

MAY 30 2021

OFFICE OF THE CLERK

No. 21-5705ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Lazaro Fernandez — PETITIONER
(Your Name)

vs.

Jonathan W. Blodgett — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

First Circuit Court of Appeals

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

PETITION FOR WRIT OF CERTIORARI

Lazaro Fernandez

(Your Name)
MCI Shirley, Medium
P.O. Box 1218
1 Harvard Road Shirley, MA 01464

(Address)

Shirley, MA 01464-1218

(City, State, Zip Code)

none

(Phone Number)

QUESTION(S) PRESENTED

Whether it was error for the Court of Appeals to uphold the District Court in denying to order testing of the biology found at the crime scene, the alleged victim's panties in the crotch area, wherein the prosecution stated there was no male DNA biology, but conceded in the courts below that there was saliva found.

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:

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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

[x] For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[x] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[x] is unpublished.

[] For cases from state courts:

The opinion of the highest state court to review the merits 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[] is unpublished.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 _____ 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[] is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was April 28, 2021.

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 _____. A copy of that decision appears at Appendix _____.

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

Fifth Amendment, U.S. Constitution

Sixth Amendment, U.S. Constitution

Fourteenth Amendment, U.S. Constitution

Title 28 U.S.C. 1331 and 1343

Title 42 U.S.C. 1983 et seq

Title 28 U.S.C. 1254(1)

STATEMENT OF THE CASE

On November 22, 2006, the complainant was living with her mother, two sisters, and a brother, as well as her mother's boyfriend, the co-defendant in this matter. He is Cardoza, and they all lived together in Lawrence, Massachusetts. The complainant was 14 years of age at the time, and attended a school that was five to ten minutes walk from her home. She found co-defendant Cardoza easier to speak to than her mother and talked to him about school, boys and friends. She had met his friend, Lazaro Fernandez, the petitioner in the instant matter and had been to his home at a family cookout.

On November 22, 2006, the Wednesday before Thanksgiving, the complainant was home preparing to walk to school. Her mother and siblings left and Cardoza asked her to skip school. Cardoza went to the store. When he came back to the living room about twenty-five to thirty minutes later, he told her that he did not like that she was "hanging out" with the guys and that she should start using them for money. He suggested that she "mess around" with an older man who had money. He also explained to her what an orgasm was. He asked her to follow him into his bedroom. In the bedroom, he locked the door. He asked her to relax and then touched her breasts and licked her hand, neck and ear. He also touched her vagina over her clothes. He licked to top of her breasts. He said he wanted to have

sex with her in her mother's bed, but she said no. He said okay, and she walked into the living room.

While she was in the living room, Cardoza came and told her not to act suspicious around her mother. He went back into the bedroom and called her. He asked her to lock the door and when she turned around, he pulled his pants down. She saw his penis with two tattoos on it that said "Kim" and "lick it me." She then went to her room and took off her shoes. She went back into the living room and asked Cardoza for money. He gave her money and told her to call Lazaro Fernandez and ask him for forty dollars.

When Lazaro Fernandez answered, she read him a letter. He asked her if he could take a naked picture, if she would give him a "blow job" and if she would sleep with him, to which she answered no. Cardoza told her he was leaving because he did not want to be there when Lazaro Fernandez came. This is alleged by the complainant.

The complainant testified that the defendant came over five minutes after the call. She heard a knock at the door, but when she opened the door to her apartment no one was there. She then went downstairs to check and he came in. They were both standing in the staircase. He asked her if she would let him take a picture and she said no. He pulled down her shirt and bra, told her to hold it and took a picture with his phone. Her breasts were exposed. This is more testimony of the complainant..

She said Lazaro Fernandez then undid her pants and

lowered her underwear. He took a picture of her vagina and "tried" to lick her. The complainant testified that he licked the top but she was backing away.

The first floor neighbor, Harves Diaz, walked in and said hello to her. Diaz testified that he walked into the staircase and saw the complainant with a man.

Lazaro Fernandez is claimed to have told the complainant that he would give her forty more dollars if she was willing to have sex with him, but she said no. She then testified that Lazaro Fernandez left and she went upstairs.

The next morning, Thanksgiving, the complainant testified she told Cardoza that she was going out to buy clothes. When she left, she called a friend, Tanari, to pick her up. She told her friend that there was stress in the house and she needed a place to stay and that something had happened between her and her stepfather.

Tanari and her sister picked her up. She told them that something had happened with her stepfather and his friend. When they got to Tanari's house, she told her that something had happened. She stayed there a couple of hours. Tanari's mother then drove her to Jesus Rodriguez's house. She stayed with Jesus Rodriguez until Sunday.

The complainant testified that Jesus was her friend, and became her boyfriend months later. The complainant later testified that she had mentioned her boyfriend, J.R. an 18 year old at Lawrence High School, at her initial interview with police, but that J.R. was not Jesus Rodriguez.

She testified that she did not know J.R.' name despite dating him for a couple of months.

The police searched Lazaro Fernandez's phone, but it did not contain any pictures of the complainant.

In September of 2006, two months prior to the time of the allegation, the complainant and her family were involved with the Department of Social Services as a result of allegations that the complainant's mother had assaulted her. That same month, her mother also filed a CHINS petition at juvenile court. That is a petition stating that a child is in need of social services intervention. Also, in September, the complainant began attending after school programs.

Prior to the date of the allegations, the complainant had left her home on three occasions, she had lied to her mother about where she was going. On those occasions, she lied to her mother about where she was going and as a result, her mother punished her by taking away her privileges and becoming more restrictive and controlling. At the time, she argued with her mother frequently. In the fall of 2006, the complainant's mother was called to school and to bring a change of clothes after the complainant left her apartment and changed clothes at school and her mother's negligee was found in her backpack. The complainant had issues that fail with absences from school programs, and she was home watching her sister's which she did not like to do.

Before the incident, her mother had a rule that the complainant could not have friends over that she and Cardoza

did not know. The complainant violated that rule and was caught by Cardoza speaking to a boy in the middle of the night from her window. She had spoken to this man on the phone previously on a two-way call, but did not know him. She had given him directions to her home. Her mother and Cardoza had changed the phone number at the house because she had given the number to too many people who were calling often.

She told the social worker that she did not want to live at the house or with her mother.

On October 26, a month prior to the allegations, she was suspended from the inner city program for a serious violation of the rules. Her mother grounded her. She threatened to run away. She also said that her mom called the police, and she was going to find her dead. Her mother took the complainant to Lawrence Hospital where she told them that she was just angry at her mom.

Lazaro Fernandez presented a number of witnesses in support of his alibi defense. This evidence included testimony that he was at work the morning of the incident and that the Commonwealth's witness Harves Diax, was in school and could not have seen the complainant that morning.

In addition, Armand Hyatt, an attorney for Lawrence Community Works, testified regarding records that he brought pursuant to a subpoena for Movement City, the Youth Division of Lawrence Community Works. He testified that the complainant was suspended on October 26, 2009.

Paul Zambella testified that he was the forensic scientist who examined the complainant's underwear. He testified that no saliva was found.

REASONS FOR GRANTING THE PETITION

The petition should be granted to allow Lazaro Fernandez to return to state court and collaterally argue his appeal wherein by the use of DNA testing results, he would be able to show that he is innocent of the charge for which he is presently imprisoned. And, there is precedent from this court that militates in favor of allowing this petition and ordering DNA testing so that Lazaro Fernandez may return to state court and prove he is actually innocent of the crime charged.

Upon review and reflection, it is clear that the holding of this court in Skinner v. Switzer, 562 U.S. 521 (2011) is controlling and extremely similar to the situation Lazaro Fernandez presents in the instant action. In Skinner, supra, this Court reported that Skinner had twice attempted to obtain DNA testing under the then existing Texas law and been denied. So too, in the instant case, Lazaro Fernandez has twice sought DNA testing under the only existing Massachusetts law, the only law available to Lazaro Fernandez, and twice been denied pursuant to M.G.L. c. 278A.

Probably answering some questions that might be put forth by the Commonwealth, Skinner, supra, held inter alia, that seeking DNA testing in a 42 U.S.C. § 1983 action is cognizable under the statute; it is a right recognizable under the Fifth and Fourteenth Amendments to the United States Constitution; the Rooker-Feldman doctrine does not

bar this action because Lazaro Fernandez is not challenging the state court decision itself; and, this action is not the equivalent of a habeas corpus action because Lazaro Fernandez is not seeking release from prison or the shortening of his sentence, he is merely seeking prospective injunctive relief not to the biology from the crime scene to have DNA testing so that he can prove he is actually innocent of the crime for which he has been convicted, and when he get the favorable DNA test results, he will then have to initiate a new and distince proceeding in state or federal courts under a different statute seeking relief, Rule 30 in the state court or habeas corpus in the federal court, and therefore this action is not the same as what has been previously filed and the results, although intended for use, will not affect Lazaro Fernandez's incarceration.

In Wade v. Monroe Ct. DA, Civil Action No. 2:15-cv-00584 (D. Penn., May 13, 2019), the court held that relying upon this Court's decision in Dist. Attorney's Office for Third Judicial Dist. v. Osborne, 557 U.S. 52 (2009) as well as Skinner v. Switzer, 562 U.S. 521 (2011), that:

"Here, as in Osborne, we find that Wade has an analogous state-created liberty interest in demonstrating his innocence in the context of post-conviction proceedings with appropriate evidence. See Wagner v. Dist. Attorney Allegheny Cty. Civil Action No. 11-762, 2012 U.S. Dist. LEXIS 79951, 2012 WL 290093, at *8 (W.D. Pa. May 21, 2012)"

Consequently, post Osborn and post Skinner, the federal courts have dealt with the issues and have granted relief

in the form of an order for DNA testing. Just as in the Lazaro Fernandez case pending before this court, the Wade court ordered relief.

In the current pleading, Lazaro Fernandez submits that the Rooker-Feldman doctrine bars review by this court of any state court decisions for legal error, as established most recently by this Court in Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280 (2005), that holding does not bar this Court from allowing relief as presented by Lazaro Fernandez for exercising his federal constitutional rights, stated another way, any state court holdings were the state v. Fernandez, and this federal holding is Fernandez v. Blodgett, a totally different pleading that is not an appeal from a state court adverse holding. As the Wade court held, Lazaro Fernandez too is entitled to press his constitutional claim under 42 U.S.C. 1983, et seq. for the relief he seeks.

It is true that Lazaro Fernandez's claim is a narrow one, just as stated in Wade, however, as the court held in Wade:

"The question properly before us is a narrow one. Whether the Pennsylvania post-conviction DNA testing statute as construed by the state courts in Wade's case, 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental, or transgresses any recognized principle of fundamental fairness in operation.' Osborn, 557 U.S. at 69."

The court in Wade went on to say:

"But weighing the record before us, we nevertheless find that the particular-and peculiar-construction of the state post-conviction DNA testing statute applied by the PCRA court in Wade's case was fundamentally unfair."

So, too, in Lazaro Fernandez's case, the application as applied is fundamentally unfair. Relief was granted in the Wade case, and relief should be granted in the Fernandez case.

The District Attorney's Office for the Third Dist. v. Osborn, supra, left unresolved the question of whether a convicted state prisoner seeking DNA testing of crime-scene evidence may assert that claim in a civil rights action under 42 U.S.C. § 1983 action or may assert the claim in federal court only in a petition for a writ of habeas corpus under 28 U.S.C. § 2254. The Skinner, supra, decision has now resolved that question in favor of the state prisoner seeking access to biological evidence from the crime-scene for the purpose of DNA testing to prove actual innocence, and the Wade court embraced that holding and allowed relief in the Wade case.

And, pursuant to Federal Rules of Civil Procedure, specifically 8(a)(2), Lazaro Fernandez is only required to present a plausible "short and plain" statement of his claim, not an exposition of his legal argument. And, Lazaro Fernandez has presented his argument supra, that he has twice been denied access to the crime-scene biology

for the purpose of DNA testing to prove he is actually innocent of the crime for which he has been convicted of in state court. And, just as Skinner's counsel did not challenge the prosecution's conduct or the court decision, so too, Lazaro Fernandez likewise challenges only Massachusetts' post-conviction DNA statute "as construed" by the Massachusetts courts.

The Rooker-Feldman doctrine does not bar Lazaro Fernandez's suit. This Court has applied the doctrine only in the two cases from which it takes its name. Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) and District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) as explained in Exxon Mobile Corp. v. Saudi Basic Industries Corp, 544 U.S. 280 (2005). All of this is contained in the Skinner, supra, opinion.

Although Wade v. Brady, 460 F.Supp.2d 226 (D.Mass. 2006) predates the Skinner, supra, case, it is a major holding of Massachusetts litigation in that forum, and has now been affirmed in the Wade case most recently in the Third Circuit. The right to DNA testing of crime-scene evidence was recognized in the Massachusetts District Court as early as 2006 as noted in the Wade case.

Lazaro Fernandez's sole remedy presently is to solve the crime for the Commonwealth of Massachusetts. This he attempts to do, but the Commonwealth, its agents courts have not been willing to solve the crime, instead blocking Lazaro Fernandez's attempts to obtain DNA testing of the

crime-scene biology in this matter, that of the underwear of the alleged victim. Lazaro Fernandez has claimed an alibi defense, he was at work the day of the incident, he is accused of taking pictures of the victim on his phone, but when police searched his phone, there were no pictures, and the veracity of the victim has already been reduced, as she told stories in the past that turned out to be less than truthful. Thus, in the instant matter, Lazaro Fernandez submits that DNA testing of the biology of the alleged victim's underwear will exclude him and show the untruths that the aleger has perpetrated upon the Commonwealth, its agents and courts as well as Lazaro Fernandez.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in cursive ink, appearing to read "Lizzo Remondy". The signature is written over a horizontal line.

Date: May 30, 2021