

NO.18-6218

IN THE
SUPREME COURT OF THE UNITED STATES

DESREL R. LINDEN

PETITIONER

VS

DIRECTOR, TDCJ-CID

RESPONDENT

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

PETITION FOR REHEARING OF PETITION OF WRIT OF CERTIORARI

PRO SE PETITIONER
DESREL R. LINDEN #1634037
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TO THE HONORABLE JUSTICES OF THE SAID COURT:

NOW COMES DESREL R LINDEN AND PURSUANT TO THE PROVISIONS OF RULE 44 OF THE SUPREME COURT OF THE UNITED STATES, HEREBY PETITION THIS COURT FOR A REHEARING TO ISSUE A WRIT OF CERTIORARI TO REVIEW THE JUDGMENT ENTERED BY U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT WHO'S ORDER EXCEEDED THEIR LIMITED SCOPE BY DENYING PETITIONER'S 'C.O.A' BASED ON THE ADJUDICATION OF THE ACTUAL MERITS WHICH DENY'S PETITIONER OF HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL.

IN THE INTEREST OF JUSTICE THIS COURT SHOULD BE AWARE THAT I'VE BEEN INCARCERATED FOR NINE YEARS OF A FIFTEEN YEAR SENTENCE FOR THE CRIME OF MURDER THAT I'M INNOCENT OF.

IN ESSENCE "A.E.D.P.A.'S" LIMIT ON FEDERAL REVIEW OF STATE DECISIONS AND FEDERAL FACT DEVELOPMENT COMBINED WITH PRACTICALLY NON-EXISTENT FACT DEVELOPMENT PROCEDURES ON STATE HABEAS AMOUNT TO AN UNCONSTITUTIONAL SUSPENSION OF THE WRIT.

THE WAY THE CURRENT SYSTEM IS DESIGNED A PETITIONER IS BARRED OF ANY AVENUE OF REDRESS OR RELIEF.

TRIAL COUNSEL DID NOT INTERVIEW NOR INVESTGATE (5)
EXCULPATORY EYE-WITNESSES.

THE 13TH COURT OF APPEALS REFUSED MY 'PDR' AND BASED
THEIR OPINION ON A MATERIAL FALLACY.

THE TEXAS COURT OF CRIMINAL APPEAL DENIED MY 11.07
WRIT WITHOUT A WRITTEN ORDER BASED ON THE TRIAL
COURT'S BIASED FINDINGS, LEAVING NO FAIR OUTCOME.
THE EASTERN DIST. COURT BEAUMONT DIVISION DENIED
MY 2254 BASED ON THE STATE COURT'S PROCEEDINGS
WHICH ARE BIAS AND FLAWED.

SUBSEQUENTLY, THE 5TH CIRCUIT COURT OF APPEALS
FOLLOWED SUIT DENYING MY 'C.O.A.' BASED ON THE
CLAIMS OF THE DISTRICT COURT'S MERITS.

THIS COURT, THE SUPREME COURT OF THE UNITED STATES
HELD IN BUCK V DAVIS 137 S.CT. 759, 765 (2017), THAT
THE 5TH CIR. CT. EXCEEDED THEIR LIMITED SCOPE OF
'C.O.A.' ANALYSIS BY DENYING THE 'C.O.A.' BASED ON
ADJUDICATION OF THE ACTUAL MERITS" AS SUCH
MY CASE WAS HANDLED IN THE SAME MANNER AS
BUCK V DAVIS, THEREFORE, THIS COURT SHOULD
RULE IN MY FAVOR BASED ON ITS OWN CASE-LAW.

THE ONLY QUESTION AT THAT STAGE FOR THE 5TH CIR. CT.
WAS WHETHER I HAD SHOWN "JURISTS OF REASON
COULD DISAGREE WITH THE DIST. CT.'S RESOLUTION OF
MY CONSTITUTIONAL CLAIM OR COULD CONCLUDE, THE
ISSUES PRESENTED ARE ADEQUATE TO DESERVE
ENCOURAGEMENT TO PROCEED FURTHER" MILLER-EL VS
COCKRELL 123 S.CT. 1029 (2003)

THE KEY ISSUE IS THE STATE COURT'S BIAS REASONING
IN HOLDING, THAT TRIAL COUNSEL'S STRATEGY WAS
PRE-DETERMINED BASED ON MY ADMISSION TO
LAW-ENFORCEMENT THAT I SHOT THE VICTIM IN
SELF-DEFENSE.

HOWEVER, THEY GIVE "NO SUPPORTING CASE-LAW" STATING
COUNSEL IS PRECLUDED FROM INVESTIGATING A
PLAUSIBLE LINE OF DEFENSE, ONCE HE'S AWARE THAT
ONE EXIST WHICH EXONERATES HIS CLIENT.

I PRESENTED A CONSTITUTIONAL CLAIM OF (IAC) WHERE COUNSEL FAILED TO INTERVIEW AND INVESTIGATE (5) EXCULPATORY EYE WITNESSES WHO CORROBORATIVELY EXPLAIN OF A PERPETRATOR OTHER THAN MYSELF CAUSING THE DEATH OF THE VICTIM, MAKING IDENTITY AN ISSUE OF WHO CAUSED THE VICTIM'S DEATH, WHICH WAS NOT PRESENTED TO A JURY FOR FACT DETERMINATION.

HAD THE 5TH CIR ENTERTAINED MY 'C.O.A' BRIEF WHICH SHOWED BRYANT V. SCOTT 28 F.3D 1411, 1418 (5TH CIR 1994) THAT'S ANALOGOUS TO MY CASE INTERPRETING STRICKLAND V. WASHINGTON 104 S. CT. 2052, 2061 (1984) HOLDING, 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.

TRIAL COUNSEL JAMES R. MAKIN DID NOT DO HIS DUTY UNDER THE STRICKLAND STANDARD THEREFORE, HE WAS INEFFECTIVE WITH A DEFICIENT PERFORMANCE AND PREJUDICED MY CASE DENYING ME OF MY CONSTITUTIONAL 6TH AMEND RIGHT TO COUNSEL AT TRIAL.

COUNSEL WAS RETAINED 6-8-07. HIS INVESTIGATION WAS LIMITED TO THE CHARGED OFFENSE AND MY VERSION OF THE EVENT WHEN HE CHOSE SELF DEFENSE AS A TRIAL STRATEGY.

ONE YEAR LATER - 5-29-08 'DA' RAMON RODRIGUEZ SENT A MEMO [SEE: PET. EXB 24 OF 'COA' APPENDIX] AWAREING COUNSEL OF (5) EXCULPATORY EYE-WITNESSES WHO EXPLAIN OF AN "ALTERNATE-SHOOTER" CAUSING THE VICTIM'S DEATH. COUNSEL DID NOT INVESTIGATE CRUCIAL INFORMATION THUS, ABORTING HIS DUTY OF THE STANDARD OF STRICKLAND AT 2061

COUNSEL PREJUDICED LINDEN DENYING A DEFENSE NOT INVESTIGATING A PLAUSIBLE LINE OF DEFENSE, ALSO, FAILING TO INFORM ME SO I COULD MAKE AN INFORMED DECISION IN MY CASE.

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

A REASONABLE PROBABILITY EXIST THAT BUT FOR COUNSEL'S UNPROFESSIONAL ERROR THE RESULT OF THE PROCEEDING WOULD HAVE BEEN DIFFERENT STRICKLAND SUPRA:

I'VE MADE A SUBSTANTIAL SHOWING OF DENIAL OF MY CONSTITUTIONAL RIGHT ACCORDING TO 28 USC SEC. 2253(C)(2)

THE STATE'S FACT-FINDING PROCEDURE WHICH TO DENIAL OF HABEAS RELIEF WAS DEFICIENT AND BIASED AN "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 DIST. CT'S DENIAL OF MY 'COA' WAS AN ABUSE OF DISCRETION, AND THE PURPORTED DETERMINATION OF THE FACTS WITHOUT A FAIR OPPORTUNITY TO PRESENT FAVORABLE EVIDENCE VIOLATES 'AEDPA' WHILE DENYING ME OF DUE PROCESS.

DENIAL OF MY CLAIM WITHOUT AN EVIDENTIARY HEARING AMOUNTS TO AN UNREASONABLE DETERMINATION OF THE FACTS." MURLES V RYAN 706 F.3D 1021 (9TH CIR 2013).

THE SUPREME COURT 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. CT. (2008).

A CONSTITUTIONALLY ADEQUATE HABEAS CORPUS PROCEEDING MUST AT LEAST INCLUDE A MEANINGFUL OPPORTUNITY TO SATISFY THE REQUIREMENT OF 'AEDPA' OR WHETHER IT DENIES LINDEN'S DUE PROCESS [SEE: DIST. ATTNY. OFF. V. OSBORNE 129 S. CT. (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.

I HAVE 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:

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

RESPECTFULLY SUBMITTED,

DATE 12-27-18


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