No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

STEVEN DEEM
PETITIONER

vs.

LORIE DAVIS, DIRECTOR
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE FIFTH COURT OF APPEALS

APPEAL NO. 17-41041

PETITION FOR WRIT OF CERTIORARI

Steven Deem #16418-035

Fed. Cor. Inst.

P.O. Box 5000

Oakdale, LA. 71463

PRO-SE

QUESTION(S) PRESENTED

1) Did the Fifth Court of Appeals abuse it's discretion when it denied the Petitioner's motion for a certificate of appealability (COA) because Deem failed to demonstrate that jurists of reason could conclude the issues presented are adequate to deserve encouragement to proceed further?

2) Does an actual innocence "claim" have to be proven before a COA will issue, or is the "claim" itself enough to entitle the Petitioner to a hearing on the merits of that claim?

LIST OF PARTIES

This case involves a district court and appellate court de novo decision, the government AUSA has never been ordered to answer, however, the Solicitor General has been served.

All other parties are included in the caption of the case on the cover page.

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STATUTES AND RULES

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 attached judgment, stated below.

OPINIONS BELOW

The opinion of the Fifth Court of Appeals is attached as **EXHIBIT A** and is not published. The Judgment was issued as the mandate, on June 14th 2018.

JURISDICTION

The Supreme Court of the United States now has jurisdiction under 28 U.S.C. §1254(1), as no petition for rehearing has been filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the constitutional right of due process and the statutory provision of 28 USC §2244 (AEPDPA) and 28 USC §2253(c)(1)&(2).

STATEMENT OF THE CASE

The Appellant filed a 28 U.S.C. §2254 Motion seeking a redress of his 1997 Texas state conviction on five grounds:

1) Actual Innocence,
2) Denial of self-representation,
3) Unconstitutional Texas penal code (22.021),
4) Hybrid Indictment,
5) Ineffective assistance of counsel during trial as well as on appeal.

The Appellant provided an affidavit dated Sept. 21st 2017, stating that he is actually innocent of the charges against him, that he was denied the constitutional right to represent himself during the trial and was denied effective assistance of counsel during the appeal process as well as during the trial by his court appointed attorneys. See attached copy of affidavit **EXHIBIT B.**

The Appellant argued his points in the Sept. 11th 2017, petition under §28 U.S.C. §2254 which the District Court Judge, Ron Clark, dimissed without prejudice for lack of subject matter jurisdiction, and denied the COA, de novo, on Sept. 27th 2017, see DOC. 8, see attached copy **EXHIBIT C.**

The Appellant filed a Notice of Appeal and request for a COA from the Fifth Court of Appeals on Oct. 7th 2017, cause no. 17-41041.

The Fifth Circuit denied the COA, "because Deem fails to demonstrate that jurist of reason 'could conclude the issues presented are adequate to deserve encouragement to proceed further,'" citing Miller-El v. Cockrell, 537 U.S. 322, 327 (2003); and McQuiggin v. Perkins, 569 U.S. 3831, 395-96 (2013); and Crone v. Cockrell, 324 F.3d 833, 836 (5th Cir. 2003); 28 U.S.C. §2244(b)(3)(A).

However, the staff attorneys working with Circuit Judge Stephen Higginson, who wrote the Fifth Court of Appeals decision, took some liberties with the case citations, deliberately omitting the common theme of the cases. The phrase that was used, "could conclude the issues presented are adequate to deserve encouragement

to proceed further." Putting the quote back into context, using Miller-El v. Cockrell, 537 U.S. 322, 327, 123 S. Ct. 1029, 154 L.Ed.2d 931 (2003):

> **Appeal § 1321 - federal habeas corpus - review of state prisoner's claims**
>
> 3a, 3b, 3c, 3d, 3e, 3f, 3g, 3h, 3i. Under the standards imposed by the Antiterrorism and Effective <*pg. 935> Death Penalty Act of 1996 (AEDPA) (PL 104-132) before a Federal Court of Appeals may properly issue a certificate of appealability (COA) to review a Federal District Court's denial of habeas corpus relief, when a prisoner seeks permission to initiate appellate review of such a denial, the Court of Appeals should limit its examination to a threshold inquiry into the underlying merit of the prisoner's claims, rather than ruling on the merit of the prisoner's claims, for (1) a COA determination is a separate proceeding, one distinct from the underlying merits; (2) deciding the substance of an appeal, in what should only be a threshold inquiry, undermines the concept of a COA; and (3) the question is the debatability of the underlying federal constitutional claims, not the resolution of that debate. Thus, consistent with the United States Supreme Court's prior precedent and the text of the habeas corpus statute (in 28 USCS § 2253(c)(2)), a prisoner seeking a COA need only demonstrate a substantial showing of the denial of a constitutional right. Moreover, a prisoner satisfies this standard by demonstrating that jurists of reason could (1) disagree with the District Court's resolution of the prisoner's federal constitutional claims, or (2) conclude the issues presented are adequate to deserve encouragement to proceed further. Under 28 USCS § 2253(c)-which establishes procedural rules and requires a threshold inquiry into whether a Court of Appeals may properly entertain such an appeal-a COA determination requires an overview of the claims in a habeas corpus petition and a general assessment of their merits, by (1) looking to the District Court's application of AEDPA to a prisoner's constitutional claims, and (2) asking whether that resolution was debatable among jurists of reason. This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it. Accordingly, a Court of Appeals should not decline an application for a COA merely because the Court of Appeals believes that the applicant will not demonstrate an entitlement to relief, for (1) it is consistent with § 2253 that a COA will issue in some instances where there is no certainty of ultimate relief, and (2) when a COA is sought, the whole premise is that the prisoner has already failed in that endeavor. (Thomas, J., dissented in part from this holding.)

The Supreme Court decided in the above case that the only question for the court of appeals was, "the debatability of the underlying federal constitutional claims" of the petition, "not the resolution of that debate."

In the Fifth Court of Appeals "Order," the court failed to address the two main issues stipulated in Miller-El; "A COA determination requires an overview of the claims in a habeas corpus petition and a general assessment of their merits, by (1) looking to the District Court's application of AEDPA to a prisoner's conctitutional claims, **AND** (2) asking whether resolution was debatable among jurists of reason." They were NOT to conclude whether or not the issues presented were adequate to deserve encouragement to proceed further. That is a decision

on the merits of the claim, which contradicts the ruling in Miller-El, the very case they cite as their precedence for denying the COA.

LEGAL STANDARD ARGUMENT FOR A COA

In a recent Supreme Court case, Buck v. Davis, (No. 15-8049)(S.Ct. Feb. 22nd 2017), the Court held that the 5th Circuit exceed the limited scope of the C.O.A. analysis. The C.O.A. statute sets forth only a two-step process for deciding what is required for a C.O.A.: an initial determination whether the claim is reasonably debatable, and then, if it is an appeal in the normal course.

Chief Justice Roberts, writing for the court, held that the Certificate of Appealability "inquiry, we have emphasized, is not coextensize with a merits analysis." According to Justice Roberts, "the question for the Fifth Circuit was not whether Buck had shown extraordinary circumstances. Those are iltimate merits determinations the appeal panel should not have reached. We reiterate what we have said before: A court of appeals should limit its examination at the C.O.A. stage to a threshold inquiry into the underlying merit of [the] claims, and ask only if the District Court's decision was debatable." And in this case it most certainly is, see United States v. Deem, Criminal No. 5:13cr00149 and Civil No. 5:16cv00961, filed in the Western District of Louisiana, Shreveport Division. All the same issues presented in this §2254 was presented and argued in that §2255, but the government argued it was without jurisdiction to consider the merits of those claims. The case was filed in 2016 and is still pending.

In Henry v. Cockrell, 327 F.3d 429 (5th Cir. 2003), the court explained that: under the Antiterrorism and Effective Death Penalty Act (AEPDPA), a petitioner must obtain a Certificate of Appealability (COA) before he can appeal the district court's decision (28 USC §2253(c)(1). A COA will be granted only if the petitioner makes "a substantial showing of the denial of a constitutional right." (28 USC §2253 (c)(2).

In order to make a substantial showing of a denial of a constitutional right, a Petitioner must demonstrate that a "reasonable jurist would find the district court's assessment of the Constitutional claim debatable or wrong." Slack v. McDaniel, 529 US 473, at 484, 120 S.Ct 1595, 146 L.Ed.2d 542 (2000). When a district court has denied a claim on procedural grounds, rather than on the merits of a claim, then the Petitioner must demonstrate that a "jurist of reason would find it debatable whether or not the district court was correct in its procedural ruling." id. As the Supreme Court made clear in its decision in the case of Miller v. Cockrell, 537 US 322, 123 S.Ct 1029, at 1039, 154 L.Ed.2d 931 (2003), a COA is a "jurisdictional prerequisite," and "until a COA has been issued, the federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners." When considering a request for a COA, "the question is the debatability of the underlying Constitutional claim[s], not the resolution of the debate." id, at 1042.

ACTUAL INNOCENCE

However, the Fifth Court of Appeals did agree "that his actual innocence is sufficient to overcome the jurisdictional bar against an unauthorized, successive §2254 application," but denied the the issuance of a COA on other grounds.

Over the years and through many attempts this Petitioner has raised the issue of actual innocence in many Petitions: Deem v. Texas, 540 US 987, 157 L.Ed.2d 381, 2003 US LEXIS 8090, 124 S.Ct 474 (2003); Deem v. Director, TDCJ-CID, No. 6:04cv554 (E.D. Tex. March 4th 2005); Deem v. Daughty, No. 05-40604 (5th Cir. dec. 14th 2005); Deem v. Warden, Caddo Corr. Ctr., 2014 U.S. Dist. LEXIS 104961 (W.D. La. July 16, 2014); Deem v. Warden, Caddo Corr. Ctr., 2014 U.S. Dist. LEXIS 104969 (W.D. La., July 30, 2014); United States v. Deem, 582 Fed. Appx. 553, 2014 U.S. App. LEXIS 19678 (5th Cir. La., 2014); United States v. Deem, 623 Fed. Appx. 206, 2015 U.S. App. LEXIS 20148 (5th Cir. La., 2015); Deem v. United States, 2016 U.S. LEXIS 3473 (U.S., May 23 2016). All have been denied because of jurisdictional errors and time bars. Which proves that the Petitioner has acted with reasonable diligence in the pursuit of his innocence.

In McQuiggin v. Perkins, 569 U.S. --, 1335 S.Ct.1924, 185 L.Ed.2d 1019 (2013), the Supreme Court held that the mere **CLAIM** of actual innocence would render the requirements under 28 U.S.C.S. §2244 (AEPDPA) are effectively NULL and VOID when it comes to claims of actual innocence, see also Schlup v. Delo, 513 U.S. 298 (1995); and Satterfield v. Dist. Attorney Phila., 2017 BL 339627, 3rd Cir., No. 15-2190, (9/26/2017).

In Schlup v. Delo, 513 U.S. 298, 130 L.Ed.2d 808, 115 S.Ct 851 (US 1995), the Supreme Court held that in order to avoid any procedural bar, a federal habeas corpus petitioner need only to show that a constitutional violation **PROBABLY** resulted in a conviction of one who was actually innocent. The court in that case said, "With respect to a state prisoner's federal habeas corpus petition, the United States Supreme Court has held that, absent a showing by the prisoner of cause and prejudice, a federal court may not ordinarily avoid several types of procedural bar- including the bar imposed with respect to successive or abusive claims in a second or subsequent petition- and reach the merits of the prisoner's federal constitutional claims,"(internal quotation marks omitted).

In a more recent case, Satterfield v. Dist. Attorney Phila., 2017 BL 339627, 3d Cir., No. 15-2190 (3rd Cir. 9/26/2017), the court applied the U.S. Supreme Court's 2013 decision in McQuiggin and Civil Rule 60(b)(6) to allow a convicted murderer the opportunity to prove his "actual innocence. Satterfield's habeas petition was denied as untimely before McQuiggin was decided in 2013, just like Deem's was here. He argues now that the change in the law under McQuiggin qualifies as an "extraordinary circumstance" allowing for relief. Although Mr. Deem is accused of a much more heinous crime than murder (according to social standards), he should still be allowed the "opportunity" to prove his actual innocence in the court. This can only be done with a COA from this court or a Court Order from this court.

REASON(S) FOR GRANTING THE PETITION

This Petition should be GRANTED on the grounds of justice, for it is unjust to deny a person his day in court simply because of a conviction that is considered heinous. This Court should be of a mind-set that should allow even the most reprehensible of society can come before it and at least be allowed to explain to it how he/she was found guilty of such charges.

And if the Petitoner can explain himself/herself to the Court in such a way that would alleviate his/her guilt of the offense of which they were charged, then that is the purpose of the Court, that is why the Supreme Court was enacted, to hear the pleas of those the lower courts do not want to consider.

CONCLUSION

This Petition should be GRANTED, allowing the Petitioner to present to the Court, the reasons why the lower courts do not want to hear his pleas.

Signed on this 21ST day of JUNE 2018,

Respectfully Submitted,

/s/ _____

Steven Deem, **Pro-Se**

cc: File

: ~~Solicitor~~ General