ORIGINAL

No. 23-6038

In The
Supreme Court of the United States

FRANK GARCIA.
Petitioner.

v.

Joseph Noeth, NYS DOCCS
Respondents.

On Petition for A writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Frank Garcia, 09B2727
Pro -se. Petitioner
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February 28, 2024

QUESTION PRESENTED

Can the might have reasonable possibility Harmless error doctrine be applied to DNA, that has the sole trifecta ability, to either:

1. Clear the Accused
2. Convict the Accused

+/ or

3. Exonerate the imprisoned thru post-conviction statues/procedures.

LIST OF PARTIES

Pursuant to Rule 14.1(b) :

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

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PETITION FOR WRIT OF CERTIORARI

Petitioner Frank Garcia respectfully requests this Court to issue a writ of certiorari to review a decision of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit, unreported, reprinted at Pet. App. F, a denial to issue a certificate of appealability and denial of rehearing, unreported, reprinted at Pet. App. E, from the NYS (W) District Court decision rendered on February 17, 2023, reported as 2023 WL 2082703, reprinted at Pet. App. G, from a NYS Appellate Division, Fourth Department decision rendered on December 21, 2012, reported as People v. Garcia 101 A.D.3d 1604, reprinted at Pet. App. H.

JURISDICTION

Invoked under 28 U.S.C. §§ 1254(1),(2) and 1257 (a).

STATUTORY PROVISION INVOLVED

This case involves the provision of the Federal Habeas statue governing federal review of State Court decision, 28 U.S.C § 2254, reprinted at Pet. App. G.

STATEMENT OF THE CASE

A. Background

On February 14, 2009 Petitioner was contacted by Monroe County Sheriff Office Investigator Crough via phone @ approx 10am and a time and place of meeting was agreed upon by both parties. Three(3) minutes after Petitioner arrival at designated agreed place, Rochester Police Department Officer Koehn parket his police cruiser behind Garcia's parked car. Upon Officer Koehn stepping out of his vehicle - told Petitioner that he's under arrest and proceeded to ask Petitioner if he had any weapons on his person. Petitioner responded with a yes, in sum: he had a registered Glock semi-auto pistol on his hip at 4 o'clock and an extra magazine at 7 o'clock. While Petitioner stood with hands on police cruiser's trunk area, Officer Koehn removed said firearm and mag from Petitioner's in waist gun holsters and handed both items to RPD Officer D''Maria which just arrived at scene.

Subsequently - Petitioner was cuffed, placed in police vehicle and transported to the Monroe County Sheriffs Office - HQ, thus arriving at approx 3pm. Upon entering facility - Petitioner was searched anew and led to an interrogation room. Petitioner was read Miranda warnings and then cuffed to chair in said room. Petitioner was advised by Monroe County Sheriffs Office Investigator Crough that - a firearm examiner has been called, and will arrive shortly to test the retrieved Glock handgun taken from Petitioner. Interrogation was stop'd at 4:55pm and Investigator Crough left Petitioner

cuffed to chair. At approx 7:05pm - Investigator Crough entered Interrogation room, uncuffs Petitioner and informs Petitioner that - he is under arrest for the murders comitted hours prior. At 10 pm - Petitioner was transported to the Swedentown Court for arraigment on ii murder 1st and i attempt murder 2nd charges. At the 11pm Saturday night arraigment, the unrepresented Petitioner was read the charges by the Court. Monroe County Asst District Attorney Randall handed Petitioner a notice of grand jury presentation and the Court has a deputy hand Petitioner a probable cause tentative hearing notice too. The Court ordered Petitioner be held without bail and ordered Petitioner be brought to the Monroe County Jail. Upon Petitioner's arrival at Sally port of the Monroe County Jail and his exiting of police vehicle, Ontario County Sheriffs Office's Deputy Taylor steps in front of Petitioner and demands Petitioner open his mouth. Upon compliance - Dept Taylor swabs Petitioner's oral cheek and placed sample in a clear tube and proceeds to leave and head back to the Ontario County Sheriffs Office HQ. Garcia is walked inside, processed and ultimately placed in isolation.

Thirteen(13) days later on Feb 27, 2009 - via a warrant of arrest, stemming from a sealed indictment in the County of Ontario, Petitioner was removed from the Monroe County jail by numerous Deputies from the Ontario County Sheriffs Office and taken to the Ontario County Court for arraigment. Assigned defense counsel Mr. Morabito was present and Court read charges found in sealed indictment. The Court ordered that no bail be given and remanded Petitioner back to the Monroe County jail. Upon Petitioner's Court departure, Deputies from the Ontario County Sheriffs Office took petitioner to their Ontario County jail for processing, and upon conclusion - transported Petitioner back to the Monroe County jail.

On June 1, 2009 - the Ontario County Court ordered Petitioner be brought from the Monroe County jail, for the set - Huntley/WADE/MAPP scheduled hearing. At hearing defense counsel Mr. Morabito argued that the DNA obtained from Petitioner was from a drinking cup, that was given to Mr. Garcia at the Monroe County Sheriffs Office - HQ

while being interrogated by M.C.S.O -Inv Crough. The Ontario County District Attorney informed that counsel was incorrect and it's a oral DNA swab sample taken by Ontario County Sheriffs Office Deputy Taylor. Defense counsel argues that - supression must be, because counsel has attached at the 2/14/09 Swedentown Court in Monroe County. Ontario County District Attorney argued that- despite violations, inevitable discovery doctrine applies, because - if we are to obtain a proper search warrant, said evidence would be the same.

On June 19, 2009 - The Ontario County Court decided that: probable cause was present at defendant's 2/14/09 2:30pm arrest and all items removed from his person were lawfully obtained. The 2/14/09 8pm line up was not duly, nor suggestive, but proper and lastly - eventhou the oral DNA swab was unlawfully obtained from Defendant, the Inevitable Discovery Doctrine applies. This constitutes the decision of this Court.

B. The Guilty/Innocence trial

On August 3, 2009 - Petitioner was brought to the Ontario County jail and placed in protective custody isolation. Two(2) days after - on August 5th, 2009 - Petitioner was brought to the Ontario County Court, where individual voir dire jury selection was commenced and concluded at the end of day. On August 6th - Prosecutor in his opening summation spoke about DNA evidence. Tr: 557.4 - 559.1

On August 7th - O.C.S.O. Dept Hoffman testified about being the first on the scene, and having observed a piece of gum on the table and cigarette butts in sink at crime scene. Tr: 771 - 794. On the same day of August 7th - O.C.S.O - Deputy Taylor testifies how he obtained Petitioner's oral DNA swab. Tr: 837 - 838 and 843 - 848. On the same day of August 7th - O.C.S.O Deputy Martin testified how physical DNA evidence was gathered at crimescene and wherefrom. Tr: 1134, 1139, 1144 and 1151 - 1154.

On August 12th - DNA criminologist/Biologist from the Monroe County Public Safety Lab, testified in sum: of what was tested, methology and her ultimate conclusions. Result profile matched Garcia DNA at a 1:118 quatrillion, thus eliminating the rest

of the current world population as constributor (6 Billion). Tr: 1497 - 1500, 1502 - 1508, 1512 - 1513, 1516 - 1517, 1526 - 1527 and 1548 - 1549.

On August 13th - Prosecutor re-iterated ALL DNA evidence in his closing end of trial summations. Tr: 1669.23 - 1672.25

C. Sentencing

On September 1, 2009 - The Ontario County Court proceeded to sentence Petitioner. Said illegally obtained DNA evidence, not only had a great influence upon the trier-of-facts in reaching their guilty verdicts, two(2) and ½ weeks earlier, Dna also had a great influence upon Ontario County Court Judge Craig J. Doran himself. Ontario County Court judge while addressing Petitioner, Judge Doran did not refer to anyother physical evidence used during trial. Judge Doran did not mention for ei: the line-up, firearm examiner's conclusions, fingerprint conclusions, tire cast molding, cellphone (CSIL) real time tracking, evidence removed from Petitioner's car, nor to anyother physical evidence removed from Petitioner's person (legally registered Firearm and magazine), or to the boot mud track impression conclusion. Nor - did Judge Doran speak about any testimonies of the People's witnesses from Aug 5 - 7 or the 10th - 13th, except for one. If Judge Doran was influenced by the following testimony, and he's presummed to be the gate keeper of trial evidence admisibilities, it can be concretly stated without any reservations herein, said testimony and evidence therefrom had a bigger and greater influence on the layman trier-of-facts.

see: 9/1/09 sentencing minutes at Tr: 50.8 - .15, reprinted herein at Pet. App. J.

Where the Court addressed Garcia with the following :

> ...." It was mentioned during the testimony I believe by the DNA expert. That the DNA - and I think you mentioned in one of your statements something about a defective genes... you got them. And thankfully you are only one in, I think it was 1:184-quatrillion. o another silver lining in the cloud, that the defective gene that this gentleman carries around, he is only 1:184 quatrillion. We can be very thankful for that..."

Thus refering to trial testimony at Tr: 1515 - 1516.

D. Direct Appeal/State post conviction proceedings

On May 2012 - Appellate Counsel submitted briefs and sent a copy of brief to Petitioner, thus excluding a copy of the stipulated record on appeal. Petitioner moved the Appellate Division, Fourth Department thrice(3) to have counsel relieved, because counsel's brief contained many incriminating non- record facts. All three(3) relief/ reassigment of appellate counsel motions were denied and Appellate Division,Fourth Dept instead gave Petitioner a new deadline to submit his pro-se supplemental briefs. Garcia being fully aware of Jackson v. Barnes 463 US. 745, 750 (1983) - did not file any pro-se supplemental briefs. Nevertheless - while direct appeal was in its sub judice stage and before oral arguments were to be heard on October 18, 2012..(reprinted at Pet. App. I)..seventeen (17) days prior - a new NYS Legislative Law was passed. (L.2012 Ch. 19 § 4) It was a new section to the New York State Criminal Procedure Laws, 440.10, which was allocated 440.10 [1](g-i) DNA, which had been three(3) years in the making.

The NYS Legislative body utilized the United States Supreme Court's case District Attorney's Office for the Third Judicial Dist v. Osborne 557 US 52 (2009) see: Mckinney's practice commentaries under CPL§ 440.10

District id 55 " DNA testing has an unparalleled ability both to exonerate the wrongly convicted and - to identify the guilty.

District id 80 " testing in a way that harnesses the unique power of DNA.."

If Appellate counsel had kept current with changes of Law, while direct appeal was sub judice, Mr. Tyo was required to notify the Appellate Division and ask to amend or withdraw all submitted briefs. Thus postponing oral arguments to the following spring 2013 term. All briefs would've been returned to Appellate counsel and a new scheduling order sent out by Appellate Division to all parties of interest. Ultimately - Appellate

counsel would've strengthend his Inevitable Discovery Doctrine error and shown that harmless error doctrine was inapplicable, with the Three(3) example illustrated herein on Pgs. 4 - 6¶2. The outcome of direct appeal within the reasonable probability threshold would've been different, with Appellate Division declaring: " reversed on the Law, and a new trial granted, thus excluding all DNA evidence and testimonies therefrom. Contrary to what took place on direct appeal, reprinted at Pet. App. H.

E. NYS (W) District Court § 2254 proceedings.

In January 2019 - Petitioner submitted a § 2254 petition upon the NYS (W) District Court, and four(4) years after - on February 17, 2023, Writ of Habeas Corpus was denied. The (W) District Court addressed the DNA evidence, agrees with Appellate Divison fourth Department's direct appeal decision of harmless error and Appellate counsel's performance i/r/t his direct appeal DNA argument. Reprinted at Pet. App. G at P. 8¶1, 17¶2 and Pgs. 44¶3 - 45¶2. Whereby - the (W) District Court acknowledging that no precedent case is in existance within the 2nd Circuit or the U. S. Supreme Court when it comes to the application of Harmless error to 4th Amendt DNA violations.

F. The Second (2nd) Circuit's rulings.

In August 16, 2023 - 2nd Circuit Court denied the issuance of certificate of Appealability, despite Petitiner raising the DNA, at Point 3 of leave. reprinted at Pet. App. F. On October 27, 2023 - 2nd Circuit Court denied Petitioner's application/ motion for rehearing/reconsideration, despite Petitioner illustrating in depth, the DNA argument on page 2¶1. Reprinted at Pet. App. E.

H. Actions commenced within this U.S. Supreme Court, by Petitioner pro-se.

Petitioner writes this Court's Clerk Office and requested a poor person packet and pro-se forms. Reprinted at Pet APP. D. Petitioner submits an application for extension to file a Writ of Certiorari in this Court. Reprinted at Pet. App. C

Petitioner receives packet for prospective indigent petitioners for Writ of

Certiorari in this Court on January 10, 2024. Reprinted at Pet. App. B And - on January 17, 2024 - Petitioner receives a January 10, 2024 Order/Permission from HON Sotomajor's chamber, thus granting extension time until March 25, 2024. Reprinted at Pet. App. A.

REASONS FOR GRANTING THIS PETITION.

I. In 2012 - Appellate counsel did not weaken nor erradicated the Inevitable Discovery Doctrine that was attached by the Ontario County Court, to unlawfully obtained DNA evidence, that was used at Petitioner's trial and sentencing.

Nevertheless - the five(5) judges deciding Petitioner's direct appeal, were fully aware of the change of Law, specifically CPL§ 440.10[1](g-i) and knowing this U. S. Supreme Court has never decided the issue of harmless error being applied to un-lawfully obtained DNA evidence used at one's trial - Appellate Division, Fourth Department ruled harmless error is applicable. In sum: ..".. w(e) conclude that there is no reasonable possibility that the erroneously admitted evidence contributed to defendant's convic-tion...". (Reprinted at Pet. App. H @ P. 2¶2). Which according to this Supreme Court under Anthony v Louisiana 143 SCT 29, 35-36 - the standards is might have, contrary to Appellate Division, Fourth Department's conclusion.

see also: Richardson v Capra 2023 WL 1094949 * 23-25, built on

Brecht v Abrahamson 507 U.S. 619, 623 (1993)

quoting: Kotteakos v. United States 328 U.S. 750, 776

Kotteakos, id 764 - 765.

And:

Sullivan v. Louisiana 508 U.S. 275, 279

citing: Chapman v California 368 U.S. 18, 24 (1967)

and - Fry v. Pliler 551 U.S. 112, 124 - 125 (2007)

Regardless of the fact that - Appellate Division Fourth Department on direct used the words reasonable possibility, the remainder of the sentence was enveloped within the hightened reasonable probability standard, not the mandated lower threshold of might have possibility. (Reprinted at Pet. App. H @ p.2 ¶2)

In addition - the NYS (W) District Court also error'd by agreeing with the Appellate Division, Fourth Department that - harmless error was +/is applicable, because the (W) District Court was fully aware that no 2nd Circuit or the U.S. Supreme Court case precedent is currently in existence, on the issue of harmless error being or not being applicable to unlawfully obtained 4th Amendt violation DNA evidence.
(Reprinted at Pet. App. G at pp. 8¶1, 17¶2 and 44¶3 - 45¶2)

Nevertheless - in the end - 2nd Circuit Court of Appeals denied to issue a certificate of Appealability. (Reprinted at Pet. App. F & E). If a certificate of Appealability was to be granted, in addition of Petitioner showing the 2nd Circuit that (W) District decision was full of errors on both facts and Law. ei: District Court cited numerous cases that were distiguishable from facts at bar, nor had any relevance to the § 2254 at bar. 2). District Court adjudicated issues never advanced by Petitioner below or there. and finally 3). Petitioner would've shown the 2nd Circuit Court of Appeals, that - said DNA erroneously admitted during trial and thereafter, was not harmless. As illustrated herein at pgs. 4 - 7¶1, thus erradicating the (W) District Court's factual conclusions found on pgs. 44¶ - 45¶2. (Reprinted at Pet. App. G)

Ei: the sole power of DNA to convict the accused without anyother evidence.

In 2009 - two(2) months after Petitioner was sentenced by the Ontario County Court, in Petitioner's residential County of Monroe, on November 9th the Monroe County Supreme Court sentenced Mr. Timothy Farrere to 25 to Life, for a crime comitted 20 years prior on June 18, 1990.

In sum: In the County of Monroe. On June 18, 1990, as a silver aged married couple slept, a burglary was afoot. Husband sustained a serious blow and laid on the ground unconscious and wife was raped, but lived. Unable to positively identify perpetrator and no physical evidence retrieved by law enforcement from crimescene, the case went cold. Two(2) days after the attack - Mrs. Rickless told a reporter in an interview from channel 10 WHEC-tv that she and her husband were asleep, when a burglar hit her husband (Mr. Rickless) on the head, then raped her and robbed her of $ 13 dollars, as her husband lay mortally wounded on the floor. The Monroe County ADA at Ferrera's Sept 2009 trial, played the recording to give a voice to Ann Rickless, who died of natural causes in a nursinghome in 2006, shortly after Rochester Homicide Investigators informed her that DNA had finally led them to a suspect in the 1990 attacks. Regardless of the fact that - Mr. Rickless died 19 days after his 1990 attack and surviving witness Ann Rickless couldn't identify their assailant and the case was unsolved until DNA found on Ann Rickless was matched through a national CODIS database with DNA Ferrera was compelled to surrender in Ohio after being convicted of shooting at police officers during a robbery. This case was the oldest case solved by DNA to result in a conviction in Monroe County. At sentencing - the judge noted that Ferrare couldn't be charged with rape or burglary because of the statue of limitaions for both crimes had passed. Judge sentenced Ferrare to 25 to Life for the Murder of Mr. Rickless instead.

The above information can be verified from the Monroe County District Attorneys Office

Attn of : Sandra Doorley
47 S. Fitzhugh st
Rochester, NY 14614
(585) 753 - 4780
fax (585) 753 - 4692.

Ei.(2) - the sole power of DNA to convict the accused without anyother evidence.

Presently (2024)within the Monroe County Supreme Court, a new trial has been set. Symopsis: \A female school aged student under the age of 14 was raped and murder'd in 1989. No witnesses , physical evidence, confession or suspect ever arrested. Then Approx 34 years after - solely based on ancestry/genealogical DNA matching, a person of interest was arrested in Florida and extradited back to Monroe County. In 2023 - a mistrial was declared at the first trial, from jurors failure to adhere to given Court instructions. The People and Court have set a date for a new trial in 2024. If +/or when Mr. Williams is convicted of NYS Penal Law§ 125.25[5], the only mandatory sentence available to him shall be Life without parole. PL§ 70.00[3](a)(i)(B) and § 60.06.

A conviction solely based on DNA. Verification can be obtained from the Monroe County District Attorney Office. Attn of: Sandra Doorley @ 47 S. Fitzhugh street
Rochester, NY 14614. (585) 753 - 4780
fax: (585) 753 - 4692.

Ei. The sole power of DNA, to exonerate the imprisoned.

This U.S Supreme Court is fully aware how DNA has been used in the past and continues to be utilized presently to exonerate, in light of conviction obtained via overwhelming circumstantial evidence at trials. As we speak - The L.A Innocence project has taken up the Scott Petterson case. In sum: Mr. Petterson was convicted in 2004, for the 2002 Murders of his wife (Lacey Petterson) and their 8 month in utero baby boy named Connor. The Innocence project has motioned the Court for DNA testing. The Firm's theory is that - Lacey Petterson was abducted from her home, after being a witness to a burglary across the street, placed in a van, then lifeless body disposed in a lake. The van was found burned a couple of days after. The innocence project are requesting that certain items found on Lacey's body (ei: tape used to gag her and bind her hands),

plus - mattress found in van and blood samples within van, all be tested. In arguendo - hypothetically thru the hightened threshold of reasonable probability, what are the chances that conviction shall be set aside ?.. if DNA is obtained from items after being tested and Scott Petterson is excluded as contributor ? Or better yet - what shall occur if said retrieved DNA profile is entered into the National CODIS and Donor of said DNA is found ? even when Scott Petterson's conviction was procurred thru a mountain of overwhelming circumstantial evidence. This is just an example of the power of DNA.

The above just narrated was reported on January 18, 2024 by both CNN with Laura Coates, Live at 11pm est (discussed between host and one of the 2004 Petterson trial jurors)- and on News Nation with Dan Abrams, Live at 12am est (discussed between host and a three(3) person panel).

II. Since 2012 - In the State of New York, upon an arrest, law enforcement per Law are mandated to obtain the accused's DNA and enter said profile into the National CODIS DNA database, despite accussed being under the presumption of innocence according to both Constitutions- Which presumption is lost only upon accussed entering any future guilty plea +/or being convicted by a jury of his or her peers.

Which brings this U. S. Supreme Court, back to the only question advanced by Petitioner Garcia, in this Writ application..

Can the might have reasonable possibility harmless error doctrine be applied to DNA evidence, that has the sole trifecta ability, to either

1. Clear the Accused
2. Convict the Accused

+/ or

3. Exonerate the imprisoned thru post-conviction state statues/procedures ?

CONCLUSION

This being a case of first impression upon this Court, and decision shall effect all United States Courts at both the Level of Federal and State , said Petition for a Writ of Certiorari should be granted.

I, Frank Garcia declares under the penalty of perjury that the foregoing is true and correct. (see: 28 U.S.C § 1746; 18 U.S.C. § 1621)

Executed on: Feb 28, 2024

Respectfully submitted 09B2727

Garcia

Garcia, 09B2727, Petitioner
Pro-se, IFP.