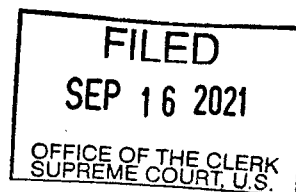


ORIGINAL



No. 21 - 5751

IN THE
SUPREME COURT OF THE UNITED STATES

Charles Kovary — PETITIONER
(Your Name)

vs.

Willis Chapman — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of appeals for the sixth circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Charles Kovary 247122
(Your Name)

Thumb Correctional Facility, 3225 John Conley drive,
(Address)

Lapeer, Mich. 48446
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

- 1) Was Appellate Counsel ineffective for failing to raise trial counsel's ineffectiveness for failing to fully investigate Alibi witness, and help Alibi witness prepare a correct affidavit that the Court would understand in legal terms, and to have Alibi witness testify?
- 2) Was Appellate Counsel ineffective for failing to raise trial counsel's ineffectiveness for failing to request a retest of DNA Evidence of two semen stains left by perpetrator at crime scene, that Michigan State Police Crime Laboratory provided inconclusive Nuclear DNA analysis of perpetrator's biological material, and seek Mitochondrial DNA analysis that has been proven in court to come back with a profile that would demonstrate Petitioner's factual innocence?

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

- 1) Strickland v. Washington, 466 US 668, 689, 694 (1984).
- 2) United States v. Beverley, 369 F.3d 516, 529 (6th Cir. 2004).

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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 A,C 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☐ is unpublished.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 B,D to E 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 E 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 of Appeals state of Mich. court appears at Appendix F 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 6-23-2021 and 12-01-2020

☒ 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 4-28-2015.
A copy of that decision appears at Appendix E.

☐ 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

At Appendix A Pg. 4, 28 U.S.C. 2254(d)(1), and 28 U.S.C. 2254(d)(2).

At Appendix A Pg. 6, other bad acts, Confrontation clause issues. Sixth Amendment.

At Appendix D Pg. 2 Sixth Amendment and Antiterrorism and Effective Death Penalty Act of 1996 Pub. L. 104-132, 110 Stat. 1214 (AEDPA) and Pg. 9. Title 28, section 2244(d)(1) of the United States Code provides: (1), (A), (B), (C), (D).

Pg. 11 Rule 2(c) of the Rules Governing 2254 cases.

Pg. 12 28 U.S.C. 2242. and Pg. 13 28 U.S.C. 2244(d)(2), and section 2241(d)(1)(D), and Pg. 14 section 2244(d)(1)(D), Pg. 15 MCR 6.502(6)(2)

Pg. 17 Michigan Rule of Evidence 804(b)(1), Pg. 18 MRE 804(a)(4)

Pg. 19 MRE 804(b)(1), Pg. 22 Michigan Court Rule 6.508(D)(3)

Pg. 30, 28 U.S.C. 2253(c)(2)

Appendix E MCR 6.508(D)

Appendix F MCR 6.508(D)

STATEMENT OF THE CASE

Trial Facts: Charles Kovary was charged by jury trial of two counts of first-degree criminal sexual conduct, and one count of first-degree home invasion.

The Prosecutor's Theory of Case: Prosecution argued that on the night of September 27, 2009, Mr. Kovary and his friend Coley Riggs entered the Fireplace Inn of Karlin Michigan that Monica Richardson ran, and lived in an apartment above the inn. Ms. Richardson was asleep in her bed when someone wearing a hoodie entered her bedroom and attacked her, hitting her, grabbing her by the hair and forcing her to engage in two acts of sexual penetration. Although Ms. Richardson did not see the face of the man who attacked her, she saw his outline, and she testified that he was thin and about 6'1" tall. A second person kicked her in the side of her head while she was on the floor. (Trial Tr. 101, #1; Page 162-167). Ms. Richardson testified that she recognized the voice of the perpetrator as that of a man whose wedding reception she had worked on and attended just a few weeks earlier. She knew the man

as "Chaz" and had heard his voice three or four times prior to the wedding reception. (Trial Tr. Vol. #2, page 170, 186-188).

Corey Riggs: who described himself as a "professional alcoholic", (Trial Tr. Vol. #3, page 362). Testified that he had entered into a plea agreement, in exchange for his testimony the criminal sexual conduct charges that carried a life sentence would be dropped. (Trial Tr. Vol. #3, page 359 at 25). He then pleaded guilty to one count of first-degree home invasion and agreed to testify that Mr. Kovary was the perpetrator. At the time of his testimony, Mr. Riggs had been sentenced to 7-20 years for the home invasion. (Trial Tr. Vol. #3, page 333-334). Mr. Riggs testified that he witnessed Mr. Kovary force himself in acts of sexual penetration on the victim Ms. Richardson. Mr. Riggs also testified that, he, himself, kicked the victim in the side of her head. (Trial Tr. Vol. #3, page 342-349).

Defense Theory of Case: The Defense said that Mr. Kovary was not guilty of these offenses, and it was a case of mistaken identity. Additionally, Prosecution witness Corey Riggs had a motive to fabricate false testimony implicating the defendant.

Christopher Barsheff of the Grand Traverse Sheriff's Department collected evidence at the scene. On October 1, 2009, he examined Defendant

Kovary's purple jeep. (Trial Tr. Vol. #2; page 223-224), and documented the tread patterns on the jeep's tires. (Trial Tr. Vol. #2; page 242, 245-267). A forensic scientist who testified as an expert in tire track impression analysis testified that the tread impressions on Kovary's jeep could not be identified as matching tread impressions found at the scene. (Trial Tr. Vol. #2; page 295-299).

Voice Misidentification: Counsel substantiated his theory of voice misidentification with testimony of Dr. Robert Shomer, an expert in auditory perception. Dr. Shomer testified that voice identification is accurate less than 50% of the time, and stress reduces the accuracy of voice identification. (Trial Tr. Vol. #4; page 427-429, 435-37).

Deputy Sheriff Matthew Jerome: testified for the defense, that when he first questioned Ms. Richardson after the 2009 assault she said she did not know who her assailant was, but when he interviewed her a second time in the hospital, she said she recognized her assailant as Defendant Kovary by his voice. (Trial Tr. Vol. #3; page 408-409).

Other Evidence of Kovary's Innocence: Please see Kovary v. McLaren 202045 Dist Lexus 102282 at pg. 5-6. The District Court incorrectly decided that the alibi witness, "does not state she saw petitioner in bed asleep between 3:15 am, and 3:30 am. Galbraith states that around 3:15-3:30, she got up to get ready for work." Id. Please see Attachment (A), Alibi witness Sandra Galbraith sworn affidavit. Ms. Galbraith states that on 9-29-2009 around 3:15-3:30 am, she got ready for work and, "I saw my son Charles Elmer Kovary in his master bedroom sleeping." Also, the District Court incorrectly decided that the victim did not testify that she made a phone call two minutes after the Petitioner left. She did not testify that she used her phone to make a call two minutes later. Please see the following record facts. The victim testified that the assault ended around 3:45 am, on 9-29-2009. (Trial Tr. Vol. #2 pg. 191 at 13). She testified that "after the two minutes that I felt was up, I called my mom's boyfriend Mike Keis (Keyes)." (Trial Tr. Vol. #2 pg. 181 at 14). Please see attachment (B) Police File class 11001/22001 original by Jerome on 9-29-2009 pg. 4 Michael Keyes statement. Keyes stated that he had received a telephone call from Richardson at 3:47 am, in the morning and this is when Richardson had called him after the incident had happened, however, his

phone was out in the kitchen on the battery charger. Mr. Keyes's phone records demonstrate the exact time Mrs. Richardson called him. Therefore, the assault ended about two minutes before 3:47 a.m. Please review the complaint felony which is attachment (c) to this petition in showing when Monica Sue Richardson states approximately 2:30 a.m. is when assault started.

Also Richardson states there were three individuals who disguised their appearance in this Complaint Felony. Not two, not one but three individuals had part in Richardson's assault.

Key prosecution witness Corey Riggs lied to investigators twice before he told the "true story" alleging Kovary was involved in the crime.

(Trial Tr. Vol. #3; Page 358 at 16), Mr. Riggs had a motive for fabricating a third story. The fact that his third story lead to a plea agreement that got him out of a life sentence, (Trial Tr. Vol. #3; page 359 at 25).

The victim Ms. Richardson testified that the attack ended around 3:45 A.M. (Trial Tr. Vol. #2; page 191 at 13-16).

Corey Riggs testified that he might have dropped Kovary off at home around 1:30 A.M. (Trial Tr. Vol. #3; page 362 at 5). Consistent with Mr. Riggs statement, Defense counsel provided corroborating testimony from Michael Bellman. Mr. Bellman testified that Corey Riggs told him that he did in fact drop Mr. Kovary off at home around 1:00 A.M. (Trial

Tr. Vol. #3; page 397 at 11; page 402 at 7).

Closing Argument And Verdict: The case against Mr. Kovary was not overwhelmingly strong. Evidence of a close case, is the fact that the State failed to present physical evidence of connection. Perpetrator's tire tread marks did not match Kovary's jeep that Corey Riggs alleged was used in the crime. The state did not present a DNA profile. Even though there was ample biological material left on a towel by the perpetrator. (Dec. 11, 2009 Motion Tr. page 10 at 12); (March 10, 2010 Trial Tr. pg. 324 at 10). Instead in closing argument the prosecutor inappropriately argued that the lack of physical evidence was due to Defendant's experience in committing this type of crime. (Trial Tr. Vol. #4; page 493 at 10).

Another fact that suggest that it was a close case, is that the jury initially deadlocked and stated they "cannot come to a unanimous decision." (Trial Tr. Vol. #4; page 521 at 7). The jury deliberated for almost 24 hours, even though they heard argument and evidence for less than three days. (Trial Tr. Vol. #1 March 8, 2010; 1:36 P.M.; page 3 at 1). (Trial Tr. Vol. #4 March 11, 2010; 11:33 A.M.; page 518 at 16). The jury's statement and lengthy deliberations suggest a difficult case.

REASONS FOR GRANTING THE PETITION

AMENDED CLAIM

The Michigan state Police crime Laboratory Provided INCONCLUSIVE NUCLEAR DNA ANALYSIS OF PERPETRATOR'S BIOLOGICAL MATERIAL. TRIAL ATTORNEY'S AND APPELLATE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE IN FAILING TO SEEK MITOCHONDRIAL DNA ANALYSIS THAT DEMONSTRATES PETITIONER'S FACTUAL INNOCENCE. THUS, BUT FOR COUNSEL'S DEFICIENT PERFORMANCE, THE RESULT OF THE PROCEEDINGS WOULD HAVE BEEN DIFFERENT.

HABEAS RULE 6 DISCOVERY REQUEST

PETITIONER KOVARY REQUEST DISCOVERY OF TWO SEMEN STAINS ON WHITE COTTON TOWEL, LEFT AT CRIME SCENE BY PERPETRATOR AND MARKED AS ITEM #52. REQUEST MT DNA TESTING.

Applicable Law: A petitioner in Federal court is not entitled to discovery as a matter of course, such a petitioner is entitled to discovery upon a showing of good cause, *Bracy v. Gramley*, 520 U.S. 899, 903-05, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997). Therefore, discovery is appropriate where specific allegations show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is entitled to relief or that the discovery will lead to relevant evidence to support his claims. *Id.* at 908-09. Rule 6(a) of the Rules Governing Section 2254 cases in the United States District Courts provides: "A Judge may, for good cause, authorize a party to conduct discovery under Federal Rules of Civil Procedure and may limit the extent of discovery," "The burden of demonstrating the materiality of information requested is on the moving party[.]" *Stanford v. Parker*, 266 F.3d 442, 460 (6th Cir. 2001). Cert. denied, 537 U.S. 831, 123 S.Ct. 136, 154 L.Ed.2d 47 (2002), however, a petitioner need not show that additional discovery would definitely lead to relief. Rather, he need only show good cause that the evidence sought would lead to relevant evidence, regarding his petition. Discovery that would not resolve any factual dispute entitling a petitioner to relief, even if the facts were found in his favor will not be granted. Likewise, a motion that is entitled

a discovery motion but is, in effect, a fishing expedition, will not be granted. *Id.*

Circumstances that satisfy Elements of Habeas Rule 6 Discovery:

The courts have granted Habeas Rule 6 discovery when a habeas petitioner establishes "GOOD CAUSE" for discovery by making specific factual allegations corroborating the underlying habeas claim. In a claim of actual innocence and ineffective assistance of counsel Habeas Rule 6 discovery was permitted upon a finding that good cause existed to conduct mitochondrial mtDNA testing on seminal fluid that had been deemed inconclusive at trial based on nDNA test technology that was below the standards of the mtDNA test available at the time of the habeas petition, because the new mtDNA test might procure conclusive evidence. In *re Braxton*, 131 F.Supp. 2d 756 (E.D. Va. 2000), Mitochondrial DNA testing will lead to Relevant Evidence Regarding claim of Ineffective Assistance of Counsel.

Good Cause:

Prior to trial Kovary learned that two of the perpetrator's semen stains were left on a white cotton towel. Kovary requested that the evidence be independently tested. Counselor Seger disapproved of his request, and opted to wait for

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the State's test results. Once the State's nDNA results came back as inconclusive, again Kovary requested independent DNA testing. Kovary expressed the opinion that it was hard for him to believe that a forensic lab could not recover a profile from two semen stains. Defense attorneys decided to forego independent DNA testing on the assumption that said testing would produce the same results from an outside lab. Please see Attachment (D) (MCR 6.502 (G)(2) Affidavit of Counselors ineffectiveness, at page 2).

Kovary asserts that (mtDNA) mitochondrial DNA testing of the two semen stains will exclude him as the donor. Exculpatory mtDNA evidence would have a very persuasive effect on the jury. Certainly, had counsel provided exculpatory mtDNA results there would have been a reasonable probability that the jury would not have returned a guilty verdict. *Cherrix v. Braxton*, 2001 U.S. Dist. Lexis 2231 at 38 (In the context of actual innocence) ("This Circuit has previously found with regard to Schlup-type claims of innocence that "DNA evidence that the defendant was not the one who contributed the seminal fluid in the semen samples taken from the victim or her clothing established the requisite probability that a reasonable jury would not have returned a guilty verdict.").

Rivas v. Fischer, 786 F.3d 529, 550-52 (2d Cir. 2015) (habeas relief granted because petitioner produced credible and compelling evidence which called into serious doubt evidence linking petitioner to crime and counsel's deficient performance prejudiced defendant). Habeas Rule 6 discovery in the form of mtDNA testing of perpetrator's two semen stains is appropriate because; Trial attorneys had a constitutional obligation to investigate, know and understand law, This includes the common knowledge, that when nuclear DNA testing is inconclusive the common practice is to perform mitochondrial mtDNA testing. Kovary's allegation that counsel's presumption that independent re-testing would produce the same inconclusive results as that of the State's nDNA testing is incorrect and mtDNA testing will exclude Kovary as the donor. If these facts are fully developed, Petitioner can demonstrate that he is entitled to relief or that the discovery will lead to relevant evidence to support his claim of counsel's ineffectiveness.

Consider the following. Ordering discovery with mtDNA has the potential of producing three different outcomes. First, the test results could show Kovary is the donor of the two seminal stains on the towel, in which case the evidence would moot his ineffective assistance claim. Second, the test results could show that Corey Riggs deposited the seminal fluid, in which case Riggs testimony implicating Kovary

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of the sexual penetration act is demonstrated as being false. This hypothetical would demonstrate the State's failure to substantiate the penetration element of first-degree CSC. Third, the mtDNA test results can show a third party deposited the seminal fluid. If the mtDNA test results implicate a third party, or Corey Riggs, then the issue would be placed before this Court of whether such evidence would be sufficient to grant Kovary's claim of counsel's ineffectiveness.

Kovary has alleged that mtDNA testing will exclude him as the source and demonstrate that counsel's failure to re-test with mtDNA analysis is ineffective under Strickland. (1) counsel's performance "fell below an objective of reasonableness" Strickland v. Washington, 466 U.S. 668, 688 (1984) and (2) counsel's deficient performance prejudiced the defendant, resulting in an unreliable or fundamentally unfair outcome in the proceedings. Strickland, 466 U.S. at 687, 691-92. Trial counsel's failure to develop and present exculpatory forensic evidence to the jury is ineffective under Strickland. Please see, Washington v. Murray, 952 F.2d 1472, 1476 (4th Cir. 1991); Dorsey v. Kelly, 112 F.3d 50, 51 (2nd Cir. 1997); Holsomback v. White, 133 F.3d 1382, 1388 (11th Cir. 1998); Thompson v. Calderon, 120 F.3d 1045, 1053 (9th Cir. 1997); Elmore v. Ozmint, 661 F.3d 783, 869-70 (4th Cir. 2011); Rivas v. Fischer, 780 F.3d 529, 550-52 (2nd Cir. 2015).

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Conclusion: Perpetrator's two semen stains are available for mtDNA testing. Please see attached to this petition, Attachment (E) (People's Response to Defendant's MCL 770.16 Petition, at page 2) ("while Defendant's attempts were unsuccessful, the people have determined that item #52 is still in evidence at the Grand Traverse Sheriff's office."). The State put forth the following explanation of why they could not retain a profile with nuclear DNA analysis of two semen stains. State analyst Heather Johnson testified that there was "No results, period" on the perpetrator's two semen stains. (March 10, 2010 Trial Tr. pg. 330 at 20). Analyst Johnson explained that semen consisted of "seminal fluid" and "sperm cells." And that the nuclear DNA method retrieves DNA from the "nucleus" within the sperm cells. Ms. Johnson explained further that it is possible there wasn't just enough sperm cells or maybe there wasn't any sperm there at all." (March 10, 2010 Trial Tr. pg. 324 at 14 - pg. 325 at 4). Sperm cells are necessary for establishing a profile with nDNA nuclear testing. However, sperm cells are not necessary for establishing a profile with mtDNA testing. In fact, a profile can be established with just the seminal fluid. The State's explanation of inconclusive results demonstrates the necessity of mtDNA testing. *Early v. Braxton* (In re Braxton), 258 F.3d 250, 254 (2001) ("mitochondrial test can conclusively

identify the donor of seminal fluid" . . .). Also explaining the limits of nDNA analysis of seminal fluid, and the advantage of mtDNA analysis of seminal fluid. United States v. Bererly, 369 F.3d 516, 529 (6th Cir. 2004); United States v. Coleman, 202 F.Supp. 2d 962, 965 (E.D. Mo. 2002).

The State denied Kovary's MCL 770.16 petition in support of his ineffective assistance claim because "Mitochondrial DNA testing results were first introduced in a United States court in 1996 and mitochondrial DNA testing technology has been available in the State of Michigan since 2003" Id. (Attachment (E) in this petition please see page 3, Decision and order Denying Defendant's MCL 770.16 Petition). If mtDNA testing produces the exculpatory evidence that Petitioner alleges, then the fact that mtDNA testing has been available in Michigan since 2003 (People v. Holtzer, 255 Mich. App. 478, 487 (2003)), weighs in finding counsel ineffective for failing to investigate and know applicable Michigan law concerning mtDNA testing. Especially, when considering that mtDNA testing is applied when nDNA testing is inconclusive, as it was in the Holtzer case. Joseph v. Coyle, 469 F.3d 441, 460 (6th Cir. 2006) ("yet, it can hardly be doubted that defense lawyers have a constitutional obligation to investigate and understand the law as well. See e.g., Williams, 529 U.S. at 395; 120 S.Ct. 1495.").

Petitioner has demonstrated the following good cause for discovery. Please see *Dellinger v. Bell*, 2011 U.S. Dist. LEXUS 112441 at 33-36 ("As previously stated, good cause exists where specific allegations before the court show reason to believe Petitioner, may, if the facts are fully developed, be able to demonstrate he is entitled to relief. *Harris v. Nelson*, 394 U.S. 286, 300, 89 S.Ct. 1082, 22 L.Ed.2d 281 (1969)... *Pham v. Terhune*, 400 F.3d 740, 743 (9th Cir. 2005) Petitioner must submit evidence from which a court can conclude the requested discovery "may well" uncover favorable, material information" that would lend support to the claims.")

Failure to investigate Alibi defense:

Because this is a claim of ineffective assistance for failure to investigate alibi defense, the court should have applied the principles of *Strickland v. Washington*, 466 U.S. 668, 689, 694 (1984).

Court should have granted C.O.A. for petitioner's entire claim of ineffective assistance for failure to investigate alibi defense. Michael Bellman's deposition impeaching Corey Riggs testimony of implicating petitioner, is essential to the prejudice caused by the counsel's failure to investigate Sandra Galbraith's alibi deposition.

Appellant counsel was ineffective for failing to raise trial counsel's ineffectiveness specifically trial counsel

Failed to investigate alibi witness and impeach the testimony of Corey Riggs implicating Petitioner,

Requested Relief:

Petitioner Kovach respectfully requests the Court issue C.O.A., and issue a writ of habeas corpus on the said claim of ineffective assistance of appellate and trial counsel.

Petitioner humbly request that this Court find good cause for Habeas Rule 6 discovery of two semen stains on white cotton towel marked as Item #52 in support of ineffective assistance claim. Provide facilities for adequate mtDNA testing or any other appropriate relief.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Charles Kovary

Date: 9-13-2021