No. 21-1371

In The

Supreme Court of the United States

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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTRODUCTION

The court of appeals disposed of Tommy Morrison's (TOMMY'S) case solely on *timeliness grounds*, so it didn't address the merits, and this Court is one "of review, not of first view." *Skinner*, 562 U.S. at 521 (citation omitted).

Petitioner MORRISON contends although the Ninth Circuit did not reach the issue, TOMMY'S case may be entitled to relief under **Rule 60(b)(6)**.

Just like in *Skinner*, if this Court resolves the threshold questions presented in TOMMY'S favor, the merits will be "ripe for consideration on remand." *Id.*

There are no questions of fact here to be disturbed. MORRISON has demonstrated there is more than a scintilla of evidence creating a genuine issue of material fact on which a jury could reasonably find for TOMMY. Overwhelming, undisputed evidence on the record scientifically confirms TOMMY did not have, nor did he die of, HIV/AIDS.

Certiorari is warranted because the Ninth Circuit interpreted *Nevitt v. United States*, 886 F.2d 1187, 1188 (9th Cir.1989) and *Fed.R.Civ.P.60* (1946) to improperly withhold and forbid access to a constitutional procedure of DNA/HIV testing that will prove the Quest Diagnostics 1996 LDT (laboratory developed test) result did not detect HIV in TOMMY on February 10, 1996. (LDT's are **not** approved by the FDA).

The Ninth Circuit reviewed the district court's decision under the wrong legal standard – de novo – the

Court should vacate the judgment and remand for consideration under the proper legal standard – abuse of discretion. Abuse of discretion is the proper standard. See *Cooter & Gell v. Hartmarx*, 496 U.S. 384 (1990); *Pierce v. Underwood*, 487 U.S. 552 (1988). As this Court explained in *Pierce*, many decisions applying law to facts should be reviewed for abuse of discretion. 487 U.S. at 559-60. Deferential review is appropriate when "one judicial actor is better positioned than another to decide the issue in question."

Indeed, just this past month, (May 02, 2022) this Court granted certiorari in Case **21-442** *Rodney Reed v. Bryan Goertz, et al.*, based on the statute of limitations in another denial of DNA testing. As *McDonough* reaffirmed, accrual occurs once there is "a complete and present cause of action." 139 S. Ct. at 2149 (quoting *Wallace v. Kato*, 549 U.S. 384, 388 (2007)). As in *Reed*, TOMMY'S "Defendants may be held liable if they recklessly ignored evidence suggesting the Plaintiff's innocence or systematically pressured witnesses to manufacture false testimony to fill gaps in an investigation." *Winslow v. Smith*, 696 F.3d 716, 734 (8th Cir.2012).

Respondents/Defendants NSAC, RATNER, GOODMAN (collectively "NSAC") filed a WAIVER.

Respondents/Defendants QUEST DIAGNOSTICS and HIATT (collectively "QUEST") filed a BIO. Ms. Caldwell, the author of QUEST'S BIO, is not an expert in HIV/AIDS and cannot provide a reliable opinion in this case and has never held board certification in

immunology, pathology, neurology, or the sub-specialty of infectious diseases. Ms. Caldwell has *never produced* any hospital discharge summaries signed by any physician using ICD-9 codes which would be required if they were confirming an HIV/AIDS diagnoses.

Undisputed by all Respondents, TOMMY was certified physically and mentally fit for competition and to be licensed to fight on February 10,1996. TOMMY complied with the Legislative *recorded 1996 boxing license* regulation which did not require the search and seizure of blood, and TOMMY was never diagnosed with HIV by anyone in Las Vegas, Nevada.

Having no documented basis for forcing an immediate, indefinite, worldwide suspension on TOMMY'S profession, all on one day, February 10,1996, makes NSAC'S and QUEST'S actions "arbitrary and capricious."

If any tradition is relevant here, it is the constitutional tradition of equal treatment for all. DNA/HIV testing does not in and of itself, detect or implicate any criminal wrongdoing.

The information is intended to provide evidence of a person's identity. A DNA/HIV sample is evidence only of one's ***genetic code*** which in this case will determine if TOMMY'S preserved tissue includes a *genetic code* that either contains or excludes DNA/HIV.

The error and irreparable, harmful, effects of the Ninth Circuit's ruling requires this Court's urgent attention.

The petition should be granted because good cause has been shown.

ARGUMENT

I. The Circuit Split Is Real On Statute Of Limitations When Seeking DNA/HIV Testing.

As the petition explained, the circuits have split over whether the statute of limitations for newly discovered evidence in a federal civil case, seeking DNA/HIV testing begins to run at the end of state-court litigation or at the moment the state trial court first denies testing, despite any subsequent appeal.

Had TOMMY'S case arisen in the Eleventh Circuit rather than the Ninth Circuit, DNA/HIV testing would have been timely. Instead, the lower courts tossed the testing, leaving a petitioner without access to exculpatory evidence – including the testing – that could help provide TOMMY'S identity of innocence on February 10, 1996 when Respondents regarded TOMMY as having the human immunodeficiency virus ("HIV") and immediately, indefinitely, worldwide suspended him from boxing, cancelled the fight that night, and lost a multi-million dollar contract to fight Mike Tyson.

In the Eleventh Circuit, the limitations period begins to run from the end of the state-court litigation denying testing, *Van Poyck v. McCollum*, 646 F.3d 865, 867 (11th Cir.2011) (per curiam). TOMMY'S case would have been timely there.

In the Fifth and Seventh Circuits, the limitations period runs from the moment the state trial court denies DNA testing, despite any appeal. *Savory v. Lyons*, 469 F.3d 667, 672 (7th Cir.2006). TOMMY'S case would have been timely there.

This Court repeatedly told courts not to define clearly established law at a high level of generality and has responded to the unfairness that would result if the presentation of the issue were barred by time limitations and has found both the use of *perjured testimony* and the *withholding of exculpatory evidence* to violate the due process clause, *Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (perjured testimony); *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (exculpatory evidence).

II. DNA/HIV Test Was Not Available At The Time Of Judgment.

Because of today's technological advances in 2022, TOMMY'S biological evidence is preserved in **perpetuity (forever)**. The biological evidence is at the University of Nebraska Medical Center in Omaha, Nebraska. (UNMC). UNMC is accredited by the American Society of Crime Laboratory Directors-LAB-Laboratory Accreditation Board.

QUEST has now come clean its test was an **LDT**. The FDA warns unapproved LDT'S lack, among other things, medical laboratory testing and controls, and provide inaccurate results and are not reliable in detecting the presence of HIV.

QUEST'S BIOp02 promises the Court its testing on TOMMY complied with the "clinical standard of care for HIV testing in 1996." There was no such "clinical standard of care" using LDT'S, nor any reference to a link to prove a QUEST test for $20-$30 in 1996 even existed. Clinical laboratories do not regulate testing – the FDA does that.

Since 1996, the FDA has conducted several investigations of firms selling and promoting unapproved HIV test kits. QUEST has been under the radar, **until now**.

The type of DNA/HIV testing to verify QUEST'S 1996 ***non-FDA*** approved home-brew/Laboratory Developed Test was not available within one year of Judgment. Such testing now available will produce more accurate and probative results. See *State v. Lotter*, 266 Neb. 758, 669 N.W.2d 438 (2003).

If all the criteria has been met, as shown in the petition, and the reviewing court finds testing may produce non-cumulative, exculpatory evidence relevant to the claim TOMMY was wrongfully convicted on February 10, 1996: (5) **the court must order DNA testing**. *State v. Hale*, 306 Neb. 725, 947 N.W.2d 313 (2020). See also Nebraska Revised Statute 29-4120, 2019.

QUEST'S peculiarly strong resistance to this petition can be explained only by its strong desire to avoid the questions this petition alone forces it to confront.

QUEST has "never told" about its technological challenges and elaborate *20 yearlong* fraud of exaggerated, false, misleading statements about its technology, business, testing, reporting, of its HIV-LDT'S (laboratory developed tests). In fact for over 20 years QUEST has made everyone believe their HIV test was approved by the FDA. The FDA does not approve LDT'S.

When QUEST subpoenaed TOMMY's FINAL DIAGNOSIS of September 17, 2013, revealing no HIV and no AIDS, its first move was to conceal it from the courts. (Pet.p.10-12).

When QUEST subpoenaed TOMMY'S negative results for any AIDS diseases, it withheld those records from its own expert witness. (Pet.p.12).

QUEST'S resistance is self-evident. QUEST would prefer to obscure details of its fraudulent scheme, as this case makes it clear. QUEST prefers not to talk about the Fourth and Fourteenth Amendments, this case would oblige it to.

QUEST'S BIO repeatedly mentions its summary judgment record bolstering certiorari because QUEST fails to mention NSAC finally came clean ***there was no law*** in Nevada requiring a blood test for HIV to obtain a boxing license in 1996. The summary judgment record shows the lower court committed clear error granting MSJ.

Attorney General's Office Dkt#306 P.5:2

". . .the regulation was not adopted into the form cited in Defendant's motions until *1997*."

Note Bene: Defendant's motions (over 300 motions) used a regulation not adopted until 1997, not on February 10, 1996, earning them the granting of their MSJ.

QUEST'S BIO repeats blood testing was required to obtain a license. This is **continuing perjured testimony**.

Some courts have stretched the limitations periods by construing the crimes as "continuing" to toll the statutes, some under the theory defendants sought to conceal the crime. Both scenarios apply to Respondents'/Defendants' conduct in TOMMY'S case.

TOMMY was innocent of HIV/AIDS on February 10, 1996 and the QUEST 1996 LDT test result in question is wrong.

The specific evidence to be tested is in Nebraska and was not previously subjected to DNA/HIV testing and neither parties knowingly and voluntarily waived the right to request DNA testing of that evidence in a court proceeding or knowingly failed to request DNA testing of that evidence in a prior motion for postconviction DNA testing.

MORRISON is requesting DNA/HIV testing using a new method or technology that is substantially more

probative than the QUEST LDT testing of February 1996.

The proposed DNA testing is reasonable in scope, uses scientifically sound methods, and is consistent with accepted forensic practices.

MORRISON identifies a theory of defense not inconsistent with an affirmative defense presented throughout this case and would establish the actual innocence of TOMMY'S "offense" of testing positive for HIV in Las Vegas, Nevada.

The DNA/HIV testing may produce new material evidence that would support the theory of defense referenced and raise probability TOMMY did not commit the violation of what has now been exposed as an *ex post* facto law.

Respondents cannot suppress exculpatory evidence. It is well settled under Nevada law suppression or nondisclosure of a material fact, which a party is bound in good faith to disclose, is equivalent to a false representation. *See Midwest Supply, Inc. v. Waters*, 89 Nev. 210, 510 P.2d 876, 878 (1973).

QUEST spends the bulk of its brief re-prosecuting, raising arguments the court of appeals and district court already rejected (such as accusing MORRISON of being vexatious), and attacking MORRISON'S constitutional arguments.

Someone reading QUEST'S BIO can quickly recognize it never addresses, much less disputes, the test

it used on TOMMY in 1996 was a Laboratory Developed Test – not approved by the FDA.

III. The Ninth Circuit Flouted The *DNA ACT* And *FRCP 60(b)(6).*

Nevitt and FRCP 60 were ruled before the DNA Act and the Innocence Project Act and it is time for our laws to reflect science.

In the new, illogical, Ninth Circuit one-size-fits-all *Nevitt* rule dating back to *1989*, DNA/HIV testing in 2022 can only be made within one year after judgment has been entered, even if the biological evidence or the required testing is not available at that time.

But *Nevitt, nor the Legislature*, makes no reference to DNA/HIV testing. Sure, *Nevitt* involves newly discovered evidence, but actual DNA testing cases rest in the hands of more updated constitutional rules under the DNA ACT, *inter alia*, which was still a decade away from *Nevitt.* DNA samples were not collected or tested until Congress enacted the 2000 DNA Act, 11 years post *Nevitt*. That new Ninth Circuit *Nevitt* rule departs from this Court's precedent, splits from the Ninth Circuit and other courts of appeals and threatens massive restrictions on Fourth and Fourteenth Amendment expressions and makes a mockery of all other cases gone before TOMMY'S.

The Ninth Circuit also rested its holding on a notion that *FRCP 60* rule applies to DNA/HIV testing. This is a first, and is split with other circuit courts,

even its own. Accepting the Ninth Circuit's reasoning in *Nevitt* and *FRCP 60* would require reversal of cases from virtually every State and many federal court decisions as well. In light of these and many other persuasive authorities upholding the DNA Act and Innocence Project Act, MORRISON respectfully suggests that the Ninth's Circuit analysis is suspect and *Nevitt* and *FRCP 60* do not apply in this case and indicate that the Legislature did not intend to impose a strict one year limitations period on actions brought to challenge a presumption of HIV innocence. *FRCP 60* suffers from multiple constitutional deficiencies and does not address the use of any DNA collection techniques. To be sure the Ninth Circuit should not have applied those unconstitutional requirements to TOMMY'S case, and MORRISON challenges their constitutionality.

In the Ninth Circuit's view, this Court should retain the implied statute of limitations of *one year from judgment* because Congress now expects federal judges to do the job that Congress failed to do itself. That's not how the separation of powers exists. If Congress wants to include a private right of action in a statute, it should do what Article I anticipated – enact a law. Congress should not rely on Judges to fill in the blanks. Congress knows how to enact a private right of action when it wants to and that is why the DNA ACT was enacted. The DNA ACT is frequently used in both civil and criminal cases and not only helps identify actual perpetrators of crimes, paternity, but also helps eliminate individuals from suspect lists, *inter alia*.

The Court should not let the Ninth Circuit's illogical *Nevitt* rule bar MORRISON'S opportunity to seek DNA/HIV testing that could exonerate TOMMY of HIV on February 10, 1996, especially when this case would have gone forward in the Eleventh Circuit.

The Ninth Circuit, flouting a well settled DNA ACT, could also have applied ***FRCP 60(b)(6)*** supporting "extraordinary circumstances" in light of 'the consequences and attendant hardships of dismissal or refusal to dismiss' and 'the competing values of judgment and right to litigation of unreviewed disputes.' *Dilley v. Gunn*, 64 F.3d 1365, 1370-71 (9th Cir.1995) (quoting *Ringsby Truck Lines, Inc. v. Western Conference of Teamsters*, 686 F.2d 720, 722 (9th Cir.1982)).

IV. The Questions Presented Are Exceptionally Important.

This case is resolved by simple but important and recurring questions of law.

This Court is presented with clean issues of important but unresolved law. By QUEST'S objections, and NSAC's silence, this Court should resolve the exceptionally important questions.

When the Federal Rules of Civil Procedure (FRCP) were created in 1938, their purpose was simple: "secure the just, speedy, and inexpensive determination of every action and proceeding." This purpose has become muddled over the years especially during pandemics such as Covid-19. FRCP are not statutes because they

are not enacted by Congress and are not regulations because they are not issued by a federal administrative agency. Instead, FRCP is drafted by an Advisory Committee, and its proposals are subject to publication and public comment.

FRCP 60 proposal to deny DNA/HIV testing has never been publicized nor up for public comment.

The Federal Government *can* constitutionally "encroach" on an area previously 'regulated' solely by the 'states', as already addressed by this Court. *United States v. International Boxing Club of New York*, 348 U.S. 236 (1955), (where this Court decided that even though the boxing matches were indeed of a "local" nature, the fact that they were promoted, televised, and broadcasted on a multistate level made them amenable to Federal Law).

This Court has held invasions of the body are searches and, thus, are entitled to the protections of the Fourth Amendment. *Schmerber v. California*, 384 U.S. 757, 767-71, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966) (blood).

Nothing prevents or even complicates this Court's resolution of the Questions Presented. The Ninth Circuit was supposed to review findings for clear error, *FRCP 52(a)(6)*, instead it created a double standard by failing to protect the Fourth and Fourteenth *Amendments* to the same extent they protect *other* constitutional rights.

In QUEST'S view none of this matters. But contrary to QUEST'S argument, the Questions Presented and statute of limitations will come into play in many suits seeking DNA/HIV testing because state-court litigation is rarely swift. The testing is relevant to TOMMY'S injuries traceable directly to *that* QUEST 1996 LDT/result, and QUEST'S degree of resistance to replicate its 1996 result may be admissible to show consciousness of guilt.

MORRISON can "allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *California v. Texas*, 141 S. Ct. at 2104 (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006)).

MORRISON can connect "the judicial relief requested" and the "injury suffered." *Id.* (quoting *Allen v Wright*, 468 U.S. 737, 753 n.19 (1984)).

CONCLUSION

MORRISON is not an attorney. No Federal Judge, nor Magistrate Judge, has ever taken into submission MORRISON is vexatious and harassing as accused in QUEST'S BIO.

MORRISON is honored and thankful to receive kind words from the only woman lawyer from the State of Nevada elected a fellow of the International Society of Barristers, the International Academy of Trial Lawyers, and the American College of Trial Lawyers.

Magistrate Judge Lean was both a criminal and civil trial lawyer.

> **"Ms. Morrison has appeared before the court and has conducted herself appropriately. She is an intelligent and articulate woman." Order by Magistrate Judge Peggy A. Lean. (dkt#184 P.2:17-18).**

The petition should be granted.

Respectfully submitted,

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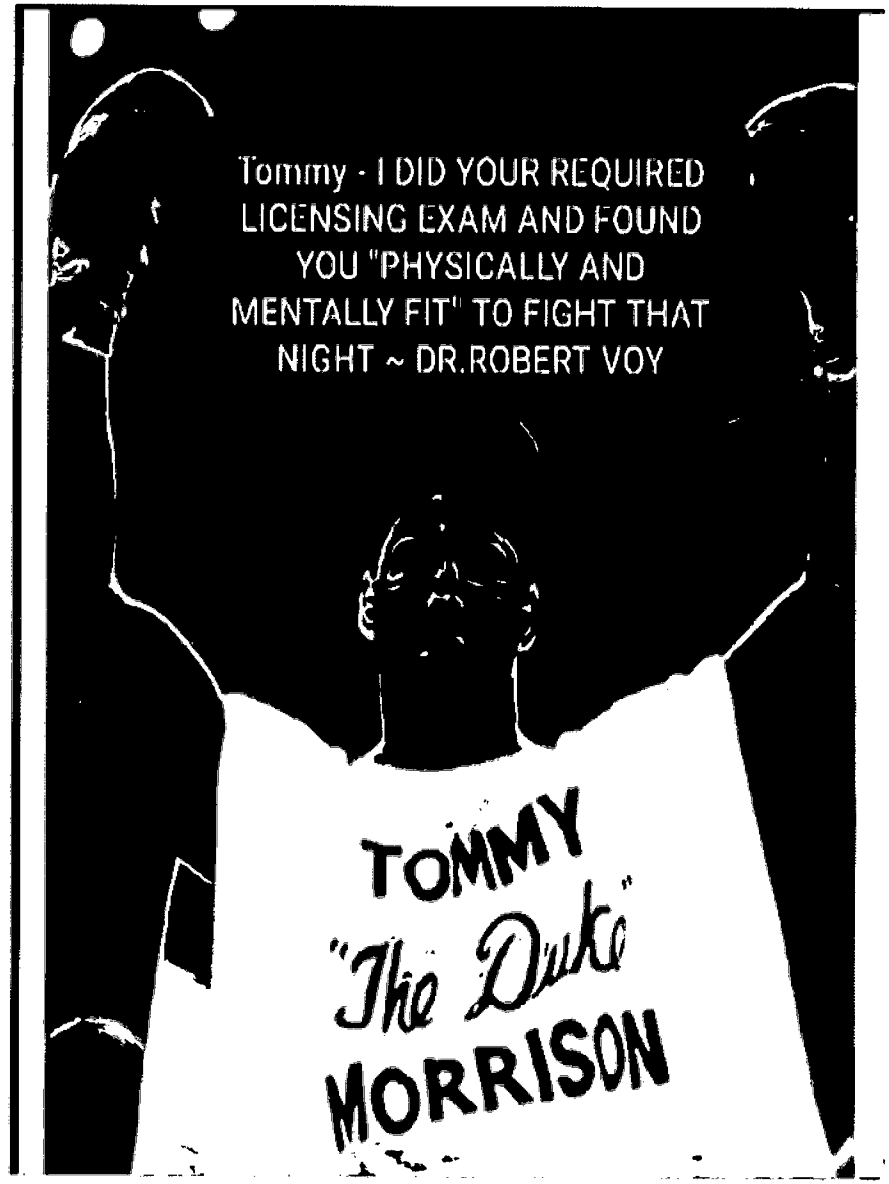
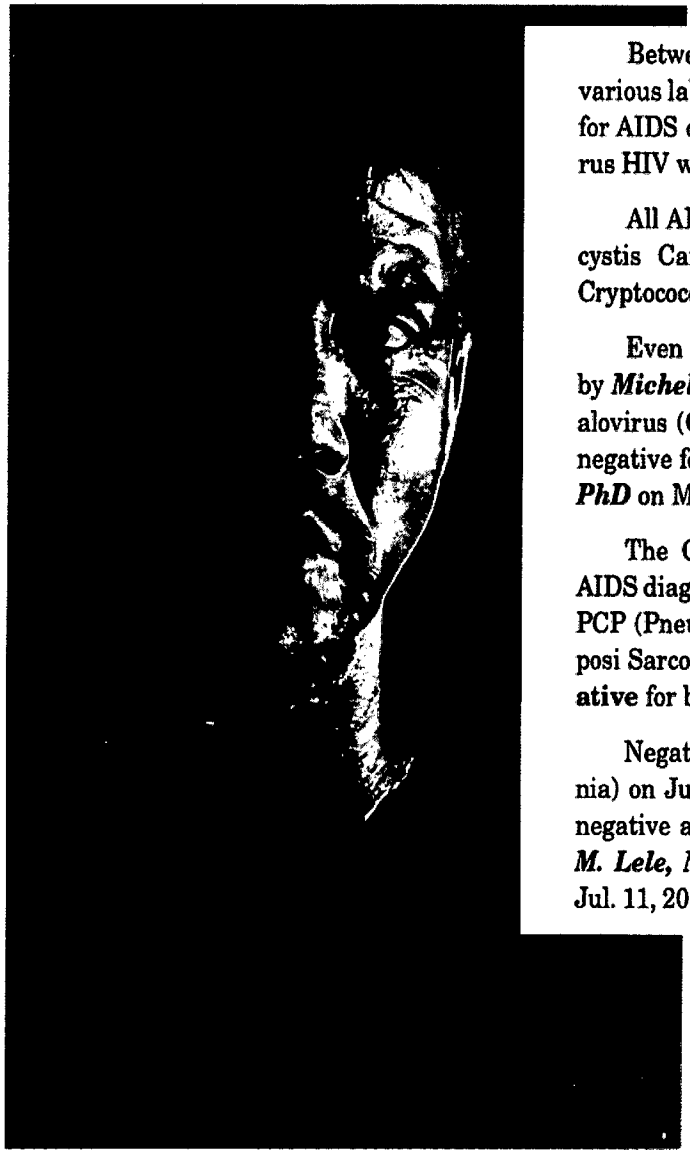
Dated: June 3, 2022

U.S. SUPREME COURT

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."**





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***.

U.S.SUPREME COURT

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 post-mortem report – **"No viral inclusions, fungi or bacterial forms are identified."** This antemortem

G. Petur Nielsen, MD

U.S.SUPREME COURT

Page.11/12

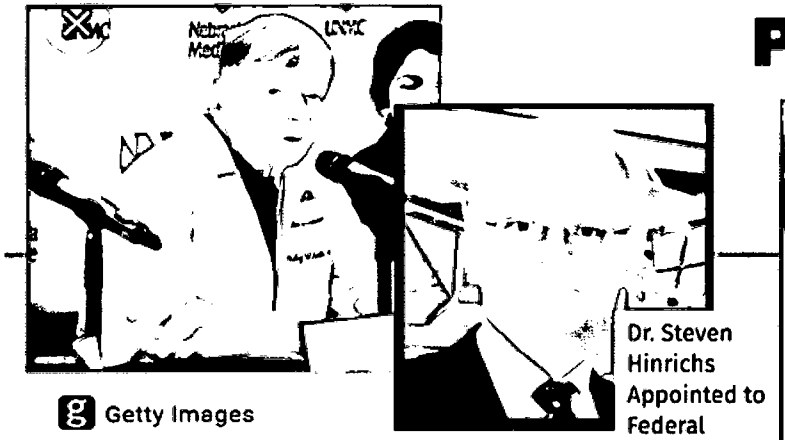
Pathologist,
Massachusetts General Hospital
Professor of Pathology,
Harvard Medical School

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.

U.S. SUPREME COURT

Page.10/11

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



Getty Images

Dr. Phil Smith,

11

Dr. Steven Hinrichs Appointed to Federal Committee

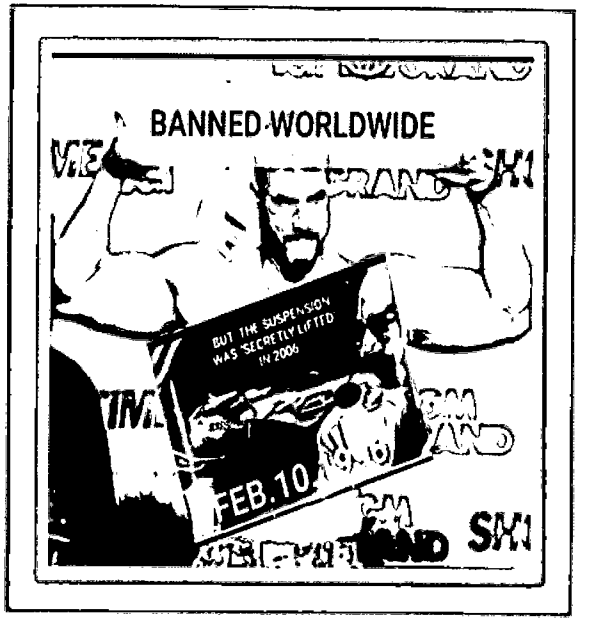
October 1, 2017 | Categories:

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

Page.15

U.S. SUPREME COURT



(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.