Misc. No. ____

Term

21-6653

IN THE

SUPREME COURT OF THE UNITED STATES

URBAN FERMIN,

Petitioner,

-v-

A. ANNUCCI, Acting Commissioner of DOCCS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

The Petitioner hereby petitions for a writ of certiorari to review the order of The United States Court of Appeals for the Second Circuit entered in this proceeding on May 12, 2021.

QUESTION PRESENTED FOR REVIEW

Whether the business record exception to hearsay survives the United States Constitution's Sixth Amendment Confrontation Clause when the regularly conducted business activity of that business is the production of evidence for use at trial.

Or alternatively;

Whether the admission of testimony as to DNA test results conducted by non-testifying analyst through surrogate criminalist witness who did not perform actual test violated the Sixth Amendment Confrontation Clause.

PARTIES IN THE COURT BELOW

The only parties in the court below were petitioner Urban Fermin and A. Annucci, Acting Commissioner of DOCCS, represented by the Attorney General of the State of New York.

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OPINION BELOW

The opinion of the Court of Appeals for the Second Circuit appears in an unpublished summary order.

JURISDICTION

The order of the Second Circuit was entered on or about May 12, 2021. This petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USC § 1254. Jurisdiction was in the Second Circuit pursuant to 28 USC § 1291; jurisdiction was in the district court pursuant to USC § 2254.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment VI: "In all criminal prosecutions, the accused enjoy the right… to be confronted with the witnesses against him…"

United States Constitution, Amendment XIV: "… nor shall any State deprive any person of life, liberty, or property, without due process of law; …"

STATEMENT OF THE CASE

Urban Fermin was convicted of, *inter alia*, attempted murder in the first degree, reckless endangerment in the first degree, and attempted aggravated assault on a police officer. A substantial part of the evidence against him came from testimony by criminalist, J. Lucas Herman, about the results of DNA tests, which he had not himself conducted.

In his direct appeal Fermin raised a claim, among others, that the trial court violated the confrontation clause by allowing a criminalist to testify as to DNA results

conducted by non-testifying analyst. Fermin's judgment of conviction was modified in part and affirmed by the New York State Supreme Court, Appellate Division, Second Department, on May 10, 2017 (People v. Fermin, 150 AD3d 876 [2 Dept. 2017]). The court dismissed Fermin's convictions for second degree attempted murder, but held that this claim was "unpreserved for appellate review and, in any event without merit." Permission to appeal to the New York State Court of Appeals was denied on December 29, 2017 (People v. Fermin, 30 NY3d 1060).

On January 3, 2019, in a writ of habeas corpus filed with the United States District Court for the Eastern District of New York, Fermin further advanced this same ground, among others. His *pro se* habeas corpus petition pursuant to 28 USC § 2254 was denied on August 26, 2020 (__F.__ ____ [EDNY 2020]). The Eastern District in rejecting this argument held that "the prosecution presented sufficient evidence of Petitioner's identity… aside from the DNA evidence testified to by [the non-testing analyst]." The Second Circuit denied Certificate of Appealability on May 12, 2021.

REASONS FOR GRANTING THE WRIT

The decision of the state court relied on the idea that a surrogate criminalist witness is never covered by Crawford v. Washington, 541 US 36 (2004). Between petitioner's trial in 2010 and the Appellate Division's decision on his direct appeal in 2017, the Supreme Court decided Williams v. Illinois, 567 US 50 (2012) and the New York Court of Appeals decided People v. John, 52 NE3d 1114 (NY 2016). Under John, "the laboratory reports as to the DNA profile generated from the evidence submitted to the laboratory by the police in a pending criminal case were testimonial, "and their

introduction without the benefit of cross-examination may violate the Confrontation Clause."

At the time Fermin's appeal was determined, no Supreme Court case had explicitly ruled that the Crawford principle applied to any but testimony by a fully qualified Office of Chief Medical Examiner expert in lieu of the actual testing analyst.

The implication of this analysis is that until this Court issues a specific opinion relating to non-testifying analyst receipt of testimonial laboratory reports as to the DNA profile generated from the evidence submitted to the laboratory by the police in appending criminal case, the Crawford decision does not apply.

The Crawford decision was in no way dependent on the identity of the parties to the lab reports generated. Crawford applies to all reports as long as they are testimonial. This case provides an opportunity for this Court to clarify the point. The Appellate Division failed to realize that by allowing Herman to testify as a surrogate witness, the State was thus allowed to employ a method of questioning using Herman as a conduit to incorporate incriminating lab report results under state law business records exception to hearsay, circumventing the Sixth Amendment Confrontation Clause requirement.

The fact that the reports were admitted under state law business records exception to hearsay does not dispose of the Confrontation Clause issue. Results in lab reports may be testimonial for Confrontation Clause purposes, because the regularly conducted business activity of that business may very well be the production of evidence for use at trial, as was the case here.

If a statement/result in a lab report is testimonial and is offered for its truth – as was both the case here – its introduction is prohibited in the absence of an opportunity to

cross-examine the analyst who actually performed the test and authored the report, regardless of its evidentiary admissibility. When the testing analyst who authored the lab report is unavailable, and because a fully qualified surrogate witness expert has analyzed the necessary data does not make him a permissible surrogate witness to survive Confrontation Clause protections to defendants.

Herman testified to hearsay of errors that took place during testing that was not noticed until after Hurricane Sandy destroyed the evidence which were tested for DNA (October 2012). Herman then testified that, though the evidence was destroyed a month prior, that some "other analyst examined the evidence" and that they were able to test the "destroyed evidence" and "produce results that were identical to the compromised testing." However, during cross-examination, the People's analyst could not provide the defendant with any facts or direct evidence in regards to these errors.

The state courts' determination that the lab report results were properly admitted through Herman for its truth without petitioner having an opportunity to cross-examine the actual testing analyst was substantially different from relevant precedents.

The report results' untested conclusions are significant. The State was able to convey evidence on the central question of this criminal prosecution – through the testimony of Herman, no less – without producing the actual author of the reports himself at trial. The improperly admitted testimony of Herman pertaining to reports' results had substantial effect and influence precisely because it went to the core of the State's case against petitioner – whether he was the actual perpetrator – placing an unimpeachable accusation before the jury. Without doubt, this is what the Confrontation Clause seeks to guard against.

It was through these untested and unimpeachable testimony of the conclusions in the reports through Herman, in which the jury was allowed to accept for its truth, that the prosecution was given a passkey for an indirect method of bringing before the jury the substance of testimonial assertions, by an unavailable witness, of the petitioner's guilt that would otherwise be barred the Confrontation Clause Rule.

This Court is asked to issue a writ of certiorari on whether the business record exception to hearsay rule survives the Sixth Amendment Confrontation Clause when the regularly conducted business activity of that business *is* to produce evidence for use at trial. It is an open question as to whether the scope encompasses actual evidence produced solely for purposes of criminal proceedings against a defendant at trial. This issue requires precedent set by this Court and due to the lack thereof this Court is asked to consider the question presented.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the order of the United States Court of Appeals for the Second Circuit.

Dated: Oct. 13, 2021.

Respectfully submitted,

Urban Fermin

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