No._____

_____

IN THE
SUPREME COURT OF THE UNITED STATES

_____

RICARDO LUPIAN-BARAJAS- PETITIONER

VS.

JULIE L. JONES as SEC'Y DEP'T. OF CORRECTIONS, and PAM BONDI, as ATTORNEY GENERAL of FLORIDA-RESPONDENT'S

_____

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

_____

PETITION FOR WRIT OF CERTIORARI

Ricardo Lupian-Barajas #263427
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QUESTION(S) PRESENTED

I.

DID THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS WHEN IT FAILED TO STATE THE REASONS WHY A CERTIFICATE OF APPEALABILITY SHOULD NOT ISSUE AS REQUIRED BY FED.R.APP.P. 22 (B)?

II

DID THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT ERR WHEN IT CONCLUDED THAT THE DISTRICT COURT'S ASSESSMENT OF GROUND ONE WAS NOT DEBATABLE OR THAT THE STATE COURT'S DECISION WAS NOT CONTRARY TO OR AN UNREASONABLE APPLICATION OF THE CLEARLY ESTABLISHED SUPREME COURT LAW ANNOUNCED IN *STRICKLAND* WHEN IT DENIED MR. LUPIAN'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO LOCATE AND PRESENT MR. MATTA TO SUPPORT HIS SELF DEFENSE THEORY. THE ELEVENTH CIRCUIT ERRED WHEN RULING ON PETITIONER'S APPLICATION FOR CERTIFICATE OF APPEALABILITY 28 U.S.C. 2253 (c) (2)

III

DID THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT ERR WHEN IT CONCLUDED THAT THE DISTRICT COURT'S ASSESSMENT OF GROUND TWO WAS NOT DEBATABLE OR THAT THE STATE COURT'S DECISION WAS NOT CONTRARY TO OR AN UNREASONABLE APPLICATION OF THE CLEARLY ESTABLISHED SUPREME COURT LAW ANNOUNCED IN *STRICKLAND* WHEN IT DENIED MR. LUPIAN'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO LOCATE AND PRESENT MR. APOLINAR SANCHEZ TO SUPPORT HIS SELF DEFENSE THEORY. THE ELEVENTH CIRCUIT ERRED WHEN RULING ON PETITIONER'S APPLICATION FOR CERTIFICATE OF APPEALABILITY 28 U.S.C. 2253 (c) (2)

IV

DID THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT ERR WHEN IT CONCLUDED THAT THE DISTRICT COURT'S ASSESSMENT OF GROUND THREE WAS NOT DEBATABLE OR THAT THE STATE COURT'S DECISION WAS NOT CONTRARY TO OR AN UNREASONABLE APPLICATION OF THE CLEARLY ESTABLISHED SUPREME COURT LAW ANNOUNCED IN *STRICKLAND* WHEN IT DENIED MR. LUPIAN'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT WHEN THE PROSECUTOR INTERJECTED HIS PERSONAL OPINION THAT MR. LUPIAN WAS A LIAR DURING CLOSING ARGUMENTS . THE ELEVENTH CIRCUIT ERRED WHEN RULING ON PETITIONER'S APPLICATION FOR CERTIFICATE OF APPEALABILITY 28 U.S.C. 2253 (c) (2)

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

Cases

Statutes

Constitutional Provisions

OPINIONS BELOW

For Cases from Federal Courts:

The opinion of the United States Court of Appeals for the Eleventh Circuit appears at Appendix A and C to this petition and is unpublished.

The opinion of the United States District Court, Middle District of Florida, Ocala Division, appears in Appendix B, and is; unpublished as yet.

For cases from the State Court:

The opinion of the highest state court to review the merits appears at Appendix D, to the petition and is reported at: **Ricardo Lupian-Barajas v. State**, 72 So. 3d 772 (Fla. 5th DCA 2011): *Ricardo Lupian-Barajas v. State*, 150 So. 3d 1172 (Fla. 5th DCA 2014); *Ricardo Lupian-Barajas v. State* , 149 So. 3d 34 (Fla. 5th DCA 2014)

JURISDICTION

For cases from Federal Courts:

Initially, jurisdiction of the United States District Court was invoked under Title 28 U.S.C. Section 2254 and 28 U.S.C. §1254 (1). Mr. Lupian is in custody pursuant to a State Court judgment in violation of the laws and constitution of the United States. District Court Docket No.: 5:15-cv-00463-WTH-PRL

The date on which the United States Court of Appeals decided Mr. Lupian's case was on May 9, 2018. A timely Motion for Reconsideration was denied by the United States Court of Appeals Eleventh Circuit on July 5, 2018. Case No.: 18-10527-C.

The petition for writ of certiorari is due to be filed by October 2, 2018.

Further, Mr. Lupian avers the Court also has jurisdiction pursuant to 28 U.S.C. § 2101 (c) and Sup.Ct.R. 13.3 (2018).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Statutory provision: Title 28 U.S.C. § 2253 (c) (2), and 28 U.S.C. 2254 is involved, circumscribed by the 6th Amendment (*effective assistance of counsel*) and 14th Amendment (*due process*) of the United States.

STATEMENT OF THE CASE

The judgment sought to be reviewed originated from the State of Florida, County of Lake stemming from an indictment charging Mr. Lupian with First Degree Murder, Case No.: 2009- CF- 2163. Mr. Lupian was found guilty by jury of Second Degree Murder after trial and sentenced to life in prison.

After exhausting all state court remedies Mr. Lupian filed a petition for writ of habeas corpus to the Federal District Court, Ocala Division of Florida which was denied. Mr. Lupian then filed an application for certificate of appealability to the United States Court of Appeals for the Eleventh Circuit. The Eleventh Circuit Court summarily denied issuing a COA. (See Exh. A). A timely filed motion for reconsideration was denied on July 5, 2018. (See Exh. B)

The Pertinent Facts:

Mr. Lupian was at a home in the city of Mascotte drinking beer the day of the incident with some friends. While there he met Mr. Gonzalez and the two men discussed some guns that Gonzalez had on him for sale. The two men got into an argument about the price of the guns and Gonzalez began to threaten Lupian's family as Lupian as he left the home in his truck. Mr. Lupian went to his home and retrieved a gun and went back to the trailer in Mascotte while leaving his wife and son at home. When Lupian arrived at the trailer he knocked and entered the home where Gonzalez was sitting on a couch and he immediately stood and reached

behind his back where Lupian knew he kept his two guns in the waist band of his pants. When Lupian saw Mr. Gonzalez reaching behind his back with his right hand he raised his own gun and fired striking Gonzalez in his outstretched left hand, the bullet traveling down the arm into the heart of Gonzalez causing his ultimate death.

Lupian was arrested at the scene and interrogated by the Mascotte Police. During the interview Lupian who is of Mexican decent and spoke very little English could not remember much of what had transpired earlier that day. After a lengthy interrogation and some coffee, Lupian began to remember more of the events. Lupian never told the police he acted in self defense when he shot Gonzalez. The police never asked him if he acted in self defense. After being represented by counsel he informed counsel he acted in self defense.

During the investigation a witness, Mr. Matta told the police he was riding by the trailer where Gonzalez lived earlier that morning and he observed a man on the front porch loading a gun with his deformed right hand. It was presented at trial that the victim Gonzalez had a deformed right hand from birth and presented the testimony of Gonzalez's long time friend Pedro Castro Hinojosa who testified that he'd known the victim about 15 years and that the victim's right hand was deformed from birth, and that the victim could not use his right hand at all. (T.T. 258-260). The state presented this witness to support their rebuttal to the self-

defense that Lupian put forth.

There were several other men at the trailer that day at the time of the shooting but none of them witnessed the shooting, but heard what transpired; these witnesses testified at trial.

Trial counsel Harrison represented Lupian at trial and presented the defense of 'self defense to the jury. Mr. Lupian testified in his own behalf telling the jury he acted in self defense and shot Gonzalez before he could shoot him. Lupian testified that Gonzalez had already threatened him and his family earlier that morning so he already knew Gonzalez was armed and capable of using the guns he had in his waist band when he entered the trailer.

Mr. Matta, the witness who saw Gonzalez on the front porch using his deformed right hand to load one of the guns, was listed in the prosecutions discovery including his address in Mascotte.

During cross examination of one of the police officers who investigated the case trial counsel Harrison questioned him about one of the witnesses who saw the victim loading a gun with a deformed hand, and the state objected on the basis of hearsay. The trial court asked counsel at a side bar about his line of questioning and Harrison told the court that the "fact that the alleged victim was out in front of the residence loading a gun is highly relevant and germane to the Defense".

The trail court then inquired about the witness availability to testify and counsel stated "[t]he person is not available as far as I can tell. I mean, I hadn't gone out and tracked him down, haven't gone driving around Mascotte looking for him". (T.T. 431-432)

The trial court sustained the states objection on the basis the witness would not be there to testify. Lupian raised the claim that counsel was ineffective for failing to investigate a known witness that could have bolstered his self defense theory.

Lupian also claimed there was another potential witness whom counsel failed to investigate and present for the defense of self-defense. Mr. Sanchez was a man who had worked with Mr. Gonzalez at a construction warehouse where Mr. Gonzalez operated a forklift. Mr. Sanchez could have testified that Gonzalez was capable of using his deformed right hand to operate the levers of the forklift and thus it was conceivable that he could have handled a gun to attempt to shoot Lupian.

During closing arguments the prosecutor told the jury Mr. Lupian was a liar inferring that he was lying about his acting in self defense because he never told the police he acted in self defense. The prosecutor argued Lupian wasn't smashed drunk to where he couldn't remember shooting the victim that he'd lied to the police. The prosecutor then stated

> "And you must ask yourself, why would an innocent person who was acting in self-defense, a person who had very right to do what he did, a person who was in his rights, why would he feel a need to lie to the police? In my experience, ladies and gentlemen, it is not the innocent who feel the need to lie to the police, but the guilty." (T.T.583-584)

Mr. Lupian was found guilty of Second Degree Murder and sentenced to life in prison.

ARGUMENT IN SUPPORT OF REASONS FOR GRANTING THE PETITION

Mr. Lupian respectfully asserts that his petition should be granted because the United States Court of Appeals for the Eleventh Circuit has decided an important federal question in a way that conflicts with relevant decisions of this Court and has so far departed from the accepted and usual course of judicial proceedings when it failed to state its reasons with specificity why each issue was denied COA. Lupian submits the following arguments:

I.

DID THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS WHEN IT FAILED TO STATE THE REASONS WHY A CERTIFICATE OF APPEALABILITY SHOULD NOT ISSUE AS REQUIRED BY FED.R.APP.P. 22 (B)?

The petition should be granted because the Eleventh Circuit Court summarily denied issuing a COA without an expressed written opinion addressing each issue raised by Lupian in his application for certificate of appealability. The petition should also issue to help ensure uniformity in the federal habeas corpus review proceedings of state prisoners when seeking a COA in the Circuit Courts.

Fed.R.App.P. 22(b) states no reasons are required for the issuance of the certificate of probable cause [COA], only for the denial thereof. The decision is left to the sound discretion of the district judge. *Dillingham v. Wainwright*, 422 F.

Supp. 259 (S.D.Fla. 1976), aff'd, 555 F.2d 1389 (5th Cir. 1977). Courts have variously articulated the standards for issuance of a certificate of probable cause [COA] to appeal. See generally *Alexander v. Harris*, 595 F.2d 87 (2d Cir. 1979), and cases cited therein.

However, the proper exercise of that discretion cannot be adequately reviewed where no reasons for the determination have been given. The District Court and Eleventh Circuit Court of Appeals both gave summary denial of a COA. The Court's summary denial was a bare-bones statement concluding Lupian did not meet the standard for COA under *Slack v. McDaniel*, 529 U.S. 473, 478 (2000).

In the Eleventh Circuit Court of Appeal the majority of the judges state with specificity in their denials of COA applications the reasons why the grounds are being denied. Lupian asserts the petition should be granted and the Circuit Court order remanded back for the entry of an articulated opinion as to why COA should not issue or grant COA.

The Advisory Committee Notes explain that in the interest of insuring that the matter of the certificate will not be overlooked and that, if the certificate is denied, the reasons for denial in the first instance will be available on any subsequent application, the . . . rule requires the district judge to issue the

certificate or to state the reasons for its denial. See *Dillingham v. Wainwright*, 422 F. Supp. 259 (S.D.Fla.1976), aff'd, 555 F.2d 1389 (5th Cir. 1977).

Clearly the rule imposes a responsibility on the district judge to issue a certificate or a statement detailing his reasons for declining to confer one. *Gardner v. Pogue*, 558 F.2d 548, 550 (9th Cir. 1977). A similar provision is found in Fed.R.App.P. 24(a), which requires a written statement of reasons for certifying an appeal is not taken in good faith. See *Liles v. South Carolina Dept. of Corrections*, 414 F.2d 612 (4th Cir. 1969)

The same should be required of Circuit Court Judges when denying a COA in order for this Court to adequately review the propriety of the denial of the certificate on petition for writ of certiorari. This petition should be granted.

II

DID THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT ERR WHEN IT CONCLUDED THAT THE DISTRICT COURT'S ASSESSMENT OF GROUND ONE WAS NOT DEBATABLE OR THAT THE STATE COURT'S DECISION WAS NOT CONTRARY TO OR AN UNREASONABLE APPLICATION OF THE CLEARLY ESTABLISHED SUPREME COURT LAW ANNOUNCED IN *STRICKLAND* WHEN IT DENIED MR. LUPIAN'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO LOCATE AND PRESENT MR. MATTA TO SUPPORT THE SELF DEFENSE THEORY. THE ELEVENTH CIRCUIT ERRED WHEN RULING ON PETITIONER'S APPLICATION FOR CERTIFICATE OF APPEALABILITY 28 U.S.C. 2253 (c) (2)

The petition should be granted because the Eleventh Circuit Court has so far departed from the accepted and usual course of judicial proceedings, or sanctioned

such a departure by a lower court, as to call for an exercise of this Courts supervisory power when the Eleventh Circuit Court determined the District Court's decision on ground one finding that the state courts adjudication of the claim was not contrary to or an unreasonable application of clearly established federal law [*Strickland*] or an unreasonable determination of the facts in light of the evidence presented in the state court proceeding was not debatable or wrong.

The petition should further be granted in order for guidance to the lower courts when analyzing claims of ineffective assistance of trial counsel and to ensure the publics perception of the fairness of the criminal justice proceedings.

Mr. Lupian urges this Court to find that the petition should be granted because his Sixth and Fourteenth Amendments were clearly violated and the state and federal courts have so far failed to correct this constitutional violation. The record clearly demonstrates that trial counsel was prejudicially ineffective in failing to investigate and present what counsel even described as a witness being "highly relevant and germane to the defense".

Mr. Matta's eyewitness account that he saw the victim using his deformed right hand to load a gun which would have supported Lupian's strategy of self-defense and to counter the state's theory that the victim could not use his right hand at all. Reasonable jurist would find the district court's resolution as to claim one debatable or wrong and did deserve encouragement to proceed further.

The evidence, when viewed in the light most favorable to Lupian established that the victim Efrain Gonzalez had made threats against Mr. Lupian, and that he was carrying two loaded guns in his waist band. Mr. Gonzalez was known by Lupian to have a bad temper. After an argument with Gonzalez, Gonzalez made threats to shoot Lupian and his family. Mr. Lupian left and armed himself only later to return to confront Gonzalez about the threats. When Lupian returned and entered the residence he found Gonzalez sitting in a chair. Gonzalez got up and began to reach behind his back with his right hand while holding up his left hand as if to tell Lupian to stop where he was. Lupian told the victim he was going to kill him and fired his weapon before Gonzalez could pull his gun and shoot Lupian.

Mr. Lupian testified at trial that he acted in self defense when he shot the victim because the victim was reaching for one of the two loaded guns in his waist band with his right hand. The victim was found with two loaded handguns in his back waistband. (T.T. 239, 245) The state presented witness Pedro Castro Hinojosa who testified that he'd known the victim about 15 years and that the victim's right hand was deformed from birth, and that the victim could not use his right hand at all. (T.T. 258-260). The state presented this witness to support their rebuttal to the self-defense that Lupian put forth.

During the case for the defense counsel questioned Corporal Banasco about

the witnesses he interviewed. Counsel questioned Banasco about Mr. Matta and the statement he made during the interview. The state objected on the basis the statement would be hearsay and should not be allowed. Mr. Harrison argued that it would not be hearsay because he's just asking about what the witness discovered in the course of the investigation. (T.T. 431:4-10). Mr. Harrison argued that the fact the victim was out in front of his house loading a gun was "highly relevant and germane to the defense". (T.T. 431: 20-23)

Trial counsel was asked by the court if this witness was available to testify and counsel responded:

> MR. HARRISON: The person is not available, as far as I can tell. I mean, I hadn't gone out and tracked him down, haven't gone driving around Mascotte looking for him. (T.T. 432: 4-7)

The trial court sustained the prosecutor's objection and the defense was not allowed to bring in Mr. Matta's testimony through Corporal Banasco. The jury never heard this critical evidence.

The state court and district court when reviewing the constitutional claims both concluded that Mr. Matta's testimony would not have added anything new to the trial so there was no prejudice from counsel's inaction because the jury heard testimony from the emergency responders who testified that the victim had two loaded guns in his waist band when they found the victim bleeding on the floor.

This conclusion was a misunderstanding of Lupian's claim. Mr. Lupian

clearly alleged in his state habeas that:

> "Had the jury heard and considered Mr. Matta's testimony that the victim did have use of his right hand there is a reasonable probability the result of the trial would have been different. The self-defense theory hinged solely on whether or not the victim was reaching with his right hand to use a gun to shoot the Defendant. The failure to place Matta's testimony before the jury left the State's witnesses that Gonzalez could not use his right hand at all uncontested and left to sway the jury that the Defendant did not have justifiable use of deadly force upon Gonzalez finding him guilty of second degree murder." (Exh. M, p.9)

Mr. Lupian did not claim Mr. Matta would have informed the jury the victim had two loaded guns in his waist band when he was shot. Such a misunderstanding of a claim has caused Mr. Lupian's constitutional claim not to be addressed properly by any court so far. Mr. Lupian's unconstitutional detention has therefore gone uncorrected as the result of this error.

This petition should be granted in order to correct the violations of his Sixth and Fourteenth Amendment rights to effective assistance of trial counsel, due process of law and a fair trial.

III

DID THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT ERR WHEN IT CONCLUDED THAT THE DISTRICT COURT'S ASSESSMENT OF GROUND TWO WAS NOT DEBATABLE OR THAT THE STATE COURT'S DECISION WAS NOT CONTRARY TO OR AN UNREASONABLE APPLICATION OF THE CLEARLY ESTABLISHED SUPREME COURT LAW ANNOUNCED IN *STRICKLAND* WHEN IT DENIED MR. LUPIAN'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO LOCATE AND PRESENT MR. APOLINAR SANCHEZ TO SUPPORT THE SELF DEFENSE THEORY. THE ELEVENTH CIRCUIT ERRED WHEN RULING ON PETITIONER'S APPLICATION FOR CERTIFICATE OF APPEALABILITY 28 U.S.C. 2253 (c) (2)

The petition should be granted because the Eleventh Circuit Court has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Courts supervisory power when the Eleventh Circuit Court determined the District Court's decision on ground two finding that the state courts adjudication of the claim was not contrary to or an unreasonable application of clearly established federal law [*Strickland*] or an unreasonable determination of the facts in light of the evidence presented in the state court proceeding was not debatable or wrong.

The petition should further be granted in order for guidance to the lower courts when analyzing claims of ineffective assistance of trial counsel and to ensure the publics perception of the fairness of the criminal justice proceedings.

The federal constitutional claim that trail counsel was ineffective for failing to investigate and present the testimony of Apolinar Sanchez who could have

testified that the victim could use his deformed right hand which would support the self-defense theory was not addressed correctly because the state and federal district courts failed to consider evidence that supports Mr. Lupian's constitutional claim when it found that Mr.Lupian has still failed to show that he was prejudiced by the absence of Mr. Sanchez's testimony.

Mr. Sanchez worked with the victim at a construction supply firm prior to Mr. Gonzalez's death. Mr. Sanchez was available for trial and would have testified that Mr. Gonzalez could in fact use his deformed right hand. Mr. Sanchez observed Mr. Gonzalez use his deformed right hand to operate the levers on the fork lift used in his job.

Mr. Lupian alleged that trial counsel's failure prejudiced him because Mr. Sanchez's testimony was critical to the defense in order to rebut evidence the prosecution put forth alleging that the victim could not use his right hand at all. Mr. Lupian argued that Mr. Sanchez's testimony would have supported the theory of self-defense. Lupian argued that it was important for the jury to hear that if the victim could grasp and manipulate the control levers of a fork lift with his deformed right hand while steering with his left hand, the jury could have reasonably determined that he could have grasped a gun with that deformed hand in order to shoot someone. Such evidence could have given the jury reasonable doubt as to Lupian's guilt and reason to find he acted in self-defense.

The state court rejected the claim finding that "the overwhelming weight of the evidence supports the Defendant's conviction . . . [t]he information that the victim could have used his right hand to operate levers at work does not establish a reasonable probability that the outcome would have been different". (Exh. P, p. 5)

The state court and federal district court failed to consider the fact that the sole defense presented to the charge of first degree murder was that of self-defense and the realistic possibility that if Mr. Gonzalez could hold a lever and move the lever to operate a fork lift he could also have been reaching for his gun to shoot Lupian when he entered the trailer. The prosecution would not have presented a witness to testify that the victim could not use his right hand at all if the issue was not critical to the case.

The states witness Mr. Zambrano was in the next room when he heard Lupian say he was going to kill the victim, but Zambrano could not see what was transpiring between the victim and Lupian when Lupian said he would kill the victim. (T.T. 328-329) Also the states witness Mr. Torres even though he testified he was sitting in the same room as the victim when Lupian entered the room he did not see Gonzalez from the angle he was at in the kitchen area; he only saw Lupian. (T.T. 347-49) Therefore, it is possible had the jury heard evidence that the victim could use his deformed hand to operate fork lift levers, that it would be reasonable to conclude he could have been reaching for one of his loaded guns when Lupian

came through the door, in order to shoot Lupian, especially in light of the evidence that showed the victim had just made threats to kill Lupian or his family a half hour earlier.

The clear and convincing evidence contained in the state court record demonstrates the state court findings are objectively unreasonable and not entitled to deference under the AEDPA because the state court failed to give consideration and weight to pertinent facts that support Lupian's claim. See *Porter v. McCullum* ___U.S.___, 130 S.Ct. 447,454,175 L.Ed.2d 398 (2009) (an unreasonable application of the Strickland standard, where the state court "either did not consider or unreasonably discounted the mitigation evidence adduced in the postconviction hearing")

The state court's fact-finding process is undermined and its decision is "so lacking justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement". *White v. Woodall*, ____U.S. ___, 134 S.Ct. 1697, 188 L.Ed. 2d 6987 (2014)

The Eleventh Circuits denial of Lupian's application for COA and petition for rehearing resulted in an abuse of discretion for the record is clear that the district federal court's decision would be found to be debatable or wrong, and the claim did deserve to proceed further for briefing on appeal.

This petition should be granted in order to correct the violations of his Sixth and Fourteenth Amendment rights to effective assistance of trial counsel, due process of law and a fair trial.

IV

DID THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT ERR WHEN IT CONCLUDED THAT THE DISTRICT COURT'S ASSESSMENT OF GROUND THREE WAS NOT DEBATABLE OR THAT THE STATE COURT'S DECISION WAS NOT CONTRARY TO OR AN UNREASONABLE APPLICATION OF THE CLEARLY ESTABLISHED SUPREME COURT LAW ANNOUNCED IN *STRICKLAND* WHEN IT DENIED MR. LUPIAN'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT WHEN THE PROSECUTOR INTERJECTED HIS PERSONAL OPINION THAT MR. LUPIAN WAS A LIAR DURING CLOSING ARGUMENTS . THE ELEVENTH CIRCUIT ERRED WHEN RULING ON PETITIONER'S APPLICATION FOR CERTIFICATE OF APPEALABILITY 28 U.S.C. 2253 (c) (2)

The petition should be granted because the Eleventh Circuit Court has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Courts supervisory power when the Eleventh Circuit Court determined the District Court's decision on ground three finding that the state courts adjudication of the claim was not contrary to or an unreasonable application of clearly established federal law [*Strickland*] or an unreasonable determination of the facts in light of the evidence presented in the state court proceeding was not debatable or wrong.

The petition should further be granted in order for guidance to the lower courts when analyzing claims of ineffective assistance of trial counsel and to ensure the publics perception of the fairness of the criminal justice proceedings.

The petition should be granted in order for Lupian to have full appellate review of the on ground six of his habeas petition on the constitutional claim that trial counsel's failure to object to the prosecutor's closing argument in which he improperly stated it was his experience as a prosecutor that innocent people did not need to lie to the police but guilty people do when he told the jury Lupian was lying about acting in self defense because he never told the police he acted in self-defense. Trial counsel violated Mr. Lupian's 6th and 14th Amendment rights to effective assistance of counsel and due process of law by failing to object and move for mistrial. Reasonable jurist would find the district court's assessment of the claim debatable or wrong.

Mr. Lupian was questioned by the police on the morning of his arrest. Mr. Lupian agreed to talk to the police and told them about what transpired between him and the victim. Lupian admitted to shooting Mr. Gonzalez. Mr. Lupian did not tell the police he acted in self-defense. (Exh. A)

During closing arguments at trial the prosecutor argued:

> MR. GROSS: ". . . Some of these guys were out there drinking that afternoon and the Defendant was one of them. He wasn't sober. He wasn't smashed drunk to the point where he couldn't remember going back and shooting a man to death.

> And he lied to the police about that. And you must ask yourself, why would an innocent person who had every right to do what he did, a person who was in his tights, why would he feel a need to lie to the police? In my experience, ladies and gentlemen, it is not the innocent who feel the need to lie to the police, but the guilty." (Exh. A 583:21-584:7) Emphasis added

Mr. Lupian alleged that counsel should have objected to the prosecutor's improper comment. Mr. Lupian argued that the prosecutor crossed the line when he expressed his personal beliefs based on his experience as a state prosecutor that only guilty people have a reason to lie to the police. Lupian argued that counsel's failure to object allowed the jury to be unduly influenced by the prosecutor's improper comments, thus violating Lupian's U.S. Constitutional rights under the Sixth Amendment to effective counsel representation.

The state court concluded that Mr. Lupian's argument is generally without merit because he chose to take the stand in this case, that '[i]n this instance, the prosecutor may have exceeded proper bounds by commenting on his experience as a prosecutor . . . [t]his Court concludes, however, any error was harmless error. The jury had the Defendant's testimony at the trial and the transcript of the interrogation and could determine the honesty of the Defendant on that basis." (Exh. P pp. 7-8)

This Court in *Darden* held that "[a] lawyer shall not . . . state a personal opinion as to . . .the credibility of a witness. . .or use the guilt of innocence of an

accused" and "shall not use any words calculated to influence passions or prejudices of the jury". The *Darden* Court concluded that the relevant question is "whether the prosecutors comments so infected the trial with unfairness as to make the resulting conviction a denial of due process". *Darden* at 180

The state court when considering whether counsel was ineffective for not objecting to such an improper closing comment failed to consider that the "prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence". See *Berger v United States*, 295 US, at 88-89, 79 L Ed 1314, 55 S Ct 629."

The underlying question in determining whether counsel was ineffective is whether the prosecutors comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Mr. Lupian would argue that it is entirely unfair to allow the prosecutor to place his opinion as an experienced prosecutor for the State of Florida that only guilty people lie to the police. It cannot be inferred from the cold hard record that Lupian lied to the police because he didn't tell them he acted in self defense when he shot Gonzalez. Mr. Lupian was born in Mexico and had a very limited understanding of the English language much less an understanding of his rights in America to claim a defense of 'self-defense' when he shot Gonzalez. Not to mention Mr. Lupian was under the

influence of alcohol at the time of the shooting and interview.

The unreasonable factual determinations made by both the state court and the district court on which the adjudication of this claim stands, is clearly debatable. Lupian asserts that reasonable jurist could debate, (or, for that matter, agree that) the petition should have been resolved in a different manner, or, that the issues presented were adequate to deserve encouragement to proceed further *Gonzalez v. Sec'y Dep't of Corr*, 366 F.3d 1253, 1267 (11th Cir 2004).

This petition should be granted in order to correct the violations of his Sixth and Fourteenth Amendment rights to effective assistance of trial counsel, due process of law and a fair trial.

V

DID THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT ERR WHEN IT CONCLUDED THAT THE DISTRICT COURT'S ASSESSMENT OF GROUND FOUR WAS NOT DEBATABLE OR THAT THE STATE COURT'S DECISION WAS NOT CONTRARY TO OR AN UNREASONABLE APPLICATION OF THE CLEARLY ESTABLISHED SUPREME COURT LAW ANNOUNCED IN *STRICKLAND* WHEN IT DENIED MR. LUPIAN'S CLAIM THAT APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE FUNDAMENTALLY FLAWED JURY INSTRUCTION ON MANSLAUGHTER. THE ELEVENTH CIRCUIT ERRED WHEN RULING ON PETITIONER'S APPLICATION FOR CERTIFICATE OF APPEALABILITY 28 U.S.C. 2253 (c) (2)

The petition should be granted because the Eleventh Circuit Court has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Courts

supervisory power when the Eleventh Circuit Court determined the District Court's decision on ground four finding that the state courts adjudication of the claim was not contrary to or an unreasonable application of clearly established federal law [*Strickland*] or an unreasonable determination of the facts in light of the evidence presented in the state court proceeding was not debatable or wrong.

The petition should further be granted in order for guidance to the lower courts when analyzing claims of ineffective assistance of trial counsel and to ensure the publics perception of the fairness of the criminal justice proceedings.

Furthermore, the petition should issue for review of the constitutional claim raised in ground seven of his habeas petition, that appellate counsel was prejudicially ineffective in failing to raise an erroneous manslaughter by act jury instruction on direct appeal. Mr. Lupian asserts that the Eleventh Circuit erred when it concluded that he failed to demonstrate reasonable jurist could debate, (or, for that matter, agree that) the petition should have been resolved in a different manner, or, that the issues presented were adequate to deserve encouragement to proceed further.

At the conclusion of the evidence and closing arguments the trial judge instructed the jury as to first-degree murder, second-degree murder, and manslaughter by act. The instruction for manslaughter by act jury instruction was read to the jury in pertinent part as follows:

"To prove the crime of manslaughter, the State must prove the following two elements beyond a reasonable doubt: First, Efrain Ceballos Gonzalez is dead; and Second, A, Ricardo Lupian-Barajas's act caused the death of Efrain Ceballos Gonzalez; or B, the death of Efrain Ceballos Gonzalez was caused by the culpable negligence of Ricardo Lupian-Barajas."

The written instructions that were read to the jury tracked the same language of the oral instructions. No objections were made. The jury returned a verdict of guilty of the lesser included offense of second-degree murder.

The Florida Supreme Court decided in *State v. Montgomery*, 39 So.3d 252 (Fla. 2010) that a fundamental flaw existed in the 2006 standard manslaughter by act jury instruction. The Court found that the instruction required the jury to find the defendant "intentionally caused the death" of the victim even though the statute prescribes no such requirement.

The Court concluded the giving the erroneous 2006 instruction requiring the jury to find the killing was intentional in order to convict for manslaughter by act constituted fundamental error because Montgomery was convicted of second-degree murder, one step removed from manslaughter and because he was entitled to a correct instruction on manslaughter.

Contemporaneously with the issuance of the Montgomery opinion the Court approved an interim amendment to the manslaughter by act instruction. See *In Re*

Amendments to Standard Jury Instructions in Criminal Cases-Instruction 7.7, 41 So.3d 853 (Fla. 2010) The instruction given to Mr. Lupian's jury was the same as the amended instruction approved by the Florida Supreme Court.

During the pendency of Mr. Lupian's direct appeal the Florida Supreme Court was resolving a certified conflict involving the amendment to the 7.7 manslaughter by act jury instruction in *Daniels v. State*, 121 So.3d 409 (Fla. 2013), 38 Fla.L.Weekly S380 Case No.; SC11-2170.

Appellate counsel had a duty to remain abreast of any pending cases that may affect their clients appeal. Appellate counsel in the instant case did not, and therefore, failed to raise the issue of the erroneous manslaughter by act instruction.

In Daniels the Supreme Court explained why the amendments were made following the Montgomery decision over the following years. The Court made this statement:

> "After the issuance of the Montgomery decision and after issuance of the 2010 interim instruction, we again amended the instruction in 2011 to further correct the flaw identified in Montgomery. That amendment stated in pertinent part:
>
> To prove the crime of Manslaughter, the State must prove the following two elements beyond a reasonable doubt:
>
> 1. (Victim) is dead.
>
> Give 2a, 2b, or 2c depending upon allegations and proof.
>
> 2. a. (Defendant 's) intentionally committed an act (s) or acts that caused the death of (victim.
>
> b. (Defendant) intentionally procured an act that caused the death of (victim).
>
> c. The death of (victim) was caused by the culpable negligence of (defendant)

. . . .

Give only if 2a alleged and proved, and manslaughter is being defined as a lesser included offense of first degree premeditated murder.

In order to convict of manslaughter by act, it is not necessary for the State to prove that the defendant had an intent to cause death, only an intent to commit an act that was not merely negligent, justified, or excusable and which cause death.

In Re Amendments to Standard Jury Instructions in Criminal Cases-Instruction 7.7, 75 So.3d 210, 21-22 (Fla. 2011) Emphasis Added

It is evidenced by the Supreme Court's own admission in *Daniels* that the amended instruction approved of in 2010, which was given in Mr. Lupian's trial was still a flawed jury instruction. The Court inserted back into the instruction the element of "intent" to commit an "act" that caused the death of the victim for the jury to find the intentions of the defendant were only to "commit an act" not to cause the death of the victim.

Mr. Lupian's jury instruction did not include the language "intentionally committed an act or acts that caused the death of (victim), thus fundamental error occurred.

The State charged Mr. Lupian with first-degree premeditated murder and argued in closing arguments that he intended to kill Gonzalez when he shot the gun and that it was not a case of self defense or manslaughter. Thus the issue of intent was clearly before the jury as a disputed issue of fact. Mr. Lupian's intent or lack of intent to cause the death was material a pertinent to what the jury had to

consider in deciding if Lupian was guilty of first-degree murder, second-degree murder, or manslaughter by act.

When choosing between second-degree murder and manslaughter by act the jury could have reasonably reasoned that the instruction for manslaughter sounded too much like excusable homicide because there was no element of intent to commit an act therefore, the only logical conclusion would be to find guilt as to second-degree murder because they believed Lupian did intend to do something which caused the death of Gonzalez.

Appellate counsel was prejudicially ineffective for failing to raise the erroneous instruction on direct appeal even though the Supreme Court had approved the amendment to 7.7 manslaughter by act instruction because the Court made it clear that in authorizing the publication and use of the amended standard jury instruction it stated:

> "[w]e express no opinion on the correctness of this instruction and remind all interested parties that this authorization forecloses neither requesting additional or alternative instructions nor contesting the legal correctness of the instruction." Emphasis added. See *In Re Amendments*, 41 So.3d 853 (Fla. 2010)

Appellate counsel therefore had every right to challenge the correctness of the amended jury instruction. Mr. Lupian was an interested party in whether the jury instruction was correct or not and appellate counsel deprived Lupian of his

right to effective assistance appellate counsel on direct appeal.

The District Court's decision was debatable or wrong because the Court applied § 2254 (d) to the claim finding the Fifth District Court of Appeals decision was not contrary to or an unreasonable application of federal law. The District Court erroneously concluded "the summary nature of a state's appellate decision does not lessen the deference that it is due. See *Wright v. Moore*, 278 F.3d 1245, 1254 (11th Cir. 2002)"

Although the District Court may be correct in the usual scenario that "the summary nature of a state's appellate decision does not lessen the deference that it is due", the Court failed to follow the principle set forth by this Court in *Harrington v. Richter* that holds "when a federal habeas claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Harrington* at 264.

The Florida Supreme Court has clearly established a state-law procedural principle that holds, "any original writ filed in a Florida court that is disposed of with only the word "DENIED" is not a disposition on the merits and thus does not bar relitigation of the claim". See *Topps v. State*, 865 So.2d 1253 (Fla 2004)

The Fifth District Court of Appeal did not reach the merits of Mr. Lupian's state habeas petition according to the holding announced in Topps, therefore he is

not barred from relitigating his claim by the §2254 (d) limitations and the federal District Court should have reviewed the claim de novo. Such a failure was an abuse of discretion.

Reasonable jurist could debate, (or, for that matter, agree that) the petition should have been resolved in a different manner or, that the issues presented were adequate to deserve encouragement to proceed further *Gonzalez v. Sec'y Dep't of Corr,* 366 F.3d 1253, 1267 (11th Cir 2004).

This petition should be granted in order to correct the violations of his Sixth and Fourteenth Amendment rights to effective assistance of trial counsel, due process of law and a fair trial.

CONCLUSION

The petition for writ of certiorari should be granted and the writ issued upon the Eleventh Circuit Court of Appeal for a proper review of Lupian' COA application in order to cure his unconstitutional detention.

Respectfully Submitted

Ricardo Lupian-Barajas

Ricardo Lupian-Barajas #263427
Petitioner, *Pro Se*

JURAT

I, Pascual Lupian, DO HEREBY DECLARE, under the penalties of perjury, pursuant to 28 U.S.C. 1746, that I am the Petitioner in the above styled cause of action; that I have read the foregoing *Petition for Writ of Certiorari* and the statements and facts contained therein are true.

Executed on this 1st day of October, 2018, by:

Ricardo Lupian-Barajas

Ricardo Lupian-Barajas #263427