

No. 21-6612

IN THE
SUPREME COURT OF THE UNITED STATES

Brian K. Cavitt, pro se,

Petitioner,

vs.

Commonwealth of Massachusetts

Respondents,

PETITION FOR REHEARING OF DENIAL
OF WRIT OF CERTIORARI

Inmate petitioner, Brian K. Cavitt, pro se, requests a rehearing by this Court, to reconsider its denial of his Writ of Certiorari, as permitted by Rule 44. Specifically, petitioner would ask this Court to give the issue concerning the scientifically false DNA conclusion, violating his 5th, 6th, and 14th Amendment due process, a more thorough review. The issue is much more complex than the simplistic explanation given by the lower courts, and presents national implications concerning the FBI's Quality Assurance Standards for forensic DNA testing laboratories.

1.) The Courts erred in their denials where the introduction of false, scientifically inaccurate, and erroneous DNA-STR report compromised the integrity and veracity of the police investigation creating a substantial likelihood of a miscarriage of justice, and violation of the fifth, sixth, and fourteenth Amendments right to due process.

Mr. Caviti's writ of Certiorari should have been granted where, as supported by the affidavit provided by retired forensic serology / DNA expert, Dr. Thomas Fedor, the conclusion of a match of the DNA evidence from a knife handle to decedent Milagros Rosario is false, and is evidence of cross-contamination of at least one piece of DNA evidence, which is so blatantly obvious as to border on the incompetent, and is in clear violation of the FBI's: Quality Assurance Standards for Forensic DNA testing Laboratories, as well as the 5th, 6th, and 14th Amendments right to due process.

While the simplistic argument made by the lower courts is that the DNA error does not go towards identifying the killer, it is evidence of cross-contamination and shows that at least 3 of the Massachusetts State Police Crime Lab employees did not adhere to the Quality Assurance Standards guidelines, which are meant to control the integrity of forensic DNA work, including Standards; 5.3.4, 5.3.4.4, 5.3.4.5; 5.3.5; 7.1, 7.1.2, 7.1.3; 7.3, 7.3.1, 7.3.3, 7.3.3.1; 9.5.1-9.5.5; 9.6-9.6.6.3; 9.7-9.7.2; 9.9; 9.10-9.10.7; 9.12; 11.1; 11.2-11.2.9; 12.1, 12.1.1; 12.2-12.2.7; 12.3, 12.3.1; 12.4; 14.1, 14.1.1; 14.2, 14.2.1; 16.2-16.2.2.1.

The 3 employees include: Assigned DNA analyst Matthew

Dindinger; DNA analyst and reviewer Jennifer Elliot; and the casework CODIS Administrator (unknown) at that time (2006/07). In this case there is no doubt that there are clear violations that occurred by all 3 MSPCL employees, of the Quality Assurance Standards.

Furthermore, Dindinger testified at trial to the integrity and veracity of his report, falsely, misleading the jury and perjuring himself.

In an article from the Champion (2006) by Dr. William C. Thompson, J.D., Ph.D., titled "Tarnish on the 'Gold Standard': Understanding Recent Problems in Forensic DNA Testing", the then professor in the Department of Criminology, Law + Society at the University of California, Irvine, member of the California bar and co-chair of the NACDL's Forensic Evidence Committee, **Stated**:

"... The same processes that cause detectable errors in some cases can cause undetectable errors in other cases. If DNA from a suspect is accidentally transferred into a "blank" control sample, it is obvious that something is wrong; if the suspect's DNA is accidentally transferred into an evidentiary sample, the error is not obvious because there is another explanation - i.e., that the suspect is the source of the evidentiary DNA. Errors that incriminate a suspect are unlikely to be detected as errors; they are likely to be treated as incriminating evidence." (2006).

In this case, the error is blatantly obvious, yet was ignored or overlooked. The lower courts ruled that the issue was insignificant because the DNA from the knife handle does not go toward the identity of the killer, but the victim. However, the issue at hand

is the veracity and integrity of the DNA conclusions and results as a whole. We can see a detectable error that somehow, even with the FBI's Quality Assurance Standards, went undetected. It is the evidence of this cross-contamination that lends the possibility of undetectable errors, which looms prevalent. Without the obvious errors presence, the court's would say "there's no evidence of errors or cross-contamination." Yet, with the evidence of error and cross-contamination, the lower courts have chosen to minimize its significance to the integrity of the rest of the DNA, including inculpatory DNA evidence.

In Keko v. Hingle, 318 F.3d 639, 644 (5th Cir. 2003) that court stated that "a false or scientifically inaccurate report is equivalent to any other false evidence created by an investigator, such as a false report by police." Brown v. Miller, 519 F.3d 231, 2008 U.S. App. LEXIS 4169 (5th Cir. 2008), held that the deliberate or knowing creation of a misleading and scientifically inaccurate serology report amounts to a violation of a defendant's due process rights, and that a reasonable laboratory technician in 1984 would have understood that these actions violated these rights.

And, while the DNA evidence from the knife handle is not inculpatory evidence against Mr. Cavitt, it is relevant and probative to establishing the compromised integrity and veracity of the DNA-STR conclusion report and results and police investigation. In Harris - Lewis v. Mudge, 60 Mass. App. Ct. 480, 485 (2004), citing P.J. Liacos, M.S. Bradin, and M. Avery, Mass. Evidence §4.1.1 (7th ed. 1999), "The concept of relevance has two components: (1) the evidence must have some tendency to prove a particular fact; and (2) that particular fact must be material to an issue in the case."

Here, 1.) the particular fact is that the DNA report shows an error in its conclusion results, which shows evidence of cross-contamination, and evidence of the MSPCL violating the Quality Assurance Standards. 2.) This particular fact compromises the integrity of the DNA testing results, including inculpatory DNA evidence, which was heavily relied upon to convict Mr. Cavitt, violating his right to due process.

2.) The courts erred in their denial where Trial Attorney William J. O'Neil, defense DNA expert Dr. Brian Wraxall, and Appellate Attorney Jeffrey L. Baler provided ineffective assistance of counsel by not challenging the DNA conclusions and results provided by the state, creating a substantial likelihood of a miscarriage of justice, violating Cavitt's fifth, sixth, and fourteenth Amendment right to due process, and assistance of counsel, as well as Article 12 of the Massachusetts Declaration of Rights right to counsel.

As supported by the affidavit provided by Dr. Fedor, at least one of the DNA conclusions is false. The error is so blatantly obvious to the point it borders on incompetent. Atty. O'Neil was informed of Mr. Cavitt's concerns with the DNA, as noted in a letter from O'Neil to Mr. Cavitt, dated Sept. 4th, 2007. While a DNA expert was hired to review the DNA report, the expert, Wraxall, of the Serological Research Institute (SERI), also did not notice the error, and, in fact repeated the conclusion of the false DNA evidence in his report. Wraxall was never called to the stand to testify. Upon questioning of Dindinger, O'Neil and the state prosecutor both asked

specifically, if the DNA evidence from the knife handle matched decedent Milagros Rosario, both times he confirmed his results. O'Neil made no attempt to challenge this. (T.T. IV; 220, 224).

Appellate Attorney Baler refused to appeal the DNA evidences introduction into this case, as noted in a letter from Baler to Cavitt dated Oct. 7, 2011.

(It should be noted that Dr. Thomas Fedor and Dr. Brian Wraaxall are former colleagues at SERI. Wraaxall passed away in 2012.)

Under the Sixth Amendment, a defendant's right to counsel is violated if "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland v. Washington, 466 U.S. 668, 687 (1984).

Under article 12 of the Declaration of Rights, the SJC's inquiry as to ineffective assistance of counsel is two-fold:

'for the defendant to prevail on his claim of ineffective assistance of counsel, we must conclude, first, that defense counsel's performance fell 'measurably below that which might be expected from an ordinary fallible lawyer' and, second, that the defendant's case was prejudiced by counsel's conduct such that the conduct 'has likely deprived the defendant of an otherwise available, substantial ground of defense.'

Commonwealth v. White, 409 Mass. 266, 272 (1991) quoting Comm. v. Sefarian, 366 Mass. 89, 96 (1974)

further, pursuant to G.L.c. 278, §33E, the standard for a

substantial likelihood of a miscarriage of justice is "more favorable to a defendant than is the constitutional standard for determining ineffective assistance of counsel." Comm. v. Nieves, 429 Mass. 763, 770 (1999). As the SJC states, "we need not focus on the adequacy of trial counsel's performance..... we shall consider whether there was an error in the course of the trial (by defense counsel, the prosecutor, or the judge) and, if there was, whether that error was likely to have influenced the jury's conclusion." Comm. v. Wright, 411 Mass. 678, 682 (1992)

The errors here ~~were~~ the prosecution introducing a false DNA report into evidence, allowing their DNA expert to perjure himself, misleading the jury into believing that the DNA reports veracity and integrity was beyond reproach; defense counsels not challenging the false DNA report or testimony of Dindinger; Wrayalls incompetent review; Appellate Attorney's refusal to challenge, on appeal, the DNA evidence. Without the compromised DNA conclusions, the states case against Mr. Cavitt for murder, arson, and armed robbery, hinges solely on a single eyewitness identification, and he said, she said testimony.

3.) The Court erred in their denial where Mr. Cavitt made a substantial showing of constitutional errors that, but for these errors, created a miscarriage of justice, and unfair trial, and has shown that a (Massachusetts) "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 (Rule 10(b)); and that "a state court or a United States court of appeals has decided an important question of

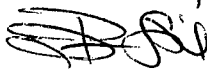
federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

The issue presented here is not simply an erroneous factual finding, if it is that at all, but the very essence of DNA standards created by the FBI, which aren't being adhered to, allowing the MSPCL to present false DNA results, even with updated methods of testing and the equipment used in it.

The Supreme Court granting a Writ of Certiorari in this matter would set a precedent for future, and past, DNA cases with similar issues. Failure to grant the Writ of Certiorari will allow DNA analysts all over the country to continue to provide scientifically inaccurate reports infected with detectable and undetectable errors, lowering the DNA Quality Standards while violating the FBI's DNA Quality Assurance Standards.

For the grounds stated above, I, Brian K. Cavitt, pro se, humbly request that this Court reconsider its denial of the Writ of Certiorari, and grant said writ based on the grounds provided above, ordering a New Trial, the DNA evidence dismissed from this case.

Dated: MARCH 28, 2022

Respectfully Submitted


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