No. 21-7446

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Kristopher Kyle Russell — PETITIONER
(Your Name)

vs.

Bobby Lumpkin Dir. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Texas Court of Criminal Appeals in Austin
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Kristopher Kyle Russell #1380681
(Your Name)

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(Address)

Abilene Tx. 79601
(City, State, Zip Code)

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(Phone Number)

QUESTION(S) PRESENTED

1. The plain reading of the statute indicates that counsel must be appointed to learn if biological evidence exists, yet Texas courts have specifically held that such is not necessary Russell argues that this violates due process.

2. Under subbhapter section 64.035 if DNA was previously tested and is still in the form to be compared under acceptable standards then such should be done to not do so violates equal protection and due process.

3. The Second Court of Appeals never issued a judgment or written opinion as such Russell has no specific idea of the basis for the denial of DNA testing. To fail to offer a written opinion making it's basis for a decision clear violates the underlying ideas of fairness and dueiprocess.

4. The courts have both at the appellate level and trial courts have made judicial decisions/interpretations about what constitutes "identity" for the purpose of testing. This has resulted in only 10 people out of thousands who have applied for testing, being actually tested. Russell argues that this standard is being applied differently for pro se litigants and those who are represented by counsel, which violates equal protection and favors the wealthy over the common many

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:

RELATED CASES

NONE[

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TABLE OF AUTHORITIES CITED

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 Not applicable; 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 Not applicable; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[X] 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,
[X] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

JURISDICTION

[ ] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was Not applicable.

[ ] 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).

[x] For cases from **state courts:**

The date on which the highest state court decided my case was 12/8/2021. 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

1) The Fifth and Fourteenth Amendment's Due Process and Equal Protection clauses, of the United States Constitution.

2. Texas Code of Criminal Procedure Chapter 64 and 64.035.

STATEMENT OF THE CASE

Russell seeks review of a decision in the Texas Court of Criminal Appeals denying review of an order denying DNA testing of potentially exculpatory material. The 89th Judicial District Court of Wichita County Texas over saw a trial in which Russell was convicted of murder. During the course of the trial it was shown by lab report that there was numerous bits of "unknown" DNA at the scene. This was DNA that was according to the report tested but unidentified as being related to anyone at the crime scene. Or anyone that police had considered to be a suspect.

Russell entered a plea of not guilty and maintained that position through out trial. Russell admitted that he was in a sexual relationship with the victim Samantha Lezark. His DNA and fingerprints were found at the scene of the crime and such was considered sufficient to try him for the crime of murder.

At trial, the police admitted that the reason that the police had investigated Russell and not the obvious suspect John Lezark was because John had been excluded as a contributor to the DNA from the crime scene. However, the DNA report submitted by Amber Moss did not in fact exclude John Lezark. Moreso, in trial Moss testified that John had been excluded.

Russell argues these facts alone are sufficient to appoint consel for DNA testing under Texas Code of Criminal Appeals, Chapter 64. Yet counsel was not appointed.

Texas Legislature passed an amendment to Chapter 64, numbered Chapter 64.035 which holds that if DNA still exists and is in the

The record indicates that multiple bits of DNA are and were tested from the crime scene by Orchid Cellmark labeled as unknown. If an attorney determied these were still in testable form then under a plain reading of the statute they should be compared to the ones in the federal and state databases referred to as CODIS.

Which has been the key to solving crimes in the public sphere of concern. Specifically Ex Parte Grant 622 S.W.3d 392 (Tex.Crim. App. 2021) and In re Morton, 326 S.W.3d 634 (Tex.Crim.App. 2010) Russell argues that the court should review the judicially created rules that deny review of this statute as it is clear that those who have attorneys from have been paid by innocence projects have the complete access to the courts but pro se litigants do not.

In the efforts made by Russell he has repeatedly asked for a written order to have the appellate courts review on appeal. But, none of the courts have issued an order or written opinion that could be reviewed on appeal. None of the courts made a specific finding or provided Russell any reason that his case was denied. BUT-in the history of the Court of Criminal Appeals there is a staff writ memorandum which is the basis of the court's decision. Russell argues that such should be provided upon request to give pro se litigants a fair chance.

To deny review without any justification is unreasonable and has denied thousands of inmates review some on death row. Russell argues such is unconstitutional as applied to him!

REASONS FOR GRANTING THE PETITION

ISSUE ONE: Counsel should have been appointed. Historically some of the state courts have made a point of reviewing the statute under plain english and held that appointment of counse was mandatory upon a showing of indigency. See Gray v. State, 69 S.W.3d 835 (Tex.App. Waco 2002). However this was quickly ended and the court instead held that there was a number of cases that the court could envision that did not need an attorney to assist the indigent pro se litigant in trying to reverse his conviction because it did not meet the other factors of the statute. However, this is not how the statute reads. See Article 64.01 Motion which states in part (a-1) "A convicted person may submit to the convicting court a motion for forensic DNA testing of evidence containing biological material. The motion must be accompanied by an affidavit, sworn to by the convicted person, containing statements of fact to support the motion." When read in conjunction with (c) "A convicted person is entitled to counsel during a proceeding under this chapter. The convicting court shall appoint councel for the convicted person if the person informs the court that the person wishes to submit a motion under this chapter, the court finds reasonable grounds for a motion to be filed, and the court determines the person is indigent. Counsel must be appointed under this section not later than the 45th day after the date the court finds reasonable grounds or the date court determines the the person is indigent, whichever is later..."

Russell argues that there has been a violation of his rights as the Texas courts have failed to read the statute as written and such was done specifically to exclude the pro se, indigent persons from the court system. Duncan v. Walker 121 S.Ct. 2120 (2001) states clearly that "To understand the interpretation of a statute one must begin with the text." Connecticut National Bank v. Germain, 112 S.Ct. 1146 (1992) [Congress] "says in a statute what it means and means in a statute what it says there" Thus the plain meaning of a statute controls where that meaning is ambiguous. See also Harris Trust and Savings Bank v. Saloman Smith Barney Inc., 120 S.Ct. 2180 (2000). Most important under this issue is the notion that it is an "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." See Mountain States Telephone & Telegraph Co. v. Pueblo, 105 S.Ct. 2587 (1985).

The core of this argumenbt is that under the statute listed on the previous page the Texas legislature wrote that the convicting court shall appoint and that Counsel must be appointed. Which the court should recognize as the language of command under it's own well defined case law. Essentially, these words create a due process based liberty interest in appointment of counsel. One that the courts of Texas has ignored. As Russell did not have an attorney appointed for this case below for the purpose of DNA testing of DNA in state custody. Which could in fact be exculpatory.

Russell would quickly point out that he is not seeking a review of the interpretation of the case law that was used to deny counsel, but rather seeking review to determine if the state can

create law that gives rise to appointment of counsel under the federal constitution. Specifically, does that statute as applied to him provide a constitutionally based right for appointment of counsel.

Russell argues that the court should consider that without counsel in this case, not only can he not varify that the DNA still exists but that there is no advocate on his behalf to determine if the situation is such that testing is likely to result in exculpatory body of evidence that would free him. Further, in context of the Chapter 64.035 issue the need for appointment of counsel and the advocacy of such is crucial as it is necessary to determine if testing has already been done and then if such a sample is still in condition for comparsion via CODIS.

Russell avers that he was harmed by the lack of counsel and the supporting advocacy as dozens of bits of evidence points to a killer other than himself and "unknowns" were common on the crime scene yet none were sent through CODIS.

ISSUE TWO: The Texas scheme of DNA testing includes a subpart enacted at least in part to increase the number of samples that could not be identified as specific individuals and comapred to to those is state and federal databases generally referred to as CODIS. Which is how the killer in the Morton and Grant case were in fact identified see above.

Specifically thea statute states in part, "If the analyzed sample meets the applicable requirements of state or federal submission policies, on completion of the testing under article 64.03, the convicting court shall order any unidentified DNA profile to

be compared with the DNA profiles in; 1) the DNA database established by the Federal Bureau of Investigation, and 2) the DNA database maintained by the department of Public Safety under subchapter G, Chapter 411, Government Code."

Again under a plain reading of the statute the only question is if DNA testing has been completed and it was finished after the investigation ended but nothing in the statute requires that it be repeated for a second DNA testing. Russell argues that if the Texas Department of Public Safety did not find a match the first time it was not necessary for a re-testing only an effort to compare the numerous unknowns to those in CODIS was all that legislative intent ever envisioned.

ISSUE THREE; Russell argues that it is improper for the courts to simply deny testing and not issue an opinion as to why or what it's reasoning for the denial was at the time.

In the Texas jurisprudence the courts have held that under Chapter 64 there are three specific instances where DNA is forbidden as these do not qualify for testing as identity is not a question in the context of the case before the court. In the case of Prible v. State, 245 S.W.3d 466, 470 (Tex.Crim.App. 2008). the court summarizes the cases and discusses them at length.

It is possible for example, that such was the issue in the Russell case since the murder occured at the Lezark residence, where Russell was a frequent guest. But no written decision of the court was ever proffered to Russell or held to be the case, as such the appeal was required to be a document that argued a plethora of identity issues. For example, Texas has held that

whenever fingerprints are found at the scene of a crime then the identity of a party is not an issue. See Hart v. State, 2004 Tex. App.Lexis 1006 or Wilson v. State, 2006 Tex.App.Lexis 18 both of which were denied DNA testing because the defendant's fingerprints were found at the scene of the crime. However, the same was true of Morton ibid as the scene of the crime was his home.

The lack of a written decision or any guidance from the Texas courts either the District Court or the Court of Appeals is unfair as it gives no basis for the decision.

ISSUE FOUR: Russell argues that the fact is that the judicial definitions of what is and is not "identity" are discriminatory in their interpretation as they result in the indigent poor being unable to obtain testing.

The shepard's citation function of the Lexis Nexus system lists 986 specific cases that have applied for testing and been denied and appealed. Certainly there are more that have not filed an appeal to the denial of testing in Texas. Yet according to the Texas Governor's council on Criminal Justice only 11 have ever been granted testing.

Russell has very limited ability to find and review these cases but in in each of the ones granted there was attorney's who had taken up the cause and assisted the indigent inmate in gaininng testing.

Russell argues that this demonstrates a strong preference for represented cases over pro se litigation. A statistical disparity that cannot be explained except for a discrimination against the impoverished.

Russell argues that there is discriminatory intent within the practice of denying access to DNA testing to the average person. "Statistical proof can rise to level that it, alone proves intent to discriminate on the basis of race and statistical proof can be sufficiently supplemented by other types of proof to establish discrimination." Bean v. Southwest Waste Management 482 F.Aupp 673 (S.D. Tex. 1979). And, "Where gross statistical disparities can be shown, they alone may in a proper case constitute prima facia proof of a pattern of practice of discrimination." Hazelwood School District,v. U.S, 97 S.Ct. 2736 (1977).

Russell points out that the sole question before the trial court should have been "who" killed Samantha Lezark? Same with the court considering whether or not to test DNA. Russell argues that it is not unreasonable at all to believe the killer could be already in prison that was the case with Morton and Grant ibid. Which will not be an issue as long as the court feels that the "identity" issue can turn solely on the fact that Russell's prints were found at the scene, where he had been given regular and routine access. Yet there was not one witness to the murder. The body was found 14 hours after Russell left her home and no motive for killing her was ever demonstrated or proven. Yet, the reports indicate at least 7 samples of "unknown" DNA did not match any suspect that was interviewed or tested by police. Russell argues that the "identity" question framed by the Texas legislature was one that was intended to make the court question if the person convicted was the perpetrator not a single line that could be used to eliminate testing!

Yet, these identity issues are ignored if one has Barry

Schek or other notedvattorney then the courts of Texas are willing to listen to the questions and perform DNA testing.

Russell argues that he needs assistance to properly even evidence this argument as the law library on the prison only provides the names of the persons who were granted testing and the names of their attorneys, not detailed proof of the cases.

Substantive due process prevents the government from engaging in conduct that "shocks the conscience" Rochin v. Calif, 72 S.Ct. 205 or interfers with rights "implicit in the concept of ordered liberty" Palko v. Connecticut, 58 S.Ct. 149 (1937) When government action depriving aperson of life, liberty or property survives substantive due process scrutiny, it must be implemented in a fair manner.

The argument is simple, in the Morton case the accused Mr. Morton lived at the home where the murder occured, his prints were all over the home. His testing was granted. In Russell's case he was also spending loads of time at the residence of the victim his prints were also at the scene of the crime. Yet testing was denied. Clearly, having a prominent attorney makes a difference.

Granted there were other differences but these seem to be the most significant in the course of the cases.

Russell asks that this high court take note of the problems and people at the other end of the scale, hear the complaint provide counsel to asskst with the development of a proper and full briefing of the issue relative to the facts and give those thousands of us who file petitions in Texas a chance to be

proven innocent of a variety of horrible crimes. Consider this had the state simply run these unknowns through CODIS in the first place and investigated the person, if any that turned up then Russell might not have ever been tried as the real killer would have been found! But the state chose not to cross reference these unknown samples not because the evidence for conviction was so 'overwhelming' but because it wanted to defeat an opportunity for advocacy.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: 27FEB2022