

No.

**21-7037**

**ORIGINAL**

Supreme Court, U.S.  
FILED

**FEB - 1 2022**

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

Robert Breest

— PETITIONER

(Your Name)

vs.

New Hampshire

— RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

New Hampshire Supreme Court

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

PETITION FOR WRIT OF CERTIORARI

Robert Breest

(Your Name)

MCI Shirley, Medium, P.O. Box 1218

(Address)

Shirley, MA 01464-1218

(City, State, Zip Code)

None

(Phone Number)

**RECEIVED**

**FEB - 1 2022**

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

### QUESTION(S) PRESENTED

1. Issue One: Whether the DNA tests were favorable under New Hampshire RSA 651-D-2, VI (b) and warrant dismissal of the charge because a different result would be reached on retrial. The Superior Court denied the motion and stated "denied for the Reasons set Forth in the State's Objection." The state supreme court declined discretionary appeal.

2. Issue Two: Whether Robert Breest is entitled to the raw data to establish that the 2012 DNA test excluded him at both the major and minor profiles. The state has conceded to the state supreme court that Robert Breest is excluded by the raw data at the major profile. The hearing in 2015 revealed that the minor profile consisted of two of 17 markers that match Robert Breest, and the state's expert testified that she thought the two markers could be artifacts. Should Robert Breest be entitled to the raw data to show that the two markers are not aleles, but merely artifacts. In all the previous tests, they were never detected.

3. Issue Three: Whether the state courts should have vacated the psychosexual murder certification and increased sentence, where the District Court of New Hampshire in 1977, Slip Opinion 77-45, on application for habeas corpus ruled that Robert Breest was never convicted by a jury of psychosexual murder and remanded the action to the New Hampshire Supreme Court for action not inconsistent with that number 77-45 opinion and order.

QUESTION(S) PRESENTED  
Continued

4. Issue Four: Whether because the Attorney General argued that testimony at the 2015 hearing in Merrimack County Superior Court didn't exist. Robert Breest sought a court order that the Attorney General supply the state supreme court with a copy of the 2015 hearing transcript. Thus, allowing Robert Breest to substantiate that his expert DNA witness did not testify about the 2012 DNA Y-STR DNA results that Robert Breest argues that exclude him on both the major and minor profile.

5. Issue Five: Whether the motion for judgment should have been granted where the transcript shows that the testimony of the state's expert did not inculcate Robert Breest, contrary to the state's argument.

## LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[x] 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:

Senior Assistant Attorney General in charge of the homicide division of the New Hampshire Attorney General's office, Elizabeth Woodcock.

## TABLE OF CONTENTS

|  |    |
|--|----|
| OPINIONS BELOW.....                                    | 8  |
| JURISDICTION.....                                      | 9  |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ..... | 10 |
| STATEMENT OF THE CASE .....                            | 11 |
| REASONS FOR GRANTING THE WRIT .....                    | 13 |
| CONCLUSION.....  | 19 |

## INDEX TO APPENDICES

APPENDIX A New Hampshire Supreme Court denial of discretionary appeal, No. 2021-0427, November 16, 2021.

APPENDIX B New Hampshire Superior Court denial of motions and pleadings, No. S-789, August 25, 2021.

APPENDIX C

APPENDIX D

APPENDIX E

APPENDIX F

## TABLE OF AUTHORITIES CITED

| CASES   | PAGE NUMBER    |
|---|----------------|
| Apprendi v. New Jersey, 530 U.S. 466 (2000)     | 17             |
| Breest v. AG for N.H., 06-cv-361-SM (2007)      | 13             |
| Breest v. AG for N.H., 06-cv-361-SM (2008)      | 13, 14, 15, 16 |
| Breest v. Perrin, 495 F.Supp. 287 (1979)        | 11             |
| Breest v. Perrin, 655 F.2d 1 (1981)             | 11             |
| Dunn v. Perrin, 570 F.2d 21 (1978)              | 11             |
| Massaro v. United States, 123 U. S. 1690 (2003) | 11             |
| Sparf v. United States, 156 U.S. 51 (1895)      | 17             |
| Sullivan v. Louisiana, 508 U.S. 275 (1993)      | 11, 17, 18     |

## STATUTES AND RULES

|                                 |       |
|---------------------------------|-------|
| OTHER Constitutional Provisions |       |
| Article III, jury verdict       | 7, 10 |

OTHER Constitutional Provisions  
Continued

PAGE NUMBER

Fifth Amendment, Due Process

7, 10

Sixth Amendment, Jury Verdict

7, 10

Fourteenth Amendment, Due Process

7, 10

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 superior 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 Nov. 16, 2021.  
A copy of that decision appears at Appendix A.

☐ 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**

Article III, United States Constitution, jury verdict

Fifth Amendment, United States Constitution, due process

Sixth Amendment, United States Constitution, jury verdict

Fourteenth Amendment, United states Constitution, due process.

### STATEMENT OF THE CASE

In 1973, Robert Breest was convicted of First Degree Murder in Merrimack County Superior Court in Concord, New Hampshire.

On appeal to the New Hampshire Supreme Court, the appeal was denied.

Several applications for writ of habeas corpus were filed, and the District Court denied relief Breest v. Perrin, 495 F.Supp 287 (1979), holding that Robert Breest had failed to show cause for counsel's failure to object to the jury charge defining reasonable doubt.

In Breest v. Perrin, 655 F.2d 1 (1981), the First Circuit recognized that the reasonable doubt jury charge was the exact same jury charge they had determined unconstitutional in Dunn v. Perrin, 570 F.2d 21 (1978), but denied relief because defense counsel had not objected and Robert Breest failed to show cause for the failure to object.

In 1993, this court ruled in Sullivan v. Louisiana, 508 U.S. 275 (1993), and held, inter alia, that an unconstitutional jury charge defining reasonable doubt was a structural error requiring reversal of the conviction because an incorrectly instructed jury is tantamount to no jury verdict.

In 2003, this court ruled in Massaro v. United States, 123 S.Ct. 1690 (2003), and held that on an issue of ineffective assistance of counsel, no objection is required.

In May, June and July of 2021, Robert Breest filed five motions seeking relief of the conviction and sentence, these motions were denied by the superior court on August 25, 2021.

A timely appeal was taken to the state supreme court, and on November 16, 2021, the state supreme court declined discretionary appeal.

### REASONS FOR GRANTING THE PETITION

After several rounds of DNA testing, including the Mini-filer test in 2008, and the Minifiler and Y-STR DNA test in 2012, Robert Breest is excluded at both the major and minor profiles. At a hearing in the superior court in Merrimack County, Concord, New Hampshire on May 19 and 20, 2015, the evidence and testimony of both DNA experts, Huma Nasir, of Orchid Cellmark in Dallas, Texas, Robert Breest's expert and Dr. Charlotte Word, an independent DNA expert, former assistant director of Cellmark in Germantown, Maryland, the state's DNA expert, testified. Everyone agrees Robert Breest is excluded at the major profile, the DNA experts infer that Robert Breest is not excluded at the minor profile.

The error complained of is that the state of New Hampshire did not oppose Chief Judge McAuliffe's holding on January 18, 2008, wherein he held in Breest v. AG for N.H., No. 06-cv-361-SM, that the state had effectively conceded that the DNA testing results could prove critical to allowing Robert Breest to establish his innocence.

When the 2012, Orchid Cellmark DNA test results were obtained and Robert Breest was excluded at the major profile, the state argued before the state supreme court, relying upon the 2000 DNA test results, that were determined to be flawed in Breest v. AG for N.H., No. 06-cv-361-SM, in the magistrate report on January 3, 2007, that they had plenty of other evidence, and

when questioned by Chief Justice Lynn why the state's DNA expert, Dr. Charlotte Word had testified in the lower court that the DNA profile was that of an African American, and Senior Assistant Attorney General, Elizabeth Woodcock, said she could not explain that. Yet, previously in Breest v. AG for N.H., No. 06-cv-361-SM, Chief Judge McAuliffe in the United States District Court for the District of New Hampshire had found that Robert Breest is Caucasian.

Huma Nasir, when employed at ReliaGene in New Orleans, had determined that using both the MiniFiler and Y-STR DNA testing, Robert Breest was not a match at eight of eight in the MiniFiler test, but a match in the Y-STR DNA test. At page one of the ReliaGene Report, Attachment B, Notice of Appeal, hereinafter NOA, at page 30, report page 1, paragraph 1, Huma Nasir reported that she used half of the remaining fingernails, the evidence, for both test, and yet, reported a nonmatch in one, and a match at the other. This report is dated May 28, 2008.

Yet, when Huma Nasir relocated to Dallas, Texas and was working for Orchid Cellmark, she did an additional 17 Y-STR DNA test and excluded Robert Breest at the major profile because, at ReliaGene in New Orleans in 2008, she determined that the DNA markers at the DYS385a/b were 12 and 14 for the crime scene, which was the fingernail clippings of the victim containing blood and thus biology, i.e. DNA from the assailant. In Breest v. AG for N.H., No. 06-cv-361-SM, Chief Judge McAuliffe found and reported at the first page, quoting Judge Conboy of the state superior court, that Susan Randall, the victim, had clawed

her assailant to the bone. When the DNA results were obtained, and showed Robert Breest was excluded at the major profile, the state then changed its holding, contrary to what they had told the jury in 1973, that touch DNA explained why they were not able to find Robert Breest's DNA at the crime scene.

However, Huma Nasir while at ReliaGene in New Orleans in 2008, determined Robert Breest's DNA profile, and it is contained in the appendix B, NOA at 33. She claimed Robert Breest was or is 12 and 14 at the DYS385a/b, however when using a more sophisticated and advanced test kit at Orchid Cellmark in Dallas, Texas, in 2012, determined that Robert Breest while 12 and 14 at those loci, he did not match the crime scene profile of 11 and 13 at those loci and excluded Robert Breest in a supplemental report dated June 29, 2012, NOA at page 40, et esq.

She did find two additional markers at the DYS456 and DYS458, they are 17 and 17. She had already determined that Robert Breest is 15 and 19 at those loci, as determined by both the ReliaGene 2008 report, NOA at page 33 and Orchid Cellmark, NOA page 42. Thus, Robert Breest is excluded. And, the lower court should have dismissed the murder indictment.

The courts of New Hampshire are out of step with other state supreme courts, and the holding is contrary to the 2008 District Court holding by Chief Judge McAuliffe, wherein he held that the DNA results if favorable to Robert Breest would allow him to prove his innocence in this case, Breest v. AG for N.H., No. 06-cv-361-SM.

The second issue for review is that Robert Breest had sought the raw data, and the state responded that he had already received it, but he had not. In a previous holding, Judge Kathleen McGuire of the Merrimack County Superior Court, holden at Concord, New Hampshire had ordered the state to supply Robert Breest with the raw data from the Cellmark, and Dr. Charlotte Word test, and upon review several DNA experts determined that the Cellmark DNA work in 2000 was flawed. This is contained in the footnote of the 2007 magistrate report in Breest v. AG for N.H., No. 06-cv-361-SM. Robert Breest's attorney paid for the DNA testing, and thus, Robert Breest is entitled to it, not just the final analysis, to show that, as Dr. Charlotte Word, testified at the 2015 hearing in Concord, New Hampshire, that upon her review of the 2012 DNA report, she concluded that the markers were possibly artifacts and not true alleles, as Cellmark included all markers, even those that might be artifacts, so an independent reviewer could draw independent conclusions, Robert Breest was denied this capability, even where he showed that previous reports were flawed.

The third issue before this court is that after Robert Breest was convicted of murder in the Merrimack County Superior Court in Concord, New Hampshire in 1973, and sentenced to prison, the state moved to increase the sentence from 18 to life to 40 to life on the basis of a request to certify the murder as psycho-sexual, the court did so, and Robert Breest appealed. Judge Bownes of the District Court for the District of New Hampshire rendered an 18 page opinion and order wherein he determined that

Robert Breest had not been convicted of psychosexual murder and that was not one of the elements of the crime of murder that he had been convicted of committing. This opinion and order was presented to the superior court in Concord, New Hampshire and denied on August 25, 2021 with the notation that prior to this court's holding in Apprendi v. New Jersey, 530 U.S. 466 (2000) and other mentioned cases, Robert Breest was not entitled to a jury verdict and Apprendi is not retroactive. Other than that, the superior court held that Robert Breest was procedurally barred and the state supreme court declined discretionary review, see appendix A and B. Robert Breest submits that the holding of this court in Sullivan v. Louisiana, 508 U.S. 275 (1993) and specifically relying upon Sparf v. United States, 156 U.S. 51 (1895) as well as Article III and the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution make any sentence for a crime where there is no jury verdict renders the matter void ab initio and the court, any court, lacks jurisdiction to impose a sentence for a crime where there is no guilty verdict. The federal habeas corpus district court opinion and order is attached hereto as Appendix B, NOA at 86 et seq. Robert Breest moves this court to render judgment in his favor, because the state courts are not in compliance with this court's holding nor the Constitution of the United States, and have failed to obey a federal court order, in violation of Article IV of the Constitution.

The fourth issue was that in Robert Breest's pleading, the state through senior assistant attorney general Elizabeth Woodcock accused Robert Breest of not being truthful in his pleading as

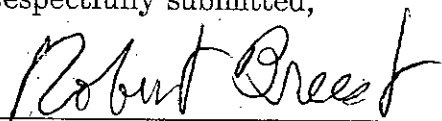
he filed in the superior court, thus, Robert Breest sought to have the superior court order the attorney general to produce a copy of the transcript for the court. The state responded and inquired of the court if the court wished a paper copy or a disc. The court responded by saying the motion was moot as the court had already determined on the basis of the facts as presented by the state that the transcript was not necessary. Robert Breest says this ex parte determination without having the evidence is a violation of Justice Harlan's holding audi alteram partem, Robert Breest explained to the court that the transcript of the hearing would substantiate his position, and the court summarily disposed of the pleading saying it was moot. The court erred and should have ascertained that Robert Breest was speaking the truth and the state was being deceptive and the issues presented were critical to a DNA determination.

Finally, the last issue before the court was a motion for judgment on the pleadings, Robert Breest sought judgment on the pleadings because the evidence was already before the court in the 2015 hearing. The court also denied this motion saying the matter was denied for the same reasons as the court denied the motion to vacate the psychosexual murder argument. The court held, contrary to this court's holding in Sullivan, supra, and the Constitution, that Robert Breest was not entitled to relief. The state courts erred in failing to correct the error, and the error is contrary to other state supreme court holdings, this court's holding and the Constitution.

### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

  
\_\_\_\_\_

Robert Breest

Date: January 20, 2022