

65.
No.

Supreme Court of the United States

GILLMAN RODDY LONG,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 175885

Petition for Rehearing

Gillman Roddy Long

#10527-273

PO BOX 24550

Tucson, AZ 85734

Date 10-22-18

(ReSubmitted)

date: 11-14-18

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15. Salinas v. Texas 133 S.Ct. 2174 (2013)
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17. Strickland v. Washington 104 S.Ct. 2052 (1984)
18. Wigmore Evidence § 2272 p. 426
19. Long v. United States 721 F3d 927, 7-25-13 8th Cir.

Now comes Petitioner, Gillman Roddy Long pro-se, filing a petition of rehearing under this court's rule 44.2 of the United States Supreme Court, under the grounds that it's limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented.

Petitioner respectfully petitions the Supreme Court of the United States of America for a rehearing of the denied Writ of Certiorari (17-5885 filed 3-19-18, denied 10-9-18) to review the judgment of the United States Court of Appeals for the Eighth Circuit. Affirming the District Court (16-2820 filed 6-23-16, affirmed 11-09-17) Petitioner's 28 U.S.C. 2255 (filed 4-1-14, developed the record with evidentiary hearing on ineffective counsel, docket #19 evidentiary hearing (See Appendix) 6-17-15 before District Judge Karen E. Schreier, dismissed 5-19-16, granted a C.O.A. on both issues) motioned to vacate judgment and grant new trial (Criminal Case 09-50051-01 docket #273; #277, filed 1-19-12, denied 4-9-12, docket 287), Petitioner's direct appeal (12-1959 filed 4-20-12 Court of Appeals affirming District Court 7-25-13).

Petitioner now brings to the United States Supreme Court's attention that the Petitioner has demonstrated due diligence on the claims of the Fifth Amendment violations and Sixth Amendment violations that have been stripped from his citizenship, to which all citizens of the United States of America are guaranteed in the Constitution of the United States of America.

I' (a). Memorandum of Law

The government violated Petitioner's Fifth Amendment privilege against self-incrimination by presenting during its case-in-chief his prearrest, pre-Miranda warnings invocation of the privilege while being questioned by law enforcement, and by commenting during its closing argument that Petitioner did not testify at trial and had not denied the accusations against him. Petitioner was denied his Sixth Amendment right to effective counsel as a result of trial counsel's failure to object to or otherwise make a motion to prevent the government from presenting, during its case-in-chief, his invocation of the Fifth Amendment privilege against self-incrimination as though it were his confession; and by the failure to object to the government's argument that Petitioner did not testify at trial and that he had not denied the allegations against him.

I (b). Testimony by Government at trial

At Long's trial, Agent Rice testified for the government about the interview.

Q. How did you begin this interview?

A. I reminded him that we were there to talk to the-talk to him about the allegations that had been made regarding himself and [A.P.], and asked him again when was it that he met Brenda . . . and began a relationship with her.

Q. At one point did you turn his attention specifically to his contact with [A.P.]?

A. Yes.

Q. How did you do that?

A. Well, I was asking him when he lived with Brenda and then I said that we wanted to talk about specifically what happened between he and [A.P.].

Q. What did he say?

A. He described an incident-sorry. I wanted to talk to him about any kind of sexual contact. He described an incident in which he said he was sitting at the computer in the house where he lived with Brenda . . . and described that [A.P.] came up and rubbed her breasts on his back. Then he said that he stood up and pushed [A.P.] away from him.

Q. How did the interview go from there?

A. Well, he wanted to-he wanted to discuss peripheral issues and I said that I really want to just concentrate on the sexual contact between you and [A.P.].

Q. What did he say?

A. He said, "I do not want to incriminate myself. I would like to stop talking."

Q. What did you do?

A. We stopped the interview.(Trial Tr. 281-82.)

On cross-examination, Long's attorney questioned Agent Rice as follows:

Q. Now, you talked about the fact he said, "I do not want"-at the end of the second statement he said, "I do not want to incriminate myself." You said something along those lines?

A. That's exactly what he said.

Q. You don't know what he meant by that? You don't know what he thinks that word means, correct? You don't know what he meant by it, do you?

A. It seemed pretty clear to me.

Q. Well, you don't know if he maybe thought that just saying he lived there during a time frame was going to get him into trouble, correct?

A. That didn't seem to be the meaning.

Q. Well, he didn't say anything else around it, did he?

A. He said, "I don't want to incriminate myself; I want to stop talking."

Q. Okay. So-but you don't know what he's referring to as what he might say that would incriminate himself, do you? You have no idea what he was referring to?

A. I had an idea.

Q. Well, you had-you had what you thought it was, but you are not in his brain, right?

A. I am not in his brain.

Q. You don't know what he was thinking about, do you?

A. No.

Q. Because you don't read minds?

{721 F.3d 923} A. Correct.(Trial Tr. 290-91.)

On redirect examination, the government revisited the issue, briefly questioning Agent Rice:

Q. Agent Rice, during the second interview when right before the defendant said, "I don't want to incriminate myself,["] the question immediately before that where you reported you asked him about what happened between him and [A.P.], correct?

A. Yes.(Trial Tr. 296.)

Before moving to the next witness, the court gave the jury the following instruction in regards to Long's statement that he "did not wish to incriminate himself":

Right before we took our break, you heard testimony from Agent Rice that Gillman Roddy Long, also known as Dave Gillman Long, made a statement to the Federal Bureau of Investigation and it's for you to decide first whether Gillman Roddy Long, also known as Dave Gillman Long, made the statement; and second, if so, how much weight you should give to it. In making these two decisions, you should consider all of the evidence including the circumstances under which the statement may have been made.(Trial Tr. 305.)

Prior to closing arguments, the court instructed the jury that "the fact that the defendant did not testify must not be discussed or considered by you in any way when deliberating and arriving at your verdict." (Trial Tr. at 408.) Then during the government's rebuttal closing argument, the prosecutor started her argument to the jury this way:

MS. COLLINS: "I don't want to incriminate myself." That was what Gillman Long said to Agent Sherry Rice when she asked him about sexual contact between him and [A.P.]. . . . What was his response? "I don't want to incriminate myself."

Ladies and gentlemen, you can never use against somebody when they invoke their right to remain silent. You can't use that Mr. Long didn't testify in this trial; you cannot use that against him. The law says he has an absolute right to remain silent and he had the right not to talk to Agent Sherry Rice either time she spoke to him, but he chose to speak to her. And when he did that, that gives you the ability to scrutinize what he said. He blames [A.P.] a couple different times; he blamed her saying, "Yeah, she came up behind me." You know what he didn't say? He sure didn't say, "I didn't do it."

MS. COLBATH: I am going to object, Your Honor. He did.

THE COURT: Ladies and gentlemen, you need to rely on what you believe the evidence is and what you find the evidence is.

MS. COLLINS: And there was a couple different things I am going to rely-ask you to rely on your memory as well that defense counsel said were certainly not correct either. But if you will go back and listen and look at your notes, at no point did Gillman Long say, "I didn't do this," when

he was confronted with these accusations. He says, "[A.P.] came up behind me at the computer and put her arms around me, pressing her breasts up against my back." And then he ended the interview by saying, "I don't want to incriminate myself."

We are asking you not to leave your common sense at the door. If somebody doesn't want to incriminate themselves, it means any sort of statement as to that topic that they are being asked for would get them in trouble.(Trial Tr. 442-43.)

I (c). Grounds for rehearing, Fifth Amendment and Sixth Amendment

1. The government violated Petitioner's Fifth Amendment privilege against self-incrimination by presenting during its case-in-chief his prearrest, pre-Miranda warnings invocation of the privilege while being questioned by law enforcement,

2. by commenting during its closing argument that Petitioner did not testify at trial,

3. that Petitioner had not denied the accusations against him.

4. Petitioner was denied his Sixth Amendment right to effective counsel as a result of trial counsel's failure to object to or otherwise make a motion to prevent the government from presenting, during its case-in-chief, his invocation of the Fifth Amendment privilege against self-incrimination as though it were his confession;

5. and by the failure to object to the government's argument that Petitioner did not testify at trial,

6. and that Petitioner had not denied the allegations against him.

II. United States Supreme Court Precedent

The Fifth Amendment provides in relevant part, "No person...shall be compelled in any criminal case to be a witness against himself[.]" U.S. Const. Amend. V. "This provision of the Amendment must be accorded liberal

construction in favor of the right it was intended to secure." Hoffman v. United States, 71 S.Ct. 814, 818 (1951) (further citations omitted). The Fifth Amendment privilege against self-incrimination "reflects a complex of our fundamental values and aspirations, and marks an important advance in the development of our liberty." Kastigar v. United States, 92 S.Ct. 1653, 1656 (1972) (citations omitted).

"[N]o ritualistic formula is necessary in order to invoke the privilege[.]" Salinas, 133 S.Ct. at 2178 (quoting Quinn v. United States, 75 S.Ct. 668, 674 (1955)). "It is agreed by all that a claim of the privilege does not require any special combination of words." Quinn, 75 S.Ct. at 673. Long clearly invoked the privilege under what the United States Supreme Court has referred to as the Self-Incrimination Clause, see, e.g., id., by stating "I do not want to incriminate myself. I want to stop talking."

The Fifth Amendment privilege against self-incrimination "can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory[.]" Kastigar, 92 S.Ct. at 1656 (citations omitted) (emphasis added). The United States Supreme Court has held:

The [Fifth] Amendment not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal

proceedings.

Lefkowitz v. Turley, 94 S.Ct. 316, 322 (1973) (emphasis added).

The United States Supreme Court has "long held that a witness who desires the protection of the privilege [against self-incrimination] must claim it at the time he relies on it." Salinas, 133 S.Ct. at 2179 (citing Murphy, 104 S.Ct. at 1142 and Monia, 63 S.Ct. at 410-411) (quotation omitted). The Supreme Court has given recognition to the fact that the inability to invoke the privilege at one stage may make its invocation useless at a later stage. Tucker, 94 S.Ct. at 2362. Accordingly, "[the] Court has always broadly construed its protection to assure that an individual is not compelled to produce evidence which later may be used against him as an accused in a criminal action." Maness v. Meyers, 95 S.Ct. 584, 592 (1975) (citations omitted). It is clear that Long, the target of a criminal investigation, had a right to assert the Fifth Amendment privilege against self-incrimination in response to questioning by the FBI.

The United States Supreme Court has given recognition to Wigmore's observation that "the layman's natural first suggestion would probably be that the resort to privilege in each instance is a clear confession of crime." Mitchell v. United States, 119 S.Ct. 1307, 1315-16 (1999) (quoting Lakeside v. Oregon, 98 S.Ct. 1091, (1978) and 8 Wigmore, Evidence § 2272, p. 426). However, the Supreme Court has warned against such a negative attitude with respect to the Fifth Amendment privilege against self-incrimination:

Too many, even those who should be better advised,

view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege. Such a view does scant honor to the patriots who sponsored the Bill of Rights as a condition to acceptance of the Constitution by the ratifying States. The Founders of the Nation were not naïve or disregardful of the interests of justice.

Ullmann v. United States, 76 S.Ct. 497, 500 (1956) (emphasis added).

The Supreme Court has held that the Fifth Amendment privilege against self-incrimination forbids a prosecutor from commenting upon the fact that a defendant did not testify. Griffin v. California, 85 S.Ct. 1229, 1233 (1965). Such a comment "is a penalty imposed by courts for exercising a constitutional privilege." Id. at 1232-33. "It cuts down on the privilege by making its assertion costly." Id. at 1233. Given the negative attitude toward the privilege held by laymen and those who should be better advised, the Supreme Court has recognized that the rule against adverse inferences is of proven utility. Mitchell, 119 S.Ct. at 1315. "[T]here can be little doubt that the rule prohibiting an inference of guilt from a defendant's rightful silence has become an essential feature of our legal tradition." Id. at 1316.

The reasoning in Griffin applies equally to Long's prearrest, pre-Miranda warnings invocation of his privilege against self-incrimination. Having a right to invoke the privilege, see, e.g., Kastigar, 92 S.Ct. at 1656, the

Government's presentation to the jury as a confession the words Long used to invoke his constitutional privilege inflicted a severe and costly penalty upon his decision to do so. The infliction of such a penalty is forbidden by the Fifth Amendment privilege as made clear by the United States Supreme Court's pronouncements regarding it.

The Government's comment upon the fact that Long did not testify at trial violated well-established precedent of the United States Supreme Court. See Griffin. It is clear that the Government impermissibly treated Long's exercise of his right to remain silent at trial as substantive evidence of guilt. The Government's comment upon the fact that Long did not testify at trial was coupled with its assertion that he had not denied the accusations against him. Both were made while arguing that Long's pretrial invocation of his Fifth Amendment privilege against self-incrimination was a confession. Simply put, the Government argued to the jury that Long refused to talk -- either before or during trial. In light of the clear teaching of Griffin, trial counsel's failure to object to the Government's conduct fell below an objectively reasonable standard.

III. In Light of Salinas...

Salinas v. Texas, __U.S.__, 133 S.Ct. 2174, 186 L. Ed. 2d 376, (2013) this Court enunciated a Fifth Amendment claim. The Court's decision and opinions set guidance to the lower courts. See Sessoms v Grounds, United States Court of Appeals for the Ninth Circuit, 768 F.3d 882; 2014 U.S. App. Lexis 18237 No. 08-17790 3-18-14 argued and submitted, San

Francisco, California. Sept. 22, 2014 filed, Reverse and Remanded.

The Fourteenth Amendment states that all laws are to be applied equally, and Petitioner invokes the Fourteenth Amendment. Petitioner's direct appeal was in the heart of the Eighth Circuit decision process, See U.S. v. Long, 721 F.3d 920, United States Court of Appeals for the Eighth Circuit No. 12-1959, November 16, 2012 submitted, July 25, 2013 filed. The lower court's ruling was an unreasonable application of Supreme Court precedent as it existed at the time of the Court of Appeal's determination. See Burns v. Gammon 260, F.3d 892 (8th Cir. 2001). Also see Freeman v. Class 95 F.3d 639 (8th Cir. 1996)

In Burns the Eighth Circuit held that there was neither a "sound trial strategy" nor a "reasonable tactical basis" for failure to object to the prosecution's use of the defendant's exercise of specific fundamental constitutional guarantees against him at trial Id 897 (Citations omitted). In holding that the performance of Burns' trial counsel was constitutionally deficient, the Court noted that the failure to object "allowed, and in fact, invited the jury to punish Burns for exercising his constitutional rights." Id.

In Freeman the Eighth Circuit noted that "[t]here was no reasonable tactical basis" for counsel's failure to object to the prosecution's use of the defendant's exercise of his Fifth Amendment privilege against self-incrimination. 95 F.3d at 644. In holding that trial counsel's inaction denied the defendant effective assistance of counsel, the Court noted that counsel's inaction "allowed the jury to equate Freeman's

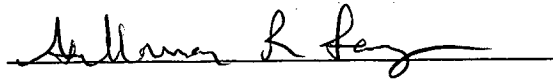
silence with guilt." Id. (citations omitted).

IV. Conclusions

Through the petitioner's appeal process, Petitioner has demonstrated the constitutional violations that occurred and has shown both prongs of the Strickland requirement, as demonstrated. Trial counsel's deficient performance prejudiced Long.* In light of the highly questionable testimony of A.P. and T.E., and the complete absence of any physical evidence, there existed not only a reasonable possibility that, absent the errors, the jury would have had a reasonable doubt respecting guilt, but the trial was reduced to an unfair and unreliable proceeding. Strickland, 104 S.Ct. at 2065; Freeman 95 F.3d at 641.

Petitioner respectfully requests that the Petition for Rehearing be granted, and Petitioner's Writ of Certiorari to review the Eighth Circuit Court of Appeals be also granted in light of the constitutional violations, and the United States Supreme Court precedents condemning such violations.

Respectfully,



Gillman R. Long

Date: 10-22-18

(Resubmitted)

date: 11-14-18

#10527-273

PO BOX 24550

Tucson, AZ 85734-4550

* See Appendix

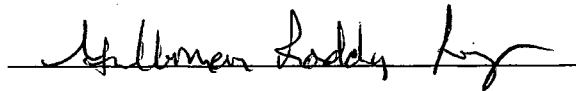
"Certificate of Good Faith" by Petitioner

I, Gillman Roddy Long pro-se, certify that the Petition for Rehearing is presented in good faith and not for delay, and that it is presented to the grounds specified in Supreme Court Rule 44 of the rules of this Court. Petitioner corrected and resubmitted as ordered by Clerk of Courts for Supreme Court and is within the 15-page limit.

I further state that I am incarcerated in the federal prison at Tucson, Arizona 85734, and am filing documents pro-se.

Signed under penalty of perjury
under 28 U.S.C. § 1746, this 11th
day of November, 2018.

(Resubmitted)



Gillman Roddy Long

#10527-273

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Solicitor General

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United States Attorney Western District S. Dakota

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No.

Supreme Court of the United States

GILLMAN RODDY LONG,

Petitioner,

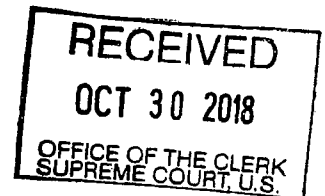
vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CERTIFICATE OF FILING
AND SERVICE



I, Gillman Roddy Long, being first duly sworn
according to law, depose and say that the required number of
the following document:

1. Petition for Rehearing of Petition for
Writ of Certiorari to the United States Court
of Appeals for the Eighth Circuit;

was this day filed with this Court and served on counsel for
the United States on this same date, by depositing the
required number of originals and copies of the documents into
prison legal mail collection box, in sealed envelopes, first

class United States postage prepaid and addressed to: Supreme Court of the United States, Office of the Clerk, 1 First Street N.E., Washington, DC 20543, and United States Attorney, For the District of South Dakota, 515 Ninth St #201, Rapid City, SD 57701, ((605) 342-7822) (counsel for respondent) and Solicitor General, Department of Justice, Washington, DC 20530 (Phone: 202-514-2217) (counsel for respondent).

I further state that I am incarcerated in the federal prison at Tucson, AZ 85734, and am filing the documents pro se.

Signed under penalty of perjury
under 28 U.S.C. § 1746, this 22nd
day of October, 2018.

Gillman Roddy Long

GILLMAN RODDY LONG

10527-273

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