it available for the first time to NSAC in this lawsuit in 2014. QUEST'S test claims a *positive for Western Blot* (HIV-1) result. TOMMY'S license was immediately denied, and resulted in the immediate cancellation of a fight, immediate indefinite, worldwide, medical suspension; immediate cancellation of a multi-million-dollar contract, loss of career and earnings, forever tarnishing TOMMY'S legacy and leading the rest of his life into despair.

The damage was caused to TOMMY in Las Vegas on February 10, 1996 and under Federal and Constitutional law the warrantless search was unconstitutional violating TOMMY'S Fourth and Fourteenth Amendments, in violation of the Administrative Procedures Act applying an *ex-post facto* law *NAC 467.027(3)(b)(1997)*, in violation of *Nevada Administrative Code 467.027*, using a deficient outdated medical release in violation of *45 CFR 164.506(2)(i)*; and its only proof of its testing with *Exhibit QDI-1* is

invalid with no handwritten signature or legal mark of an individual to authenticate its results.

In applying the *Exclusionary Rule* the admission of QUEST'S test result yielded, Exhibit QDI-1, is inadmissible in both a civil and criminal proceeding and should be removed from this case.

In the alternative, reasonable cause exists for the newly discovered preserved tissue, relevant exculpatory material evidence, be ordered for DNA/HIV testing in accordance with *NRS.48.015*, the *DNA Act 18 U.S.C. §3600(B)(ii)*, the *Innocence Protection Act Title 1*, and *NRS 48.075*.

The *Fourth Amendment* provides protection and prohibits "unreasonable searches," and the taking of a blood sample or administration of a breath test is a search. See *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 616-617 (1989); *Schmerber v. California*, 384 U.S. 757, 767-768 (1966). In *Mapp v. Ohio*, 367 U.S. 643 (1961) the Court tied the *Exclusionary Rule* strictly to the *Fourth Amendment*, finding exclusion of evidence seized in violation of the Amendment to be the "most important constitutional privilege" of the right to be free from unreasonable searches and seizures, finding that the rule was "an essential part of the right of privacy" protected by the Amendment. Blood tests "require piercing the skin" and extract a part of the subject's body. *Skinner*, supra, at 625; see also *McNeely*, 569 U.S., at ____ (opinion of the Court) (slip op., at 4) (blood draws are "a compelled physical intrusion beneath [the defendant's] skin and into his

veins"); *id.*, at ___ (opinion of ROBERTS, C.J.) (slip op., at 9) (blood draws are "significant intrusions").

QUEST 1996 test result continues to cause **irreparable harm** with malicious publications and social media videos still to this day designed to blacken and scandalize TOMMY'S memory, surviving relatives, friends and fans.

Things would have been very different had Respondents abided by the laws at the time, TOMMY would have received his professional boxing license for Nevada, no indefinite worldwide suspension would have been announced to the world, the fight that night would have happened, and the multi-million-dollar contract to fight Mike Tyson would not have been cancelled.

C. The Proceedings In This Case

This case has been very active since 2014, and throughout the Covid-19 pandemic. All parties have filed documents with the permission of the lower courts and this case has not been dismissed with or without prejudice.

Current situation as of April 2022:

The motion for DNA/HIV testing on TOMMY'S tissue is now pending in the U.S. Supreme Court. The *Innocence Protection Act of 2000 - Title 1* "does not bar a state from relying upon a time limit or procedural default rule to deny a person an opportunity to present non-cumulative, exculpatory DNA results in court, or

in an executive or administrative forum in which a decision is made in accordance with procedural due process."

No evidence, in any form, has been presented to sustain QUEST'S efficacy in 1996 testing, and absolutely nothing was presented that would excuse each Respondents' failure from complying with duly enacted statutes and ACTS.

Respondents could have been honest in 2014 and could have disclosed everything that has taken 8 years in and out of each court to uncover. Frankly, Respondents could have been honest back in 1996 to TOMMY and what happened to TOMMY would have never happened.

On July 24, 2014 Petitioner, on behalf of and as the surviving spouse of Tommy Morrison filed this diversity action pursuant to 28 U.S.C. §1332 in the United States District Court for the District of Nevada. Petitioner asserts various claims against Respondents arising from QUEST'S February 1996 HIV laboratory test result. Petitioner's claims are for negligence, defamation, fraud/misrepresentation, intentional infliction of emotional distress, and intentional interference with a contract. Each claim has been met. The evidence suppressed by Respondents for over 20 years, and even throughout this case, is now on the record and now complete.

The Proceedings specific to this Petition are:

August 2020:

Petitioner filed a Motion with the Federal Court in Las Vegas, Nevada for DNA/HIV Testing on Newly Discovered, Preserved, Tissue belonging to Tommy Morrison. (Dkt#325)

January 2021:

The Judge denied HIV/DNA testing. (Dkt#335)

February 2021:

Petitioner filed an Appeal for Motion for DNA/HIV Testing. (Dkt#336)

Between February 2021 and June 21:

Arguments were made between the parties over a delay in delivery by Federal Express due to a deadly Polar Vortex Storm, White House contract with Federal Express to deliver Covid-19 vaccinations as priority, and state of emergency regulations due to the Covid-19 pandemic. COURT GRANTED Petitioner EXTENSION OF TIME.

June 2021:

The Ninth Circuit ordered Mediation. Mediation was released in July 2021. (Dkt#13/Dkt#15)

Between June 2021 and Sep. 2021:

Opening, Answering, Reply Briefs, were filed.
(Dkt #18/21,22,23,24,25,26/27)

November and December, 2021:

The Ninth Circuit Court Denied the Motion for DNA/HIV Testing and Petitioner filed a petition for rehearing and rehearing en banc.
(Dkt#30/31)

March 2022:

The Ninth Circuit Court Denied the petition for rehearing and rehearing en banc.
(Dkt.32,33)

April 2022:

This Petition is filed in the U.S. Supreme Court.

Whether Petitioner had a full and fair litigation of the claims at pretrial, or on direct appeal is now the final say of this Court.



REASONS FOR GRANTING THE WRIT

- I. The Ninth Circuit's Holding is Unworkable and Will Inflict Serious Irreparable Harm on The Surviving Members of the Estate, and on TOMMY'S Legacy.**

In the decades since this Court has decided dozens of cases challenging the constitutionality of the *Fourth Amendment* and the *Exclusionary Rule* never has it

suggested that there is an expiration date or time limit on a civil case especially when *newly discovered* biological evidence and retracted testimony made under oath comes into play.

There is no plausible reason for so objecting to scientific testing by **any** party to this case and the results would be relevant evidence in publicly and legally establishing, or de-establishing, TOMMY'S HIV status and would be in the best interest of not only family members of the Estate, but also to the general public as a matter of first impression and public policy.

The law does not require such cruelty towards widows and decedents' family Estates denying the motion whereby scientific testing on newly discovered relevant material evidence can spare the family from further infliction of serious **irreparable harm** and cruelty through unprivileged publication by writing, printing, picture, or effigy, or other fixed representation to the eye, which exposes any person to public hatred, contempt, ridicule or obloquy, or which tends to deprive him of public confidence, or to injure him in his occupation, or any malicious publication as aforesaid, designed to blacken or vilify the memory of one who is dead, Tommy Morrison, and tending to scandalize his surviving relatives or friends.

II. The Ninth Circuit's Holding Creates A Circuit Split And Implicates Deeper Confusion Over Newly Discovered Evidence And Use Of DNA/HIV TESTING In Criminal v. Civil Cases.

This Petition raises a question of exceptional importance regarding scientific testing for DNA/HIV on newly discovered, preserved tissue/biological evidence, belonging to a deceased person in a civil case filed by the decedents' Estate. The decision below by the Ninth Circuit forbids DNA/HIV testing on newly discovered biological evidence in civil cases. Certiorari is warranted to prevent an untenable result that DNA/HIV testing could be lawful only in criminal cases, and unlawful in civil cases, depending on whether a court is permitted to ascertain the meaning of *newly discovered*.

Petitioner argues that courts should be allowed to give more weight to hard scientific evidence (such as DNA/HIV) which indisputably shows that evidence produced at the original trial was false, than they would give to evidence that is less scientific and hence less reliable.

Petitioner urges this Court to rule that judges should re-open cases when new scientific evidence can prove innocence and disproves a material fact in CIVIL cases. The decision below creates conflict in its own district. Granting DNA/HIV testing in closed criminal cases but not in closed civil cases. The Ninth Circuit's decision below creates a circuit split and casts a cloud

of legal uncertainty over an entirely new aspect of the *Fourth Amendment* and the *Exclusionary Rule* in civil and criminal cases.

The Ninth Circuit has held it refuses to test TOMMY'S biological evidence whereby Petitioner of the Estate of Tommy Morrison could have this opportunity to prove TOMMY'S innocence in front of a jury that can look at **all** the facts in this case.

The U.S. Supreme Court has held in *House v. Bell*, 547 U.S. 518 (1996), "a death row inmate, is entitled to a new hearing in federal court because post-conviction DNA testing invalidated the prosecution's theory that he raped and then murdered a woman more than 20 years ago. Blood evidence presented at House's trial is also in doubt because of new scientific information. The case marks the first time since DNA testing became widely available that the Supreme Court has looked at the standards for reopening death penalty cases."

Since 1989, 180+ wrongly convicted people in 32 states have been exonerated with DNA evidence, according to the Innocence Project.

The Ninth Circuit rule imposes a harsh result on the MORRISON ESTATE and misses the point by refusing to test TOMMY'S biological evidence under a court order.

III. The Ninth Circuit's Order Conflicts With Applicable Law and Legal Standards And The Trial Court Was Still Obligated To Follow Those Duly Enacted Statutes.

There is a material injury – **irreparable harm** – and whether the order under review constitutes a departure from the essential requirements of law.

The Petition is based entirely on following the science and on Constitutional, Federal, statutory laws, together with the court record in the entire appeal. The undisputed laws in this matter shows TOMMY was subjected to statutes and legislative laws that Respondents knew at the time were in serious violation of and simply just completely disregarded.

Respondents repeatedly violated applicable laws and the governing legal standards. The lack of candor with not only this Court standing alone, warrants granting of the Petition.

Simply put, what took place in Nevada and forced on TOMMY and fraudulently concealed and intentionally suppressed for 20 years or more and throughout this case was without any authority or laws or recommendations passed by: Executive order, Congress, State Legislatures, the courts at various levels, and not even the private industry, nor the FDA or Health and Human Services nor CDC.

No law existed requiring the *search and seizure* of blood in 1996 to get a boxing license. Respondents were wrong in forcing TOMMY into submitting personal

genetic information and were wrong to fraudulently misrepresent the law to TOMMY and under Penalty of Perjury.

The undisputed actions would support the inference why Respondents happily agree to the lower courts' Orders to avoid allowing TOMMY'S remains to be tested therefore prohibiting the widow, the Estate, the Public, and the Courts, from having TOMMY'S true HIV status issue **lawfully** resolved.

At no time has any party to this case ever waived rights for HIV/DNA testing on newly discovered preserved tissue belonging to TOMMY.



CONCLUSION

THE ESTATE OF TOMMY MORRISON is a case of first impression. This petition for certiorari is to grant new evidence into this case that would lawfully clear TOMMY surrounding a false HIV claim on February 10, 1996 by QUEST which resulted in the injury traceable to the immediate cancellation of the boxing fight that night, indefinite, worldwide, medical suspension from boxing, and cancellation of a multi-million-dollar fight contract with a fight against Mike Tyson included, and \$110 million dollars in damages in this case.

Respectfully submitted,

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