

No.

21-6262

IN THE

SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED

OCT 26, 2021

OFFICE OF THE CLERK

GUADALUPE PADILLA

— PETITIONER

(Your Name)

vs.

BOBBY LUMPKIN,

Director of T.D.C.J.

— RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

TEXAS COURT OF CRIMINAL APPEALS OF TEXAS

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

PETITION FOR WRIT OF CERTIORARI

GUADALUPE PADILLA #1088118

(Your Name)

C.T. TERRELL UNIT, 1300 FM 655

(Address)

ROSHARON, TX 77583

(City, State, Zip Code)

512-463-1551

(Phone Number)

QUESTION(S) PRESENTED

IS A NON-PROFIT CORPORATION, WHO IS ACTING AS A GOVERNMENTAL BODY TO REVIEW CRIMINAL CONVICTIONS INVOLVING THE RE-CALCULATION, RE-ANALYSIS AND/OR RE-TESTING OF DNA TEST RESULTS (DNA MIXTURES) OBTAINED UNDER POST-CONVICTION DNA TESTING STATUTE, IMMUNE FROM: 1). COMPLIANCE WITH THE STATUTORY REQUIREMENTS FOR PERFORMING SUCH DNA TESTING AND ANALYSIS; IMMUNE FROM: 2). JUDICIAL OVERSIGHT, THUS, VIOLATING THE DUE PROCESS THE STATUTE IS ASSUMED TO PROVIDE UNDER OSBORNE? (FN)

FN
Y

Subsidiary Question

DID THE STATE COURT ABUSE ITS DISCRETION AND HOLD PETITIONER TO A HIGHER STANDARD OF REVIEW IN VIOLATION OF THE STATUTORY REQUIREMENTS FOR OBTAINING DNA TESTING, THUS VIOLATING DUE PROCESS THE STATUTE IS ASSUMED TO PROVIDE ? UNDER OSBORNE ? (FN)

FN - District Attorney's Office, Third District. v. Osborne, 129 S.Ct. 2308 (2009)

X

LIST OF PARTIES

[X] 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:

Respondent - Bobby Lumpkin, Director of Texas Department of
Criminal Justice - Correctional Institutional Div.

Attorney - Ken Paxton - Texas Attorney General
Criminal Litigation Div.
P. O. Box 12548
Austin, TX 78711

RELATED CASES

1. District Attorney's Office, Third Judicial District,
v. Osborne, 129 S.Ct. 2308 (2009)
2. Skinner v. Switzer, 131 S.Ct. 1289 (2011)

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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 State trial court court appears at Appendix ^B_____ 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 _____.

☐ 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 07-28-2021.
A copy of that decision appears at Appendix C.

☐ 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

FOURTEENTH AMENDMENT - Due Process of Law

Chapter 64 (DNA Testing) - Texas Code of Criminal Procedure

STATEMENT OF THE CASE

Petitioner was convicted by jury of aggravated sexual assault (child) after refusing plea bargain offer of 15-years with five years jailtime credit. Sentence was imposed by jury at 37 - years confinement on or about February 02, 2002. The offense allegedly occurred on October 22, 1994, and Petitioner was ~~re-arrested~~ indicted in July, 1995. For the next 5½ - years Petitioner was in and out of prison for various technical violations of parole for an unrelated burglary conviction. In April of 2000, the Travis County District Attorney's Office decided to exercise its authority and begin prosecution of this offense, and Petitioner was arrested.

At trial, appointed counsel only raised issue of violation of constitutional right to a speedy trial, but did not challenge the testimony of the State's expert witnesses. Limited DNA testing was performed at trial but only to the extent of determining if semen was present on the evidence. This is the summary of the extraordinary delay between alleged offense and prosecution.

After the exhaustion of direct appeal and State/Federal writs of habeas corpus. Petitioner filed a motion for post-conviction DNA testing. The motion was denied, but reversed on appeal and counsel was appointed. DNA testing was performed by a State Lab (Dept. Public Safety - Crime Lab) on or about 2010, June. The DNA/Serology Report reflects that certain DNA profiles were not compared to other DNA profiles that were discovered. Testing also discovered DNA profiled mixtures in the DNA evidence. The DNA mixture profiles discovered in sexual assault kit evidence (vaginal

swabs) was negated and no further testing, analysis or comparisons were made to this evidence. (CR 79-80). At that time period, this Petitioner did file objections, pro se, to those DNA findings.

On or about January 7, 2016, The Travis County District Attorney's Office served Petitioner with a "BRADY NOTICE" in relation to this cause, which reflected this case might be impacted by recent scientific developments and that I may wish to contact the "Capitol Area Private Defender Service" for more information relating to the scientific developments. After contacting "CAPDS" I was informed that the "DNA mixture evidence" in my case could be re-calculated or re-analyzed using the new scientific technique. (CR 69-81). I perceived these actions to be within the jurisdiction of the trial court, under statute and due process. Years passed without any further actions by CAPDS or the courts.

In August, 2018, I sought resolution to determine whether the trial court had jurisdiction over CAPDS and their actions involving the re-calculation/re-analysis of the DNA evidence in my case. I submitted a formal "Subsequent Motion For DNA Testing and Analysis Using Newer Testing Technique, pursuant to the statutory provisions of Chapter 64, Texas Code of Criminal Procedure. The motion requested the trial court's jurisdiction and showed the court how my motion met the requirements for subsequent DNA testing using newer testing technique. (CR 46-109). The actions of Capitol Area Private Defender Service (CAPDS), I labeled as collateral proceedings outside the jurisdiction of the trial court.

The CAPDS turned out to be a non-profit corporation acting as a State governmental body in Travis County, Texas. **This** became

"The Forensic Project, who then sat on this case and the forensic evidence for years. The trial court ignored the issue of CAPDS involvement denied motion on basis that I did not meet the requirements for obtaining testing. (CR App. Br. pg. 9-10A).

Court of Appeals

On appeal, Petitioner informed the Court that the State and the trial court had failed to respond to the issue of jurisdiction over the collateral proceedings involving the non-profit and the DNA evidence, re-calculation and re-analysis process. ~~QED~~ At this point Petitioner raised the issue of constitutional error which the court should consider. (App. Br. pg. 43).

In addition, I showed the court how the trial court's findings and conclusions were not supported by the record, in light of the evidence in the record during Chapter 64 proceedings, and in light of the statutory text. Appellant's brief did direct the court to the record and controlling caselaw of the Court of Criminal Appeals in relation to: 1). that my evidence should be characterized as biological material per statute; 2). that I did state what evidence I wanted re-tested and re-analyzed (evidence negated during post-conviction DNA testing process - MINOR COMPONENT DISCOVERED IN SEXUAL ASSAULT KIT EVIDENCE/MIXTURE. (see Lab Report of June, 2010, - CR 80); 3). that the evidence still existed (CR 69-76); 4). that the State did not turn over exculpatory forensic report collected by SANE (Sexual Assault Nurse Examiner) Nurse during sexual assault examination conducted at local hospital within a couple hours of alleged assault; 5). and that this re-calculation re-analysis constituted a newer testing technique under statute.

REASONS FOR GRANTING THE PETITION

A STATE COURT OF LAST RESORT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE DECISION OF ANOTHER STATE COURT OF LAST RESORT OR OF A UNITED STATES COURT OF APPEALS.

On appeal Petitioner raised points of error stating that the trial court erred in denying his motion for subsequent DNA testing using newer testing technique, and appointment of counsel; and that the trial court erred in failing to exercise jurisdiction over "extrajudicial proceedings" that are related to DNA testing statute and proceedings; and the sufficiency of the evidence supporting the Court of Appeals determinations concerning previous DNA testing in this case.

Subsequent DNA Testing

Newer Testing Technique

Petitioner contends that his motion clearly shows that a newer, more reliable and accurate testing technique was available to himself and the State, relating to the re-calculation and re-analysis of DNA "mixture" evidence obtained in previous DNA testing in this criminal case. The State of Texas and the Travis County District Attorney's brought this to the attention of Petitioner through service of a "Brady Notice" that confirms this. (CR 69-81).

Chapter 64 of the Texas Code of Criminal Procedure reflects, in relevant part:

FN - CR = Clerk's Record on Direct Appeal

Article 64.01 - Motion

(b) The motion may request forensic DNA testing only of evidence... that was secured in relation to the offense that is the basis of the challenged conviction and was in possession of the state during the trial of the offense, but:

...

(2) although previously subjected to DNA testing;

(A) can be subjected to testing with newer testing techniques that provide a reasonable likelihood of results that are more accurate and probative than the results of the previous test...

Article 64.03 - Requirements; Testing

(a) A convicting court may order forensic DNA testing under this chapter only if:

(1) the court finds that;

(A) the evidence;

(i) still exists and is in condition making DNA testing possible; and

(ii) has been subjected to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect;

(B) there is a reasonable likelihood that the evidence contains biological material suitable for DNA testing; and

(C) identity was or is an issue in the case; and

(2) the convicted person establishes by a preponderance of the evidence that:

(A) the person would not have been convicted if exculpatory results had been obtained through DNA testing; and

(B) the request for the proposed DNA testing is not made to unreasonably delay the execution of sentence or administration of justice.

TEXAS CODE CRIMINAL PROCEDURE, Chapter 64 (Art. 64.01 (b)(2) & 64.03(a))

To a reasonable person it should appear that Petitioner met his burden in providing sufficient facts to support his claim. The information is provided in State's Brady Notice. (CR 69).

The Court of Appeals accepted the trial court's findings and conclusions which allegedly were based on the record, and accepted the State's assertion that the newer testing technique (CPI/CPE) had allready been performed in this case and in the record of this case. (Appendix A, pg. 11-12). However, this is not correct. The Report (CPI Evaluation Laboratory Report) was dated March 23, 2017, and was never filed with the papers in this Cause with the District Clerk's office. In addition, the Report was never served on Petitioner or brought before the court for scrutiny and its authors for cross-examination. The report was simply attached to State's Response to Motion for Subsequent DNA Testing. (Cf.).

Petitioner would argue that the trial court abused its discretion in finding that Petitioner did not make the statutory requirements for DNA testing, and that the Court of Appeals erred in affirming the court's ruling. Here, Petitioner's attachments to his Motion contain all the information describing what evidence he wished to have re-tested and re-analyzed, that the evidence still exists and that newer testing technique was available and could provide more reliable and accurate DNA results.

In this case, previous DNA testing discovered that Petitioner's DNA profile was excluded from the sexual assault kit evidence (vaginal swabs). The trial court and the jury, at trial, was not aware of this fact, because the State only conducted limited DNA testing at trial. The State used a DNA expert from the crime lab to explain the test results; the State used police officers to show how the evidence was found and collected from the scene; the State used a hired gun/expert (not Hospital personnel) to testify

from the Hospital business records of sexual assault exam to show the significance of the biological material (vaginal discharge) collected from alleged victim, However, the State, whether by design or by accident, failed to DNA test the most important biological material collected, the sexual assault kit evidence to determine whether Petitioner's DNA profile was present.

On post-conviction DNA testing, Petitioner's DNA profile was excluded from sexual assault kit evidence, and the alleged victim's DNA profile was excluded from the bedsheet evidence - (Semen stains) from bed where assault allegedly occurred. Because the DNA evidence excluded Petitioner's DNA profile, thus altered the State's theory of the case as presented to the jury, the evidence should have been found to be exculpatory. Instead the Court of Appeals found this findings to be merely inconclusive DNA test results. (previous DNA test results - Court of Appeals Opinion of June 20, 2013 , Case No. 03-12-00300-CR , ~~2X~~)

DNA Mixture Profiles

The new scientific technique CPI/CPE or other newer scientific technique is relevant and material in the following ways. First, previous testing discovered a "Minor" component in the sexual assault kit evidence, together with a Major component, The major component was identified as victim's DNA profile, while the minor component remained unidentified. The State's expert at trial testified that victim was infected with sexually transmitted disease, with symptoms, at time of sexual assault exam. Hospital testing of the vaginal fluid revealed victim had "Trichomonas" with live parasitic organisms in the vaginal fluid. The expert

testified to the jury that the STD - Trichomonas would have had to come from fluid in the semen, that there was no incubation period for the STD, that it was just transmitted from one person to another, and that this was an acute assault. The victim was given the exam within a couple hours of alleged assault. On appellate review of previous testing, the Court of Appeals deduced that the minor component was probably the DNA profile of the STD. However, there was no affirmative finding that minor component was STD's DNA profile. This evidence of minor was "negated" from further review and analysis. (CR 79, 83-84). This evidence also happens to be the DNA mixture evidence that the State claims could have been re-calculated and re-analyzed, although Petitioner has been arguing this point for many years prior to service of Brady Notice.

Petitioner was led to believe, by the non-profit corporation CAPDS, that they would be performing the re-analysis on this DNA mixture within the boundaries of the statute (Chapter 64) and within the jurisdiction of the trial court. CAPDS was further allowed discovery under the Discovery statute, Article 39.14 Tex. Code Crim. Proc.. The District Attorney's Office provided discovery in this Cause during this action. This led me to believe that the actions of CAPDS were sanctioned by the trial court.

In late 2018, after a lengthy delay, I came to the conclusion that CAPDS attorney's were either not being diligent in resolving DNA testing issue, or they had another agenda. It was for these stated reasons that my motion for subsequent DNA testing specifically requested the trial court to exercise its jurisdiction over CAPDS (non-profit) attorney's who were involved in the

DNA testing/re-analysis process. It was my belief that CAPDS could bring something new to the trial court table in a Chapter 64 proceeding that provided judicial oversight and appellate review, or in other words due process.

Mine, was not the only case involved in the re-calculation and re-analysis scheme. CAPDS attorneys made it known to this Petitioner that they were involved in reviewing hundreds and possibly thousands of cases, thus explaining the lengthy delay. In 2017, the Travis County, Austin Police identified 1,297 cases as needing reviews of DNA profile statistics. In December of 2016, the Texas Department of Public Safety - Crime Lab decided to retain only two of the 6 DNA analysts employed at the Austin crime lab, citing "significant challenges that impact confidence in the work product" of the lab's DNA testing, and that the Lab is expected to remain closed for over two years, and improvements will cost up to \$14 million.

This is the same crime lab that conducted the DNA testing in my case at trial, and on post-conviction DNA testing under Chapter 64. This is also the lab that allegedly conducted the newer testing technique at a time that the lab was closed for improvements. (see CR 82). This would show the national importance of having the U.S. Supreme decide the question of whether the Texas court's should step in and take jurisdiction over the actions of non-profit corporation performing the statutory functions of DNA testing under a criminal statute.

Prayer

Petitioner prays that the Court liberally construe this writ.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Handwritten Name

Date: 10-26-2021