

21-5546

IN THE SUPREME COURT OF THE UNITED STATES

\*\*\*\*\*

FERNANDO RODRIGUEZ,  
Petitioner,

v.

BOBBY LUMPKIN,

Respondent,

\*\*\*\*\*

ORIGINAL

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

\*\*\*\*\*

PETITION FOR WRIT OF CERTIORARI

\*\*\*\*\*

FILED  
AUG 19 2021

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

FERNANDO RODRIGUEZ  
TDC#1859563  
Telford Unit  
3899 State Hwy 98  
New Boston, Tx 75570

QUESTIONS PRESENTED

Mr. Rodriguez alleged that his appointed counsel for the offense in which he is currently incarcerated switched sides and worked for the prosecution for the same offense which created a conflict of interest for her as a prosecutor, denied him the effective assistance of his counsel and denied him Due process.

Did the Fifth Circuit err in deferring to the state court ruling that Mr. Rodriguez was not prejudiced by counsel switching sides in this offense.

Did the state court deny Mr. Rodriguez Due Process when it failed to follow the jurisprudence of the state legislature and higher courts.

## TABLE OF CONTENTS

Questions presented	i
Table of Contents	ii
Table of Authorities	iii
Opinion below	1
Jurisdiction	1
Statutory and constitutional provisions involved	2
Statement of the Case	4
Reasons for Granting the Writ	
I. The fifth Circuit's misapplication of the standard of Miller-El warrants this Court's attention	4
Conclusion	5
Appendix	
Decicion of the Court of Criminal Appeals	1a
Decision of the District Court	2a
Decision of the Fifth Circuit	3a

## TABLE OF AUTHORITIES

### CASES

Ex Parte Spain, 589 S.W.2d 132(Tx.Cr.App.1979)	5
Landers v. State, 256 S.W.3d 295(Tx.Cr.App.2008)	5
Miller-El v. Cockrell, 537 U.S. 322 (2003)	4

### Statutes

28U.S.C. §1254	1
28 U.S.C. §2254	2
T.C.C.P. art. 2.01	3
U.S. CONST. AMEND. VI	2
U.S. CONST. AMEND. XIV	2

PETITION FOR WRIT OF CERTIARI TO  
THE FIFTH COURT OF APPEALS

The Petitioner, Fernando Rodriguez, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Fifth Circuit Court of Appeals, rendered in these proceedings on April 16, 2021.

OPINION BELOW

The Texas Court of Criminal Appeals denied petitioner's writ without written order. the opinion is unpublished, and reprinted in the appendix to this petition at page 1a. The District Court granted Summary judgment for the Respondent, the opinion is unpublished, and reprinted in the appendix to this petition at page 2a. The Fifth Court of Appeals denied petitioners application for a Certificate of Appealabilitythe opinion is unpublished and reprinted in the appendix to this petition at page 3a.

JURISDICTION

The original opinion of the Fifth Circuit Court of Appeals was entered April 16, 2021.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

## STATUTORY AND CONSTITUTIONAL 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 Counsel for his defence.

### 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. §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.

TEX. CODE CRIM. PROC. art. 2.01

If a prosecuting attorney has formerly represented the defendant in the "same" criminal matter as that currently being prosecuted, he is statutorily disqualified.

## STATEMENT OF THE CASE

Mr Rodriguez was convicted of the murder of Jose Gonzalez. Two days later Christina Alva was appointed on February 01, 2011. She was his attorney until the court appointed Fausto Sosa on April 06, 2011. Attorney Alva stated she did not remember any specific conversations with Mr. Rodriguez. Petitioner stated that he discussed the specifics of the case with Ms. Alva. This fact was developed at the motion for new trial.

The state Appeals Court affirmed Petitioner's conviction and The Texas Court of Criminal Appeals denied Discretionary Review.

The Federal District Court granted Respondent's motion for Summary Judgement and The Fifth Circuit denied petitioner a Certificate of appealability.

## REASONS FOR GRANTING REVIEW

### I. THE FIFTH CIRCUIT'S MISAPPLICATION OF THE STANDARD OF MILLER-EL WARRANTS THIS COURT'S ATTENTION

The fifth Circuit's opinion misapplied the Miller-El v. Cockrell, 537 U.S. 322, 336(2003). Specifically whether 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.

The Texas Legislature has ruled petitioner's ground a conflict of interest. The legislature has decreed that this conflict

of interest is both obvious and actual. *Ex parte Spain*, 589 S.W. 2d 132, 134 (Tx.Cr.App.1979), *Landers v. State*, 256 S.W.3d 295 (Tx.Cr.App.2008)

For a prosecuting attorney to "switch sides" in the same criminal case is an actual conflict of interest and constitutes a due process violation, even without a specific showing of prejudice. *Landers*.

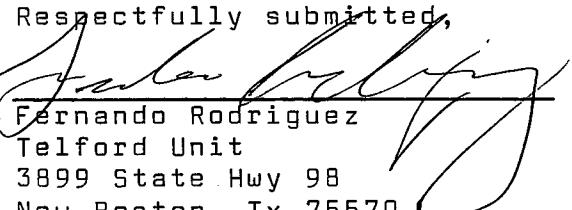
This is the issue that the court's have misinterpreted. At the motion for new trial and the state habeas hearing the court focused on making petitioner show harm. In the court's eyes petitioner could not prove he was harmed by Ms. Alva switching sides. The Problem with that is he does not have to show any specific harm. *Landers* at 304. Jurists of reason could and would disagree with the district court's resolution of this constitutional claim.

Because the Fifth Circuit has truncated the scope of *Miller-El v. Cockrell*, 537 U.S.322, this Court must grant certiorari.

#### CONCLUSION

For these reasons, a writ of Certiorari should issue to review the judgment and opinion of the Fifth Circuit Court of Appeals.

Respectfully submitted,

  
Fernando Rodriguez  
Telford Unit  
3899 State Hwy 98  
New Boston, Tx 75570