ORIGINAL

No. 23-6241

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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

Mark Emmanuel Martinez — PETITIONER
(Your Name)

vs.

Erik A. Hooks — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

the United States Court of Appeals for the Fourth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Mark Emmanuel Martinez
(Your Name)

1255 Prison Camp Road
(Address)

Whiteville, NC, 28472
(City, State, Zip Code)

(Phone Number)

Questions Presented

1. If opposing parties to the action each present a contravening piece of evidence, both of which satisfy the prima facie authentication requirements under Fed. R. Evid. 901(a), 901(b)(9), 1001(d), 1001(e),
   a- What is the proper procedure for the court to undertake?, Due to both being generated by an accurate electronic process. What if the court cannot ever conclusively prove the authenticity of one over the other?
   b- Is the court obligated to place both pieces of "authentic" evidence in front of a jury under Fed. R. Evid. 104(b), with instructions to make findings of fact?
   c- Does the trial court abuse it's discretion by excluding one party's evidence without proving it a fabrication, or conclusive authentication of the other?
2. Does the evidentiary conflict in Question 1 present justification for extending Brady v. Maryland to apply to suppression hearings?
3. If a respondent submits a Petitioner's electronic evidence as an exhibit in habeas proceedings,
   a) Is respondent adopting the evidence?
   b) Is respondent implicitly authenticating it?
   c) Since the evidence is of the same type as the evidence in Question 1, generated by the same process, and turned over by Petitioner in the same discovery file, would Fed. R. Evid. 901(b)(4) and 901(b)(3) apply to substantively prove that Petitioner's evidence is real by party admission under Fed. R. Evid 1007, resolving the conflict in Question 1?

4. Is a Federal Habeas Court obligated to review a Petitioner's Actual Innocence claim on the merits?

a- If so, is the court required to expressly state their reasons for denying relief? In other words, do summary denials conflict with the review afforded to an Actual Innocence claim under Schlup v. Delo?

b- If so, Did the 4th Circuit Court of Appeals unreasonably uphold the U.S. District Court's denial of Petitioner's §2254 Habeas Petition under AEDPA Statute of Limitations grounds without addressing Petitioner's Actual Innocence claim?

LIST OF PARTIES

[✓] 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

- Mark Emmanuel Martinez v. Erik A. Hooks, No. 5:19-cv-00117-MR, U.S. District Court for the Western District of North Carolina, Statesville Division. Judgement entered Nov. 2, 2021
- Mark Emmanuel Martinez v. Erik A. Hooks, No. 21-7608 U.S. Court of Appeals for the Fourth Circuit. Judgement entered June 28, 2023
- State of North Carolina v. Mark Emmanuel Martinez, No. 15 CRS 52158, State of North Carolina, Lincoln County. Judgement entered Feb. 13, 2017

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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 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 United States district 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.

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

The opinion of the highest state court to review the merits appears at Appendix D 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 Lincoln County Superior Court court appears at Appendix E 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 June 28, 2023.

[ ] 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: August 28, 2023, and a copy of the order denying rehearing appears at Appendix C.

[ ] 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 ________. A copy of that decision appears at Appendix ____.

[ ] 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. 28 U.S.C.A. § 2244 (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court.
2. U.S.C.A. Const. Amend. XIV Section 1. ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
3. Fed. R. Evid. 104 (a) In General. The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.
4. Fed. R. Evid 104 (b) Relevance That Depends on a Fact. When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist.
5. Fed. R. Evid 104 (e) Evidence Relevant to Weight and Credibility. This rule does not limit a party's right to introduce before the jury evidence that is relevant to the weight or credibility of other evidence.
6. Fed. R. Evid. 901(a) In General. To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.
7. Fed. R. Evid. 901 (b)(1) Testimony of a Witness with Knowledge. Testimony that an item is what it is claimed to be.

8. Fed. R. Evid. 901(b)(3) Comparison by an Expert witness or the Trier of Fact. A comparison with an authenticated specimen by an expert witness or the trier of fact

9. Fed. R. Evid. 901(b)(4) Distinctive Characteristics and the Like. The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all circumstances.

10. Fed. R. Evid. 901(b)(9) Evidence about a Process or System. Evidence describing aprocess or system and showing that it produces an accurate result.

11. Fed. R. Evid. 902(13) Certified Records Generated by an Electronic Process or System. A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent must also meet the notice requirements of Rule 902(11).

12. Fed. R. Evid. 902(14) Certified data Copied from an Electronic Device, Storage Medium, or File. Data copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent must also meet the notice requirementsof Rule 902(11).

13. Fed. R. Evid. 1001(d) an "original" of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it. For electronically stored information, "original" means any printout

or other output readable by sight - if it accurately reflects the information. An "original" of a photograph includes the negative or a print from it.

14. Fed. R. Evid. 1001(e) A "duplicate" means a counterpart produced by a mechanical, photographical, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.

15. Fed. R. Evid. 1004(a) An original is not required and other evidence of the content of a writing, recording, or photograph is admissible if: all the originals are lost or destroyed, and not by the proponent acting in bad faith;

16. Fed. R. Evid. 1007. The proponent may prove the content of a writing, recording, or photograph by the testimony, deposition, or written statement of the party against whom the evidence is offered. The proponent need not account for the original.

17. Fed. R. Evid. 1008(b) Ordinarily, the court determines whether the proponent has fulfilled the factual conditions for admitting other evidence of the content of a writing, recording, or photograph under Rule 1004 or 1005. But in a jury trial, the jury determines - in accordance with Rule 104(b) - any issue about whether: another one produced at trial or hearing is the original.

Statement of the Case

The core of this case involves a simple evidentiary dispute What complicates the situation is that the dispute involves evidence generated by two distinct, but legally equally reliable, electronic processes.

On the State's side is a cellular phone extraction generated by the Cellebrite program. On Petitioner's side is a set of 8 Screenshots of Text messages, generated by the Iphone Operating System's internal software. The Cellebrite report undisputably proves that Petitioner committed the crimes he was convicted of, while the text message screenshots undisputably prove that Petitioner is completely innocent. Both purportedly show the text messages from the date of the incident, and therefore, one of the parties involved has broken the law by fabricating evidence.

Screenshots and Cellebrite reports are both authenticated by the same process. Fed. R. Evid. 901(a) requires that a proponent of evidence make a prima facie showing that the evidence is "what it purports to be." Fed. R. Evid. 901(b)(9) allows authentication through the description of "a process or system" that produces an accurate result. Fed. R. Evid. 1001(d) defines "original" writings as a "printout or other output readable" by sight that "accurately reflects the information." Also, screenshots can also be authenticated under Fed. R. Evid 901(b)(1) through testimony of a witness with Knowledge, Fed. R. Evid. 901(b)(3) comparing it with others that have been authenticated, and Fed. R. Evid. 901(b)(4), which authenticates through unique identifiers that are observable in the evidence, such as phone numbers, message content, names, and timestamps of relevant dates and times.

Fed. R. Evid. 104(a) and (b) discuss the preliminary questions that are made by a judge, and how any disputes are settled. In short, if a challenge is not made to a proffer of evidence, or if a challenge is made with no support, Rule 104(a) applies, due to there being no disputed issues of fact. If the evidence is challenged, and the challenge is supported by facts, Rule 104(b) controls, sending the dispute to a jury with instructions to make factual determinations.

The State trial court, on the morning of trial, February 13, 2017, held a suppression hearing, ruling against Petitioner's use of the text message screenshots. (U.S. Dist. Court. Doc. 1 at 8-9) No factual determinations were made to disprove the authenticity of Petitioner's evidence, contravening Fed. R. Evid. 104(a) and (b), and Due Process guarantees under the 14th Ammendment. The court's justifying reason was disgraceful: the Court simply "[did] not like" Petitioner. (U.S. Dist. Court. Doc 22 at 25-55) Petitioner pled guilty due to the ruling against his evidence. Petitioner's post-conviction counsel filed an MAR (U.S. Dist. Court Doc. 14-4) on 9-25-18, asserting Petitioner's "probable innocence", and citing a letter that the victim in the case wrote recanting her accusations against Petitioner. The letter also states that the "detective threatened her every time he went to see her." (U.S. Dist. Court. Doc 22-1 at 2-3) The MAR court denied the motion on 5-6-19 (Appx. E-26a-28a). Although the MAR court claimed it was going to review all of the evidence on record, (Appx. F-29a-30a) The denying order only cites review of the

State's evidence, and claims that Petitioner pled guilty due to said evidence. (Appx. E-27a) completely ignoring the fact that contravening versions of the evidence exist. On 7-23-2019, Petitioner appealed the MAR court's decision (U.S. District Court, Doc 1-1 at 3-23) arguing, inter alia, that the State tampered with evidence - namely, the Cellebrite report, that the State withheld exculpatore evidence at trial, that on 3-29-2018, Petitioner spoke to the Detective in the case on a recorded prison phone call where he admits to coercing the victim, trial Ineffective Assistance of Counsel, and that Petitioner possesses text message screenshots that prove he is innocent (U.S. Dist. Court Doc 1 at 30-37). The N.C. court of Appeals summarily denied the Certiorari Petition on 8-5-19. (Appx. D-25a)

On 9-25-18, Petitioner filed his §2254 Petition (U.S. District Court, Doc. 1). The grounds asserted are similar to the Certiorari Petition:

1- That the State tampered with cellphone records extracted from the victim's phone

2- That the State denied the Petitioner his right to present evidence in his defense at trial and failed to suppress evidence that the State tampered with

3- That Petitioner received Ineffective Assistance of trial counsel and ineffective assistance of post-conviction counsel

4- That the state denied Petitioner his right to appeal based on Ground 2 facts and other avenues of relief Petititioner was advised of by trial counsel

5 - That the victim wrote a statement at the end of 2017 that asserts Petitioner's innocence

6 - That the MAR court and N.C. Court of Appeals have absolutely no response to the grounds raised by Petitioner

The § 2254 Petition also contained a full copy of the Certiorari Petition in the N.C. Court of Appeals attached to it. Therefore, Petitioner presented the Question 1 in this Petition to the trial court, MAR court, N.C. Court of Appeals, and U.S. District Court.

On 1-25-21, Respondent filed its initial answer to Petitioner's §2254 Petition (U.S. District Court, Doc 12) The argument made by respondent was that the AEDPA 1 year Statute of Limitations had passed under §2244(d)(1). Respondent also attached exhibits (Document 14-6 at 9-13) but did not attach any portion of the Cellebrite report.

On 3/2/21, Petitioner filed a response asserting -

1- Equitable Tolling of the AEDPA time limit

2- A defense to procedural default,

3- An argument calling the court's attention to the fact that in it's 'Initial Answer', Respondent had made a fraudulent claim by attaching Petitioner's ev to its own list of exhibits and claiming that the evidence had been given to Petitioner as pretrial discovery.

4- A 40+ page ~~showing~~ of Actual Innocence

Despite Petitioner's assertion of Actual Innocence at the trial level, to the MAR court, (Doc 1-1 at 20-23) and (Document 14-4), the N.C. Court of Appeals, and the U.S. District Court (Document 1 at 24-26), the U.S. District Court denied Petitioner's §2254 Petition on 11-2-21, based on AEDPA Statute of Limitations grounds (Appx. B-3a-23a)

Among the few findings made by the court was the court's recognition that Petitioner made an Actual Innocence claim (Appx B-9a), and repetition of the same claim that the MAR court made - that Petitioner pled guilty based on the "incriminating evidence", referring to the State's Cellebrite Report (Appx B-17a-18a).

Petitioner appealed to the 4th Circuit on 11-9-21. The focus of the appeal was the reinforcement of the constitutional violations asserted in the U.S. District Court, the U.S. District Court's incorrect application of AEDPA Statute of Limitation grounds instead of reviewing the Petition based on the Actual Innocence exception under Schlup v. Delo, 115 S. Ct. 851 (1995), and, the erroneous factual determinations made by the U.S. District Court; The most important of these erroneous determinations being the court's reference to the Cellebrite report, despite Respondent not attaching any portion of the report or arguing its authenticity when given the opportunity, as well as the fact that respondent attached Petitioner's evidence to it's own motion and tried to claim that it was "Pretrial discovery given to Petitioner" (Document 14-6 at 9-13). Petitioner's Question 3 to this court concerns these actions by respondent.

Does the fact that respondent attached a set of Petitioner's Screenshots to its "Relevant excerpts" (Document 14-6 at 9-13) imply that respondent is adopting the evidence and authenticating it? The screenshots were given to the State along with over 100 others, including the ones that conflict with the State's Cellebrite report. (Appx. G-32a-39a). Since they are both sets of Screenshots, does Rule 901(b)(3)'s authentication method substantively resolve the conflict in Question 1?

Petitioner has raised the argument regarding Question 3 to the U.S. District Court (Document 22 at 5-25), and the 4th Circuit Court of Appeals in Certiorari.

In April, 2023, Petitioner submitted a Memorandum of Additional Authorities to the 4th Circuit. The purpose of the memorandum was to ask the Court to review Petitioner's Actual Innocence claim in the same way that the U.S. District Courts under its jurisdiction have reviewed the Innocence claims of other Petitioners. Petitioner argued that U.S. District courts have historically gone out of their way to accomodate Petitioners in Actual Innocence review, even when

a- A petitioner doesn't assert Actual Innocence as a ground (Petty v. Padula, 2009 WL 3063127, U.S. Dist. Court, D. South Carolina, Rock Hill Division)

b- A petitioner doesn't assert actual innocence at all (Garvin v. Eagleton, 2013 WL 3821482 U.S. Dist. Court, D. South Carolina, Anderson/Greenwood Division)

c- A petitioner only makes a 'fleeting reference' to being Actually Innocent (Flowers v. Harkleroad, 2012 WL 5879822, Western District of N.C., Statesville Division)

The 4th Circuit Court denied Petitioner's Certiorari Petition Summarily on 6-28-2023. (Appx. A-1a-2a)

Petitioner filed a timely Petition for Panel Rehearing with Request for En Banc Rehearing on 7-31-2023. Petitioner briefed this Petition's Question 4 for the Panel: Is a Habeas Court constitutionally obligated to review a Petitioner's Actual Innocence claim on the merits? Petitioner also briefed the two versions of conflicting evidence in Question 1 once again, outlining the Substantial amount of

New evidence regarding cell phone extractions and specifically, the Cellebrite program that raises substantial doubt about the Software's reliability.

The 4th Circuit summarily denied Petitioner's Petition for Panel Rehearing on 8-28-23 (Appx. C-24a)

Reasons for Granting Certiorari

1. The evidentiary dispute in Question 1 presents a matter of first impression for the Court.

The trial court's denial of Petitioner's use of his evidence is clearly not the correct or constitutional procedure for resolving such a complicated dispute, as the denial was not based on any factual determinations or conclusive finding of one evidence's authenticity over another. The illegal suppression of Petitioner's evidence violates Petitioner's 14th Amendment Due Process guarantee, and controvenes the procedure outlined by Fed. R. Evid. 104(b) and 1008(b), which state that only juries can make factual determinations about which version of evidence produced at trial is the original. The greater problem is that once a jury is shown both pieces of evidence, they may find that they are unable to conclusively determine which is the original and which is the fabrication.

And so the question becomes - would either side be unfairly prejudiced if both are shown to the jury? Should both be excluded, and the matter settled on the rest of the evidence? Or should both be accepted and should both sides be allowed to attack the authenticity of the evidence?

It would be easy for this court to cast this case aside and not have to resolve this Question. The problem with that solution is that electronically stored information is going to play a larger and larger role as time passes. This exact type of evidentiary dispute is guaranteed to arise again.

2. New evidence from various sources has cast serious doubt as

to the reliability of Cellebrite reports.

Petitioner substantially briefed the problems with Cellebrite extractions for the En Banc Panel. To start, just on the face of the evidence, an observer can see that there is a large problem with the State's version of the evidence. All of the explicit photographs in the report show a creation date - that is, the date in which the photographs were ever part of the phone's contents - of 3-29-15, the week that the Detective in the case had the phone in his possession. There are no explicit images with dates prior to the day of the incident. If the reports are as accurate as perceived by the courts, then the State's report on its own, shows illegal alterations made by the Detective in the case.

Next comes the problem of spoliation. The Detective's report (Doc 14-1-4) states that he was in possession of the victim's phone as well as Petitioner's Ipod, and that he was going to run a forensic extraction of the contents of both. If the State's cellebrite report were authentic, then Petitioner's Ipod would show a mirror image of the incriminating conversations. No report was ever submitted by the detective. Petitioner provided the Ipod without a passcode lock. The Detective's report says nothing about this device ever again. To make matters worse, the State claimed that both AT&T and Sprint could not provide any cell phone records at all. To make matters worse still, the Detective deleted the victim's Icloud backup, which could disprove the Cellebrite report because a copy of all of the victim's text messages was stored in the cloud. Also, Petitioner's phone was seized by the Detective during Petitioner's first appearance a month after turning himself in and making bond. And, to make matters worse still, the Detective destroyed the victim's phone on which the Cellebrite extraction was performed, forever preventing a secondary extraction being performed on the phone to verify that the report is accurate. Shouldn't the State be precluded from even submitting their version of the evidence under Fed. R. Evid. 1004(a)?

The authenticity of Cellebrite reports is also dubious. See

a- Thomas Brewster, April 22, 2021 "Cops' Iphone hacking Tools are (sometimes) insecure and Buggy (https://www.forbes.com/sites/thomasbrewster/2021/04/22/cops-iphone-hacking-tools-are-sometimes-insecure-and-buggy/?sh=7ddd682287f)

b- Lorenzo Franceschi-Bicchierari, Joseph Cox, April 27, 2021 "Cellebrite pushes update after Signal Owner Hacks Device (https://vice.com/en/article/qj8pjm/cellebrite-pushes-update-after-signal-owner-hacks-device)

c- Nathan Ord, April 28, 2021 "Cellebrite physical Analyzer Tool Drops Full Iphone Support After High-Profile Signal Hack (https://hothardware.com/news/cellebrite-physical-analyzer-software-no-longer-supports-iphones)

d- Lucas Ropek, April 27, 2021 "Signal's Cellebrite Hack is already causing Grief for the Law" (https://gizmodo.com/signals-cellebrite-hack-is-already-causing-grief-for-th-1846773797)

Not only are news outlets reporting on this problem. See D.O.J. 22384, 2022 WL 10516094 (U.S. Att. Office, District of New Jersey) - a criminal defendant fabricated a cellebrite report, fooling her defense counsel and the courts submitted to.

This is the new reality of technological evidence. The D.O.J. obviously wanted to put the warning out that this is possible,

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Mark Emmanuel Martinez

Date: Wednesday, 22 November, 2023