IN THE DISTRICT COURT OF
HARRIS COUNTY TEXAS
338 JUDICIAL DISTRICT

THE STATE OF TEXAS,	)	
	)	Case No. 140289801010
v.	)	
	)	
KEVIN STONE,	)	

MEMORANDUM OF LAW IN SUPPORT OF
APPLICATION FOR WRIT OF HABEAS CORPUS IN TEXAS

TO THE HONORABLE JUDGE OF SAID COURT:

The Applicant seeks a Writ of Habeas Corpus for the following reasons. First, the Applicant argues he was denied due process of law during the penalty phase of his trial.

Second, the Applicant makes the motion regarding the application of *Birchfield v. North Dakota*, 579 US ___ No. 14-1468 (2016) to the warrantless blood draw in his case.

EXHIBITS IN SUPPORT OF THIS APPLICATION

Applicant submits the following exhibits in support of this Application:

(a) Opinion of the Fourteenth District Court of Appeals. Exhibit 1.

STATEMENT OF FACTS

Kevin Edward Stone, was charged by indictment with the felony offense of intoxication manslaughter alleged to have occurred on September 27, 2013. Mr. Stone was found guilty by a jury. There was an affirmative finding of a deadly weapon by the jury. The punishment range was enhanced with Mr. Stone's prior felony conviction for burglary—residential (Arkansas) May 1, 2008. The jury assessed punishment at 38 years imprisonment in the Institutional Division of the Texas Department of Criminal Justice and a $5,000.00 fine. Mr. Stone timely filed a Notice of Appeal. The appeal was denied on October 13, 2016. Mr. Stone filed a timely Petition for Discretionary Review to the Texas Supreme Court. That Petition was denied February 15, 2017. A Mandate was issued by the Texas Court of Appeals on March 17, 2017. Mr. Stone files this Petition within 1 year of the Mandate of the Texas Court of Appeals and expressly reserves his right to amend or alter the petition with additional claims and supporting facts, nunc pro tunc.

On appeal, Mr. Stone contended the Trial Court erred by denying Mr. Stone's motion to suppress the mandatory blood draw in this case. The initial

blood draw taken from Mr. Stone at Officer Dunn's direction was without a warrant or a recognized exception to the warrant requirement. Officer Dunn had already taken steps to obtain a grand jury subpoena for Mr. Stone's residual blood from the hospital. Officer Dunn had access to a magistrate for presentation of a search warrant, as well as 10 prosecutors from the Harris County District Attorney's Office to assist him. The blood draw was not necessary prevent the destruction of evidence, and no exigent circumstances existed to justify the warrantless blood draw. The Court further erred by failing to instruct the jury to disregard the prosecutor's improper argument regarding the potential sentence of the lesser included offense of Driving While Intoxicated, rather than the facts. Once the prosecutor began to reference the punishment range of a Class B Misdemeanor, this amounted to a plea to the jury to consider the punishment at the guilt innocence stage of the trial as opposed to the facts of the case. Finally, the Court erred by allowing the father of the complainant to opine to the appropriate punishment for Mr. Stone. The sentence to be assessed is the ultimate issue for the jury to decide during the punishment phase. Just as an expert witness is not permitted to recommend a particular punishment in a case, a lay witness' opinion of an appropriate sentence is nothing more than an appeal to sympathy and tends to suggest that jurors shift their responsibility to the witness.

ARGUMENT

I. APPLICANT WAS DENIED DUE PROCESS OF LAW DURING THE PENALTY PHASE OF HIS TRIAL.

Applicant contends that this Court should vacated the judgment and hold a new punishment hearing concerning the Sentencing Phase of the Applicant's conviction. For this argument, the Applicant relies on two cases: *Ex parte Boyd*, 58 S.W.3d 134 (Texas Court of Criminal Appeals) (October 24, 2001) and *Apprendi v. New Jersey*, 530 U.S. 466 (June 26, 2000). Applicant contends that *Apprendi* applies to the sentencing phase of his trial. As set forth herein, *Ex Parte Boyd* allows a criminal defendant to raise *Apprendi* issue within the context of a habeas corpus proceeding, stating:

> Before we address the merits of applicant's federal constitutional claim, we must first address whether that claim is cognizable via habeas corpus even though it is presented for the first time. Ordinarily, the writ of habeas corpus may not be used to litigate matters that could have been raised at trial and on direct appeal. Ex parte Bagley, 509 S.W.2d 332, 334 (Tex.Crim.App. 1974). However, an applicant's failure to raise a claim at trial may be excused if the basis of the claim was not reasonably available at the time of trial. Ex parte Goodman, 816 S.W.2d 383, 385 (Tex.Crim.App. 1991). Because the Supreme Court's decision in *Apprendi* came almost four years after applicant's trial, we hold that his failure to assert an *Apprendi*-type claim at trial and on appeal does not bar him from asserting such a claim via habeas corpus. *Ex Parte Boyd*, at 135.

Regarding the merits of Mr. Stone's claim: following a jury trial in the Harris County District Court (Texas), Mr. Stone applicant was convicted of intoxicated manslaughter.

In *Stone*, the jury assessed the Mr. Stone's punishment at imprisonment for 38 years.

In *Apprendi*, the Supreme Court considered the constitutionality of the New Jersey hate crimes statute. That statute allowed a jury to convict a defendant of a second degree offense based on its finding, beyond a reasonable doubt, that he unlawfully possessed a prohibited weapon; it then allowed, after a subsequent and separate proceeding, a trial judge to impose punishment for a first degree offense based upon the judge's finding, by a preponderance of the evidence, that the defendant's "purpose" for unlawfully possessing the weapon was "to intimidate" his victim on the basis of a particular characteristic the victim possessed. In holding the New Jersey statute violative of due process, the Supreme Court explained: "It is unconstitutional for a legislature to remove from the jury the assessment of facts [other than the fact of a prior conviction] that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.: *Apprendi v. New Jersey*, 530 U.S. at 490.

As applied at Mr. Stone's trial, the Court removed from the jury the assessment of a fact beyond a reasonable doubt - that applicant used a "weapon" during the commission of the offense - that increased the prescribed range of penalties to which applicant was exposed. Therefore, both *Ex Part Boyd* and *Apprendi*, as applied at Mr. Stone's trial, violated his right to due process.

As a result, the prerequisites for habeas relief have been met. *See Ex parte Fierro*, 934 S.W.2d 370, 372 (Tex.Crim.App. 1996); *Ex parte Banks*, 769 S.W.2d 539, 540 (Tex.Crim.App. 1989). The sentence in Mr. Stone's case in the 338 District Court of Harris County should be vacated, and applicant should be afforded a new punishment hearing.

II. THE INTIAL WARRENTLESS BLOOD DRAW VIOLATES BIRCHFEILD V. NORTH DAKOTA.

On September 27, 2013, Mr. Stone was involved in a two car automobile accident in Harris County around 1:30 AM. Mr. Stone was driving with no passengers in his vehicle, and the complainant, Ms. Rebecca Alvarez, was driving with no passengers in her vehicle. There was one eyewitness witness to the accident, Jerbios Jones. Mr. Jones was driving behind the complainant, and he testified that Mr. Stone ran a red light going about 100 miles per hour and "t-boned" the driver's side of the complainant's car. Id. Mr. Jones called 911 and noticed that Mr. Stone was bleeding. Mr. Jones testified that Mr. Stone said the complainant caused the accident. Mr. Jones did not know if Mr. Stone had been drinking and could not testify regarding intoxication.

officer Matthew Smith was the traffic investigator at the scene of the accident. He testified that Mr. Stone had been driving between 60 and 70 miles per hour on a 30 mile per hour street. Mr. Stone was strapped to a backboard at the scene where Officer Smith observed a strong odor of alcohol, red, glassy eyes, and slurred speech. Officer Smith testified that Mr. Stone told him he had consumed three or four beers earlier at a friend's house. Officer Smith administered horizontal gaze nystagmus (HGN) and observed all six clues. He testified that in

his opinion Mr. Stone "had lost the normal use of his mental and physical faculties by the introduction of alcohol into his system."

Officer Matthew Dunn went to the hospital and testified that Mr. Stone had slurred, slow speech, glassy, watery eyes, and a distinct odor of alcoholic beverage on his breath. Mr. Stone told Officer Dunn he had some beers and mixed drinks. Mr. Stone was strapped to a backboard with blood on his face when Officer Dunn administered the HGN test. He observed six clues and determined that Mr. Stone was impaired. Officer Dunn then obtained a grand jury subpoena for the hospital blood draw records and the residual blood.

Officer Dunn then conducted a mandatory blood draw under the implied consent statute via a hospital nurse at 3:41 AM. (Officer Dunn was concerned about dissipation of the alcohol, because he testified that it was after 2:00 AM and Mr. Stone ha 4 would behoove us to get the blood as quick as possible so that we don't lose that evidence."

Mr. Stone told the officer he had two mixed drinks. Officer Dunn then proceeded to obtain a search warrant for Mr. Stone's blood via fax at the hospital. The warrant was signed at 6:25 AM. Mr. Stone's blood was drawn pursuant to the warrant at 6:38 AM. Officer Dunn took the residual blood vials from the hospital, the blood vials from the mandatory blood draw, and the blood vials from the blood

drawn pursuant to the warrant to the Harris County Institute of Forensic Sciences (IFS).

Mr. Stone's hospital records, and the three test results from IFS were admitted over objection.

Defense counsel had previously filed a motion to suppress and there were hearings conducted outside the presence of the jury. The trial court denied all of the motions to suppress. Mr. Stone had a swollen right eye at the hospital, nasal fractures, a facial laceration, a liver laceration, and an ankle laceration.

As a result of the injuries to Mr. Stone, defense counsel argued that the HGN was not proper but Officer Dunn disagreed. Josanne Phillips, a registered nurse, testified to the blood draws she conducted for Officer Dunn. She could not give an opinion as to intoxication. Fredria Shaw testified as the IFS toxicologist who tested Mr. Stone's blood for the presence of marijuana. The results were admitted over objection.

Dr. Anna Kelly testified as the IFS analyst to the alcohol testing in the blood vials. She conducted the re-testing after the original analyst, Ms. Dumas, was fired for dishonesty by obtaining interview questions for a promotion in advance and then lying to her supervisor. The blood test results yielded the following blood alcohol concentration (BAC): 2:44 AM draw (hospital) = .184 3:41 AM draw (mandatory) = .169 6:39 AM draw (warrant) = .110

Dr. Jeff Walterscheid testified as the co-director of IFS and the expert reviewer of the blood testing. He also conducted the retrograde extrapolation of the blood testing which was admitted over defense objection. The extrapolation results were as follows: 2:44 AM draw (hospital) = .181 3:41 AM draw (mandatory) = .180 6:39 AM draw (warrant) = .177 6 He also testified that the parent drug was present for marijuana, and he gave the opinion that the marijuana and alcohol levels were sufficiently high enough to cause intoxication.

In this habeas petition Mr. Stone claims that a United States Supreme Court decision in *Birchfield v. North Dakota* compels reversal. That decision held that a blood test or draw is a search within the meaning of the Fourth Amendment and are significantly more intrusive than a breath test. The Court concluded that requiring breath tests is constitutional; however, requiring blood tests is not, as the goal of traffic safety can be obtained by less invasive means (such as breath tests).

In this case, the trial court should provide a habeas hearing in light of *Birchfield* because Mr. Stone's consent to draw blood was never voluntary under the totality of the circumstances and therefore the results of the blood test should not have been admissible at trial against him.

The *Birchfield* Court analyzed the constitutionality of blood tests under the *Fourth Amendment* guarantee against unreasonable searches and seizures, and

found that a blood test, because of its intrusive nature, requires a warrant. *See Birchfield, supra* at 2173, 2184-85.

Appellant next argues that he is entitled to remand to the trial court for a new trial or a hearing in light of *Birchfield,* because his consent to the blood draw was involuntary.

Birchfield differentiated between two very different types of tests: breath test that the Court ruled on non-invasive, and blood test or blood draws, which the Court ruled to be invasive. This rationale for the new rule weighs in favor of its application to Mr. Stone because the rule's purpose is to improve the accuracy of trials and improve the reliability of evidence. Since the new rule seeks to make evidence more reliable application is appropriate.

The second factor also weighs in favor of application. Indeed, *Birchfield* has changed evidence gathering techniques enormously. Its concrete impact was immediate and substantial in both appellate and trial courts on the evidence rendered inadmissible.

Finally, the third factor weighs in favor of retroactivity. Retroactive application would require courts to overturn only a handful of convictions that relied solely on blood test.

Thus, all three factors in the *Witt* analysis weigh in favor of the retroactive application of *Birchfield*.

III. THE RECORD MUST BE DEVELOPED IN THIS CASE, AND THE APPPLICANT IS ENTITLED TO EXPRESSLY RESERVE HIS RIGHT TO AMEND THIS PETITION AND IS ENTITLED TO A HEARING IN THIS CASE.

Article 11.07, §3(d) of the Code of Criminal Procedure authorizes a trial court to hold a hearing on an application for habeas corpus in a non-death penalty felony conviction. The Court of Criminal Appeals has established an extremely lenient standard for when a hearing should be held in a habeas corpus application. If an applicant "has alleged facts that, if true, might entitle him to relief, . . . the trial court [should resolve] the factual issues presented in accordance with Article 11.07, §3(d) of the Code of Criminal Procedure" by holding a hearing. *Ex parte Patterson*, 993 S.W.2d 114, 115 (Tex.Crim.App. 1999); *see also Ex parte Hernandez,* 398 S.W.3d 369, 374 (Tex.App. – Beaumont 2013, no pet.) ("In our opinion, the issues raised by Hernandez in his application allowed the parties to develop the record beyond the written record of the prior plea proceedings, and a further development of the record is required so the trial court may make an informed decision on the issues in dispute."). *Hernandez* held that, under the circumstances, the trial court was required to receive the applicant's testimony whether by hearing or, if his "actual appearance was impractical" because he was being detained by federal authorities, then by deposition or teleconference. *Id.*

Accordingly, under *Patterson*, a hearing is required in this case because the Applicant has alleged facts that, if true, might entitle him to relief.

WHEREFORE, the Applicant respectfully requests that this Honorable Court grant the Applicant a hearing on this Application, and that, after hearing, grant the Application for a Writ of Habeas Corpus.

Dated: MARCH ___, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. First Class Mail this ___ day of March, 2018 to:

_____, Esquire
Criminal District Attorney
Austin County

_____
Robert L. Sirianni, Jr., Esquire

CERTIFICATE OF COMPLIANCE

Undersigned hereby certifies that the foregoing document is within the word-limit proscribed by Texas Rule of Appellate Procedure 9.4(e). Appellant's Application for Writ of Habeas Memorandum contains approximately 2,163 words.

._____
Robert L. Sirianni, Jr., Esquire