

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

JACOB CHARLES STEELE,

Petitioner,

v.

KIM HOLLAND, Warden,

Respondent.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth
Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court’s decision in *Griffin v. United States*, 502 U.S. 46, 60, 112 S. Ct. 466, 474, 116 L. Ed. 2d 371 (1991) established a bright-line rule that a jury instruction which correctly states the law will not deny a criminal defendant’s Fifth and Fourteenth Amendment right to Due Process even when the evidence does not warrant the instruction.

2. Whether the Court’s decision in *Gilmore v. Taylor*, 508 U.S. 333, 343–44, 113 S. Ct. 2112, 2118–19, 124 L. Ed. 2d 306 (1993) established a bright-line rule that a jury instruction which correctly states the law will not deprive a criminal defendant’s Sixth and Fourteenth Amendment right to present a *complete defense*, even though the Court has acknowledged that “[T]he presence or absence of the heat of passion on sudden provocation—has been, almost from the inception of the common law of homicide, the single most important factor in determining the degree of culpability attaching to an unlawful homicide.’ (*Mullaney v. Wilbur*, 421 U.S. 684, 696, 95 S.Ct. 1881, 1888, 44 L.Ed.2d 508 (1975).” *Gilmore*, supra, 508 U.S. 333, 358, 113 S. Ct. 2112, 2126, fn. 4. Emphasis added.

3. Whether, in light of the Court’s decisions in *Middleton v. McNeil*, 541 U.S. 433, 437, 124 S. Ct. 1830, 1832, 158 L. Ed. 2d 701 (2004), *Boyde v. California*, 494 U.S. 370, 378, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990), a jury instruction that correctly states the law, but is not

warranted by the evidence, will offend Due Process if there is a *reasonable likelihood* that the jury applied it in such a way that affirmative defenses of self-defense were not considered and the State was relieved of *its* burden of proving, *beyond a reasonable doubt*, that the homicide was not justified, and that the defendant was not acting in a reasonable, but mistaken belief that it was self-defense.

4. Whether, in light of the Court's decisions in *Buck v. Davis*, 137 S. Ct. 759, 773, 197 L. Ed. 2d 1 (2017) and *Miller-El v. Cockrell*, 537 U.S. 322, 123 S.Ct. 1029, 1038 (2003), the Ninth Circuit erred by denying petitioner's request for a certificate of appealability.

PARTIES TO THE PROCEEDING

Petitioner is Jacob Charles Steele.

Respondent is Kim Holland, Warden.

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PETITION FOR WRIT OF CERTIORARI

Jacob Charles Steele respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit denying Petitioner's request for a certificate of appealability in this case.

OPINIONS BELOW

The Order of the Ninth Circuit (App., *infra*, 1a) is unpublished. The Order of the District Court denying Petitioner's motion for leave to proceed *in forma pauperis* (App., *infra*, 2b), the judgment of the District Court denying Petitioner's application for writ of habeas corpus (App., *infra*, 4c), and the order of the District Court denying Petitioner's Petition for Writ of Habeas Corpus and Certificate of Appealability (App., *infra*, 5d – 18d) are likewise unreported.

JURISDICTION

The Order of the Ninth Circuit denying the certificate of appealability was filed either December 15, or December 18, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution, Amendment V, provides that

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself,

nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The United States Constitution, Amendment VI, provides that

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.

The United States Constitution, Amendment XIV, § 1, provides that

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.

Title 28 United States Code § 2253 provides that

- (a) In a habeas corpus proceeding or a proceeding under section 2255 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 proceeding is held.
- (b) There shall be no right of appeal from a final order in a 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; or
 - (B) the final order in a proceeding under section 2255.
- (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

Petitioner is incarcerated at the High Desert State Prison at Susanville, California where he is serving the term of 42-years-to-Life imposed by the trial court following his conviction on one count of Second Degree Murder (Count 1), a violation of California Penal Code section 187, and one count of Criminal Threats, a violation of California Penal Code section 422. The sentence was enhanced by true findings that Petitioner personally discharged a firearm in the commission of the offense of second degree murder, as contemplated by Penal Code sections 12022.5, subd. (a)(1); 12022.53, subds. (b), (c), (d).¹ App. 5d.

As the California appellate court cast it:

Appellant, 23 years old in early 2012, was a native of Eureka who supported himself by selling drugs, and was a friend of the victim, Jerry George, who lived a few blocks away and also dealt drugs and bought cocaine from appellant. After an argument in front of several acquaintances on the night of January 21, 2010, appellant pulled out a .40 caliber gun and shot and killed George in appellant's home. The versions of how that shooting occurred and what happened thereafter varied somewhat, and we will summarize those versions.

...

On the evening in question, appellant's cousin, Richard Steele, was at appellant's apartment when George arrived. Also there were Shawn Hof, appellant's wife Lindsey, and a minor named Trey. Richard Steele also recalled the debate between appellant and George about young people driving Mercedes. He also recalled appellant asking George to leave, but the latter did not. According to Richard Steele, George stood up and said: "You are going to have to fucking move me from here." The two men then got face to face with appellant appearing "kind of ... irritated" and George said to him: "What are you going to do? Pull your fucking pistol out?" And, according to the cousin, appellant who regularly carried a pistol on his right hip at that point in time, did so, cocked it, and then moved backward from George. Richard Steele and appellant's wife Lindsey, left the room at that

¹ All further statutory references are to the California Penal Code, unless otherwise specified.

point, but the former heard a gunshot and came back into the room to find George lying on the floor “with a hole in his head.”

Richard Steele asked what had happened, and appellant replied that George had “rushed” him. Richard Steele told him he “should have called the police [but appellant] said no. He wasn’t going to lose his son.” The two decided to work to “get rid of Jerry’s body.” They commenced to do so by getting a tarp and wrapping George’s body in it. Appellant then called Hof, who had apparently also left appellant’s house a few minutes before. They then put the body, wrapped in the tarp, in the trunk of appellant’s car, and drove away and buried it at a location unspecified by appellant’s cousin. In the process, and while driving along Highway 101, Richard Steele threw the barrel of appellant’s gun out of the window of the car.

App. 6d-7d.

At trial, Petitioner Jacob Steele admitted that the bullet fired from the handgun he was holding struck and killed Jerry George, who was an invited guest at Petitioner’s home when the shooting occurred. The only real issues for the jury to determine were whether the killing was lawful or unlawful, and, if the latter, whether it was murder or manslaughter.

The difference between murder and the lesser included offense of manslaughter is the element of malice aforethought, which is found in the former, but not in the latter. Compare California Penal Code § 187, subdivision (a) (Murder) with Penal Code § 192 (Manslaughter). Here, Petitioner’s only viable defense to the murder charge was self-defense, either *perfect*, which would have made the killing lawful (CALCRIM 500, 505),² or *imperfect*, which would have reduced murder to involuntary manslaughter. CALCRIM 571. The state trial court gave those instructions, along with those on accident/misfortune (CALCRIM 510), provocation

² “CALCRIM” is the acronym for California’s pattern criminal jury instructions approved by the California Judicial Council. The relevant instructions are at pages 562 through 573 (Bates stamped by clerk) from volume 2 of the Clerk’s Transcript on Appeal, Humboldt County Superior Court case number CR1001497C, Court of Appeal, First Appellate District, case number A135606, containing jury instructions CALCRIM numbers 505, 3472, 3475, 510, 520, 521, 522, 570, 571 and 580. CALCRIM 3472 is App. 11d, *post*.

(CALCRIM 522), and sudden quarrel/heat of passion (CALCRIM 570). App. 11d.

But the trial court, over Petitioner's objection, also gave CALCRIM 3472, which states: "A person does not have the right to self-defense if he or she provokes a fight or quarrel with the intent to create an excuse to use force." There was no evidence that it was Petitioner who had provoked the quarrel with the physically much-larger Jerry George, and "...with the intent to create an excuse to use force," and the state appellate court's ambiguous finding that there was, is not supported by the record.³

Absent from the state appellate court's decision---in addition to any discussion of Petitioner's federal constitutional due process violation argument---were the following facts, drawn from the record and recited by the district court at App. 16d:

-Petitioner was aware at the time of the killing that Jerry George could not return to Louisiana because he had assaulted a police officer. 3 Tr. 760.⁴

-Petitioner was aware at the time of the killing that Jerry George had assaulted his live-in girlfriend, Hana Kim. 3 TR. 760 – 761.

³ The district court quoted and cited the unpublished decision of the California Court of Appeal, First Appellate District, Division Two, filed in this case on October 8, 2013, case number A135606, which include that court's finding that, "...the facts make clear that the jury could well have found that [petitioner] may have been provoking 'a fight or a quarrel' with George with the intention of trying to see if he could create enough tension between them to provoke George...[t]hus, per his cousin, Richard Steele, appellant became 'kind of...irritated' during the course of his argument with George, an irritation which may have derived from appellant's earlier suspicions that George might have stolen 'stuff out of his safe.'" App. 13d. But, the district court also cited and quoted the appellate court's acknowledgment that, "There may have been no testimony as to appellant's motive for behaving threateningly to George, but there certainly was evidence in the record that both men were behaving threateningly toward the other." App. 13d, italics in original; underlining added.

⁴ "Tr." refers to the Reporter's Transcript of Proceeding in Humboldt County Superior Court case number CR1001497C.

-Jerry George was 6' 3" tall and wore size 12 shoes, according to Ms. Kim. 1 Tr. 125 – 132.

-Prosecution witness Richard Steele testified that Jerry George looked like he was "going to punk Jake... [I]ike I said before, Jake's a 5'7 little wide (sic) dude from Eureka and Jerry is a 6' 4 black dude from Louisiana. The mentality is different." 2 Tr. 343.

-Richard Steele testified that Petitioner asked Jerry George to leave "four or five" times and used the word "please." 2 Tr. 355.

-Richard Steele testified that he did not recall saying that Shawn Hof had said, "We took care of that nigger," or words to that effect, but he did not hear Petitioner say it, and it was not something that Petitioner would say. 2 Tr. 339.

On his state court appeal, and on habeas in the district court, Petitioner alleged that his Sixth Amendment right to present a complete defense was denied by the giving of CALCRIM 3472 when there was no evidence to support it; that it did not apply. App. 14d. The state court construed the claim as one arising under state law, and held that the instruction was supported by "substantial evidence," and that any error in giving it was "clearly harmless." App. 13d.

The district court, according deference to the factual findings of the state court, ruled that there was evidence supporting the CALCRIM 3472 instruction (App. 17d), and that "...to the extent that Petitioner's claim is based on the state trial court giving an instruction on a factually inadequate theory, the Court denies the claim." App. 15d. Further, the district court ruled that "...the state court's rejection of Petitioner's claim was not an unreasonable application of Supreme Court precedent or based on an unreasonable determination of the facts in light of the evidence presented." App. 17d.

However, the district court never mentioned, let alone analyzed Petitioner's argument

that under either of the self-defense theories his requested and given jury instructions defined, “...the prosecution is required to prove, beyond a reasonable doubt, that Petitioner did not harbor such beliefs. See CALCRIM 505, 571.” Petition for Writ of Habeas Corpus, filed March 9, 2015, U.S. District Court (ND CA) number 15-cv-01084-BLF, docket/ECF 1-5.

Thus, Petitioner submits, the instruction also deprived him of the right to force the prosecution to carry *its* burden.

REASONS FOR GRANTING THE PETITION

I. The state court findings of fact to support the giving of the contrived self-defense instruction are not entitled to deference; the district court’s analysis on this point was flawed.

The Court has repeatedly reminded bench and bar that the presumption of correctness accorded state court factual findings may be rebutted by a showing that the findings “are not ‘fairly supported by the record.’” *Demosthenes v. Baal*, 495 U.S. 731, 735, 110 S.Ct. 2223, 2225 (1990) (per curiam). *See, also, Miller-El v. Cockrell*, 537 U.S. 322, 340, 123 S. Ct. 1029, 1041, 154 L. Ed. 2d 931 (2003) (“Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief. A federal court can disagree with a state court’s credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence.”)

Here, the factual determination at issue is the state appellate court’s finding that “substantial evidence” supported the CALCRIM 3472 charge. App. 14d. But, clearly, the evidence, to warrant the jury charge, must tend to show that Petitioner had provoked a fight or quarrel with Mr. George with the intent to thereby justify the killing of Mr. George. As noted, the state court found that there was NO testimony as to what Petitioner’s motive for behaving

“threateningly” toward the decedent, but that *finding* appears to overlook, or discount the testimony that, having been asked “politely” four or five times to leave Petitioner’s home, Mr. George had replied, “You are going to have to fucking move me from here...[w]hat are you going to do? Pull your fucking pistol out?” App. 6d. Those remarks were made by Mr. George, *not* Petitioner, who also heard the decedent call him “...was a fucking little punk.” 3 Tr. 779. George also said, ““You are going to have to shoot me to get out of here. You are going to have to kill me to make me leave.” (2RT 361.)

In sum, the evidence supporting the instruction consisted of the state court’s *speculation* as to how a jury *might* construe the exchange between the two men. App. 12d. However, the decision to give a requested jury instruction is made by the trial judge, not the jury, and this Court long ago held that, “He may not charge the jury ‘upon a supposed or conjectural state of facts, of which no evidence has been offered.’ *United States v. Breitling*, 20 How. 252, 254, 255, 15 L.Ed. 900.” *Quercia v. United States*, 289 U.S. 466, 470, 53 S. Ct. 698, 699, 77 L. Ed. 1321 (1933). It does not appear from Petitioner’s research that the Court has had occasion to disapprove, or even repeat that self-evident axiom.

Moreover, the wisdom of the *Quercia* Court is both instructive and pertinent:

So where the trial judge, in referring to the defendant's story of self-defense, said, ‘All men would say that. No man created would say otherwise when confronted by such circumstances,’ this court held that the comment practically deprived the defendant of the benefit of his testimony. ‘It was for the jury to test the credibility of the defendant as a witness, giving his testimony such weight under all the circumstances as they thought it entitled to, as in the instance of other witnesses, uninfluenced by instructions which might operate to strip him of the competency accorded by the law.’ *Allison v. United States*, *supra*. Similarly, where no testimony had been offered as to the previous character of the accused, it was prejudicial error for the trial court to comment unfavorably upon his general character.

Quercia, 289 U.S. 466, 471, 53 S. Ct. 698, 699; emphasis added.

In this regard, it must also be recalled that present at the scene at the time of the killing was Petitioner's wife, Lindsey, and his infant son, in addition to Shawn Hof, Richard Steele, a man named "Trey," and, of course, Petitioner and Jerry George. 3RT 766. It defies logic that such would be the venue for a *contrived* killing, and, as noted even the state appellate court acknowledged that the record was devoid of any evidence of Petitioner's "motive" in provoking a quarrel with Jerry George in order to justify the use of force.

The record here contains no *non-speculative* evidence that would warrant the instruction; Petitioner has rebutted the presumption of correctness of the state court findings "by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

II. Intimating, without factual support, that Petitioner contrived the verbal confrontation to justify the homicide rendered hollow the guarantee of a meaningful opportunity to present a complete defense.

In *Gilmore v. Taylor*, 508 U.S. 333, 113 S. Ct. 2112, 124 L. Ed. 2d 306 (1993), the Court appeared to discourage the argument that due process considerations bar jury instructions that prevent consideration of affirmative defenses tendered by an accused, at least to the extent that such a rule is said to draw its vitality from the Sixth Amendment right to present a complete defense. *Id.*, at 508 U.S. 343-344. However, Justice O'Connor's concurring opinion clarified that what the Court was deciding was whether that rule was "new" within the meaning of *Teague v. Lane*, rather than whether it was valid. *Id.*, at p. 352.

Indeed, Justice Blackmun's thoughtful dissent militates for just such a rule: "A useful analogy to the relation between voluntary manslaughter and murder in this case is the relation between self-defense and murder elsewhere in the criminal law. In those States in which self-defense is an affirmative defense to murder, the Constitution does not require that the

prosecution disprove self-defense beyond a reasonable doubt.” *Gilmore v. Taylor*, 508 U.S.

333, 359, 113 S. Ct. 2112, 2126–27. Justice Blackmun then explained that, “It is easy to see in the context of self-defense how the omission of an affirmative-defense instruction fundamentally denies the defendant due process.” *Id.*

Here, however, state law *does* require that, where either perfect, or imperfect self-defense is in play, the prosecution must disprove it beyond a reasonable doubt, *viz*:

The defendant is not guilty of murder/ or manslaughter if he was justified in killing Jerry George in self-defense. The defendant acted in lawful self-defense if:

1 The defendant reasonably believed that he was in imminent danger of being killed or suffering great bodily injury ;

2 The defendant reasonably believed that the immediate use of deadly force was necessary to defend against that danger;

AND

3 The defendant used no more force than was reasonably necessary to defend against that danger.

Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have believed there was imminent danger of death or great bodily injury to himself. Defendant's belief must have been reasonable and he must have acted only because of that belief. The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, the killing was not justified.

When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed.

If you find that the defendant knew that Jerry George had threatened or harmed others in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable.

A defendant is not required to retreat. He or she is entitled to stand his or her ground and defend himself or herself and, if reasonably necessary, to pursue an assailant until the danger of great bodily injury has passed. This is so even if safety could have been achieved by retreating.

Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.

The People have the burden of proving beyond a reasonable doubt that the killing was not justified. If the People have not met this burden, you must find the defendant not guilty of murder or manslaughter.

CALCRIM 505, Judicial Council Of California Criminal Jury Instruction 505, given by the trial court at 4 Tr. 1096. Underlining added.

As to the *imperfect* self-defense, the relevant instruction is at 2 CT 571, given by the trial court at 4 Tr. 1103:

A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed a person because he acted in imperfect self-defense or imperfect defense of another.

If you conclude that the defendant acted in complete self-defense or defense of another, his action was lawful and you must find him not guilty of any crime. The difference between complete self-defense or defense of another and imperfect self-defense or imperfect defense of another depends on whether the defendant's belief in the need to use deadly force was reasonable.

The defendant acted in imperfect self-defense or imperfect defense of another if:

1 The defendant actually believed that he or someone else was in imminent danger of being killed or suffering great bodily injury;

AND

2 The defendant actually believed that the immediate use of deadly force was necessary to defend against the danger;

BUT

3 At least one of those beliefs was unreasonable.

Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be.

In evaluating the defendant's beliefs, consider all the circumstances as they were known and appeared to the defendant.

If you find that Jerry George threatened or harmed the defendant or others in the past, you may consider that information in evaluating the defendant's beliefs.

If you find that the defendant knew that Jerry George had threatened or harmed others in the past, you may consider that information in evaluating the defendant's beliefs.

Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.

The People have the burden of proving beyond a reasonable doubt that the defendant was not acting in (imperfect self-defense/ [or] imperfect defense of another). If the People have not met this burden, you must find the defendant not guilty of murder.

CALCRIM 571, Judicial Council Of California Criminal Jury Instruction 571. Emphasis added.

The contrived self-defense instruction, given absent evidentiary support, made more onerous for the defendant, and less onerous for the prosecution, conviction for a lesser rather than a greater offense. *See Cool v. United States*, 409 U.S. 100, 104, 93 S.Ct. 354, 34 L.Ed.2d 335 (1972)

III. Intimating, without factual support, that Petitioner contrived the verbal confrontation to justify the homicide and thereby was not entitled to claim self-defense relieved the State of its burden of disproving, beyond a reasonable doubt, that the homicide was not in self-defense.

The district court relied on a published, intra-district decision to rule that because Petitioner had not claimed that CALCRIM 3472 was an incorrect statement of state law, and

there is no established authority prohibiting a trial court from instructing a jury on an irrelevant but accurate statement of law, Petitioner's claim was denied. App. 15d, citing and quoting *Fernandez v. Montgomery*, 182 F.Supp.3d 991, 1013 (N.D. Cal. 2016). That sweeping generality cannot be binding, particularly in light of this Court's ruling that, "In a criminal trial, the State must prove every element of the offense, and a jury instruction violates due process if it fails to give effect to that requirement." *Middleton v. McNeil*, 541 U.S. 433, 437, 124 S. Ct. 1830, 1832, 158 L. Ed. 2d 701 (2004).

It was the prosecution's burden to prove, beyond a reasonable doubt, that neither of Petitioner's self-defense theories applied. CALCRIM 505, 571. But telling the jury that neither theory applied if the self-defense was contrived by Petitioner to justify killing Mr. George, when there was no evidence that such was the case, made disproving self-defense easier for the prosecution.

IV. Reasonable jurists could debate whether the petition should have been resolved in a different manner, thus compelling issuance of a certificate of appealability

The Ninth Circuit denied Petitioner's request for a certificate of appealability following denial and dismissal of his habeas corpus application by the district court, because, the court said, "...[petitioner] has not made a 'substantial showing of the denial of a constitutional right.' 28 U.S.C. §2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)." App., *infra*, 1a.

As the Court said in the decision cited by the Ninth Circuit,

Under the controlling standard, a petitioner must "sho [w] that reasonable jurists 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.' ” 529 U.S., at 484, 120 S.Ct. 1595...

Miller-El v. Cockrell, supra, 537 U.S. 322, 336, 123 S.Ct. 1029, 1039.

As the Court also said,

The COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits. We look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason. This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it. When a court of appeals sidesteps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.

Id., at 537 U.S. 336-337, 123 S.Ct. 1039; emphasis added.

The Court more recently confirmed that the Certificate of Appealability analysis remains the same. “The COA inquiry, we have emphasized, is not coextensive with a merits analysis.” *Buck v. Davis*, 137 S. Ct. 759, 773, 197 L. Ed. 2d 1 (2017). The Court went farther, explaining that, “Of course when a court of appeals properly applies the COA standard and determines that a prisoner's claim is not even debatable, that necessarily means the prisoner has failed to show that his claim is meritorious. *But the converse is not true. That a prisoner has failed to make the ultimate showing that his claim is meritorious does not logically mean he failed to make a preliminary showing that his claim was debatable.*” Thus, when a reviewing court (like the Fifth Circuit here) inverts the statutory order of operations and “first decid[es] the merits of an appeal, ... then justif[ies] its denial of a COA based on its adjudication of the actual merits,” it has placed too heavy a burden on the prisoner *at the COA stage*. *Miller–El*, 537 U.S., at 336–337, 123 S.Ct. 1029. *Miller–El* flatly prohibits such a departure from the procedure prescribed by § 2253. *Ibid.*” *Buck v. Davis*, supra, 137 S. Ct. 759, 774, 197 L. Ed.

2d 1; emphasis added.

Petitioner submits that even though the Ninth Circuit avoided using the language that this Court said signified a merits-based decision by the Fifth Circuit in *Buck*, and instead used the language of the statute—not made “substantial showing of the denial of a constitutional right”---the denial of the COA was, in fact, based on the panel’s adjudication of the merits of Petitioner’s claim; it did not “limit its examination [at the COA stage] to a threshold inquiry into the underlying merit of [the] claims,” and ask “only if the District Court’s decision was debatable.” *Miller–El*, 537 U.S., at 327, 348, 123 S.Ct. 1029.” *Buck v. Davis*, 137 S. Ct. 759, 774, 197 L. Ed. 2d 1; underlining added.

Petitioner submits that reasonable jurists could debate the Fifth, Sixth and Fourteenth Amendments issues raised by his petition to the district court; the Certificate of Appealability should have issued.

CONCLUSION

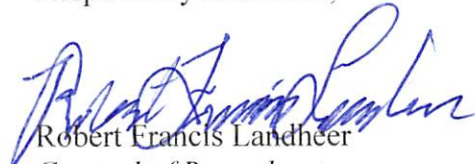
The testimony that Jerry George was 6’ 4,” while Petitioner is 5’ 7”; that Petitioner knew that Jerry George had physically assaulted Hana Kim *and a Louisiana lawman*; that Jerry George had angrily challenged Petitioner to remove him from Petitioner’s residence; that Jerry George had told Petitioner that he would need his gun to do it, all militated for a finding of at least *imperfect* self-defense (CALCRIM 571) because there was no requirement that the exact amount of force used itself had to be “reasonable,” as in the perfect self-defense (CALCRIM 505) scenario.

However, because the CALCRIM 3472 instruction subtly interjected, or suggested malice aforethought without proper evidentiary foundation, Petitioner submits that the error in giving that instruction “in the whole context of the particular case, had a substantial and

injurious effect or influence on the jury's verdict.” *Calderon v. Coleman*, 525 U.S. 141, 147, 119 S.Ct. 500, 142 L.Ed.2d 521 (1998) (citing *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993)).

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,



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