

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Kelvin Reed — PETITIONER
(Your Name)

vs.

Tammy Ford, Warden — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court Of Appeals For The Sixth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Kelvin Reed, # 450176
(Your Name)
Whiteville Correctional Facility
1440 Union Springs Road
(Address)
P.O. Box 679
Whiteville, TN 38075
(City, State, Zip Code)

None
(Phone Number)

QUESTION(S) PRESENTED

1. Did the 6th Circuit Court irrationally conclude that no reasonable jurist could disagree with the district court's conclusion that the Tennessee Court of Criminal Appeals' rejection of Petitioner's first ineffective-assistance claim was not contrary to or an unreasonable application of Strickland or based on an unreasonable determination of the facts, as it relates to defense counsel's failure to have an audio forensic expert analyze a male voice on a 911 recording and compare it to Petitioner's voice?
2. For Tennessee and all other states, should due process principles "require" states to utilize new or old technology that is reliable and that will insure that innocent United States Citizens are not wrongfully convicted of offenses they did not perpetrate?

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:

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TABLE OF AUTHORITIES CITED

CASES

PAGE NUMBER

Daubert v. Merrell Dow Pharmaceuticals
Inc., 509 U.S. 579, 589, 113 S.Ct. 2786,
125 L.Ed. 2d 469 (1993) (10, 16)

U.S. v. Gates, 20 F.3d 1555 (May 4, 1994) (11)

Walker v. Soo Line R.R. Co., 208 F.3d 581,
586 (7th Cir. 2000) (10, 11)

STATUTES AND RULES

U.S. Const. Am. 6 (p. 19)

U.S. Const. Am 14 (p. ii, 18)

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OTHER

U.S. National Research Council (NRC) (8, 15)

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 C 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 _____ 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.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was March 20, 2018.

☒ 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 April 10, 2014.
A copy of that decision appears at Appendix C.

☐ 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

U.S. Const. Am. 6: Right to have effective
Assistance of Counsel

U.S. Const. Am. 14: Right to have due process
of law.

28 U.S.C. § 2254: Habeas Corpus Statute

Tenn. Code Ann. § 39-13-202: Felony murder;
and Premeditated First
Degree Murder;
§ 39-14-403: Agg. Burglary

STATEMENT OF THE CASE

By reference, Petitioner adopts here the facts included in the decision of the Court of Appeals for the 6th circuit (Appendix A), but not its conclusions regarding the issues.

Jurisdiction is invoked pursuant to 28 U.S.C. 1254(1) and 28 U.S.C. 1257(a).

REASONS FOR GRANTING THE PETITION

As outlined on the following pages:

- A. The United States court of appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.
- B. The State court or U.S. court of appeals has decided an important question of federal law that has not been, but should be, settled by the U.S. Supreme Court.

I

Internet Facts/Statistics

And

Relevant Cases

1. According to a New York-based Innocence Project, "[m]istaken or flawed identification has assumed a newfound prominence in recent years: It's been cited as a factor in nearly 78 percent of the nation's first 130 convictions later overturned by DNA testing..." (Exhibit #1 @ *1). (Appendix, p. 52)
2. "As a result [of these wrongful convictions based on mistaken or flawed identification], a number of researchers are turning their attention to helping police departments and juries better understand the circumstances under which eyewitnesses observe crimes and later identify a suspect." (Exhibit #1 @ *2) (Appendix, p. 52)
3. "Like trace evidence, eyewitness evidence can be contaminated, lost, destroyed or otherwise made to produce results that can lead to an incorrect reconstruction of the crime." The employment of "a scientific model to collect, analyze and interpret eyewitness evidence may avoid incidents" of mistaken or flawed identification. (Exhibit #1 @ *3), (Appendix, p. 53)
4. "[P]sychological research can have a profound impact on both police's evidence-gathering practices and on how courtrooms inform

juries... of the possibility that flaws may exist in eyewitness accounts." (Exhibit #1 @ *4).
(Appendix, p. 54)

5. Facts 1-4 above are taken from the 2018 American Psychological Association (Exhibit #1 @ *5).
(Appendix, p. 55)

6. "A new report concludes that the use of eyewitness accounts need tighter control..."
(Exhibit #2 @ *6), (Appendix, p. 57)

7. "After a year of sifting through the scientific evidence, a committee of psychologists and criminologists organized by the U.S. National Research Council (NRC) has "concluded that eyewitness identification "is a serious issue with major implications for our justice system." (Exhibit #2 @ *7). "Their 2 October report, Identifying the Culprit: Assessing Eyewitness Identification, is likely to change the way that criminal cases are prosecuted." (id. @ *7).
(Appendix, p. 57)

8. "[J]ust because someone says something confidently doesn't mean it's true." Jurors place a lot of weight on an eyewitness's confidence, "even though experiments have shown that a person's confidence in their own memory is sometimes undiminished even in the face of

evidence that their memory of an event is false." (Exhibit #2 @ *8), (Appendix, p. 57)

9. "The procedures of a criminal investigation can even distort eyewitness recall." (Exhibit #2 @ *9), (Appendix, p. 57)

10. "More insidiously, police interrogators can unconsciously coach people into having false memories..." (Exhibit #2 @ *10). (Appendix, p. 58)

11. "Some 75% of the wrongful convictions for rape and murder, including a number that led to people being scheduled for execution, were based on eyewitness testimony." (Exhibit #2, @ *11). (Appendix, p. 58)

12. Facts 6-11 above are taken from the 2018 American Association for the Advancement of Science. (Exhibit #2 @ *12). (Appendix, p. 59)

13. "Some characteristics of voice are phonation, pitch, loudness, and rate." (Exhibit #3 @ *13). (Appendix, p. 61)

14. "Voice identification is a particularly predominant component of voice analysis, which uses a specially designed software that takes the recording in

question, as well as a recording of a known person's voice and then compares the two utilizing a series of three tests." (Exhibit #3 @ *14) (Appendix, p. 61)

15. "The software conducts a spectrograph analysis, followed by an average pitch analysis, and lastly a statistical analysis that includes a compiled database with millions of voices." (Exhibit #3 @ *15).
(Appendix, p. 61)

16. "After running the voice sample through the program, a percentage from 0 to 100 is generated as far as the likelihood that the two voices are the same. The forensic analyst will then make comparisons on the accent, syntax, and breathing patterns of the recordings.... This voice analysis technique has gained much notoriety for its use in the Trayvon Martin case, where a recording of a call made to the police was analyzed to determine if background screams came from George Zimmerman or from Martin." (Exhibit #3 @ *16).
(Appendix, p. 61)

17. As it relates to expert testimony, a trial judge must determine whether an expert's opinion was grounded in the "methods and procedures of science," *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579, 589, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and whether such testimony had sufficient "factual underpinnings" *Walker v.*

Soo Line R.R. Co., 203 F.3d 581, 586 (7th Cir. 2000); U.S. v. Gates, 20 F.3d 1550 (May 4, 1994).

18. "Each year on average, there are 80,000 cases that involve critical evidence acquired from eyewitnesses. Out of those 80,000 cases, at least 10,000 people are wrongly accused." (Exhibit #4 @ * 17: See entire paragraph and "unconscious transference" issues). (Appendix, p. 63)

19. "All evidence is critical in a criminal case, but an eyewitness or victim's testimony always tends to make the biggest impact in the case." (Exhibit #4, @ * 18). (Appendix, p. 63)

20. Even when a witness is uncertain as to a perpetrator's identity, he or she can be coerced into making a positive identification at trial, which can be very persuasive to a jury. (Exhibit #5, all). (Appendix, p. 64)

II

Why the United States court of appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Honorable Court's supervisory power

The 6th Circuit Court irrationally concluded that no reasonable jurist could disagree with the district court's conclusion that the Tennessee Court of Criminal Appeals' rejection of the Petitioner's first ineffective-assistance claim was not contrary to or an unreasonable application of Strickland or based on an unreasonable determination of the facts, as it relates to defense counsel's failure to have an audio forensic expert analyze a male voice on a 911 recording and compare it to Petitioner's voice.

21. Petitioner has always claimed that the voice of the perpetrator on the 911 tape was not his voice (Appendix B, p.37).
22. Petitioner's attorney testified that he retained an expert to examine the 911 call. The expert enhanced the recording and discovered that not only did the victim constantly call out the name Teddy, she also, the expert thought, on one occasion called out Kelvin (the Petitioner's nickname). Because of this, the expert recommended that no further testing be done, and Petitioner's attorney accepted that recommendation. (Appendix B, pp. 37-38).

23. Petitioner's attorney felt as if the State would use this evidence against Petitioner. (Appendix B, p. 38).
24. The U.S. District Court and 6th Circuit Court agreed with the Tenn. Ct. Crim. App. opinion that Defense counsel was not ineffective for failing to have this 911 tape tested further, as outlined in Facts 13, 14, 15 and 16 above. (Appendix B, pp. 38, 40, 41) (Appendix A, p. 24).
25. The victim's daughter, the only eyewitness, testified that the perpetrator may have been wearing a mask (Appendix D, p. 65).
26. Considering the fact that eyewitness testimony is highly unreliable when a perpetrator does not wear a mask (Facts 1-12 and 17-20 above), this unreliability factor would have to be much greater when a perpetrator does wear a mask.
27. A competent attorney would have certainly known Fact 26 above via limited experience.

28. There were some key questions for the jury to consider in this particular case, including the following:

A. Why did the victim think the perpetrator was the Petitioner if she or he was wearing a mask? (Assumption, height, weight, voice, etc.?)

B. Did the victim's daughter assume that the perpetrator was petitioner because her mother believed the perpetrator to be Petitioner?

29. Of course, the answer to question 28 A above will never be known. The victim is deceased.

30. The answer to question 28 B above falls within the purview of the unreliability factors stated in facts 1-12 and 17-20 above, which is corroborated by the U.S. National Research Council (NRC) (Fact 7 above). In this case, the only light available to see the perpetrator's face was a television in the room where the victim's daughter remained as the incident was occurring. The incident did not occur in this room where the television and victims'

daughter were located; the jury did not know how much light the television dispersed or how large the television was; and no reasonable juror could have agreed that the victim's daughter made a positive identification of the perpetrator with this lack of light and the perpetrator possibly wearing a mask.

31. Fact 30 above brings us back to the question in Fact 28 B above, where Petitioner would have been convicted based on an erroneous assumption made by the victim's daughter, based on an erroneous presumption made by the victim for reasons that the jury will never know.

32. Based on Facts 1-31 above, the only reliable evidence would have been a complete analysis of the voice on this 911 tape in accordance with the mandates outlined in Daubert, (Fact 17 above), and subsequent related cases.

III

Why the State Court or U.S. Court of Appeals
has decided an important question of federal
law that has not been, but should be, settled
by the United States Supreme Court

For Tennessee and all other states, due process principles should require states to utilize new technology or older existing technology that is reliable and that will insure that innocent United States Citizens are not wrongfully convicted of offenses they did not perpetrate.

33. If so many people are wrongfully convicted via erroneous eyewitness testimony, does it not seem contrary to logic, reason, and 14th amendment due process principles that the U.S. Supreme Court would not want to formulate a new rule of constitutional law that would help prevent such miscarriages of justice from occurring?

34. A new rule of law requiring states to utilize all available scientific, peer reviewed, and published testing procedures that would corroborate an accused person's actual and factual innocence would certainly be a step in the right direction.

35. This would eliminate ineffective assistance of counsel claims relating to counsel not requesting the tests to be done, which would

save the courts (State and Federal) time and money.

36. Additionally, if one was to consider the cost of the test compared to how much money the States would waste by incarcerating so many innocent people, would the "money factor" even be a valid consideration?

37. Petitioner avers that this Honorable Court - being the highest Court in the nation, should grab this bull by the horns and find a feasible remedy to this problem. Otherwise, the States will continue to "recognize" the problem, but no resolution will ever be made.

38. For the above-stated reasons, defense counsel should have requested that a full voice analysis be done on the 911 tape proof, and counsel was ineffective for failing to do so. (Violation of U.S. Const. Am. 6)

39. Wherefore, Petitioner prays that this Honorable Court would grant him his Petition for Habeas Corpus Relief under 28 U.S.C. 2254 and appoint him competent counsel to represent him.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Kelvin Reed

Date: June 12, 2018