ORIGINAL

20-7983

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

THOMAS LAM,

Petitioner,

Versus

ROBERT C. TANNER, Warden,
B.B. Rayburn Correctional Center,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Thomas: Lam #702286
Rayburn Correctional Center
27268 Hwy 21 N.
Angie, La 70426

(Pro-Se Litigant)

QUESTIONS PRESENTED

The trial judge relied on a discussion with the jury, during voir dire as satisfaction to a constitutional guilty plea that he informed Petitioner of the charges. But the explanation was for second degree murder – not manslaughter as to the charge he pled guilty.

Did the Fifth Circuit deny a request for COA on an important question of federal law that has not been, but should be, settled by this Court because the trial judge incorrectly explained the charge Petitioner did not plea to? Furthermore, the explanation was directed to the jury – not Petitioner. In addition, did the court err that jurists of reason could not debate that the *Henderson*[1] presumption applies when the Petitioner's case is distinguishable from *Henderson*?

[1] *Henderson v. Morgan*, 426 U.S. 637, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976).

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STATUTES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Thomas Lam, respectfully prays that this Court issue a Writ of Certiorari to review the judgment of the Court of Appeals for the Fifth Circuit of Louisiana for the denial of his COA.

OPINIONS BELOW

The Fifth Circuit Court of Appeals denied Petitioner's request to issue a certificate of appealability in order to appeal the district court's denial of habeas corpus relief. The opinion is unpublished, and is reprinted at Appendix "**F**."

The opinion of the United States Eastern District Court of Louisiana appears at Appendix "**E**" to this petition and is reported at **Lam v. Tanner, 19-1785, 2020 WL 815588 (E.D. La. 2020)**. The opinion of the highest state court to review the merits, appears at Appendix "**C**" to the petition and is reported at **State v. Lam, 2018-0108 (La. 2/11/19); 263 So.3d 416**. The opinion of the Fourth Circuit Court of Appeals appears at Appendix "**B**" to the petition and is unpublished.

JURISDICTION

The United States Court of Appeals decided Petitioner's case on March 11, 2021. No petition for rehearing was filed in Petitioner's case. The Louisiana Supreme Court decided Petitioner's case on February 11, 2019. A copy of that decision appears at Appendix "**C**".

The jurisdiction of this Court is invoked under *28 U.S.C. §1254(1)* and *28 U.S.C. §1257(a).*

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 . . . have the Assistance of 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.

28 U.S.C. § 2253

(a) In a habeas corpus proceeding . . . 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

proceedings is held.

(b) There shall be no right of appeal from a final order in 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;

(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.

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

STATEMENT OF THE CASE

On January 9, 2014, the grand jury indicted Petitioner with one count of Second Degree Murder relative to *R.S. 14:31*; two counts of Attempted Second Degree Murder, relative to *R.S. 14 (27) 30.1;* one count of Armed Robbery with a Firearm, relative to *R.S. 14:64.3*; one count of Possession of Alprazolam, relative to *R.S. 40:969* (C); one count of Possession of Hydrocodone relative to *R.S. 40:967*; one count of Possession of Oxycodone, relative to *R.S. 14:967(C)(2)*; and one count of Possession of Morphine, relative to *R.S. 40:967(C)(2).*

Prior to Petitioner pleading guilty, the State dismissed the Possession of Hydrocodone relative to *R.S. 40:967* and reduced Second Degree Murder to Manslaughter. In exchange for his guilty plea of all pending charges, Petitioner received an agreed upon sentence of forty-five (45) years, without the benefit of parole, probation, or suspension of sentence.

Petitioner filed a timely application for post-conviction relief into the state trial court and the following claims were reserved for federal court:

1. Violation of Petitioner's right to due process of law when he pled guilty without being informed of the nature of the charges and its critical elements by the trial court or counsel.
2. Violation of Petitioner's right to effective assistance of counsel when trial counsel advised Petitioner to plead guilty without notifying him of the true nature of the offenses and its required elements.

3. Violation of Petitioner's right to effective assistance of counsel when trial counsel failed to notify him of relevant facts that prove his innocence. Counsel also failed to comply with his request, and chose to maliciously withhold evidence with the intent to coerce the guilty plea.

The trial court denied claim one mentioned above based on the standards under *Boykin v. Alabama*, 395 U.S. 238 (1969). On claim two, the trial court only indicated the standard of *Hill v. Lockhart*, 474 U.S. 52 (1985), but did not address the merits of the claim and then states that Petitioner has not shown that but for counsel's alleged errors, he would not have pled guilty. Claim three, the trial court denied based on Petitioner not proving the two *Strickland* prongs. The Fourth Circuit Court of Appeals and the Supreme Court affirmed the trial court's judgment.

On February 21, 2019, Petitioner filed his petition for habeas corpus relief under *28 U.S.C. § 2254*. He also filed a motion for evidentiary hearing, motion to stay and production of documents. The habeas corpus petition included three grounds for relief, which were presented above. On January 27, 2020, the magistrate judge for the United States Eastern District Court recommended that Petitioner's habeas corpus be denied as he failed to satisfy the prejudice prong of *Strickland* in regards to ineffective assistance of counsel. On the claim of invalid guilty plea, it was recommended that it be denied because Petitioner did not satisfy the rebuttable presumption established in *Henderson*. In effect, the district court judge has adopted the magistrate's recommendation and denied Petitioner relief, and also denied him

of certificate of appealability.

Petitioner filed a notice of appeal into the district court along with an in forma pauperis. After allowing Petitioner to proceed with his pauperis status, he filed a certificate of appealability into the United States Court of Appeals for the Fifth Circuit of Louisiana on March 10, 2020. On March 11, 2021, the Fifth Circuit denied request for a certificate of appealability. Petitioner is filing a Petition for Writ of Certiorari into this Honorable Court seeking for a COA in the Fifth Circuit in order for the claims to be reviewed on the merits.

REASON FOR GRANTING THIS PETITION

The trial judge relied on a discussion with the jury, during voir dire as satisfaction to a constitutional guilty plea that he informed Petitioner of the charges. But the explanation was for second degree murder – not manslaughter as to the charge he plead guilty. Petitioner has shown that his case is distinguishable from *Henderson* and that he clearly rebuts the routine explanation espoused in *Henderson* simply because the court explained elements to the charge of second degree murder that he did not pled guilty. Therefore, the Fifth Circuit's denial of COA should be reversed as Petitioner has shown by clear and convincing evidence that the state courts' findings were incorrect, and reasonable jurists could have debated the court's conclusion, and that the issues are adequate to deserve encouragement to proceed further.

I. Invalid Guilty Plea

The state courts' denied this claim in the context of *Boykin v. Alabama*, 395 U.S. 238 (1969). But this Court has discussed this particular issue in *Henderson v. Morgan*, 426 U.S. 637 (1976), and *Bradshaw v. Stumpf*, 545 U.S. 175 (2005).[2] *Henderson* deals with a defendant not being inform of the charges by the trial judge or counsel; even without such express representation by counsel, it is appropriate to presume that in most cases counsel explained the charges to the defendant. *Bradshaw* deals with a defendant not being inform of the charges by the trial judge, but a guilty plea can be satisfied when counsel verified on the record that he explained the charges to the defendant.

The district court found that *Henderson's* presumption applies to Petitioner's case and that he did not adequately rebut the presumption. The court's findings, however, misalign with the record in Petitioner's case. As the court noted, "there are aspects of the instant case that give the court pause, such as: (1) the judge did not advise petitioner of the elements of the offenses on the record during the [plea] colloquy; (2) the elements of the offenses were not set forth on the guilty plea form; and (3) petitioner's attorneys did not affirmatively state on the record or acknowledge on the guilty plea form that they had advised petitioner of the elements of the offenses."[3]

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[2] See Appendix A, Trial Court's ruling dated October 20, 2017, p. 3 (B).
[3] See Appendix D, Magistrate's Report and Recommendation page 17.

Henderson's presumption speaks to the record when there is no explanation or representation by defense counsel that the nature of the offense has been explained to the accused. *Henderson's* presumption cannot be applied to Petitioner's case because the record, particularly the trial transcripts, reflect that on August 11, 2015, the first day of trial, the trial court and counsel advised the jury of the elements of second degree murder. But during the taking of Petitioner's plea after the state reduced the charges on the second day of trial, the trial court never mentioned or advised Petitioner of the elements of manslaughter. Further, Lam's counsel did not affirmatively state that he advised Lam of the elements of manslaughter. Unlike most cases, where the court applies *Henderson's* presumption that defense counsel routinely explains the nature and the elements of the charge, Petitioner's case is distinguishable from most cases. The record in Lam's case clearly rebuts the routine explanation espoused in *Henderson* simply because the court explained elements to the charge of second degree murder that Petitioner did not pled guilty.

More so, under the standard of review in *Bradshaw, supra.* which held that "... the constitutional prerequisites of a valid plea may be satisfied where the record accurately reflects that the nature of the charge and the elements of the crime were explained to the defendant by his own competent counsel. *Henderson v. Morgan,* supra at 647, 96 S.Ct. 2253 (granting relief to a defendant unaware of the elements of his crime, but distinguishing that case from others where "the record contains either an explanation of the charge by the trial judge, or at least a representation by

defense counsel that the nature of the offense has been explained to the accused").

In the instant case, *Bradshaw's* prerequisites are lacking in the record of Petitioner's plea colloquy because, as the court correctly noted, "petitioner's attorney did not affirmatively state on the record or acknowledge on the guilty plea form that they had advised petitioner of the elements of the offenses."[4] Petitioner's record is devoid of any explanation of the elements of manslaughter by the trial judge or by counsel.

Additionally, the court conceded that there is one aspect of Petitioner's case that "remains troubling: the charging document was amended immediately prior to the entry of the guilty pleas to reduce the charge of second degree murder to the lesser included offense of manslaughter, and the **record is unclear as to whether the previous day's discussion of the elements of the offenses included the elements of the lesser included offenses.**"[5]

The reason it is troubling and unclear is because the court refuse to compare the trial transcripts of the previous day's discussion of the elements of second degree murder to the guilty plea transcripts of the reduced charge of manslaughter. The troubling aspect of the record that the court referenced in finding that Petitioner – "acknowledged that he was in fact aware of the charges and their elements and that he had no questions" – occurred on the **previous day's discussion of the elements**

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[4] Appendix D, Magistrate's Report and Recommendation page 17.
[5] Appendix D, Magistrate's Report and Recommendation page 19. [emphasis added]

of second degree murder before the State reduced the charge of second degree murder to the lesser included offense of manslaughter. For example, the court cited the trial transcripts which states:

> **BY THE COURT:**
>
> ...
>
> Do you understand everything that I have explained to you regarding what you are pleading guilty to?
>
> **BY THE DEFENDANT:**
>
> Yes.
>
> **BY THE COURT:**
>
> *And, you understand each of the elements of those crimes as you heard us explain them to the jury yesterday?*
>
> **BY THE DEFENDANT:**
>
> Yes.
>
> **BY THE COURT:**
>
> Do you have any questions?
>
> **BY THE DEFENDANT:**
>
> No.

See Appendix D, Magistrate's Report and Recommendation page 18.

The above portion of the boykin colloquy evinces that the trial court explained the elements of the crime to the jury *yesterday*. There were only two days of trial, August 11 and August 12, 2015. Petitioner was standing trial for second degree murder on the first day. It was on August 11, the first day, that the trial court explained the elements of second degree murder *to the jury* during voir dire. On the second day of trial, August 12, the State reduced the second degree murder to

manslaughter, and the trial court asked Petitioner did he understand each of the elements of those crimes explained to the jury yesterday on August 11. Clearly the trial court was referring to the explanation of the elements of second degree murder, on August 11, and not the elements of manslaughter to which Petitioner pled guilty to on August 12.

Had the court granted Petitioner's request for production of the "(1) transcripts of the trial proceedings which occurred prior to the entry of his guilty plea and (2) the audio recording of the guilty plea," Petitioner could have directed this Court to the portion of the trial transcripts which reflect that Petitioner acknowledged that he was in fact aware of the charges and the elements of second degree murder and not the elements of the charge of manslaughter.

In turn, the trial court's explanation of the elements of second degree murder cannot translate into an explanation of the elements of manslaughter simply because the elements of the two charges are distinguishable. Furthermore, the discussion was directed towards the jury – not Petitioner.

Additionally, the court relied on *Smith v. Warden Allen Correctional Center*, 2000 U.S. App. LEXIS 40917 (5th Cir. 2000), to resolve the problem "as to whether the previous day's discussion of the elements of the offenses included the elements of the lesser included offenses."[6] In *Smith*, the defendant was originally charged with second degree murder but later pleaded guilty to the reduced charge of manslaughter.

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[6] See Appendix D, Magistrate's Report and Recommendation page 19.

In his habeas petition, he argued "that he was never informed of the elements of manslaughter and did not understand what those elements are, making his plea constitutionally involuntary."[7] The Fifth Circuit noted that there was no plea form in which defense counsel stated that they had informed Smith of the nature of the crime to which he was pleading guilty, and the judge "never expressly discussed the elements of manslaughter" during the plea colloquy.[8] But, after noting that Smith had excellent counsel and had been given the opportunity to discuss his case with them, the Fifth Circuit then concluded that "[i]t would seem reasonable to assume that his lawyers discussed his offense in detail with him before he agreed to plead guilty." Because Smith had not met his burden to prove otherwise, habeas corpus relief was denied.[9]

Nevertheless, Petitioner's case is distinguishable from the Petitioner in *Smith.* First, as discussed above, on the first day of trial, before the State reduced the charges to manslaughter, the trial court discussed on the record the elements of second degree murder to the jury and on the second day of trial, after the charges were reduced, the trial court asked Petitioner did he understand each of the elements of those crimes explained to the jury yesterday. Unlike *Smith's* case, Petitioner's record does contain an explanation of the elements of the charge of second degree murder. But, second degree murder is not the charge to which Petitioner pled guilty. Furthermore, as the

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[7] *Id.* at *1.
[8] *Id.* at *2-3.
[9] *Id.* at *3; See also Appendix D, Magistrate's Report and Recommendation pages 20-21.

Court correctly noted, "petitioner's attorney did not affirmatively state on the record or acknowledge on the guilty plea form that they had advised petitioner of the elements of the offenses."[10] Petitioner's record is devoid of any explanation whatsoever of the elements of manslaughter.

Petitioner has shown by clear and convincing evidence that the State courts' findings were incorrect, and reasonable jurists could have debated the court's conclusion, and that the issues are adequate to deserve encouragement to proceed further. Therefore, the Fifth Circuit's denial of COA must be reversed, and Petitioner's claim be reviewed on the merits.

II. Ineffective Assistance of Counsel

The Fifth Circuit denied Petitioner's ineffective assistance of counsel claim based on the fact that it relies on his involuntary plea argument and that he consequently fails for lack of substantiation. This is inaccurate as Petitioner has shown by clear and convincing evidence that the State court's findings were incorrect, and reasonable jurists could have debated the courts' conclusion, and that the issues are adequate to deserve encouragement to proceed further. Therefore, the Fifth Circuit's denial of COA must be reversed and Petitioner's claims be reviewed on the merits.

[10] See Appendix D, Magistrate's Report and Recommendation page 17.

CONCLUSION

This petition for writ of certiorari should be granted to allow Petitioner certificate of appealability in order to appeal the district court's decision in the Fifth Circuit Court of Appeals.

Respectfully Submitted,

Thomas Lam

Thomas Lam

April 19, 2021

Date