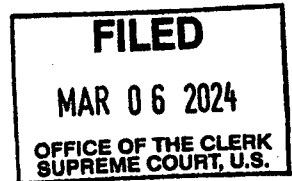


23-7308

No. 22-cv-06388-MKV

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES
_____ Term, 2024



MARVIN HOLMES

Petitioner,

v.

MARK MILLER, Superintendent of Green Haven Correctional Facility

Respondent,

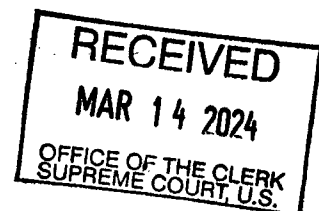
ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

Marvin Holmes

Petitioner, Pro Se
Green Haven Corr. Fac.
594 Route 216
Stormville, N.Y. 12582

March 4, 2024



QUESTION PRESENTED

1. Did the Court of Appeals violate Appellant's Constitutional right to Due Process by not issuing a Certificate of Appealability?

2. Did the District Court violate Appellant's Constitutional right to Due Process by failing to grant a hearing for reconsideration or rehearing en banc?

3. Was the District Court decision to adopt the Report & Recommendation contrary to well settled Federal Law that violated Appellant's Constitutional right to Due Process?

4. Was the District Court confronted with substantial Constitutional violations in Appellant's Petition for Writ of Habeas Corpus, and;

5. If so, did the District Court violate Appellant's right to Due Process by finding that there were no substantial Constitutional Claims made therein?

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PETITION FOR WRIT OF CERTIORARI

Marvin Holmes, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The decision of the Court of Appeals denying the Application for a Certificate of Appealability is attached as Appendix B. The Decision of the District Court denying the Petition for a writ of habeas corpus is attached as Appendix A. District Court referral to Magistrate Judge Netburn is attached as Appendix C.

JURISDICTION

On February 9, 2024 the Court of Appeals denied the application for Certificate of Appealability. The jurisdiction of this Court is invoked under 18 USC §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions:

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STATEMENT OF THE CASE

Appellant, Marvin Holmes, respectfully petitions for a writ of certiorari to appeal the Court's decision in *Holmes v. Mark Miller* 22-cv-06388-MKV, which denied Appellant's Motion for Reconsideration (District Court) and Certificate Of Appealability, rehearing en banc (2nd Cir.).

This petition is based on the fact that the Court should have issued a COA as the application made a showing of the denial of constitutional right.

The objective of this Writ is to obtain review of the Order of the United States Southern District Court and the United States Court of Appeals Second Circuit. As well as, an order vacating said Order(s) and remanding the matter, with instructions, for an appeal to be submitted and decided based upon the merits.

By the filing of a pro se petition in the U.S. District Court for the Southern District of New York, entitled Holmes v. Miller, 22-cv-6388 Appellant sought issuance of a writ of habeas corpus. Relevant to the matter at bar Appellant sought review based upon, 1) deprived Brady material; 2) denial of effective assistance of counsel; 3) Appellate Division failed to address the claims in 440.10 motion denied by the Supreme Court, New York County; 4) Appellate Division wrongly applied the actual innocence doctrine. In that, Appellant was Order by then Chief Judge Swain to file a Declaration showing why the writ should not be dismissed as time barred. (ECF No. 3).

Appellant responded in kind outlining the reason for the delay. Apparently, then Chief Judge Swain accepted Appellant's reason for the delay and Ordered that a response to the claims be filed. (ECF No. 4)

The case was forwarded to District Judge Mary Kay Vyskocil, who referred the matter to Magistrate Judge Sarah Netburn for a report and recommendation. (ECF No. 13).

Respondent submitted their response urging the court to dismiss the writ for: 1) petition is time barred; 2) the 440.10 motion did not toll the statute of limitation. (ECF No. 9, Opp. Mem. At 37).

The District Court adopted the Report and Recommendation on November 20, 2024 stating the following:

"The Court has reviewed the R&R for clear error. The court finds none and agrees with the Magistrate Judge Netburn that the petition is time-barred and that Mr. Holmes is not entitled to equitable tolling or the actual innocence exception." (ECF No. 16).

A Reconsideration motion was filed in the Southern District Court on the basis wrong application of the gateway standard that overcomes the otherwise barred 1-year limitation. (ECF No. 19).

Also, a Notice of Appeal (C.O.A.) was filed with the United States Court of Appeals Second Circuit who issued Docket No. 23-7062. (ECF No. 20). Note, Second Circuit stayed the Appeal until the Reconsideration motion was resolved. Then on February 9, 2024 the Second Circuit Denied Appellant's Certificate Of Appealability, on the ground that "Appellant has not shown that 'jurist of reason would find it debatable whether the district court was correct in its procedural ruling,' as to the untimeliness of the Appellant's petition filed pursuant to 28 U.S.C. §2254. Slack v. McDaniel, 529 U.S. 473, 478 (2000).

As to the matter below, Appellant presented litigation to the satisfaction of 28 U.S.C. §2253(c)(2) which directs a C.O.A. may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right."

This Court in Slack v. McDaniel, 529 U.S. 473, 483-84 (2000) (internal quotations and citations omitted) interprets this requirement as follows:

To obtain a COA under §2253(c), a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that... includes showing that reasonable jurist could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.

Clarifying this standard in Miller-El v. Cockrell, 537 U.S. 322 (2003), the Supreme Court stated:

.....This threshold inquiry does not require full consideration of the factual or legal basis adduced in support of the claims. In fact, the statute forbids it... [O]ur opinion in *Slack* held that a COA does not require a showing that the appeal will succeed. Accordingly, a court should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief. The holding in *Slack* 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 [at all]. After all, when a COA is sought, the whole premise is that the prisoner "has already failed in that endeavor." *Id.* at 336-37

The Application For A COA Demonstrated That Jurists Of Reason Would Find It Debatable As To Whether The District Court's Ruling Was In Error By Denying The Claim

By this motion, Appellant seeks a rehearing or rehearing en banc for the issuance of a COA. The COA should have been issued since jurists of reason would find it debatable as to whether the district court's ruling was in error when it denied Appellant's Petition for a writ of habeas corpus. The latter contended that when the lower court and District Court relied on procedural grounds to dismiss appellant's petition.

The United States Supreme Court has held that "In setting forth the preconditions for issuance of a COA under §2253(c), Congress expressed no intention to allow trial court procedural errors to bar vindication of substantial constitutional rights on appeal." (*Slack v. McDaniel*, 529 U.S. 473 [2000]).

In this case, the District Court was wrong to summarily dismiss the habeas petition, the Court of Appeals should have granted the COA, and as a result of both court's erring, the request for reconsideration and/or presentment of COA should have been granted.

This being the case, appellant herein can demonstrate that he was convicted in violation of the Constitution and demonstrate that the District Court was wrong to dismiss the petition on procedural grounds, 1-year Statute of Limitation.

To that end, Appellant submits to the court that (a) under ADEPA, Appellant was entitled to be issued a COA by the Court of Appeals, due to the fact the moving papers demonstrated a substantial showing of a denial of Appellant's constitutional rights, mainly, right to Brady

material and ineffective assistant of counsel, that a reasonable jurist could debate that such right should have proceeded. See, 28 U.S.C. §2253(c).

Also, the authority for this standard lies in the Court's ruling in Barefoot v. Estelle, 463 U.S. 880, 894 (1983). Congress adopted the meaning the Barefoot ruling gave to the words in the standard. Williams v. Taylor, 529 U.S. 362 (2000).

With the extension of Barefoot, the standard also calls for the showing that reasonable jurists could debate that the petition should have been resolved in a different manner or that the issues presented were "adequate to deserve encouragement to proceed further." Barefoot at. 893.

Appellant's due process right was violated by the District Court's failure to rule on the merits and basically foreclose Appellant from proceeding further since it only ruled on procedural grounds and not the substantive, meritorious aspect of the petition

The only recourse for Appellant herein, was to demonstrate, as he did to the Court of Appeals, that jurists of reason would find it debatable whether his petition stated a "valid claim of the denial of a constitutional right," and that jurists of reason would find it debatable whether the District Court was correct in its procedural ruling. Slack v. McDaniel at. 484

This construction by the Court gives meaning to the requirement that Appellant show the substantial underlying constitutional claims and is in conformity with the standard of "substantial showing," (Barefoot, at 893) and the statute (28 U.S.C. §2253 (c)).

The reasons set forth herein illustrates the underlying constitutional issues originally presented in the petition. It was in conformity with the statute, the application for C.O.A. and the Reconsideration motion.

REASONS FOR GRANTING THE WRIT

(a) DID THE COURT OF APPEALS VIOLATE APPELLANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS BY NOT ISSUING A CERTIFICATE OF APPEALABILITY OR GRANTING A HEARING; (b) WAS THE DISTRICT COURT CONFRONTED WITH SUBSTANTIAL CONSTITUTIONAL VIOLATIONS IN APPELLANT'S PETITION FOR WRIT OF HABEAS CORPUS, AND; (c) IF, SO, DID THE DISTRICT COURT VIOLATE APPELLANT'S RIGHT TO DUE PROCESS BY FINDING THAT THERE WERE NO SUBSTANTIAL CONSTITUTIONAL CLAIMS MADE THEREIN.

An appeal to the United States Court of Appeals is a continuation of the litigation in the District Court. Even so, the United States Supreme Court has ruled that it is a distinct step. Hohn v. United States, 524 U.S. 236, 241 (1998).

Under AEDPA, a appellate case is commenced upon the filing of an application for COA, Hohn, 241. In order for the Supreme Court to evaluate whether the Court of Appeals should have granted a COA, a determination must be made of what appellant herein must show to satisfy the requirements of §2253(c).

28 U.S.C. §2253(c) requires that a COA may issue only upon the substantial showing of the denial of a constitutional right. In this case, the Respondent will contend that it is the State's position that no appeal can be taken due to the time lapse, regardless of any "denial of a constitutional right."

It is unequivocal that the claim presented in the original writ application to the District Court and the COA to the Court of Appeals fell within the purview of 28 U.S.C. §2253(c)(2). The claim was based upon the denial of a Constitutional right.

The United States Supreme Court has ruled long ago that the "Suppression by prosecution of evidence favorable to the accused upon request violates due process where evidence is material to either guilt or punishment irrespective of good faith or bad faith of prosecution." See, Brady v. Maryland, 373 U.S. 83 (1963). In elaborating on this Brady material the Supreme Court extended the definition to ensure there was no mistake as to the prosecution constitutional duty to disclose when the Court held: "The proper standard of materiality must reflect our overriding concerns with the justice of finding of guilt. Such finding is permissible if only supported by evidence establishing guilty beyond reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exists, constitutional error was committed. See, U.S. v. Agurs, 427 U.S. 97.

Based on these holdings, and their progeny, Appellant clearly and unequivocally demonstrated in both the original writ of habeas corpus and COA that the newly discovered evidence, results of DNA found on the metro card that were recovered at the scene of the crime and not produced at trial, in fact, prosecutor did not turn this crucial piece of evidence over until approximately one & half years after guilty verdict, were Brady material that should

have been disclosed at trial for, 1) it was exculpatory and impeachable; and 2) failure to disclose this evidence deprived the trial jury from hearing all evidence amounting to undermining the confidence in the jury, thus, denial of a fair trial and constitutional due process.

In recommending the denial of the claim, the R&R, as adopted by the District Court, evaluated and admitted:

"The only new evidence supporting Holme's claim is a DNA sample from the MetroCard recovered at the crime scene, which was disclosed on May 14, 2009, after his trial....This evidence is not exculpatory.."

As such, the R&R, and District Court held Appellant did not meet the standard in Schulup v. Deno, 513 U.S. 298, 324 (1995) and denied the petition on procedural grounds, 1-year statute of limitation.

Here, the R&R and District Court was simply wrong in their determination under Schulup. The only requirement in Schulup is that it be shown that the evidence is "new" and "reliable." Clearly, the DNA sample was new by the admission of Magistrate Netburn and it definitely is reliable based on the fact that it was scientific evidence that is undisputable, thus, meeting both requirements.

Not only did the R&R and the District Court failed to acknowledge this Court's further explanation in the holding. The Court further held: "For a claim of actual innocence to be credible, claim requires habeas petitioner asserting actual innocence in successive or abusive petition to support his allegations of constitutional error with new reliable evidence, whether it be exculpatory scientific...."

Indeed, DNA sample found on physical evidence (metrocard) was either by, 1) saliva; 2) hair particle; 3) blood; or 4) sweat all that falls within the meaning of "scientific evidence. This, coupled with the fact that said DNA sample belong to someone other than the person accused (Appellant) of committing the crime. Therefore, the R&R and District Court's ruling was contrary to well establish federal law and the District Court should have proceeded to here the Brady and ineffective assistance of counsel constitutional claims.

Further, the R&R and District Court wrongly applied the holdings in Schulp when the R&R relied on, "and 'show that it is more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt.'"

The holding of this court when the Court addressed this point was based on "successive and abusive petition. Here, this is Appellant's first writ of habeas corpus filed, thus, no abusive or successive standards are applicable, hence, misapplication of clearly establish federal law. Further, to eliminate the miscarriage of justice the Brady and ineffective constitutional claim should have made it through the preverbal "gateway" within the meaning of Schulp v. Deno and the merits determined by the District Court.

There appears to be facts and circumstances which could reasonably lead jurists to reach a different conclusion. One, during trial it was determined by the prosecution witness, via photographs as Exhibits, that the metrocard was recovered in the hallway, several feet away from the door and the deceased with samples of DNA from someone else, that was not known during trial.

This DNA sample, had it been produced at trial, would have revealed who the DNA belong to, which, in turn, would have allowed the following line of questioning: 1) how did your DNA get on physical evidence found at the scene of the crime?; 2) Were you affiliated with Ms. Woods in any capacity?; Did you know Mr. Woods?; Did Mr. Woods allow you on the premises prior to his untimely demise?

Further, if the DNA sample results were produced at trial it could have been used in combination with the bloody palm print on the wall and in the bedroom belonging to another person that was not Appellant. As such, Appellant would have been in position to present this evidence to the jury and ask, 1) how did two sets of DNA found at the scene of the crime belonging to two different people; yet, I am being charged with committing the murders?; 2) Did the DNA sample belonging to law enforcement found taint the entire crime scene?

Here, it is contended that the R&R and District Court's decision to deny the writ of habeas corpus was contrary to clearly establish federal law. See, Schlup v. Delo, 513 U.S. 298 (1995). ("Schlup's claim of innocence, on the other hand, is procedural, rather than substantive. His constitutional claims are based not on his innocence, but rather on his

contention that the ineffectiveness of his counsel....and the withholding of evidence by the prosecution." [cases omitted]

Schlup further held: ("....First, Schlup's claim of innocence does not by itself provide a basis for relief. Instead, his claim for relief depends critically on the validity of his Strickland and Brady claims. Schlup's claim of innocence is thus 'not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass'...").

In light of the foregoing, issuance of a COA was warranted because reasonable jurist could debate whether the District Court's denial of the Petition was in error due to there being merit to the Claim that the was an unreasonable application of Federal Law pursuant to 2254(d)(1) and was an unreasonable determination of the facts in light of the fact that the DNA sample was clearly giving after the trial, as well as, the trial court and Appellant Division refusal to answer on the merits, on the Brady and ineffective claims.

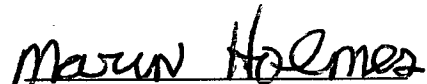
This Court should grant appellant's request for a writ of certiorari to examine whether or not a certificate of Appealability should have been issued based upon Appellant's previous application.

CONCLUSION

WHEREFORE, for the foregoing reasons, Your Honor should grant the writ of certiorari so that Appellant can fully brief the issues before the panel and any further or just relief deemed by Your Honor.

Dated: March 4, 2024

I DECLARE UNDER PENALTY OF PERJURY THAT THE ABOVE STATEMENT ARE TRUE AND CORRECT



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