

No. 19-5858

ORIGINAL

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

LAMARR T. CRITTENDEN -PETITIONER

v.

KEITH BUTTS -RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

LAMARR T. CRITTENDEN -PETITIONER
(Your name)

P.O. Box A
(Address)

New Castle, IN 47362-1041
(City, State, Zip Code)

None
(Phone Number)

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SUPREME COURT, U.S.

QUESTION S PRESENTED

Did The United States Court Of Appeals For The Seventh Circuit fail to address an issue of first impression involving an ex post facto violation of The United States Constitution, due to the failure to issue a Certificate of Appealability, after the petitioner had met the requirement under federal statute ?

Did The United States Court Of Appeals For The Seventh Circuit fail to address an issue involving an exculpatory statement made by the alleged victim, that could have been used to impeach the states witnesses, and prove the petitioners innocence, due to the failure to issue a Certificate of Appealability, after the petitioner had met the requirement under federal statute?

LIST OF PARTIES

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

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of The United States Court of Appeals for The Seventh Circuit rendered in these proceedings on May 30th , 2019.

OPINIONS BELOW

The United States Court of Appeals denied Crittendens request for a Certificate of Appealability under cause no. 18-3624, on May 30th , 2019. The opinion is a one page basic denial, and is reprinted in the appendix to this petition at (App. A1). The order of the district court denying Crittendens petition for a Writ of habeas Corpus Relief, and Certificate of Appealability which was issued on 11/16/2018 is reprinted in the appendix to this petition at (App. B1).

JURISDICTION

The original opinion of the United States Court of Appeals for the Seventh Circuit was entered on May 30th , 2019. (App. A1) No petition for a rehearing was filed. The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following statutory and constitutional provisions are involved in this case.

U.S. CONST., AMEND. VI

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 effective counsel for his defense.

U.S. CONST., AMEND. XIV

Section 1. 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 laws.

U.S. CONST. ART. 10, SEC. 1

No State shall enter into any treaty, alliance, or confederation; grant letters of Marque and reprisal; coin money; emit bills of credit; make any thing but gold and

silver coin a tender in payment of debts; pass any Bill of Attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

28 U.S.C. 2253

(a) In a habeas corpus proceeding or a proceeding under section 2255 [28 USCS § 2255] before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255 [28 USCS § 2255].

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. 2254

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody

pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B) (i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e) (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent

part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substance Acts [21 USCS § 848], in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254 [28 USCS § 2254].

STATEMENT OF THE CASE

Mr. Crittenden was convicted of child molestation after a trial by the court. The alleged victim D.M. Was the daughter of Shanta Matlock, the woman Crittenden was living with at the time. D.M. Testified at the bench trial that Crittenden entered her bedroom on one occasion while she was sleeping and performed sexual acts upon her, and told her not to tell anyone. Her mother Shanta' did not believe that Crittenden had touched her in any inappropriate way, but Counsel failed to call her as a witness at trial. D.M.'s aunt Lawanna Smith testified at the trial that D.M. Had told one of her cousins about these allegations, which prompted Lawanna Smith to take D.M. To the hospital for a medical examination, which showed to be inconclusive. On October 7th, 2008 the state charged Crittenden with two counts of class a felony child molestation, and two counts as class c felony child molestation. On April 27th , 2009 Crittenden waived his right to a jury trial, and proceeded to a trial by the bench. That same day, Crittenden was convicted of 1 class a felony, and one class c felony. At trial, counsel did not call any witnesses to the stand on Crittendens behalf, nor did he present any evidence on Crittendens behalf. The trial court found Crittenden guilty of one class A felony, and one class C felony, and sentenced Crittenden to a term of 35 years. Crittendens conviction was affirmed on direct appeal to the Indiana Court of Appeals, "Crittenden v. State, 920 n.e.2d 277 (Ind. Ct. of App. 2010)" (App. C1) (Crittenden I) The Indiana Supreme Court denied review on March 11th, 2010.

On August 10th , 2010, Crittenden filed a petition for post conviction relief, which the trial court granted in part, and denied in part, ordering a new sentencing hearing, which was stayed until Crittenden appealed the denial of the remaining issues to the Indiana Court of Appeals which was affirmed on direct review, (App. D 1) "Crittenden v. State, 37 n.e.3d 565 (Ind. Ct. App. 2015)", (Crittenden II). Transfer was sought and denied by the Indiana Supreme Court on 9/8/2015, 37 n.e.3d 960. Crittenden was then re sentenced on November 18th, 2015, to which he appealed to the Indiana Court of Appeals, who affirmed his sentence on direct review, (App. E1) "Crittenden v. State, 83 n.e.3d 154, (Ind. Ct. of App. 2017). (Crittenden III)

Crittenden sought transfer to the Indiana Supreme Court which was denied on May 18th, 2017, “88 N.E.3d 1076 (Ind. Sup. Ct. 2017)”. Crittenden then filed a petition for Habeas Corpus Relief under 28 U.S.C. 2254 on July 3rd, 2017. Relief was denied by the district court on 11/16/2018. (App. B 1), and the district court also denied Crittenden a Certificate of Appealability on the same day. (App. B1, B17) Crittenden appealed to the United States Court of Appeals for the Seventh Circuit, and the Seventh Circuit denied Crittenden a Certificate of Appealability on May 30th, 2019. (App. A1)

At Crittendens trial, Crittenden did not take the stand. Crittenden was convicted only on the testimony of the alleged victim D.M. At Crittendens sentencing hearing, the trial court stated when rendering its verdict:

“I want to state this specifically for the record, that my verdict was based solely on the testimony of the victim at trial, and not on any statements that she made to others.”

At the state post conviction hearing, Crittenden testified and stated that defense counsel Eugene Kress failed to call any witnesses on his behalf in support of his defense, including the victims own mother Shanta Matlock, who did not believe that Crittenden had touched her daughter. Crittenden also gave testimony that counsel failed to cross examine the D.C.S. family case manager who interviewed D.M. in one of the D.C.S. Reports, and that D.M. had made an exculpatory statement in one of these reports denying any sexual abuse going on in the home.

Crittenden argued that his counsel was ineffective for failing to depose the D.C.S. Family Case Managers, and for failing to admit the reports into evidence at trial for it's impeachment value towards the states chief witnesses La wanna Smith, and D.M. In response to these allegations, counsel testified at the post conviction hearing and stated that it was not a good strategy to try to present a character

witness during the guilt phase of the trial. Crittendens trial counsel then testified that he had reviewed the D.C.S. report before trial. He further testified that he would not have admitted the April 2008 report because it related to conduct not charged in Crittendens case, and that it would not have been relevant. Additionally, counsel testified that he would not have deposed the D.C.S. Case Managers because “their testimony would have tended towards proving the States case as opposed to anything exculpatory.

Crittenden admitted the D.C.S. Reports as evidence for the purposes of the post conviction hearing. He stated that had counsel admitted the April 2008 D.C.S. Report, it would have shown that Lawanna Smith, D.M.'s aunt was the one who called the hot line and initiated this D.C.S. Investigation, and that La wanna Smith did not make any mention of sexual abuse in this report, and that it could also have been used as impeachment evidence against Smith, because smith gave testimony at trial that she believed Crittenden had been sexually abusing her niece as far back as February of 2008, but yet she made no mention of sexual abuse in the April 2008 report. Lawanna Smith only states in this report that the mom had a boyfriend who was on drugs, and had stole the rent money. But then when she found out that moms boyfriend was out of the picture, she called the hotline back to tell them that this situation did not need to be investigated anymore. Similarly, D.M. Gave a statement in the May 2008 D.C.S. Report that Crittenden had sexually abused her, she could not state exactly when this incident occurred , but she stated that she was was seven years old when this happened, and that it was cold outside. D.M. was seven years old between February of 2006, and February of 2007, because

she was born February 8th, 1999. And this is also the time frame that the state of Indiana charged that these events occurred in Crittendens case. So if D.M. Stated in the May 2008 D.C.S. Report that Crittenden sexually abused her between February of 2006, and February of 2007, then this all happened way before the April 2008 D.C.S. Report where D.M. Made a statement denying any sexual abuse going on in the home, and counsel could have used this D.C.S. Report to impeach both of the states witnesses Lawanna Smith and D.M. The post conviction court denied Crittenden relief on this claim. The Indiana Court of Appeals affirmed the denial of Crittendens petition for post conviction relief on this issue, (App. D 26) stating "because trial counsels decision to not further investigate the D.C.S. Reports by deposing the case managers, and his decision to not introduce them into evidence was a reasonable strategic decision, and that Crittenden has failed to show that his trial counsels performance was deficient. Moreover, Crittenden has failed to demonstrate that there is a reasonable probability that, but for his trial counsels alleged errors, the result of the proceeding would have been different. Crittenden renewed this claim in his petition for habeas corpus relief, and the district court basically restated the facts that the Indiana Court of Appeals set forth in their memorandum decision and denied Crittenden relief on the same factual basis. (App. B 9)

Crittenden also raised the issue on direct appeal of his re-sentencing to the Indiana Court of Appeals in "Crittenden v. State, 83 n.e.3d 154, (Ind. Ct. of App. 2017)", that the trial court failed to sentence Crittenden under the correct law that was in effect when he committed the alleged offense, thereby allowing him to be

deemed a sexually violent predator by operation of law. The Indiana Court of Appeals found that Crittenden was incorrect in his conclusion that he has been found to be a sexually violent predator. The court explained "There has been no determination as to Crittendens status upon his release from incarceration, and Crittenden has not been notified that he is required to register as a sexually violent predator, and the Court ruled that Crittendens claim that the trial court improperly classified him as an sexually violent predator in violation of the ex post facto clause fails. (App. E 13-E 14)

Crittenden then renewed his claim of an ex post facto violation under Article 1, Section 10 of the U.S. Constitution in his petition for Habeas Corpus Relief. Crittenden stated that the trial court failed to sentence him under the law that was in effect at the time he committed the alleged offense, thereby allowing him to be deemed an sexually violent predator by operation of law, the same grounds that he raised in state court. (App. B13) Once again the district court restated the factual basis as presented by The Indiana Court of Appeals, and denied Crittenden habeas relief on these grounds. (App. B14)

Crittenden then filed a notice of appeal from the denial of his petition under 28 U.S.C. 2254, and an application for a certificate of appealability with the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit responded by stating we have reviewed the final order of district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. See 28 U.S.C. 2253 (c)(2). Accordingly, the request for a certificate of appealability is denied. (App. A1)

REASONS FOR GRANTING THE PETITION

I. The Seventh Circuits failure to address an issue of public regarding an issue of first impression involving an ex post facto violation as applied by operation of law, and the failure to issue a Certificate Of Appealability to address these issues after Crittenden had made a substantial showing of the denial of a constitutional right warrants this courts attention.

The seventh circuits order and finding that no substantial showing of the denial of a constitutional right has been made to meet the requirement under 28 U.S.C. 2253(c)(2) for the issuance of a certificate of appealability was clearly a heavier burden established by the seventh circuit than that which is required by the statute. A petitioner is entitled to a certificate of appealability if he makes a substantial showing of the denial of a constitutional right. "28 U.S.C. 2253(c)(2)" The United States Supreme Court in "Barefoot v. Estelle, 463 U.S. 880 (1993)", held that this means that the appellant need not show that he would prevail on the merits, but must demonstrate that the issues are debatable among jurist of reason; that a court could resolve the issues "in a different manner" or that the questions are adequate to deserve encouragement to proceed further. This standard does not require the petitioner to show that he is entitled to relief:

We do not require petitioner to prove...that some jurist would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the C.O.A. has been Granted and the case has received full consideration, that petitioner will not prevail. "Miller-El v. Cockrell, 537 U.S. 322 (2003)" This decision was reaffirmed in "Buck v. Davis, 137 S.Ct. 759, 197 L.Ed. 2D 1(2017)"

Crittenden raised 4 issues in his request for a certificate of appealability. Only 2 of these issues are relevant to the question that he presents to this court.

(A). Trial counsel was ineffective for failure to investigate, failure to call any witnesses on his behalf, and failure to present evidence.

Trial counsel failed to call any witnesses including the victims own mother who did not believe that Crittenden had touched her daughter in any kind of inappropriate way. (App. B6 - B7) Crittenden also stated that Counsel failed to cross examine or depose the D.C.S. Worker who interviewed D.M. In the April 2008 D.C.S. Report in which D.M. Had made an exculpatory statement saying that there was no sexual abuse going on in the home. (App. Pg B8 - B9) Crittenden also argued that counsel failed to admit this evidence at trial, or use this prior inconsistent statement as impeachment evidence against the states witnesses. The alleged victims aunt Lawanna Smith was the author of this D.C.S. Complaint, and in it she stated that the moms boyfriend was on drugs, and he had stole the rent money. But then a few days later, she called the D.C.S. hot-line back to let them know that the mothers boyfriend was out of the picture, and the situation did not need to be investigated any more, but the state courts and the district court failed to acknowledge any of these facts. Crittenden had stated during the post conviction proceedings, and in his habeas petition and traverse that this report could have been used as impeachment evidence against Lawanna Smith (App. B9) because she testified at trial that she believed that Crittenden had been sexually abusing her niece as far back as February of 2008, but yet neither Lawanna Smith or D.M.

Made any allegations of sexual abuse in the April 2008 D.C.S. Report. But 30 days later in the May 2008 D.C.S. Report, D.M. Stated that Crittenden had sexually abused her between February of 2006 and February of 2007. So counsel could have used this April 2008 report as impeachment evidence at the least, and also as exculpatory evidence.

However the district court denied Crittenden habeas relief, affirming the Indiana Court of Appeals ruling that Crittenden has failed to show that this was an unreasonable application of Strickland, (App. B 9), Crittenden believes that he has at least met the threshold requirement for the issuance of a certificate of appealability under 28 U.S.C. 2253(c)(2), which only requires that the appellant demonstrate that the questions are adequate to deserve encouragement to proceed further.

(B.) The trial court failed to sentence Crittenden under the law that was in effect at the time he committed the alleged offense, thereby allowing him to be deemed a sexually violent predator by operation of law.

In his 2nd argument that he raised in his petition for habeas corpus relief, that is relevant to this petition for this courts review, Crittenden had raised the claim that the trial court failed to sentence him under the law that was in effect at the time he committed the alleged offense, thereby allowing him to be deemed a sexually violent predator by operation of law in violation of Article 1, Section 10 of the United States Constitution.(App. B 13) In Indiana a person or a criminal defendant is a sexually violent predator by operation of law if they are convicted of

a qualifying offense, and the person was released from incarceration, secure detention, or probation for the offense after June 30th, 1994, - "I.C. 35-38-1-7.5(b)", effective July 1st, 2007. Crittenden was convicted of one of these qualifying offenses as a class a felony under I.C. 35-42-4-3, which makes Crittendens status a sexually violent predator by operation of law. "I.C.35-38-1-7.5(b)(1)(c) Crittenden was charged with crimes under I.C. 35-42-4-3 on October 7th, 2008 (App. C 2) for acts as charged by the state that happened on, or about. Or between February 8th, 2006, to February 7th, 2007, but was not convicted until April 27th, 2009. Crittenden was originally sentenced on May 26th, 2009, and was re-sentenced on November 18th, 2015, after receiving post conviction relief. Now the trial court never specifically stated in the record or made a finding that Crittenden is a sexually violent predator, (App. B 14) which is where Crittenden contends the ex post facto violation comes in.

The version of I.C. 35-38-1-7.5 that was in effect at the time Crittenden allegedly committed his offense, which was the version of the statute that was in effect prior to the July 1st, 2006 amendment states that, "(a)- as used in this section, "S.V.P. Has the meaning set forth in "I.C. 5-2-12-4.5", (b)- This section applies whenever a court sentences a person for a sex offense listed in "I.C. 5-2-12-4(a)(1)" through "I.C. 5-2-12-4(a)(10)", for which the person is required to register with the sheriff (or the police chief of a consolidated city under "I.C. 5-2-12-5", and (C) "At the sentencing hearing, the court shall determine whether the person is a sexually violent predator. Before making a determination under this section, the

court shall consult with a board of experts consisting of two (2) board certified psychologists, or psychiatrists who have expertise in criminal behavioral disorders.

Now as the Indiana Court of Appeals has found, - "There has been no determination as to Crittendens status upon his release from incarceration, and Crittenden has not been notified that he is required to register as a sexually violent predator. (App. E 13), which the district court reaffirmed (App. B 14) So here we see the first part of the ex post facto violation has been met, because the version of I.C. 35-38-1-7.5 that was in effect at the time that Crittenden was alleged to have committed his offense required the court to make a finding at the sentencing hearing if an individual was a sexually violent predator by 2 board certified experts. "I.C. 5-2-12-4.5" And since this has not been done, in this alone Crittenden has overcome the presumption that the state courts factual determination was correct. "28 U.S.C. 2254(e)(1)", and Crittenden has met the burden of rebutting the presumption of correctness by clear and convincing evidence. Now in continuing to establish that Crittenden has been convicted of an offense which qualifies him to be classified as an sexually violent predator by operation of law which is applied retroactively, in violation of the federal constitutions ex post facto and due process clause, we must first understand, for a criminal law or a penal law to be ex post facto, it need not impair a "vested right". Even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the ex post facto clause if it is both retrospective and more onerous than the law in effect on the date of the offense. "Weaver v. Graham, 450 U.S. 24 (1981)"

Crittenden contends that being classified as a sexually violent predator by operation of law under the 2007 amendment of I.C. 35-38-1-7.5 does all of the above. Crittenden is being substantially disadvantaged by the increase in punishment, due to the fact that a person who is classified as a sexually violent predator by operation of law must remain on parole for the rest of his life under I.C. 35-50-6-1(e) "2007". Now due to this fact, Crittenden is subject to be on parole for the rest of his life, and as such he would be subject to be re-incarcerated over and over again for the rest of his life at any point after he is released from prison for a technical violation of parole, where prior to this amendment under the statute that Crittenden should have been sentenced under, he would only have to remain on parole for 10 years if he was not found to be a sexually violent predator by the court. This amendment also changes the elements or ultimate facts necessary to prove the offense by depriving Crittenden of the defense that was available under the version of I.C. 35-38-1-7.5 prior to the July 1st, 2006 amendment where the court had to consult with a board of experts consisting of two (2) board certified psychologists or psychiatrists who have expertise in criminal behavioral disorders, before it could determine that a person was an sexually violent predator.

Therefore Crittenden believes that he has met the threshold requirement, and made more than a substantial showing of the denial of a constitutional right, which is why he stated that the United States Court of Appeals has created a standard that requires proving a heavier burden than that which is required under 28 U.S.C. 2253(c)(2). Accordingly in "Miller-El v. Cockrell, 537 U.S. 322 (2003)", it was held a Court of Appeals should not decline the application for a C.O.A. Merely

because it believes the applicant will not demonstrate an entitlement to relief. The holding in "Slack v. McDaniel, 529 U.S. 473, (2000)", would mean very little if appellate review were denied because the prisoner did not convince a judge, or for that matter, three judges, that he or she would prevail. It is consistent with 2253 that a COA will issue in some instances where there is no certainty of ultimate relief. After all, when a COA is sought, the whole premise is that the prisoner "has already failed in that endeavor". Barefoot, *supra*, at 893, n 4, 77 L. Ed. 2d 1090.

II. Indiana's retroactive application of the sexual violent predator statute by operation of law is an ex post facto violation under the United States Constitution, and is an issue of first impression in this court, and warrants this Courts Attention.

Crittenden contends that how Indiana applies the sexually violent predator statute retroactively under I.C. 35-38-1-7.5 by operation of law to criminal defendants upon release due to them being convicted of a qualifying offense under I.C. 35-38-1-7.5(b) before the statutes amendment in July of 2007, is an ex post facto violation under Article 1, Section 10 of the U.S. Constitution, and as Crittenden has stated here is an issue of first impression, because not only does this designation change a persons registration status from 10 years under I.C. 11-8-8-19(a), to lifetime registration under I.C. 11-8-8-19(b), but it also changes the sex offender parole requirement so that a person who would have been required to only be placed on sex offender parole for 10 years under 35-50-6-1(d) before the retroactive application of the sexual violent predator statute, now has to be placed on lifetime parole under I.C. 35-50-6-

1(e) due to his status as a sexually violent predator. This is a penal statute due to the fact that the parole statute is located in the criminal code which makes it penal in nature. This fact is supported by "Goldsberry v. State, 821 n.e.2d 447 (Ind. Ct. of App. 2005)" which states- "It was held that when the Indiana legislature passes a statute, or when a public law becomes a statute, as to whether it is criminal or civil will be determined by whether it has been placed in the criminal code or the civil code. In Indiana, any statute placed in tittle 35 is criminal in nature, which would make the amendment of I.C. 35-50-6-1(e) in July of 2007, requiring those who qualify as a sexually violent predator to be placed on lifetime parole penal in nature, and has a punitive effect on criminal defendants, due to the extended period of time a person has to spend on parole, which will require them to be re-incarcerated at any time during life while they are on lifetime parole in the state of Indiana.

The challenges to the sexually violent predator statute arising out of the state of Indiana may require this court to revisit its prior decision in "Smith v. Doe, 538 U.S. 84, (2003)" due to the fact that in Doe, this Court held that an Alaskan sex offender registration and notification statute posed no ex post facto violation because it was a civil rather than penal statute. However here in Indiana as explained above, the retroactive application of the sexually violent predator statute to criminal defendants who have been convicted of a qualifying offense under I.C. 35-38-1-7.5(b), requires them to be placed on lifetime parole under I.C. 35-50-6-1(e) which makes this a penal statute, and does invoke an ex post fact violation which warrants this Courts attention, and Grittenden request that this Court Grant this

Writ to address this issue, because if it is not done at this time, this issue will make it's way back to this Court, as a brief look at the challenges to this statute that are being made if the Seventh Circuit will reveal. "Johnson v. Indiana, 2017 U.S. Dist. Lexis 5978 (7th Circuit)", "Holmes v. Indiana, 2017 U.S. Dist. Lexis 699 (7th. Circuit)", "Norris v. Indiana, 2016 U.S. Dist. Lexis 171218 (7th. Circuit)", "McNamara v. Indiana, 2016 U.S. Dist. Lexis 166498 (7th. Circuit)" all of these cases are challenges under 42 U.S.C. 1983, but are arguing against the sexually violent predator retroactive application affecting there registration status from 10 years to lifetime. None are challenging the lifetime parole status as Crittenden challenges here. However "Cowan v. Warden, 2018 U.S. Dist. Lexis 124834 (7th Circuit)" - is a challenge to lifetime parole status due to the sexually violent predator retroactive application, and also shows that defendant was notified of his status upon release. "Flanders v. Lemmon, 2014 U.S. Dist. Lexis 76978, (7th Circuit)" challenging retroactive application of sexually violent predator status, conditional habeas relief granted. "Kyner v. Superintendent, New Castle Corr. Facility, 2016 U.S. Dist. Lexis 96346 (7th Circuit)"- challenge to retroactive application of sexually violent predator status, Certificate of appealability granted, but no appeal was taken on this case, so the issue remained unresolved. The United States Court of Appeals for the Seventh Circuit has not addressed the retroactive application of the sexually violent predator status to criminal defendants as far as the lifetime parole status goes, but only under the lifetime registration status, see "David Schepers v. Commissioner, Indiana Dept. of Correction, 691 f.3d 909, (7th Cir. Ct. of App. 2012)", and with such a line of inconsistent ruling on this issue, as the state of Indiana has experienced.

itself, So Crittenden request that this court here this case so that it may be resolve at this time, and not at a later time.

II . THE DECISION OF THE SEVENTH CIRCUIT IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS.

“Coady v. Vaughn, 251 f.3d 480 (3rd Cir. Ct. of Appeals 1998)”- the Court concluded that appellant had made a substantial showing of the denial of a constitutional right and issued a certificate of appealability with respect to his ex post facto claims., also see “Walker v. Steward, 2016 U.S. Dist. Lexis180122 (6th Circuit)”Certificate of appealability was Granted, petitioner claimed that his trial counsel was ineffective for not calling a social worker in Illinois who interviewed the victim as a witness. The court ruled that the petitioner lacked prejudice on this claim, because the trial court allowed counsel to impeach the victim with each of the inconsistencies he identified in the social workers report. This case is identical to Crittendens case because Crittenden presented the exact same argument the court, that counsel was ineffective for failing to impeach the alleged victim with inconsistent statements that she made to the D.C.S. Social Worker. Crittenden was denied a certificate of appealability. In petitioner Charles Walkers case, his counsel was allowed to impeach the victim with the inconsistent statements that she made to the state social worker, but the Court still ruled that Walker made a substantial showing of the denial of a constitutional right that deserved encouragement to proceed further. Therefore Crittenden should have been issued a Certificate of Appealability and allowed to proceed further.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully Submitted,

Lamarr Crittenden (SIGNATURE)
Petitioner, *pro se*

LAMARR T. CRITTENDEN (PRINTED NAME)

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