

No. \_\_\_\_\_

USDC # 4:18-cv-361-Y

5th Cir # 19-10330

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IN THE  
SUPREME COURT OF THE UNITED STATES

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MICHAEL LOGAN LOWERY - PETITIONER

VS

LORIE DAVIS , DIRECTOR - RESPONDENT

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MOTION FOR LEAVE TO FILE AN  
OUT-OF-TIME PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUDGES OF SAID COURT:

COMES NOW, MICHAEL LOGAN LOWERY, Petitioner, Pro Se, and files this his Motion For Leave To File An Out-Of-Time Petition For Writ Of Certiorari and would show this Honorable Court as follows:

1. Petitioner filed a 28 USCA § 2254, application for writ of habeas corpus with the United States District Court in Amarillo, Texas on May 10, 2018. It was transferred to the Fort Worth Division on May 11, 2018. Writ was denied on March 08, 2019. Notice of Appeal was filed on March 22, 2019. Petitioner also filed a Motion to Alter or Amend Judgment on April 03, 2019 and

it was denied on April 10, 2019. Petitioner's Motion for Certificate of Appealability with Brief was filed in the Fifth Circuit Court of Appeals in New Orleans, Louisiana on May 09, 2019. Motion for COA was denied on September 05, 2019. Petitioner filed a Petition for Rehearing En Banc on September 15, 2019, which was received by the Court on September 23, 2019. The Petition for Rehearing En Banc was denied on October 15, 2019. The Fifth Circuit never notified Petitioner of their denial of his Petition for Rehearing En Banc.

2. Petitioner's mother (Lynn Usry) contacted the Fifth Circuit via telephone on January 15, 2020 on Petitioner's behalf. She learned that the Petition for Rehearing En Banc was denied on October 15, 2019. She notified the Court that Petitioner has never received a copy of the denial order and requested that a copy of the denial order be sent to Petitioner. See exhibit "A".

3. On the same day, January 15, 2020, Petitioner sent an I-60 (request to official) to the mailroom supervisor- Mrs. Schuster and asked her to confirm that Petitioner has not received any legal mail to the unit from the Fifth Circuit Court of Appeals out of New Orleans, LA 70130-3408 between the dates of October 15, 2019 and January 15, 2020. She confirmed that no legal mail from the Fifth Circuit has arrived to the unit between the stated dates. See exhibit "B".

4. Petitioner sent three (3) separate letters to the office of the clerk for the Fifth Circuit requesting status updates on his Petition for Rehearing En Banc. The first dated Oct. 23, 2019, at 30 days after Petition was received, went unanswered. The second dated Nov. 25, 2019, at 63 days also went unanswered and a third dated Jan. 12, 2020. See exhibits "C", "D", & "E".

5. Petitioner requested Writ of Certiorari packet from the Supreme Court on Oct. 21, 2019 which was received on Nov. 05, 2019 from unit mailroom. Petitioner would have timely filed his Petition for a Writ of Certiorari with this Court had he been properly notified by the 5th Circuit following the denial of his Petition for Rehearing En Banc.

6. Petitioner believes the Fifth Circuit caused a Due Process violation in failing to notify Petitioner of the denial of his Petition for Rehearing En Banc and for failing to respond to his three (3) inquiries for status updates regarding his Petition.

7. Petitioner received a copy of the denial order on Jan. 30, 2020. The Court responded to the status inquiry letter dated Jan. 12, 2020, see exhibit "F". This was the first correspondence Petitioner received following the denial of his Petition for Rehearing En Banc.

8. Petitioner believes he has an issue of extreme importance that

would effect more individuals than himself and one that needs to be addressed by this Court. The USDC of Fort Worth decided that a No-Evidence claim is not cognizable on federal habeas review which directly goes against a Supreme Court ruling in Thompson v City of Louisville, 362 U.S. 199, 80 S.Ct. 624 (1960). Petitioner believes that Jackson v Virginia, 99 S.Ct. 2781 (1979), merely set a new and separate standard for insufficiency of the evidence claims and did not over-rule or nullify Thompson or the no-evidence standard. Also a second issue of whether a due process violation occurred when the lower federal courts disregarded established federal law requiring a court to review de novo a Petitioner's claims and trial record to determine whether the lower court's determination of the facts was valid.

It is the Province of this Honorable Court to determine significant issues affecting federal jurisprudence. By way of failing to inform Petitioner of it's decision to deny his Motion for Rehearing En Banc the lower federal 5th Circuit Court of Appeals has effectively usurped this Court's power in determining whether this Court will grant review of the merits of Petitioner's issues or deny such review.

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that this Honorable Court would grant this Motion For Leave To File An Out-Of-Time Petition For Writ Of Certiorari.

Respectfully resubmitted this the 28<sup>th</sup> day of February, 2020.



Michael Logan Lowery  
TDCJ-ID # 1954001  
Petitioner, Pro Se  
Clements Unit  
9601 Spur 591  
Amarillo, TX 79107

CERTIFICATE OF SERVICE

I, Michael Logan Lowery, hereby certify that a true and correct copy of the above and foregoing Motion has been forwarded by U.S. Mail, postage pre-paid, first-class, to Respondent's counsel of record (Cara Hanna), at P.O. Box 12548, Capitol Station, Austin, Texas 78711, by placing same in the Clements Unit, prison mail system on February 28<sup>th</sup>, 2020.



Michael Logan Lowery  
Petitioner, Pro Se

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 19-10330

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A True Copy  
Certified order issued Sep 05, 2019

*Tyler W. Cayer*  
Clerk, U.S. Court of Appeals, Fifth Circuit

MICHAEL LOGAN LOWERY,

Petitioner-Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL  
JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

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Appeal from the United States District Court  
for the Northern District of Texas

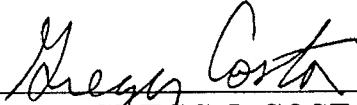
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ORDER:

Michael Logan Lowery, Texas prisoner # 1954001, was convicted by a jury of the murder of his wife Amber and was sentenced to life imprisonment. He now seeks a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2254 petition challenging this conviction. Lowery contends that his appellate counsel rendered ineffective assistance by failing to challenge the sufficiency of the evidence supporting his conviction. In addition, he maintains that the district court erred in rejecting his claims that no evidence existed in the record to establish that he killed Amber or that he possessed the necessary mens rea to support a murder conviction, based on a belief that the allegations arose under state law and thus did not warrant relief in federal habeas.

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To obtain a COA, Lowery must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). He may satisfy this standard “by demonstrating that jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Because the district court rejected Lowery’s claims on their merits, he “must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack*, 529 U.S. at 484; *see also Miller-El*, 537 U.S. at 338. Lowery has failed to make the requisite showing. Accordingly, his motion for a COA is DENIED.

  
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GREGG J. COSTA  
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 19-10330

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MICHAEL LOGAN LOWERY,

Petitioner - Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL  
JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellee

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Appeal from the United States District Court  
for the Northern District of Texas

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ON PETITION FOR REHEARING EN BANC

Before SMITH, COSTA, and HO, Circuit Judges.

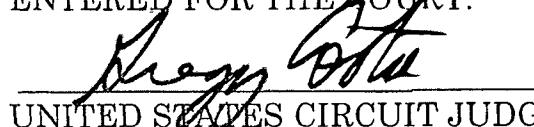
PER CURIAM:

( ) Treating the Petition for Rehearing En Banc as a Motion for Reconsideration, the Motion for Reconsideration is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5<sup>th</sup> CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Motion for Reconsideration, the Motion for Reconsideration is DENIED. The court

having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5<sup>TH</sup> CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

  
\_\_\_\_\_  
UNITED STATES CIRCUIT JUDGE

**Additional material  
from this filing is  
available in the  
Clerk's Office.**