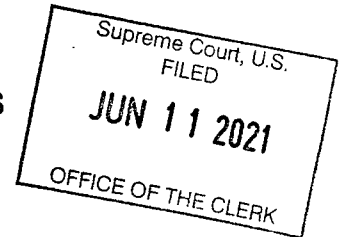


21-5083
No. _____

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES



Corbin Breitenbach — PETITIONER
(Your Name)

VS.

State of Kansas — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

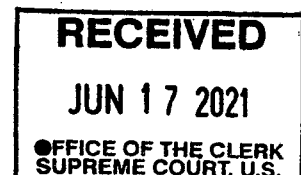
PETITION FOR WRIT OF CERTIORARI

Corbin Breitenbach
(Your Name)

El Dorado Corrections, P.O. Box 311
(Address)

El Dorado, KS 67042
(City, State, Zip Code)

N/A
(Phone Number)



QUESTION(S) PRESENTED

1. Did the District Court abuse its discretion in denying Breitenbach's request for independent DNA testing?
2. Did the District Court abuse its discretion in denying Breitenbach's request for new appointed Counsel?
3. Did the District Court abuse its discretion in denying Breitenbach's request for Stand-by Counsel?
4. Did the State violate Breitenbach's due Process rights by failing to disclose exculpatory evidence of fingerprint testing?

LIST OF PARTIES

☒ All parties appear in the caption of the case on the cover page.

[] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

- The District Court of Sedgwick County, Kansas
Honorable John J. Kisner, Judge
District Court Case NO. 17-CR-1783
Judgement entered 9-24-18
- Appeal from the District Court of Sedgwick County, Kansas
to the Supreme Court of the State of Kansas
Appeal NO. 19-120503-S
Judgement entered 3-26-21

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Mandate

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- not available -

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- U.S. v. Ellison, 798 F.2d 1102 (CA 7, 1986) 14.
- Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct 1173 (1978) 14.
- State v. Matzke, 236 Kan. 833, 837, 696 P.2d 396 (1985) 16.
- State v. Redick, 307 Kan. 797, 806, 414 P.3d 1207 (2018) 17.
- Fareta, 422 U.S. at 834 n. 46 17.
- State v. Warrior, 294 Kan. 484, 505-06, 277 P.3d 1111 (2012) 18.

Statutes or Rules

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ 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.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A 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 Kansas Supreme Court court appears at Appendix C to the petition and is

- ☒ reported at 2021 Kan. Lexis 33; or,
☐ has been designated for publication but is not yet reported; or,
☐ 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).

☒ For cases from state courts:

The date on which the highest state court decided my case was 3-21-2021.
A copy of that decision appears at Appendix A.

☐ 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

- Amendment [V] to U.S. Constitution

- No person shall be held... without due process.

- Amendment [XIV] to U.S. Constitution

- ... No state shall make or enforce any law which shall abridge the privileges or immunities of United States Citizens...

STATEMENT OF THE CASE

On June 10, 2017 a seven year old girl was assaulted while spending the night at a family friend. Police were called and evidence was documented and collected. Extensive physical evidence was documented and collected, to include; finger print in sliding glass door where it was suspected perpetrator entered the residence, suspected semen stains on couch where victim expressed attack occurred. Forensic evidence was submitted and the lead detective personally transported the evidence to the regional forensic science center. The lead detective then requested the science center expedite the testing, which the science center did. On June 13 the testing began. On June 15, 2017 the testing was finished and loaded into the CODIS data base. The lead detective testified to never having DNA samples tested and confirmed in that short a period. Several of the swabs tested presumptively positive for semen, only one was inculpatory to the defendant. A CODIS match identified Corbin Breitenbach as a potential match. On June 15, 2017 Corbin Breitenbach was arrested, a complaint was filed charging Breitenbach with attempted capital murder, aggravated criminal sodomy, burglary.

- Pre-Trial proceedings: On June 20, 2017 Mark T Rudy became the attorney of record and attempted to coerce the defendant into taking a 50 year guilty plea agreement.

Continued on "Statement of Case cont."

Statement of Case Cont.

After a heated discussion, where Breitenbach vehemently asserted his innocence, Mark Rudy withdrew from the meeting expressing that there was nothing he (Mark Rudy) could do for Breitenbach and that he (Mark Rudy) would appoint someone else to represent me. On June 28, 2017 Eli O'Brian becomes the second attorney from the public defenders office to represent Breitenbach and on August 23, 2017 the preliminary hearing was held. Breitenbach was bound for trial. On November 17, 2017 O'Brian notified the district court that he would be leaving the public defenders office and entering private practice, therefore withdrawing from Breitenbach's case. Jason Smartt appeared at the same hearing and was appointed as Breitenbach's 3rd public defender. At the hearing Breitenbach said he was unhappy with the transition of counsel but would not object to a continuance.

Request for New Counsel: On January 11, 2018 Breitenbach filed a pro-se motion for substitution of counsel because 1.) Smartt failed to meet with Breitenbach, 2.) Smartt lied to the court about meeting with Breitenbach to discuss the merits of pro-se motions, 3.) Smartt, and his office, had a conflict of interest with Breitenbach because Smartt was not going to seek independent DNA analysis because of the impact it would have on the office's indigent defense fund. Breitenbach's motion was heard on January 18, 2018 and the defendant was allowed to argue the merits of the request. Breitenbach explained that there was a lot of material evidence in his case that was not being tested because the Public Defenders Office wanted to save money. When given the opportunity Mr. Smartt did not set forth any additional information. The district court believed there was no right to testing if the state already had testing done. The district court denied Breitenbach's motion.

explaining that while Bill Gates could get the testing done and have a better opportunity at proving his innocence, there was nothing indicating Breitenbach was getting constitutionally inadequate representation. On January 30, 2018 Breitenbach filed another motion for re-appointment of Counsel which was heard on February 6, 2018. Breitenbach expressed to the Court that Mr. Smartt contacting his family to try to get money for the testing was not only a breach of confidentiality but proved his conflict of interest claim by demonstrating the only reason Mr. Smartt wanted to forgo independent DNA testing was to save money. The district court held an ex parte hearing where Breitenbach expressed the state's entire case rested on DNA evidence and further testing would prove his innocence. When the District Court asked Mr. Smartt if there was a dispute with the defendant Mr. Smartt answered "absolutely." The district court failed to obtain further explanation from Counsel. When the district court asked Breitenbach what evidence he wanted tested Breitenbach fully enumerated the items. The district court noted that the ABA had standards for obtaining independent testing but could not find any case law in Kansas to support the request. The District Court explained that Breitenbach showed nothing to question the reliability of the state's forensic evidence and then expressed the reason to forgo independent testing could be a tactical one. The district court denied the motion. Following the denial of Breitenbach's motion, Breitenbach stated he would like to go pro-se. "Lowe" Factors were read and Breitenbach stated he did not want to waive his right to presentation but could not allow Mr. Smartt to sabotage his case. Breitenbach was allowed to go pro-se.

Request for Stand-by Counsel: On February 8, 2018 after

the district court confirmed Breitenbach's continued intent to self-representation. Breitenbach petitioned the court for stand-by counsel. Breitenbach expressed the benefits of stand-by counsel, given the ignorance of the law the defendant presented. The district court denied the defendant's request. Breitenbach renewed his petition for stand-by counsel via written motion, which was never decided or opined on, and oral motion at a hearing on March 6, 2018. The district court once again denied the request noting that while it was a discretionary decision, there was no "basis in law for the court to grant the motion."

Pro-Se Request for DNA Analysis: On June 19, 2018 the district court held a hearing on Breitenbach's pro-se motion for expert services in accordance with K.S.A. 22-4508 and Constitutional due process, to perform independent DNA analysis. The district court held an ex parte portion of the hearing to discuss the need for independent DNA testing. After the State was brought back into the hearing the district court opined that it would have to determine there was a basis to question the validity of the State's evidence to approve independent DNA testing for the defense. Breitenbach argued his request was not a fishing expedition as he was factually and actually innocent. In denying the motion, the district court stated it did not believe the defendant had set forth a real claim to question the reliability or accuracy of the State's evidence as well as admitting there were states on both sides of the issue.

Jury trial and Disclosure of Tested Fingerprint Evidence: The case went to jury trial on an amended complaint charging attempted capital murder, rape (in the alternative), aggravated criminal sodomy,

and aggravated Criminal Burglary. During the cross examination of a witness (Westphall) on the first day of trial Breitenbach discovered the fingerprint evidence he requested to be tested was actually submitted or testing soon after it was obtained by the witness. Breitenbach informed the court that day that he had never received any reports related to the testing of the fingerprint evidence. The State's response to the situation was to say it was not aware of any fingerprint exam. On the second day of trial the state informed the court it was having the report of the fingerprint analysis generated but that it was informed the report was graded "of no value." The report was handed over later that day. On the final day of trial Breitenbach made a record of the report, noted that he believed the report was important to the defense, and had the report added to the record. The report states: "Upon original receipt latent was graded of value, attempts to search AFIS were made w/ negative results. (General + specific to name listed on form) The print was reevaluated and deemed not of value for identification or elimination purposes." The name listed on the form for specific comparison was Robin Breitenbach.

At the conclusion of trial and evidence, the jury found Breitenbach guilty of all four charges. Prior to sentencing Breitenbach filed a pro se motion for new trial arguing, inter alia, the district court erred in denying the reappointment of counsel, the state had failed to disclose exculpatory Brady evidence (fingerprint analysis), the district court erred in denying Breitenbach's request for independent DNA analysis, and the district court erred in denying him stand by counsel. The district court denied the motion. The district court then imposed a sentence of life without parole.

On direct appeal to the Kansas Supreme Court Breitenbach was represented by Clayton J. Perkins #26010. In Breitenbach's appeal to the K.S.C. he argued the district court abused its discretion in denying his request for independent DNA testing. The district court abused its discretion in denying his request for new appointed Counsel, the district court abused its discretion in denying Breitenbach's request for stand-by Counsel, the state deprived Breitenbach of his due process rights by failing to disclose exculpatory Brady v. Maryland evidence, cumulative error deprived Breitenbach of his right to a fair trial.

On March 26, 2021 the Kansas Supreme Court issued its decision denying Breitenbach's appeal on all issues and affirming his convictions. This Writ of Certiorari is an appeal of the K.S.C. decision.

REASONS FOR GRANTING THE PETITION

1.) Did the district court abuse its discretion in denying Breitenbach's request for independent DNA testing?

Argument: Is it an abuse of discretion, when considering a defendant's request for independent forensic analysis, to require a defendant prove the state's evidence is unreliable before being able to obtain the funds necessary to retrieve the expert needed to disprove the State's evidence? When considering this question first you must ask, "What would any defendant need to present to adequately question the reliability of the State's DNA evidence? Would the defendant have to verbalize scientific facts to the Court, which the Court would be able to understand? What if the Court recognised on record that it did not possess the scientific knowledge necessary to understand such verbalizations? Can an average criminal defendant be expected to possess the knowledge necessary to overcome a Court's belief in the reliability of the State's forensic evidence? If the average criminal defendant isn't expected to possess significant scientific knowledge, would s/he be allowed to present an expert in the field to testify to the unreliability of the State's evidence? What if such experts required

Payment for their testimony? How would an indigent defendant receive the funds necessary to obtain the expert testimony needed to "sufficiently question the reliability" of the state's evidence? (before being approved for financial assistance to assist in countering the accusatory instrument in a criminal trial.) The above reasoning would lead to the following hearings:

- 1.) Criminal defendant files petition for expert services.
- 2.) Court requires showing of unreliability.
- 3.) Criminal defendant files petition for expert services to support previous petition for expert services.

- What precedent was the Court relying on to support its decision?

According to the judge who issued the decision in the above captioned case, State v. Snodgrass, 252 Kan. 253, 843 P.2d 720 (1992), and State v. Reynolds, 230 Kan. 532, 639 P.2d 461 (1982) were the leading influences in the denial, although the judge admitted to a lacking Kansas record to assist in the decision. The district court also had K.S.A. 22-4508, which the defendant cited in his pre-trial request, which is directly related to a defendant's petition for expert services and lists out the two-prong "indigent and

necessary" test. None of the sources listed as influencers to the denial stipulated a requirement for the defendant to disprove the states evidence before being allowed the funding necessary to disprove the states evidence. Forcing a defendant to disprove the accusations before being allowed assistance in a criminal trial violates the innocent until proven guilty standard in our Constitution. The only assertion a defendant need make to question the reliability of the states evidence is an assertion of innocence. Breitenbach, on a multitude of occasions, asserted his innocence. The judges requirement violated the Fourteenth amendment and abridged this defendants due process rights. For that, and the reasoning above, the decision to deny this defendants request for independent forensic assistance should be construed as an abuse of discretion. The defendants conviction should be reversed, a new trial given with the assistance of independent DNA analysis.

2.) Did the district court abuse its discretion in denying Breitenbachs request for new appointed Counsel?

Is it an abuse of discretion, when considering a defendants request for the reappointment of Counsel, to assume intent on behalf of appointed Counsel contrary to defense Counsels own statements? Is it an abuse of discretion when a defendant alleges misconduct by his Counsel for a judge to not fully

inquire into the nature of the misconduct. What if a judge partial inquiry into the defendants allegations illicit evidence which supports the defendants allegations? Would an abuse of discretion then arise if a judge decides to abandon the evidence obtained and make a decision contrary to the facts? According to U.S. v. Ellison, 798 F.2d 1102 (CA 7, 1986) and Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct 1173 (1978) the Supreme Court is clear; "When a defendant raises a seemingly substantial complaint before trial regarding the defense attorneys conflict of interest or divided loyalties... the Court must make a thorough inquiry into the factual basis for the defendants complaint." *id.* "That inquiry should be on the record and must be of the kind to ease a defendants distrust, dissatisfaction or concern. If a trial court fails to make a sufficient inquiry, prejudice is presumed and reversal is automatic." *id.*

In the present case Breitenbach alleged, pretrial, that Mr. Smartt (court appointed representative) had divided loyalties to the financial department of the indigent defense service which required him to minimize the amount of money spent on cases he deemed unworthy. Breitenbach wanted an independent forensic analysis of the evidence in his case. Mr. Smartt,

because of his belief in the guilt of his client, decided this would be a waste of money as the department which supplied financial assistance to criminal defendants had a finite supply and the money would be better spent elsewhere. When the defendant informed the Court of Mr. Smartt's non-action/actions via a motion for the re-appointment of Counsel the Court held a hearing. At the hearing, after Breitenbach was allowed to present his motion the judge asked Mr. Smartt; "Is there a dispute as to what evidence will be presented at trial?" to which Mr. Smartt replied; "Absolutely." As if not believing the admission from appointed Counsel the judge repeated himself asking "there is a dispute?" which Smartt then replied "Absolutely." Thus concluding the totality of the Court's inquiry. As if, once again, not believing the allegations of the defendant AND the admission of defense Counsel the judge denied the defendant's request.

This inquiry was insufficient as it did nothing to ease the dissatisfaction, distrust, and concern of the defendant, nor did it obtain facts which support the decision of the Court. The statements obtained from Counsel could only be interpreted as agreeing with the defendant's allegations and the decision

to forge the evidence obtained from the partial inquiry in favor of a conflicting order denying the defendants request has to be construed as an abuse of discretion.

Therefore, pursuant to Holloway v. Arkansas, 98 S. Ct 1173 (1978) prejudice must be presumed and Breitenbach's conviction vacated with orders for the appointment of effective, conflict free counsel and a new trial to be given.

3. Did the district court abuse its discretion in denying Breitenbach's request for stand-by counsel?

Is it an abuse of discretion to fail to recognize the only requirement, when considering a defendant's request for stand-by counsel, is the court's own discretion?

Breitenbach requested the appointment of stand-by counsel at the February 8th hearing, through a pro se motion after the hearing, and argued at the March 6, 2018 hearing.

The appointment of stand-by counsel rests with the sound discretion of the trial court. State v. Matzke, 236 Kan. 833, 837, 696 P.2d 396, (1985). "A failure to recognize that one has discretion and any corollary failure to exercise it are legal errors"

"Constituting an abuse of discretion. State v. Redick, 307 Kan. 797, 806, 414 P.3d 1207 (2018).

Regarding the recognition of discretion in the above Case, the district Court ruled there was "no basis in law for the Court to grant the motion for Stand-by Counsel." However, the matter is one solely of discretion, there is no legal threshold established in Kansas law that must be met to appoint Stand-by Counsel. Stand-by Counsel can even be appropriate over a defendant's objection. Faretta, 422 U.S. at 834 n.46.

Therefore, in its belief that a "basis in law" was necessary prior to the appointment of Stand-by Counsel, the district Court abused its discretion by failing to recognize it had complete discretion. Redick, 307 Kan. at 806. A new trial should be given with Stand-by Counsel appointed.

4. Did the district Court violate Breitenbach's due process rights by failing to disclose exculpatory evidence of fingerprint testing?

Prior to trial Breitenbach requested all forensic evidence that was analyzed by the state, and identified a latent fingerprint taken from the sliding glass door the perpetrator is alleged to have used to break into

Brandyberry's apartment as a piece of physical evidence that he wanted tested. During trial it was determined that not only was the latent print tested but the results of the test was given to the State. The State denied the claim, giving the defendant a copy of a report it had generated on the third day of trial.

The report stated the print had originally been graded of value and was searched against AFIS both generally and specific to Breitenbach with negative results.

Prosecutors have a duty to disclose favorable evidence to the defense, Failure to disclose such evidence violates an accused 14th Amendment rights. State v. Warner, 294 Kan. 484, 505-06, 277 P.3d 1111 (2012)

Therefore, Breitenbach's Convictions should be overturned with a new trial ordered where the defense has an opportunity to use this exculpatory evidence.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Corbin Breitenbach

A handwritten signature in black ink, appearing to be 'Corbin Breitenbach', written over a horizontal line.

Date: 5-27-21