

In The Supreme Court of The United States
Washington, D.C.

22-5140

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Nolberto Lemus

petitioner,

Lower Tribunal NO. 21-11916-15

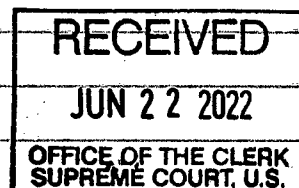
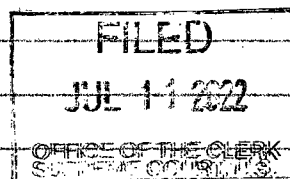
v.

Department of Corrections

Respondent.

ORIGINAL

Petition For Writ
of CERTIORARI



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Question Presented

whether the Eleventh Circuit Court Judge properly applied the correct standard when it denied the petitioner's Certificate of Appealability and Motion For Reconsideration of such denial.

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List of Parties

Nolberto Lemus, Petitioner

Ricky Dixon, Secy Florida Dep't of Corrections

Ashley Moody, Attorney General

JURISDICTION

The jurisdiction of this Honorable Court is invoked under 28 USC § 1254(1).

This Court has jurisdiction, on Certiorari, to review a denial, by a circuit judge or panel of a Federal Court of Appeals, of a Certificate of Appealability. See *Buck v. Davis*, 137 S.Ct. 759 (2017); *Welch v. United States*, 136 S.Ct. 1287 (2016).

Statement of The Case

On September 3, 2015 the petitioner was found guilty by a Jury of second-degree murder with a deadly weapon. The petitioner was sentenced to 300 months in prison. The petitioner's direct appeal and Rule 3.850 motion were denied, and petitioner then filed a §2254 petition raising two claims:

- (1) Ineffective assistance of Counsel for failing to investigate and call witnesses.
- (2) Trial Court erred by denying petitioner's Motion For New Trial

Reasons For Granting The petition

This Honorable Court should exercise its discretionary jurisdiction and grant the instant petition, because the record shows that the Eleventh Circuit Judge exceeded the scope of the COA analysis.

In a relevant and controlling case, this Honorable Court held that:

- (1) A Court of Appeals should limit its examination at the COA stage to a threshold inquiry into the underlying merit of the claims, and only ask if the district court's decision was debatable

And that:

- (2) A claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail. *Buck v. Davis*, 197 L.Ed 2d 1 (2017), 137 S.Ct. 759 (2017)

Furthermore, the same Eleventh Circuit, in *Welch v. United States*, 194 L.Ed 387 (2016), this Court, on Certiorari, held that:

"obtaining a COA does not require a showing that the appeal will succeed" and that "a Court of appeals should not decline the application merely because it believes the applicant will not demonstrate an entitlement to relief." (Citing *Miller-Ell V. Cockrell*, 537 U.S. 322, 337 (2003)).

Additionally, the Welch Court concluded as follows:

"The decision under review here is the single-judge order in which the Court of Appeals denied Welch a COA. Under the standard described above, that order determined not only that Welch had failed to show any entitlement to relief but also that reasonable jurists would consider that conclusion to be beyond all debate. ... For these reasons, the judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion."

It is well-settled that pro se pleadings are held to less stringent standards than pleadings that are drafted by attorneys and are liberally construed. See *Tannenbaum v. U.S.*, 148 F.3d 1262, 1263 (11th Cir. 1998). See also *Simmons JR v. U.S.*, 29 Fla. L. Weekly Fed S 33 (2021), wherein the Honorable Justice Sotomayor and KAGAN expounded on pro se litigant pleadings relating to habeas corpus petitions. (See page 4 of Appendix C)

In the instant case, the Eleventh Circuit Court denied the COA on the grounds that "reasonable jurists would not debate the district court's determination that the state court's resolution of Claim 1 was not contrary to, or an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984), or an unreasonable interpretation of the facts" (also mentioning that petitioner had not included Ms. Rios's affidavit when he filed his 3.850)

Furthermore, the court also based its COA denial on

the ground that "The state court's finding that Mr. Lemus had failed to establish that Ms. Rios witnessed the events was not an unreasonable interpretation of the facts, given that Ms. Garcia, another witness, testified otherwise, and Mr. Lemus only provided his own self-serving statements" (See Appendix A)

But, first of all, a 3.850 motion claim that alleges that counsel was ineffective for failure to call an exculpatory witness does not require that the uncalled witness' affidavit be attached to the motion.

Secondly, how can the petitioner be accused of failing to establish that Ms. Rios witnessed the event, when the lower court did not conduct an evidentiary hearing that would have allowed him to do so.

Furthermore, the court's position that Ms. Garcia (a state witness) testified otherwise, and that petitioner "only provided his own self-serving statements" is exactly the reason why counsel was ineffective for not calling Ms. Rios to trial to testify as to what she saw from the window.

At petitioner's Motion For Reconsideration, he pointed out to the court that Ms. Garcia herself had testified that other people had witnessed the event. (See Appendix C) (where at page 3 petitioner clearly pointed out the following);

C Specifically, petitioner explained the following:

"
Ms. Garcia's Trial Testimony states:

"
well, since it is very close and everything can be heard, I went, like everybody else, to find out what was happening" (T-332)

"
Q. And I believe you said something along the lines of, 'I went to check like everyone else.' Is that your statements today?"

"
A. yes, because I was not the only person who saw that there were some other people who are not here today." (T-342)

C At T-345 to T-346, where Ms. Garcia also testified that other people could see from the window.

The record clearly shows that Zoila Rios was one of the persons that witnessed the incident. Furthermore, the alleged failure to attach Ms. Rios' affidavit should not be fatal to Claim 1, because there was also a subclaim of Counsel's failure to investigate, which was never addressed. See *Holsomback v. White*, 133 F.3d 1386 (11th Cir. 1998) ("... 'We find, however, that, given the liberal construction to which pro se pleadings are entitled, Holsomback's pleadings can fairly be read to assert a broader claim'")

C The Eleventh Circuit denied petitioner's Motion For Reconsideration on the ground that petitioner

C "has offered no new evidence or arguments of merit to warrant relief." (see Appendix B)

The record shows that the Eleventh Circuit conducted a merits based analysis and ruling, which has been previously condemned by this Court. see *Tharpe v. Sellers*, 199 L Ed 424 (2018) (citing *Eronzalez v. Sec'y DOC*, 366 F.3d 1253, 1267 (11th Cir. 2004)).

Furthermore, contrary to the lower court's order, petitioner properly claimed claim one and subclaim one of his 3.850 motion. (See Appendix D)

C In addition, it is well-settled that a state court's determination of constitutionally effective assistance is not entitled to a presumption of correctness under 28 U.S.C. § 2254(d); see *King v. Strickland*, 714 F.2d 1481, 1485 (11th Cir. 1983)

Counsel's failure to call Ms. Rios was prejudicial to the defense of self-defense, and violated petitioner's Confrontation Rights. See *U.S. v. Burke*, 345 F.3d 416, 426 (6th Cir 2003) (The right to confrontation is basically a trial right) (quoting *Barber v. Page*, 390 U.S. 719, 725 (1968)); see also *Mason v. Allen*, 605 F.3d 1114, 1123, 1124 (11th Cir 2010), where the court held that:

"To determine the impact of a Confrontation Clause violation, courts should consider the importance of the witness' testimony in the prosecution's case,

whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, and of course, the overall strength of the prosecution's case."

In *Maryland v. Craig*, 497 U.S. 836, 845 (1990), the Court held that:

"The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact."

In the instant case, Ms. Rios' exculpatory eye-witness was critical to confront and contradict Ms. Garcia's trial testimony on the material point of whether petitioner had acted in self-defense when he struck Mr. Huerta once with a bat after Mr. Huerta attacked petitioner with a wooden board with nails on it.

CONCLUSION

The petition for a writ of Certiorari should be granted because the Eleventh Circuit Court applied the improper standard to deny petitioner's COA, in violation of this Court's controlling precedent in *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), and *Miller-El v. Cockrell*, 537 U.S. 322 (2003).

Respectfully submitted,

~~Ally~~
Nolberto Lemus

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