

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DESREL R. LINDEN,

PETITIONER

VS

DIRECTOR, TDCJ - CID

RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE FIFTH CIRCUIT COURT OF APPEALS
IN CASE NO. 17-40439

PETITION FOR WRIT OF CERTIORARI

PRO SE PETITIONER
DESREL R. LINDEN #1634037
STILES - UNIT
3060 FM 3514
BEAUMONT, TX. 77705

QUESTIONS

- 1- DID THE U.S. FIFTH CIRCUIT CT. OF APPEALS ENTER A DECISION DEPARTING FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDING BY INVERTING THE STATUTORY ORDER OF OPERATION BY DECIDING THE MERITS OF THE APPEAL AND THEN DENYING THE 'C.O.A.' AND 'EVIDENTIARY HEARING' BASED ON ADJUDICATION OF THE ACTUAL MERITS, AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER?
- 2- HAS THE STATE COURT OF LAST RESORT DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH A DECISION OF A U.S. COURT OF APPEALS, NAMELY IN BRYANT V. SCOTT 28 F3D 1411 (5TH CIR. 1999), AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER?
- 3- HAS A U.S. COURT OF APPEALS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT, NAMELY BUCK V. DAVIS 137 SUP. CT. (2012); AND STRICKLAND V. WASHINGTON 104 SUP. CT. (1984); AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER?

QUESTIONS

- 4- HAS A STATE COURT DECIDED AN IMPORTANT QUESTION THAT HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT, OF WHETHER 'AEDPA'S' LIMIT ON FEDERAL REVIEW OF STATE DECISIONS AND FEDERAL FACT DEVELOPMENT COMBINED WITH PRACTICALLY NON-EXISTENT FACT DEVELOPMENT PROCEDURES ON STATE HABEAS AMOUNTS TO AN UNCONSTITUTIONAL SUSPENSION OF THE WRIT?
- 5- HAS A STATE COURT DECIDED AN IMPORTANT QUESTION THAT HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT, WHERE A FUNDAMENTAL MISCARRIAGE OF JUSTICE RESULTED IN A CONVICTION OF PETITIONER WHO IS ACTUALLY INNOCENT?
- 6- HAS A STATE COURT DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISION OF THIS COURT NAMELY CHAPMAN V CALIFORNIA 87 SUP. CT. (1967) AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER?

FOOTNOTE: QUESTION 4 ARGUMENT PAGES 21-23

QUESTION 5 ARGUMENT PAGES 19-21

QUESTION 6 ARGUMENT PAGES 24-28

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RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF THE SAID COURT:

NOW COMES DESREL R. LINDEN AND PURSUANT TO THE PROVISIONS OF RULE 10 AND 12, RULES OF THE SUPREME COURT OF THE UNITED STATES, HEREBY PETITION THIS COURT TO ISSUE A WRIT OF CERTIORARI TO REVIEW THE JUDGMENT ENTERED BY THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT WHO'S ORDER DENIED PETITIONER'S MOTION FOR 'C.O.A.' AND MOTION FOR AN 'EVIDENTIARY HEARING' WHICH DENY'S PETITIONER OF HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL.

COURT'S ORDER

THE ORDER OF THE 5TH CIR. OF CASE NO. 17-40439 IS THE SUBJECT OF THIS PETITION, WHICH WAS ISSUED MAR. 27, 2018. IT DENIED PETITIONER'S MOTION FOR 'C.O.A.' AND 'EVIDENTIARY HEARING' WHICH DENY'S PETITIONER'S WRIT OF HABEAS CORPUS PURSUANT TO 28 USC. SEC. 2254. SEE APPENDIX: EXB 'A'; THE 5TH CIR. ON APRIL 12, 2018 DENIED PETITIONER'S 'MOTION FOR EXTENSION OF TIME TO FILE MOTION FOR RECONSIDERATION'. SEE APPENDIX: EXB 'B'; THIS MAKES THIS PETITION TO THE SUPREME COURT TIMELY AND CONSISTENT WITH LOCAL RULE 13.3.

LIST OF PARTIES

DIRECTOR T.D.C.J. LORIE DAVIS

TX. ATTORNEY GENERAL: KEN PAXON

TX. ATTORNEY GENERAL COUNSEL: CARA HANNA

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APPENDIX - CONTENTS

* WRIT OF CERTIORARI *

PET EXB 'A-1' - ORDER OF 5TH CIRCUIT CT. DENYING 'COA' AND
'MOTION FOR EVIDENTIARY HEARING' MAR. 27, 2018

PET EXB 'B-1' - MEMORANDUM DENYING 'MOTION FOR EXTENSION TO
FILE MOTION FOR REHEARING' APRIL 12, 2018

PET EXB 'C-1' - BRIEF IN SUPPORT OF 'COA' MOTION / WITH APPENDIX
FILED JULY 24, 2017

PET EXB 'D-1' - 'MOTION FOR EVIDENTIARY HEARING' FILED IN 5TH CIR. CT.
JULY 24, 2017 - FILED IN DIST. CT. MAY 6, 2015

PRIOR OPINIONS

DEC. 11, 2008 - MURDER - JEFFERSON CO. TX. NO. 07-00877

JULY 7, 2011 - DIRECT APPEAL AFFIRMED - LINDEN V. STATE 347SW3D819

JULY 15, 2011 - REHEARING DENIED - NO. 13-10-000163-CR

OCT. 11, 2011 - PDR FILED - NO. PD-1069-11

DEC 7, 2011 - PDR REFUSED - NO. PD-1069-11

JAN. 3, 2012 - PDR REHEARING DENIED - NO. PD-1069-11

OCT. 26, 2012 - 11.07 HABEAS CORPUS FILED - NO. WR-80,194-01

JAN. 15, 2014 - 11.07 DENIED W/O WRITTEN ORDER ON TRIAL CT.
FINDING W/O HEARING - NO. WR-80,194-01

JAN. 27, 2014 - 2254 HABEAS CORPUS FILED WITH 'MOTION FOR
EVIDENTIARY HEARING' - NO. 1:14 CV-00027-RC-KFG

SEPT. 2, 2014 - 'MOTION FOR EVIDENTIARY HEARING' DENIED / PREMATURE

MAY 6, 2015 - REPLY WITH 'MOTION FOR EVIDENTIARY HEARING'
FILED - NO. 1:14-CV-27

MAR. 14, 2016 - 'MOTION FOR EVIDENTIARY HEARING' DENIED
NO. 1:14-CV-27

PRIOR OPINIONS

MAR. 30, 2017 - ORDER OF DISMISSAL / FINAL JUDGMENT
NO. 1:14-CV-27

MAY 18, 2017 - MOTION FOR COA WITH MOTION FOR
EVIDENTIARY HEARING FILED - NO. 17-40439

JULY 24, 2017 - BRIEF IN SUPPORT OF MOTION FOR COA
FILED - NO. 17-40439

MAR 27, 2018 - ORDER DENYING COA AND MOTION FOR
EVIDENTIARY HEARING - NO. 17-40439

APRIL 4, 2018 - MOTION FOR EXTENSION FOR MOTION OF
REHEARING FILED - NO. 17-40439

APRIL 12, 2018 - MOTION FOR EXTENSION FOR MOTION OF
REHEARING DENIED - NO. 17-40439

JURISDICTION

SEEKING UNITED STATES SUPREME CT. REVIEW OF THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT WHICH ISSUED AN ORDER OF DENIAL ON MAR. 27, 2018. ON APRIL 12, 2018 THE FIFTH CIRCUIT DENIED PETITIONER'S MOTION FOR EXTENSION OF TIME TO FILE MOTION FOR RECONSIDERATION.

JURISDICTION IS CONFERRED ON THIS COURT BY UNITED STATES SUPREME CT. RULE 10(C) AND 13(1).

THE DENIAL CONFLICTS WITH THE 6TH AND 14TH AMEND.

THEREFORE, THIS COURT HAS JURISDICTION TO ISSUE A WRIT OF CERTIORARI TO REVIEW THE ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

CONSTITUTIONAL - PROVISIONS

VI AMENDMENT - PAGE 10, 17, 19

IN ALL CRIMINAL PROSECUTIONS, THE ACCUSED SHALL ENJOY THE RIGHT TO A SPEEDY AND PUBLIC TRIAL, BY AN IMPARTIAL JURY OF THE STATE AND DISTRICT WHEREIN THE CRIME SHALL HAVE BEEN COMMITTED, WHICH DISTRICT SHALL HAVE BEEN PREVIOUSLY ASCERTAINED BY LAW, AND TO BE INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION; TO BE CONFRONTED WITH THE WITNESSES AGAINST HIM; TO HAVE COMPULSORY PROCESS FOR OBTAINING WITNESSES IN HIS FAVOR, AND TO HAVE THE ASSISTANCE OF COUNSEL FOR HIS DEFENSE.

XIV AMENDMENT - SEC. 1 PAGE 10, 24

ALL PERSONS BORN OR NATURALIZED IN THE UNITED STATES, AND SUBJECT TO THE JURISDICTION THEREOF, ARE CITIZENS OF THE UNITED STATES AND OF THE STATE WHEREIN THEY RESIDE. NO STATE SHALL MAKE OR ENFORCE ANY LAW WHICH SHALL ABRIDGE THE PRIVILEGES OR IMMUNITIES OF CITIZENS OF THE UNITED STATES; NOR SHALL ANY STATE DEPRIVE ANY PERSON OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW; NOR DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAW.

STATUTES -

28 USC SEC. 2253(c)(2) TO OBTAIN A 'COA' PETITIONER IS REQUIRED TO MAKE A SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT. - PAGE 18, 20, 23, 28

28 USC SEC 2254(d)(2) A FEDERAL COURT MAY NOT ISSUE A WRIT OF HABEAS CORPUS FOR A DEFENDANT CONVICTED UNDER STATE JUDGMENT UNLESS THE ADJUDICATION OF THE CONSTITUTIONAL CLAIM BY THE STATE COURT: WAS BASED ON AN UNREASONABLE DETERMINATION OF THE FACTS IN LIGHT OF THE RECORD BEFORE THE STATE COURT. - PAGE 21, 23, 26, 28

28 USC SEC 2254 PETITION FOR WRIT OF HABEAS CORPUS - PAGE 1

STATEMENT OF THE CASE

AFTER NOT GUILTY PLEA PETITIONER WAS CONVICTED OF MURDER. JURY MADE AFFIRMATIVE FINDING "SUDDEN PASSION WITH ADEQUATE CAUSE" DEADLOCKING ON SENTENCING, COURT SUA-SPONTED MISTRIAL 12-12-08. IN SUBSEQUENT PROCEEDING COLLATERAL ESTOPPEL WAS DENIED AND (2ND) JURY MADE AFFIRMATIVE FINDING "SUDDEN PASSION WITH ADEQUATE CAUSE" ASSESSING (15 YR) SENTENCE 2-25-10 TRIAL CT. NO. 07-00877]. 13TH CT. OF CRIM. APPEALS REFUSED (P.D.R.) 12-7-11 LINDEN V. STATE NO. PDR-1069-11]. PETITIONER FILE 11.07 HABEAS CORPUS REQUESTING EVIDENTIARY HEARING 10-26-12 RAISING FEDERAL QUESTIONS OF: ACTUAL INNOCENCE - PROSECUTORIAL MISCONDUCT - INEFFECTIVE ASSISTANCE OF COUNSEL - JURY CHARGE ERROR; TEX. CT. OF CRIM. APPEAL DENIED 11.07 WRIT WITHOUT WRITTEN ORDER ON TRIAL CT. FINDINGS WITHOUT HEARING 1-15-14 LINDEN V. STATE NO. WR-80, 194-01].

11.07-REVIEW / COURTS PASSING AS FOLLOWS:

ACTUAL INNOCENCE - [SHCR AT 15-14] COURT FOUND (5) FIVE WITNESSES STATEMENT DID NOT QUALIFY AS NEW EVIDENCE / EVIDENCE WAS AVAILABLE AT TIME OF TRIAL / ACTUAL INNOCENCE CLAIM INCREDIBLE AND UNWORTHY OF BELIEF EVENTS RELATED BY WITNESSES NOT CONSISTENT WITH POLICE INVESTIGATION / C. SINEGAL'S (2ND) STATEMENT AND PETITIONER'S ADMISSION HE SHOT THE VICTIM.

PROSECUTORIAL MISCONDUCT - [SHCR AT 9-10] COURT FOUND NO NEW FACTS TO SUPPORT THE CLAIMS / PETITIONER FAILED TO DEMONSTRATE HOW DET. MARK BLUM TESTIMONY RELATING TO WHEN AND UNDER WHAT CIRCUMSTANCES OF WITNESS STATEMENTS (C. SINEGAL - K. HUNTER - P. TRAN) RESULTED IN PETITIONER BEING IMPROPERLY CONVICTED AND SENTENCED IN LIGHT OF PETITIONER'S ADMISSION.

INEFFECTIVE ASSISTANCE OF COUNSEL - [SHCR AT 15-18] COURT ASSUMED WITHOUT DECIDING THAT COUNSEL JAMES R. MAKIN DID NOT INVESTIGATE (5) WITNESSES OR CALL THEM TO TESTIFY FINDING a) CHOICES WERE STRATEGIC; b) WERE ~~WERE~~ CHOICES REASONABLE IN LIGHT OF FACTS AND CIRCUMSTANCES;

C) WERE SUBSTANTIALLY INFLUENCED BY PETITIONER'S ADMISSION TO LAW-ENFORCEMENT; COURT FOUND PETITIONER'S ADMISSION WAS KNOWINGLY AND VOLUNTARILY WHICH MADE IT PROFESSIONALLY UNREASONABLE FOR COUNSEL TO PRESENT WITNESSES OR PHYSICAL EVIDENCE IN FURTHERANCE OF DEFENSE THAT THE VICTIM'S DEATH WAS CAUSED BY ANOTHER UNRELATED GUNMAN OPPOSED TO PETITIONER; THE COURT CONCLUDED ANY DEFENSE USE OF EXPERTS IN 'DNA', MEDICAL FORENSICS-OR BALLISTICS THAT DEMONSTRATED PETITIONER WAS NOT THE SHOOTER AND THAT VICTIM'S DEATH WAS RESULT OF BEING SHOT BY AN UNIDENTIFIED UNSEEN INDIVIDUAL, WAS NOT NEEDED BECAUSE PETITIONER'S UNEQUIVOCAL PERSISTENT ADMISSION OF SHOOTING VICTIM IN SELF-DEFENSE PRE-DETERMINED COUNSEL TRIAL STRATEGY. JURY CHARGE ERROR - [SHCR AT 7] COURT FOUND CLAIM #15 IS WITHOUT MERIT / CLAIM WAS SUBMITTED BY APPELLATE COUNSEL ON DIRECT APPEAL / 13TH COURT OF APPEALS REJECTED THE ISSUE. LINDEN V. STATE 347 SW3D AT 823-825.

PETITIONER FILED 2254 HABEAS CORPUS AND EVIDENTIARY MOTION 1-27-14. PETITIONER FILED REPLY IN TRAVERSE AND MOTION FOR LIVE PLENARY EVIDENTIARY HEARING 5-6-15, RAISING FEDERAL QUESTIONS OF: THE UNCONSTITUTIONAL SUSPENSION OF THE WRIT; ACTUAL INNOCENCE - PROSECUTORIAL MISCONDUCT - INEFFECTIVE ASSISTANCE OF COUNSEL - JURY CHARGE ERROR; THE U.S. DIST. CT, EASTERN DIST. OF TEX. BEAUMONT DIV. DENIED EVIDENTIARY HEARING MOTION 3-14-16 AND DENIED AND DISMISSED HABEAS RELIEF 3-30-17. LINDEN V. DIST. TDCJ-CID NO. 1:14 CV 27]

2254 - REVIEW / COURT'S PASSING AS FOLLOWS:

UNCONSTITUTIONAL SUSPENSION OF THE WRIT - [DOCUMENT 22 1:14 CV 27 PAGE 1 ID #4198] COURT ORDER PETITIONER MOTION FOR EVIDENTIARY HEARING DOCKET NO 19 DETERMINED NOT NECESSARY AT THIS TIME, DENIED AS PREMATURE (MAGISTRATE JUDGE KEITH F. GIBLIN) 3-14-16.

ACTUAL INNOCENCE - [DOCUMENT 24 1:14 CV 27 PAGE 13 ID #4212] COURT DENIED CLAIM #1 - PETITIONER FAILED TO SHOW STATE CT. ADJUDICATION WAS CONTRARY TO OR INVOLVED UNREASONABLE

APPLICATION OF FEDERAL LAW DETERMINED BY SUP. CT. OR THAT STATE CT. ADJUDICATION RESULTED IN DECISION BASED ON UNREASONABLE DETERMINATION OF FACTS IN LIGHT OF EVIDENCE PRESENTED IN STATE CT. PROCEEDING.

PROSECUTORIAL MISCONDUCT - [DOCUMENT 24 1:14 CV 27 PAGE 47 ID. #4246] COURT DENIED CLAIM #2 THE STATE CT. DETERMINATION NOT UNREASONABLE IN LIGHT OF EVIDENCE PRESENTED IN STATE CT. PROCEEDING, PETITIONER FAILED TO REBUT COURTS FACTUAL DETERMINATION WITH CONVINCING EVIDENCE, PETITIONER HAS NOT SHOWN STATE CT. ADJUDICATION WAS CONTRARY TO OR INVOLVED UNREASONABLE APPLICATION OF FEDERAL LAW DETERMINED BY SUP. CT. OR THAT STATE CT. ADJUDICATION RESULTED IN DECISION BASED ON UNREASONABLE DETERMINATION OF THE FACTS IN LIGHT OF EVIDENCE PRESENTED IN STATE CT. PROCEEDING.

INEFFECTIVE ASSISTANCE OF COUNSEL - [DOCUMENT 24 1:14 CV 27 PAGE 27, 28 ID #4226-27] COURT DENIED CLAIM #7-8 PETITIONER FAILED TO SATISFY BURDEN OF PROOF REBUTTING PRESUMPTION OF CORRECTNESS AFFORDED THE STATE CT. FINDINGS, PETITIONER FAILED TO SHOW DEFICIENT PERFORMANCE OR PREJUDICE, PETITIONER FAILED TO OVERCOME STANDARD ACCORDED TO COUNSEL IN CONTEXT OF 2254(d), PETITIONER FAILED TO SHOW STATE CT. ADJUDICATION WAS CONTRARY TO OR INVOLVED UNREASONABLE APPLICATION OF FEDERAL LAW DETERMINED BY THE SUP. CT. OR THAT THE STATE CT. ADJUDICATION RESULTED IN DECISION BASED ON UNREASONABLE DETERMINATION OF THE FACTS IN LIGHT OF EVIDENCE PRESENTED IN STATE CT. PROCEEDING.

JURY CHARGE ERROR - [DOCUMENT 24 1:14 CV 27 PAGE 14-16 ID. #4213-15] THE COURT OVERRULED CLAIM #15.

CONCLUSION - [DOCUMENT 24 1:14 CV 27 PAGE 50 ID #4249] U.S. DIST. JUDGE RON CLARK DENIED AND DISMISSED PETITIONER'S RELIEF, 3-30-17.

FINAL JUDGMENT - [DOCUMENT 25 1:14 CV 27 PAGE 1 ID. #4250] RELIEF DENIED / U.S. DIST. JUDGE RON CLARK 3-30-17.

5TH CIR. - REVIEW / COURT'S PASSING AS FOLLOWS:

PETITIONER FILED NOTICE OF APPEAL / APPLICATION TO PROCEED IN FORMA PAUPERIS / MOTION TO ISSUE 'COA' / MOTION FOR LIVE PLENARY EVIDENTIARY HEARING 4-1-17. THE U.S. COURT OF APPEALS FIFTH CIRCUIT RECEIVED ON 5-18-17 [NO. 17-40439] PETITIONER FILED MOTION FOR EXTENSION TO FILE 'COA' BRIEF 5-28-17. COURT GRANTED MOTION 6-5-17. PETITIONER FILED BRIEF IN SUPPORT OF MOTION FOR 'COA' 7-24-17. [SEE: PET. EXB. C-1] RAISING FEDERAL QUESTIONS OF: ACTUAL INNOCENCE - INEFFECTIVE ASSISTANCE OF COUNSEL - PROSECUTORIAL MISCONDUCT - UNCONSTITUTIONAL SUSPENSION OF THE WRIT. 5TH CIRCUIT COURT DENIED MOTION FOR 'COA' AND MOTION FOR EVIDENTIARY HEARING BASED ON CLAIMS DENIED BY DISTRICT CT. ON THE MERITS THAT REASONABLE JURISTS WOULD NOT DEBATE THAT EVIDENCE OF (5) EXCULPATORY EYE-WITNESSES WITH EXCULPATORY BALLISTIC EVIDENCE SHOWING THAT ANOTHER PERSON KILLED THE VICTIM WOULD NOT OVERCOME PETITIONER'S ADMISSION THAT HE SHOT IN SELF-DEFENSE. 3-27-18 [SEE: PET. EXB. A-1. [NO. 17-40439] PETITIONER FILED MOTION FOR EXTENSION OF TIME TO FILE MOTION FOR RECONSIDERATION 4-4-18. COURT DENIED MOTION FOR EXTENSION OF TIME TO FILE MOTION FOR RECONSIDERATION 4-12-18 NO. 17-40439 [SEE: PET. EXB. B-1.

THIS SHOWS THAT THE FEDERAL QUESTIONS WERE TIMELY AND PROPERLY RAISED AND THAT THIS COURT HAS JURISDICTION TO REVIEW THE JUDGMENT ON WRIT OF CERTIORARI CONSISTENT WITH SUP. CT. RULE 13.3 / RULE 14 (g) (i).

ARGUMENT 1, 2, 3

I

THE SUP. CT. HELD IN BUCK V DAVIS 137 S. CT. 759, 765 (2017) "THAT THE 5TH CIR. CT. EXCEEDED THEIR LIMITED SCOPE OF 'COA' ANALYSIS BY DENYING THE 'COA' BASED ON ADJUDICATION OF THE ACTUAL MERITS."

THE EXACT ACTION HAS REOCCURRED IN LINDEN V DAVIS NO. 17-40439 [SEE: PET. EXB 'A-1'].

THE KEY ISSUE IS THE COURT'S DENIAL HELD COUNSEL'S TRIAL STRATEGY WAS PRE-DETERMINED BASED ON PETITIONER (LINDEN'S) ADMISSION TO LAW-ENFORCEMENT.

HOWEVER, THEY PROVIDE 'NO SUPPORTING CASE-LAW' WHICH STATES, COUNSEL IS PRECLUDED FROM INVESTIGATING A PLAUSIBLE LINE OF DEFENSE ONCE HE BECOMES AWARE OF ONE, BECAUSE HIS CLIENT MADE AN ADMISSION TO LAW-ENFORCEMENT. [SEE: SHCR AT 15-17] [DOCUMENT 24 1114-CV-27 PG 26, 27 ID # 4225-26].

THE ONLY QUESTION AT THIS STAGE IS WHETHER LINDEN HAS SHOWN "JURISTS OF REASON COULD DISAGREE WITH THE DIST. CT.'S RESOLUTION OF HIS CONSTITUTIONAL CLAIM OR COULD CONCLUDE THE ISSUES PRESENTED ARE ADEQUATE TO DESERVE ENCOURAGEMENT TO PROCEED FURTHER" MILLER-EL V COCKRELL 123 S. CT. 1029 (2003).

THE CONSTITUTIONAL CLAIM PRESENTED BY LINDEN WAS 'IAC' WHERE COUNSEL FAILED TO INTERVIEW AND INVESTIGATE (5) EXCULPATORY EYE-WITNESSES WHO CORROBORATIVELY EXPLAIN OF A PERPETRATOR OTHER THAN LINDEN CAUSING THE DEATH OF THE VICTIM. [SEE: PET. EXB. # 1 2 3 4 5 OF 'COA' APPENDIX].

IN BRYANT V SCOTT 28 F.3D 1411, 1418 (5TH CIR 1994) WHICH IS ANALOGOUS TO LINDEN'S CASE INTERPRETING STRICKLAND V. WASHINGTON 104 S. CT. 2052, 2061 (1984) HOLD THAT "IF THERE IS MORE THAN ONE PLAUSIBLE LINE OF DEFENSE, COUNSEL SHOULD INVESTIGATE EACH LINE SUBSTANTIALLY BEFORE

MAKING A STRATEGIC CHOICE ABOUT WHICH LINE TO RELY ON AT TRIAL." [SEE: PET. EXB C-1 'COA' BRIEF PG 10-15].

COUNSEL JAMES R. MAKIN WAS RETAINED 6-8-07. HIS INVESTIGATION WAS LIMITED TO THE CHARGED OFFENSE, AND LINDEN'S VERSION OF THE EVENT WHEN COUNSEL CHOSE SELF-DEFENSE AS HIS TRIAL STRATEGY.

"A YEAR LATER..." ON 5-29-08 ASSISTANT 'DA' RAMON RODRIGUEZ SENT A 'MEMO' [SEE: PET. EXB 24 OF 'COA' APPENDIX] AWAREING COUNSEL OF (5) EXCULPATORY EYE-WITNESSES WHO CORROBORATIVELY EXPLAIN OF AN "ALTERNATE-SHOOTER" OPPOSED TO COUNSEL'S CLIENT CAUSING THE VICTIM'S DEATH. SIMPLY, COUNSEL ABORTED HIS DUTY UNDER THE STANDARD OF STRICKLAND AT 2061. THIS SHOWS COUNSEL'S "DEFICIENT PERFORMANCE."

COUNSEL "PREJUDICED" LINDEN DENYING HIM OF A DEFENSE, BY NOT INVESTIGATING EACH PLAUSIBLE LINE OF DEFENSE SUBSTANTIALLY, ALSO FAILING TO INFORM LINDEN OF IMPORTANT DEVELOPMENTS IN THE COURSE OF THE PROSECUTION SO THAT LINDEN COULD MAKE AN INFORMED DECISION. ULTIMATELY, COUNSEL DENIED LINDEN OF HIS CONSTITUTIONAL 6TH AMEND. RIGHT TO COUNSEL AT TRIAL.

WITH THE THEORY OF AN 'ALTERNATE-SHOOTER' PRESENTED TO A JURY AT LEAST ONE JUROR WOULD HAVE HELD REASONABLE DOUBT! "IF EVIDENCE GIVES EQUAL OR NEARLY EQUAL CIRCUMSTANTIAL SUPPORT TO THEORY OF GUILT OR INNOCENCE, THE COURT SHOULD REVERSE BECAUSE UNDER THESE CIRCUMSTANCES A REASONABLE JURY MUST NECESSARILY ENTERTAIN A REASONABLE DOUBT" UNITED STATES V RAMOS-GARCIA 184 F.3D 463, 465 (5TH CIR 1999).

THERE'S A REASONABLE PROBABILITY THAT BUT FOR COUNSEL'S UNPROFESSIONAL ERRORS THE RESULT OF THE PROCEEDING WOULD HAVE BEEN DIFFERENT STRICKLAND SUPRA!

LINDEN HAS MADE A SUBSTANTIAL SHOWING OF THE DENIAL OF HIS CONSTITUTIONAL RIGHT ACCORDING TO 28 USC SEC. 2253 (C)(2).

THE DIST. CT.'S DENIAL OF LINDEN'S 'COA' WAS AN ABUSE OF DISCRETION. THE DIST. CT.'S DENIAL RESTED LARGELY ON THE TRIAL CT.'S FINDINGS THAT LINDEN'S ADMISSION TO LAW-ENFORCEMENT PRE-DETERMINED COUNSEL'S TRIAL STRATEGY. LINDEN DEVELOPED A FACTUAL BASIS THAT COUNSEL FAILED THE STRICKLAND STANDARD TO SUBSTANTIALLY INVESTIGATE A PLAUSIBLE LINE OF DEFENSE. THE DIST. CT. REFUSED TO ACKNOWLEDGE AND GIVE A FULL AND FAIR HEARING TO RESOLVE LINDEN'S GENUINE DISPUTES OF MATERIAL FACTS. "THESE ALLEGATIONS IF PROVEN TRUE WOULD ENTITLE LINDEN TO RELIEF" HALL V. QUARTERMAN 534 F.3D 365, 369 (5TH CIR 2008).

AS SUCH, "THE FAILURE TO CONSIDER THIS FEDERAL CLAIM WILL RESULT IN A FUNDAMENTAL MISCARRIAGE OF JUSTICE" COLEMAN V THOMPSON 111 S. CT. 2546, 2565 (1991).

LINDEN HAS ALSO DEMONSTRATED THAT REASONABLE JURISTS WOULD FIND THE DIST. CT.'S ASSESSMENT OF THE CONSTITUTIONAL CLAIMS DEBATABLE OR WRONG. SLACK V MCDANIEL 120 S. CT. 1595, 1608 (2000); BUCK V DAVIS 137 S. CT. SUPRA!

LINDEN REQUEST THAT THIS HONORABLE COURT REVERSE AND REMAND THIS CASE.

FOOTNOTE:

QUESTIONS 1, 2, AND 3 ARE COMPRISED IN THE ABOVE ARGUMENT.

QUESTION 5

II

AGAIN THE 5TH CIR. CT. HAS EXCEEDED THEIR LIMITED SCOPE OF 'COA' ANALYSIS BY DENYING 'COA' BASED ON ADJUDICATION OF THE ACTUAL MERITS BUCK V. DAVIS SUPRA:

THE CONSTITUTIONAL CLAIM PRESENTED BY LINDEN WAS ACTUAL INNOCENCE UNDER SCHLUP V DELO 115 S. CT. 851 (1995) CONNECTED TO PROSECUTORIAL MISCONDUCT WHERE P.A.P.D. DET. MARK D. BLUM INTRODUCED FORGED AND FRAUDULENT WITNESS STATEMENTS INTO COURT PROCEEDINGS IN DRAFTING THE 'PC' AFFIDAVIT TO OBTAIN ARREST-WARRANT, FOR PRESENTATION TO GRAND-JURY, FOR INDICTMENT AND SUBSEQUENT CONVICTION AND SENTENCE. [SEE: DOCUMENT 18 1:14-CV-27 PG 8-17].

THE SUP. CT. HAS RECOGNIZED "OUTRAGES MISCONDUCT BY LAW-ENFORCEMENT OFFICERS CAN RISE TO A LEVEL OF DUE PROCESS VIOLATION" MORAN V. BURBINE 106 S. CT. (1986).

THE COURTS DENIAL HELD NONE OF (5) EXCULPATORY WITNESS STATEMENTS QUALIFY AS NEWLY DISCOVERED EVIDENCE BECAUSE THE EVIDENCE WAS AVAILABLE AT TIME OF TRIAL, LINDEN'S ACTUAL INNOCENCE UNBELIEVABLE BECAUSE WITNESS STATEMENTS NOT CONSISTENT WITH POLICE INVESTIGATION, AND LINDEN'S STEADFAST ADMISSION OF SELF-DEFENSE. [SHCR AT 13-14 / DOCUMENT 24 1:14-CV-27 PG 12 ID # 4211] ALSO, COURT HELD THERE'S NO NEW FACTS TO SUPPORT THE CLAIM, AND LINDEN FAILED TO DEMONSTRATE HOW DET. BLUM'S TESTIMONY OF WITNESS STATEMENTS RESULTED IN LINDEN'S CONVICTION AND SENTENCE IN LIGHT OF LINDEN'S ADMISSION. THE STATE CT'S DETERMINATION WAS NOT UNREASONABLE IN LIGHT OF EVIDENCE PRESENTED IN STATE CT. [SHCR AT 9-12 / DOCUMENT 24 1:14-CV-27 PG 47 ID # 4246].

PURSUANT TO MCQUIGGIN V PERKINS 133 S. CT. 1924 (2013) "BY DEFINITION, NEWLY DISCOVERED EVIDENCE IS EVIDENCE THAT WAS NOT OBTAINED AND PRESENTED AT TRIAL BY TRIAL COUNSEL."

FOOTNOTE:

LINDEN ALSO ARGUED 'IAC' UNDER SCHLUP V DELO A RECOGNIZED CONSTITUTIONAL VIOLATION OF 6TH AMEND. QUESTION 5 IS COMPRISED IN THE ABOVE ARGUMENT.

TRIAL COUNSEL JAMES MAKIN OBTAINED A POLICE REPORT FOR THE FIRST TIME 7-15-10. FIVE MONTHS AFTER LINDEN'S SECOND TRIAL ENDED. [SEE: PET, EXB #11 'COA' APPENDIX].

THEREFORE, THESE WITNESS STATEMENTS SHOULD QUALIFY AS NEWLY DISCOVERED EVIDENCE.

IN REVIEW OF EXCULPATORY WITNESS STATEMENT [PET, EXB. #2 AND INCULPATORY WITNESS STATEMENT [STATE EXB #2 OF 'COA' APPENDIX] BOTH ALLEGEDLY BY KENNETH HUNTER, ITS EVIDENT THAT THE WITNESS SIGNATURE IS VASTLY DIFFERENT SIGNALING A FORGERY. ALSO, WHEN SCRUTINIED ITS NOTICEABLE THAT THE NOTARY'S #5 SIGNATURE IS FORGED AS WELL WHEN COMPARED TO [PET, EXB #5 AND #19 OF 'COA' APPENDIX] WHICH BEARS THE TRUE SIGNATURE OF NOTARY RODNEY WAYNE HARRISON.

ADDITIONALLY, KENNETH HUNTER SUPPLIED AN AFFIDAVIT ON 8-8-15, ATTESTING THAT HE DID NOT GIVE A (2ND) STATEMENT TO LAW-ENFORCEMENT. [SEE: PET, EXB A 'COA' APPENDIX].

THE RECORD REVEALS DET. BLUM USED K. HUNTER'S ALLEGED (2ND) INCULPATORY STATEMENT IN DRAFTING THE 'PC' AFFIDAVIT WHICH SECURED THE ARREST-WARRANT [RR VOL 2 PG 172-178] [SEE: PET, EXB #12 PG 4 - #14 - #15 OF 'COA' APPENDIX].

THE SUP. CT. REPEATEDLY HELD THAT "A CONVICTION OBTAINED THROUGH FALSE EVIDENCE KNOWN TO BE SUCH BY STATE REPRESENTATIVES VIOLATES A PETITIONER'S CONSTITUTIONAL RIGHTS" MILLER V. PATE 87 S. CT. (1967).

"ACCORDINGLY, THE SETTING ASIDE OF FRAUDULENTLY BEGOTTEN JUDGMENTS IS NECESSARY TO THE INTEGRITY OF THE COURTS FOR TAMPERING WITH ADMINISTRATION OF JUSTICE." CHAMBERS V NASCO INC. 111 S. CT. (1991).

LINDEN HAS MADE A SUBSTANTIAL SHOWING OF THE DENIAL OF HIS CONSTITUTIONAL RIGHT PURSUANT TO 28 USC SEC. 2253 (C)(2).

THE DIST. CT.'S DENIAL OF LINDEN'S 'COA' WAS AN ABUSE OF DISCRETION. THE DIST. CT.'S DENIAL REST LARGELY ON THE TRIAL CT.'S FINDINGS, THAT WITNESS STATEMENTS ARE NOT NEW EVIDENCE, LINDEN'S CLAIM IS UNBELIEVABLE BECAUSE WITNESS STATEMENTS NOT CONSISTENT WITH POLICE INVESTIGATION, AND LINDEN MADE AN ADMISSION OF SELF-DEFENSE.

LINDEN DEVELOPED A FACTUAL BASIS THAT FORGED AND FRAUDULENT STATEMENTS WERE INTRODUCED INTO COURT PROCEEDINGS BY DET. BLUM. THE DIST. CT. REFUSED TO ACKNOWLEDGE AND GIVE FULL AND FAIR HEARING TO RESOLVE ISSUES OF MATERIAL FACT.

"IF FOR ANY REASON NOT ATTRIBUTABLE TO INEXCUSABLE NEGLECT OF PETITIONER AND EVIDENCE CRUCIAL TO THE ADEQUATE CONSIDERATION OF HIS CONSTITUTIONAL CLAIMS WERE NOT DEVELOPED AT THE STATE HEARING, THE FEDERAL COURT MUST GRANT AN EVIDENTIARY HEARING" TOWNSEND V. SAIN 83 S. CT. (1963).

LINDEN REQUEST THAT THIS HONORABLE COURT REVERSE AND REMAND THIS MATTER.

QUESTION 4

III

LINDEN ASSERTS THE STATE'S FACT-FINDING PROCEDURE WHICH LED TO THE STATE CT.'S DENIAL OF HABEAS RELIEF WAS DEFICIENT AND BIASED AND "RESULTED IN A DECISION THAT WAS BASED ON AN UNREASONABLE DETERMINATION OF FACTS IN LIGHT OF THE EVIDENCE PRESENTED IN THE STATE COURT PROCEEDING" 28 USC SEC 2254 (d)(2) HARRINGTON V RICHTER 131 S. CT. 770 (2011) QUOTING - WILLIAMS V TAYLOR 120 S. CT. (2000).

THE STATE CT.'S FACT-FINDING PROCEDURE IS FAULTY UNDER (d)(2) OF AEDPA. THE STATE FAILED TO ACCEPT AS TRUE LINDEN'S FACTUAL ALLEGATIONS IN THE PETITION THAT WERE NEITHER INCREDIBLE NOR CLEARLY REFUTED BY THE RECORD; AND THE STATE FAILED TO HOLD A HEARING WHERE THOSE FACTS, ACCEPTED AS TRUE, SATISFIED THE BASIC REQUIREMENT FOR RELIEF.

LINDEN MADE A PRIMA FACIE CASE OF 'IAC' WHERE COUNSEL CLEARLY ABORTED HIS DUTY UNDER THE STANDARD OF STRICKLAND AT 2061 WHEN HE FAILED TO INTERVIEW AND INVESTIGATE (5) EXCULPATORY EYE-WITNESSES WHO LAID THE FOUNDATION OF A PLAUSIBLE LINE OF DEFENSE OF ACTUAL INNOCENCE ESTABLISHING REASONABLE DOUBT; COUNSEL'S DEFICIENT PERFORMANCE PREJUDICED LINDEN, DENYING HIS CONSTITUTIONAL RIGHT TO EFFECTIVE COUNSEL AT TRIAL. AS DETAILED IN PREVIOUS ARGUMENT. ALSO, [SEE: PET EXB 'C-1' PG 10-15 OF CERTIORARI APPENDIX].

THE STATE CT.'S DENIAL OF LINDEN'S 'IAC' CLAIM WITHOUT AN EVIDENTIARY HEARING AMOUNTS TO AN UNREASONABLE DETERMINATION OF THE FACTS "HURLES V. RYAN 706 F.3D 1021 (9TH CIR 2013).

THE STATE'S PURPORTED DETERMINATION OF THE FACTS WITHOUT A FAIR OPPORTUNITY FOR LINDEN TO PRESENT EVIDENCE VIOLATES AEDPA, AND PREJUDICED LINDEN DENYING HIS DUE PROCESS.

THE SUP. CT. HAS NOT ADDRESSED WHETHER AEDPA'S LIMIT ON FEDERAL REVIEW OF STATE DECISIONS AND FEDERAL FACT DEVELOPMENT COMBINED WITH NON-EXISTENT FACT DEVELOPMENT PROCEDURES ON STATE HABEAS AMOUNT TO AN UNCONSTITUTIONAL SUSPENSION OF THE WRIT BOUMEDINE V BUSH 128 S.C.T. (2008).

A CONSTITUTIONALLY ADEQUATE HABEAS CORPUS PROCEEDING MUST AT LEAST INCLUDE A MEANINGFUL OPPORTUNITY TO SATISFY THE REQUIREMENT OF AEDPA; OR WHETHER IT ~~DENY~~ DENIES LINDEN'S DUE PROCESS [SEE: DIST. ATTNY. OFF. V. OSBORNE 129 S.C.T. (2009)]. DUE PROCESS AFFORDS A HABEAS CORPUS PETITIONER THE RIGHT TO A FAIR OPPORTUNITY IN STATE CT. TO DISCOVER AND PRESENT POTENTIALLY EXCULPATORY EVIDENCE THAT WAS NOT CONTAINED IN THE RECORD OR DIRECT APPEAL.

THE DIST. CT. DENIED LINDEN'S MOTION FOR EVIDENTIARY HEARING AS PREMATURE. [SEE: DOCUMENT 22 1:14-CV-27 PG 1 ID #4198]. THIS DENIAL WAS AN ABUSE OF DISCRETION. THE DENIAL IS BASELESS. AS SUCH, LINDEN HAS MADE A SUBSTANTIAL SHOWING OF HIS CONSTITUTIONAL RIGHT OF DUE PROCESS ACCORDING TO 28 USC SEC 2253(C)(2) AND 28 USC SEC 2254(d)(2).

LINDEN HAS RAISED CONSTITUTIONAL CLAIMS OF PROSECUTORIAL MISCONDUCT- ACTUAL INNOCENCE- DENIAL OF DISCOVERY- 'IAC' OF TRIAL AND APPELLATE COUNSEL [SEE: PET. EXB 'D-1' OF CERTIORARI APPENDIX].

THEREFORE, "THE FAILURE TO CONSIDER THIS FEDERAL CLAIM WILL RESULT IN A MISSCARRIAGE OF JUSTICE" OF A PERSON WHO IS ACTUALLY INNOCENT COLEMAN V. THOMPSON 111 S. CT. SUPRA:

LINDEN ASSERTS THAT "JURISTS OF REASON COULD DISAGREE WITH THE DIST. CT.'S RESOLUTION OF HIS CONSTITUTIONAL CLAIM OR COULD CONCLUDE THE ISSUES PRESENTED ARE ADEQUATE TO DESERVE ENCOURAGEMENT TO PROCEED FURTHER" MILLER-EL V. COCKRELL SUPRA:

LINDEN REQUEST THAT THIS HONORABLE COURT REVERSE AND REMAND THIS MATTER.

FOOTNOTE:

QUESTION 4 IS COMPRISED IN THE ABOVE ARGUMENT.

THE 13TH CT. OF APP. APPEAR TO HAVE ONLY APPLIED THE STATE'S EGREGIOUS HARM ANALYSIS WHICH DOES NOT APPEAR TO REQUIRE CHAPMAN'S "REASONABLE DOUBT ANALYSIS" FOR CONSTITUTIONAL VIOLATIONS MAKING THIS CLAIM REVIEWABLE IN THIS COURT UNDER CHAPMAN.

THE SUP. CT HELD "A COURT MAY FIND A CONSTITUTIONAL ERROR HARMS ONLY IF IT DETERMINES BEYOND A REASONABLE DOUBT THAT THE ERROR DID NOT CONTRIBUTE TO THE CONVICTION." CHAPMAN V CALIFORNIA 87 S. CT. (1967)

FEDERAL LAW OF THE SUP. CT. HOLDS "A DEFENDANT IN CRIMINAL TRIAL HAS THE RIGHT TO MEANINGFUL OPPORTUNITY TO PRESENT A DEFENSE" CALIFORNIA V. TROMBETTA 104 S. CT 2228 (1984)

THE SUP. CT. FURTHER HOLDS "A DEFENDANT IS ENTITLED TO INSTRUCTION OF ANY RECOGNIZED DEFENSE WHERE EVIDENCE EXIST; SUFFICIENT FOR REASONABLE JURY TO FIND IN HIS FAVOR" INCLUDING SELF-DEFENSE. MATTEWS V UNITED STATES 108 S. CT 883 (1988)

THE FACT THAT FEDERAL HABEAS RELIEF DOES NOT LIE FOR ERRORS OF STATE LAW, DOES NOT MEAN, THAT ERROR UNDER STATE LAW CANNOT RESULT IN COGNIZABLE VIOLATIONS OF A CONSTITUTIONAL RIGHT TO DUE PROCESS, WHAT DUE PROCESS REQUIRE WILL OFTEN DEPEND ON WHAT STATE LAW IS. STATES ARE FREE TO DEFINE ELEMENTS OF DEFENSES TO CRIME [SEE: APPENDI V NEW JERSEY 120 S. CT (2000)]

WHERE ERROR IN JURY INSTRUCTION IS ALLEGED "IT MUST BE ESTABLISHED IT VIOLATED SOME RIGHT, WHICH WAS GUARANTEED BY THE 14TH AMEND." CLIPP V NAUGHTEN 94 S. CT. 396 (1973)

A FINDING THAT LINDEN WAS ERRONEOUSLY DEPRIVED OF JURY INSTRUCTION, WHICH HE WAS ENTITLED UNDER STATE LAW IS THE FIRST STEP IN DETERMINATION WHETHER THAT ERROR VIOLATES PETITIONER'S FEDERAL DUE PROCESS RIGHTS [SEE: DAVIS V STRUCK 270 F3D 125 (2ND CIR 2001)].

UNDER TX. LAW 'SELF-DEFENSE' IS A 'LEGAL JUSTIFICATION' FOR ENGAGING IN ACTS ALLEGED BY STATE INDICTMENT. THUS, WHEN, 'SELF-DEFENSE' IS RAISED, THE STATE MUST DISPROVE 'LEGAL JUSTIFICATION' BEYOND A REASONABLE DOUBT. SAXTON V. STATE 804 SW2D 910 (TX. CRIM. APP. 1991)

WHEN 'LEGAL JUSTIFICATION' IS IMPOSED, FEDERAL DUE PROCESS REQUIRE THE STATE TO PROVE THE ABSENCE OF 'LEGAL JUSTIFICATION' (SELF-DEFENSE) AS IF IT WAS ANY OTHER ELEMENT OF THE CHARGED OFFENSE.

THE CHARGE REQUESTED THE JURY TO MAKE A FINDING OF GUILT OR INNOCENCE FOR OFFENSE OF MURDER, BUT THE CHARGE DOES NOT REQUIRE THE JURY TO MAKE A FINDING BEYOND A REASONABLE DOUBT ON THE ISSUE OF 'LEGAL JUSTIFICATION' FOR COMMITTING THE OFFENSE OF MURDER, THUS, IT CANNOT BE SAID BEYOND A REASONABLE DOUBT, THAT; HAD THE ISSUE OF 'SELF-DEFENSE' (LEGAL JUSTIFICATION) BEEN PROPERLY INCORPORATED IN THE APPLICATION PORTION OF THE CHARGE; THAT THE JURY WOULD NOT HAVE FOUND IN FAVOR OF LINDEN.

THE CHARGE COMPLETELY DEPRIVED LINDEN OF HIS RIGHT TO HAVE THE JURY MAKE SPECIFIC FINDINGS BEYOND A REASONABLE DOUBT AS A RECOGNIZED DEFENSE OF 'LEGAL JUSTIFICATION' MANDATED THROUGH STATE LAW AND THUS, PROTECTED THROUGH FEDERAL DUE PROCESS.

THE 13TH CT. OF APP. CONCEDED "ERROR IN JURY CHARGE BY NOT APPLYING SELF-DEFENSE TO THE FACTS OF THE CASE AND INSTRUCT JURY TO ACQUIT IF THEY HELD REASONABLE DOUBT" LINDEN V STATE 347 SW3D 819 (2011); ALSO, "THERE WAS ERROR IN JURY CHARGE ALLOWING LINDEN TO BE CONVICTED BECAUSE HE ENGAGED IN CONDUCT THAT LEAD TO VICTIM'S DEATH RATHER THAN CAUSING THE VICTIM'S DEATH, ID AT 824; ALSO "TRIAL COUNSEL FAILED TO OBJECT TO THESE JURY CHARGE ERRORS" ID AT 823, 824.

THE 13TH CT. OF APP.'S DECISION TO AFFIRM THE CONVICTION IS BASED WHOLLY, THAT "TRIAL COUNSEL EFFECTIVELY CURED THE ERRONEOUS JURY CHARGE; IN HIS CLOSING ARGUMENT, WHERE COUNSEL DISCUSSED SELF-DEFENSE AT LENGTH" ID AT 823.

THE RECORD FACTS SHOW THAT TRIAL COUNSEL TOLD THE JURY, "AS THE JUDGE TOLD YOU, AND AS THE CHARGE TELLS YOU; ARGUMENTS, YOU CAN LISTEN, NOT LISTEN, WHATEVER" [TR VOL 3 P. 133] ALSO, "APPLY THE LAW AS IT'S HERE IN THE CHARGE, AND COME UP WITH A DECISION" [VOL 3 P 134].

THUS, COUNSEL QUALIFIED FOR THE JURY THAT; THEY ARE NOT BOUND BY HIS ARGUMENT, COUNSEL SPECIFICALLY TOLD THE JURY TO APPLY THE LAW AS IT'S ERRONEOUSLY WRITTEN IN THE CHARGE.

ULTIMATELY, THE SUP. CT. HOLDS "ARGUMENTS OF COUNSEL CANNOT SUBSTITUTE FOR INSTRUCTIONS BY THE COURT" TAYLOR V KENTUCKY 98 S. CT. 1930-36 (1978)

IT'S REASONABLE TO DETERMINE THAT JURY CHARGE ERROR 'DID CONTRIBUTE TO LINDEN'S CONVICTION' WHICH VIOLATED HIS CONSTITUTIONAL RIGHT OR DUE PROCESS; UNDER: CHAPMAN'S "REASONABLE DOUBT ANALYSIS" FOR CONSTITUTIONAL VIOLATIONS MAKING THIS CLAIM REVIEWABLE IN THIS COURT.

ADDITIONALLY, THE 13TH CT. OF APP. HAS RELIED ON THE STATE'S BRIEF AND ARE MISLEAD BY A 'MATERIAL FALLACY'; CONSEQUENTLY, THE COURT HAS INTRODUCED INTO IT'S JUDICIAL OPINION A 'MATERIAL FALLACY.'

THE PRESENCE OF THIS FALLACY IS FATAL AND DECEPTIVE IN THE LEGAL REASONING OF THE JUDICIAL OPINION, PROVING AN UNREASONABLE DETERMINATION OF THE FACTS IN LIGHT OF THE EVIDENCE PRESENTED IN THE STATE CT. PROCEEDING 28 USC SEC 2254(d)(2).

NON-FACTUAL EVIDENCE PRESENTED:

LINDEN V STATE AT 821 HOLDS "THE BACK GLASS OF VICTIM'S VEHICLE WAS SHOT OUT, AND BULLETS HIT VICTIM IN THE BACK OF HIS HEAD AND NECK, INDICATING LINDEN HAD EITHER BEGUN FIRING BEFORE HE WAS NEXT TO THE VEHICLE OR THAT HE CONTINUED TO FIRE AFTER THE VICTIM WAS DRIVING AWAY."

THIS WAS EVIDENCE THE COURT HELD TO INFER INTENT.

REBUTTAL EVIDENCE OF RECORD:

- 1 STATE EXB 47 DEMONSTRATE WHERE PROJECTILES STRUCK THE VEHICLE; ONE ON DRIVERS SIDE DOOR AND ONE ON DRIVERS SIDE PASSENGER WINDOW.
- 2 STATE EXB 31 DEMONSTRATE BOTH ENTRY WOUNDS OF VICTIM TO LEFT-SIDE OF HEAD AND NECK.

THIS EVIDENCE REFUTES THE JUDICIAL OPINION, PROVING NO-SUCH SCENARIO OCCURRED.

ADDITIONAL INDISPUTABLE RECORD FACTS:

LINDEN EMPTIED HIS WEAPON [RR VOL 3 P 21] FIRING A TOTAL OF (4) PROJECTILES [VOL 2 P 177 / VOL 3 P 53] (3) PROJECTILES RECOVERED ON THE SCENE [VOL 2 P 153, 154, 161, 163 / VOL 3 P 11, 26] OF WHICH NONE OF THE (3) RECOVERED PROJECTILES ENTERED THE BODY OF THE VICTIM [VOL 2 P 163 / VOL 3 P 53 / VOL 7 P 40]

THIS LEAVES (1) PROJECTILE UNACCOUNTED FOR, WHICH PROVES WITH MATHEMATICAL CERTAINTY THAT (1) PROJECTILE COULD NOT AND DID NOT CAUSE THE (2) DISTINCT WOUNDS TO THE LEFT-SIDE OF VICTIMS HEAD AND NECK.

THE STATE FORENSIC EXPERT DR TOMMY BROWN CANNOT DEFINITELY STATE THAT THE VICTIM'S WOUNDS WERE CAUSED BY LINDEN'S WEAPON, ONLY THAT IT'S CONSISTENT [VOL 3 P 51 / VOL 7 P 35].

FURTHERMORE, YOU CAN DEDUCE THAT THE JURY CHARGE ERROR CONTRIBUTED TO THE CONVICTION, WHERE CASE-LAW HELD, "OBSERVING WHEN ISSUES OF SELF-DEFENSE IS RAISED; IT IS ALSO TRUE, EXCEPT IN RARE INSTANCES WHEN THE STATE'S EVIDENCE IS SUFFICIENT TO OVERCOME A CLAIM OF SELF-DEFENSE; IT WILL ALSO BE SUFFICIENT TO SHOW THE ABSENCE OF SUDDEN PASSION" BENAVIDES V STATE 992 SW2D 511, 525 (TX APP HOUS. 1ST DIST 1999).

TWO SEPARATE JURIES FOUND SUDDEN PASSION IN FAVOR OF LINDEN [RR VOL 4 P 5 / VOL 9 P 5].

SUDDEN PASSION NEGATES INTENT; IT ALSO SUPPORTS 'LEGAL JUSTIFICATION.' THIS DEMONSTRATE THE JURY ACCEPTED THE TRUTHFULNESS OF LINDEN'S TESTIMONY. IT ALSO DEMONSTRATE, THAT IF THE JURY HAD RECEIVED PROPER JURY INSTRUCTION, IT'S PROBABLE THE JURY WOULD HAVE RENDERED A VERDICT IN LINDEN'S FAVOR.

PRESUMPTION IS EASILY DRAWN FROM THE GIVEN RECORD FACTS AND COJOINED WITH THE EXCULPATORY EVIDENCE OF (5) EYE-WITNESSES WHO CORROBORATIVELY EXPLAIN OF AN "ALTERNATE-SHOOTER" CAUSING THE DEATH OF THE VICTIM. [SEE: ARGUMENT I Pg. 17].

THIS PROVES THE JUDICIAL OPINION TO BE UNREASONABLE. CONSEQUENTLY, THE STATE CT'S FINDINGS ARE BASED ON AN UNREASONABLE DETERMINATION OF THE FACTS IN LIGHT OF THE EVIDENCE PRESENTED IN STATE CT, PROCEEDING. 28 USC SEC 2254(d)(2) HARRINGTON V RICHTER - QUOTING- WILLIAMS V TAYLOR SUPRA:

THE DIST. CT. DENIED LINDEN'S CLAIM AS NON-CONSTITUTIONAL ERRORS [SEE: DOCUMENT 24 1:14-CV-27 Pg. 18 ID #4217] THIS DENIAL IS AN ABUSE OF DISCRETION. LINDEN HAS MADE A SUBSTANTIAL SHOWING OF HIS CONSTITUTIONAL RIGHT OF DUE PROCESS PURSUANT TO 28 USC SEC 2253(c)(2) AND 28 USC SEC 2254(d)(2).

THE 5TH CIR CT. "HAS EXCEEDED THEIR LIMITED SCOPE OF 'COA' ANALYSIS BY DENYING LINDEN'S 'COA' AND MOTION FOR EVIDENTIARY HEARING, BASED ON ADJUDICATION OF THE ACTUAL MERITS OF THE CASE. BUCK V DAVIS SUPRA:

LINDEN HAS DEMONSTRATED, "JURISTS OF REASON COULD DISAGREE WITH THE DIST. CT'S RESOLUTION OF HIS CONSTITUTIONAL CLAIM OR COULD CONCLUDE THE PRESENTED ISSUES ARE ADEQUATE TO DESERVE ENCOURAGEMENT TO PROCEED FURTHER" MILLER-EL V COCKRELL SUPRA:

LINDEN REQUEST OF THIS COURT TO REVERSE AND REMAND THIS MATTER.

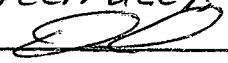
FOOTNOTE: QUESTION 6 IS COMPRISED IN THE ABOVE ARGUMENT.

LINDEN'S ARGUMENT OF JURY CHARGE ERROR IS BASED ON VIOLATIONS OF HIS CONSTITUTIONAL RIGHT OF DUE PROCESS; LINDEN IS STEADFAST IN HIS CLAIM OF ACTUAL INNOCENCE.

PRAYER

WHEREFORE, PREMISES CONSIDERED, LINDEN PRAYS THAT IN THE INTEREST OF JUSTICE, THAT THIS HONORABLE COURT GRANT HIM FULL AND FAIR CONSIDERATION, OF THE ISSUES RAISED IN THIS WRIT OF CERTIORARI, REVERSING AND REMANDING THIS MATTER FOR HABEAS RELIEF, OR GRANT HIM ALTERNATE RELIEF IN WHICH HE MAY BE ENTITLED.

RESPECTFULLY SUBMITTED


DESREL R LINDEN #1634037
STILES - UNIT
3060 FM 3514
BEAUMONT, TX. 77705-7635

DATE: 6-21-18