

No. 18-5887

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IN THE

**Supreme Court of the United States**

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CECIL L. MORTON  
Petitioner

v.

RON HAYNES,  
Respondent

On Petition For Rehearing From Denial of Certiorari

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**PETITION FOR REHEARING**

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CECIL L. MORTON  
Stafford Creek Corr. Center  
191 Constantine Way  
Aberdeen, WA 98520

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### I. Introductory Statement

Petitioner pursuant to Supreme Court Rule 44, hereby moves the Court for Rehearing of its Order of October 29, 2018 denying the Writ of Certiorari.

### II. Reasons For Rehearing

1. Rehearing Should Be Granted Where The State of Washington is Misapplying the Teague Non-Retroactivity Doctrine By Applying it to Old Case-law.

### III. Summary of Statement of the Case

Petitioner raised 1-one claim before the U.S. District Court; Denial of Due Process Where the State was Relieved of its burden on the element of consent when it shifted the burden to petitioner. The district court did not reach the merits of the claim, instead holding that the claim was untimely under the AEDPA. Ultimately, the district court dismissed the petition and denied a COA.

The Ninth Circuit also denied a COA, and held that petitioner had not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling".

This Court denied Certiorari. For the reasons

which follow, petitioner respectfully requests that a Re-hearing be Granted.

IV. Argument

A. A REHEARING SHOULD BE GRANTED WHERE THE STATE IS MISAPPLYING THE TEAGUE NON-RETROACTIVITY DOCTRINE BY APPLYING IT TO OLD CASE-LAW.

This Court in Martin v. Ohio, 107 S.Ct. 1098 (1987), held that due process does not forbid placing the burden of proving self-defense on the defendant charged with the crime of aggravated murder. 107 S.Ct. 1098. In so holding, this Court acknowledged that while self-defense "may negate" the mens rea of "purposeful killing by prior calculation and design" in "most encounters" it does not impremissibly shift the burden of proving a purposeful killing because self-defense merely excuses a killing that would otherwise constitute aggravated murder in Ohio, 107 S.Ct. at 1098 (emphasis added). In other-words, this Court found that a purposeful killing could co-exist with self-defense, so the presence of self-defense does not necessarily negate a finding of purposeful killing.

In United States v. Smith, 133 S.Ct 714 (2013), this Court clarified that the prosecution must always bear the burden of disproving a defense that necessarily negates an element of the charged offense. 133 S.Ct. at 719.

Together, this Court's holdings in Martin and Smith

indicate that a state may not burden a defendant with proving a defense that necessarily negates an element of the charged offense.

The Washington State Supreme Court in the case of State v. Camara, held that the negates analysis does not apply to consent, however, that was reversed by W.R.,Jr. The Washington Supreme Court in W.R.,Jr. itself acknowledged it was explicitly overturning its own prior decision's of 26 years in Camara, and more recently in State v. Gregory, 158 Wn.2d 759, 801-04 (2006). In summarizing it's decision in W.R.,Jr., the Washington Supreme Court held:

Camara and Gregory are also harmful. In violation of a defendant's due process right to have the State prove every element of the crime beyond a reasonable doubt, the rule in these cases impermissibly shifts the burden to the defendant to negate forcible compulsion by establishing consent. This impermissible shift in burden is not merely academic but risks compartmentalizing forcible compulsion by establishing consent, raising a very real possibility of wrongful convictions. We have found sufficient justifiable reasons to overrule prior decisions with arguably less harm . . . The due process violation created by the rule in Camara and Gregory is plainly harmful.

W.R.,Jr., 181 Wn.2d at 769. (citations omitted).

After the W.R.Jr. decision was published in the Stafford Creek Correction's Center's Law Library, petitioner filed a state court Personal Restraint Petition. The state court of

appeals stayed that petition pending the Washington Supreme Court's decision in In Re Colbert, 2016 LEXIS 1112.

The Washington Supreme Court in Colbert held that W.R.Jr. did not apply retroactively under either of the Teague v. Lane, 109 S.Ct. 1060 (1989), exceptions.

It is evident that it was the Washington Supreme Court's failure in Camara and Gregory to recognize that it is the State's burden to prove lack of consent. W.R.,Jr. Id. The Washington Supreme Court's recognition of the State's burden in W.R.,Jr. is an application of an old rule under U.S. Supreme Court law, and it applies retroactively to matters on collateral review under Teague. Whorting, 549 U.S. at 416.

The state court's failure to apply the "old rule" established by Martin, 480 U.S. at 237; Mullaney, 421 U.S. at 686-87; Winship, 397 U.S. at 364; Patterson, 432 U.S. at 215; and Smith, 133 S.Ct. at 719, is contrary to the Teague principle's.<sup>1</sup>

As the Colbert decision is contrary to this Court's retroactivity precedent as established in Teague, this Court should grant a re-hearing. Supreme Court Rule 44

<sup>1</sup> Washington State Supreme Court Justice's Gordon McCloud, and Fairhurst, J. dissented in the Colbert decision and stated; ("[T]he presumption of non-retroactivity adopted by the United States Supreme Court in Teague v. Lane applies only to new rules of constitutional law." If the holding in State v. W.R. were such a rule, then I would agree with the majority that it applied only prospectively because it meets neither of Teague's exceptions to presumptive nonretroactivity; W.R. did not announce a substantive rule of law under Teague, and it does not meet Teague's strict definition of a "watershed rule.").

B REHEARING IS WARRANTED WHERE DENIAL OF A CERTIFICATE OF APPEALABILITY ON THE DUE PROCESS CLAIM UNDERMINES THIS COURT'S PRECEDENT.

U.S. Supreme Court decisional law as dictated in Miller-El v. Cockrell, 123 S.Ct. 1029 (2003), clarified the standards for issuance of a COA:

... A prisoner seeking a COA need only demonstrate a "substantial showing of the denial of a constitutional right." A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists of reason could conclude the issues presented are adequate to deserve encouragement to proceed further.

Id., 123 S.Ct. at 1034. The test is met where the petitioner makes a showing that "the petition should have been resolved in a different manner or that the issues presented are 'adequate to deserve encouragement to proceed further'" Id., at 1039.

This means that petitioner does not have to prove that the district court was necessarily "wrong" - just that its resolution of the constitutional claim is "debatable" See Miller-El, Slack. Also see Buck v. Davis, 137 S.Ct. 759 (2017) ("[E]mphasizing that the initial determination for whether a COA should be granted is simply 'whether a claim is reasonably debatable, and if so, an appeal is the normal course.'").

Here, the decision denying a COA ignores

that the issue presented is debatable among jurists of reason, regarding the district court's procedural ruling, after all, at least 2-two judges, Washington Supreme Court Justice Sheryl Gordon McCloud, (see Colbert Id.) and U.S. Magistrate David W. Christel (see R&R at 6) have already found the issue debatable on whether the decision in W.R.Jr applies retroactively, thus, as the issue is debatable among jurists of reason a COA should have issued. Miller-El, Slack, Barefoot, and Buck, Id. Also see Tennard v. Dretke, 124 S.Ct. 2562, 2569 (2004) ("[A] COA should issue if the applicant has "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2), which we have interpreted to require that the "petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong") (citing Slack).

Here, it is clear that petitioner was deprived of his due process rights under the Washington Supreme Court's decision in W.R., and Martin. It is also clear that the Washington Supreme Court misapplied this Court's precedent as established in Teague by not applying its decision in W.R. retroactively applicable in Colbert, therefore, the Court should Grant a re-hearing. Supreme Court Rule 44.

V. Conclusion

Based on the foregoing, the Court should grant a rehearing and issue a COA.

DATED this 15th day of November, 2018.

Respectfully submitted,

  
CECIL L. MORTON  
Petitioner