

No. _____

This is a Capital Case

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

MILTON GRIFFIN-EL,

Petitioner,

vs.

MICHAEL BOWERSOX,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Respectfully submitted,

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QUESTIONS PRESENTED

1. Do the limitations on successive petitions of the AEDPA, particularly those of 28 U.S.C. § 2244(b)(1), eliminate a court of appeals' discretionary jurisdictional power to recall its mandate and rehear an appeal of a first habeas petition?
2. Whether the holding of Lindh v. Murphy that "the new provisions of Chapter 153 [of the AEDPA] generally apply only to cases filed after the Act became effective," extends to Sections 102 and 103 of the AEDPA, codified in 28 U.S.C. § 2253 and F.R.A.P. 22, which replaced the certificate of probable cause standard with a requirement that a habeas petitioner obtain a certificate of appealability to appeal.
3. Whether, in a habeas corpus appeal where one or more of the state court judges who previously reviewed the merits of the federal constitutional claims presently before the federal courts found that one or more of these claims had sufficient merit to entitle the prisoner to a new trial, the habeas petitioner has established a substantial showing of a denial of a federal constitutional right entitling him or her to a certificate of appealability under 28 U.S.C. § 2253.

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JURISDICTIONAL STATEMENT

The court of appeals below denied petitioner's motion to recall the mandate on March 23, 1998. Rehearing and rehearing en banc was denied on March 24, 1998. Jurisdiction is invoked under 28 U.S.C. § 1254(1). See Calderon v. Thompson, 118 S. Ct. 14 (1998).

STATEMENT OF THE CASE

Petitioner was convicted by a jury in the Circuit Court of the City of St. Louis, Missouri on June

30, 1987 of two counts of first degree murder in violation of Mo. Rev. Stat. § 565.020 (1986). Petitioner was convicted of the murders of Loretta Trotter and Jerome Redden, which were perpetrated during the robbery of their apartment in the City of St. Louis on August 14, 1986. In the punishment phase of trial, the jury returned a verdict of life imprisonment without parole for the murder of Ms. Trotter. However, after approximately 3½ hours of deliberation, the jury announced that it was unable to agree upon the punishment to be assessed against petitioner for the murder of Jerome Redden. Pursuant to Missouri law, the issue of punishment for the Redden murder fell into the lap of the trial judge. On July 7, 1987, the Honorable James J. Gallagher, Circuit Judge sentenced petitioner to death. In assessing this punishment, the trial judge found five statutory aggravating circumstances and noted no mitigating circumstances existed.

The facts that gave rise to these charges were extensively discussed in the district court opinion and in the opinions of the Missouri Supreme Court. Thus, in the interest of brevity, these facts will not be reiterated at great length here. In short, petitioner and his co-defendant, Antoine Owens, burglarized an apartment occupied by the two victims and stole certain stereo equipment. During the course of this burglary, the victim Trotter was killed by multiple stab wounds. The victim Redden died of a blow to the head and also received multiple stab wounds.

Apart from the testimony of some of his accomplices, the primary evidence against appellant was his confession in which he admitted taking part in the burglary and robbery of this residence. However, petitioner stated that his co-defendant Antoine Owens had stabbed the victim Loretta Trotter. Petitioner admitted striking the victim Jerome Redden in the head with a wrench to subdue him. According to petitioner's statements, after this blow with the wrench knocked Redden out, his co-defendant Owens and petitioner stabbed Redden. However, the coroner testified that the blow to the head was the cause of

Redden's death.

After conviction and sentencing, petitioner pursued a direct appeal before the Missouri Supreme Court. That court unanimously affirmed petitioner's convictions. State v. Griffin, 765 S.W.2d 475 (Mo. banc 1988). However, Judges Charles Blackmar and William Welliver dissented from the affirmance of petitioner's death sentence. In their view, the trial court improperly excluded evidence during the penalty phase regarding a statistical study that showed that the death penalty did not deter young black males from committing homicide offenses. Id. at 491. These two dissenting judges noted that the Missouri Supreme Court had allowed a prison warden to testify that the death penalty deterred prison murders in the case of State v. Amrine, 741 S.W.2d 665 (Mo. banc 1987), and in their opinion, placing the result in this case side-by-side with Amrine created serious equal protection concerns in Missouri capital cases. Id.¹

Petitioner thereafter filed a timely petition for post-conviction relief under Missouri Supreme Court Rule 29.15. After holding an evidentiary hearing, the circuit court denied relief. Thereafter, the Missouri Supreme Court affirmed the denial of post-conviction relief in Griffin v. State, 794 S.W.2d 659 (Mo. banc 1990).

Petitioner commenced the present federal habeas corpus action by filing a *pro se* petition in the United States District Court for the Eastern District of Missouri on July 5, 1991. The case was assigned to the Honorable Clyde S. Cahill. Judge Cahill stayed petitioner's execution and appointed St. Louis Attorney Lawrence J. Fleming to represent petitioner in the district court proceedings. Petitioner's *pro se*

¹Judge Blackmar alone dissented on two other grounds involving a state constitutional issue involving juror unanimity on punishment and on the basis of the trial court's failure to sustain one of petitioner's challenges for cause to a juror who was later struck by petitioner through the use of a peremptory challenge. Id. at 491-492.

petition raised twenty-six grounds of constitutional error supporting his claim for relief.

Judge Cahill retired from the federal bench before ruling on the merits of petitioner's claims. The case was subsequently reassigned to Judge Carol E. Jackson. However, before the case was reassigned, an evidentiary hearing was held before Judge Cahill on January 13, 1993 limited to petitioner's claim for relief that the prosecutor's use of its peremptory challenges to exclude five African-Americans from petitioner's jury violated the holding of this Court in Batson v. Kentucky, 476 U.S. 97 (1986). On April 23, 1993, Judge Cahill denied relief on petitioner's Batson claim which was later affirmed in Judge Jackson's final order and judgment.

On July 31, 1996, the district court issued a fifty-four page memorandum opinion denying habeas relief in all respects. On the same date, the court issued a final judgment denying petitioner's petition for writ of habeas corpus. However, the district court in this same order denying relief *sua sponte* issued petitioner a certificate of probable cause (CPC) to appeal pursuant to 28 U.S.C. § 2253 (repealed 4-24-96).

Petitioner thereafter filed a timely notice of appeal. Petitioner's appeal was docketed in the Eighth Circuit on October 17, 1996. That court issued its standard form letter informing petitioner that his notice of appeal would be treated as an application for certificate of appealability (COA). The respondent warden, on October 22, 1996, filed a motion to quash the district court's CPC and dismiss petitioner's appeal. In this motion, respondent's two primary arguments were that district courts lacked the power to issue certificates under the AEDPA, which also implicitly advanced respondent's second argument that the newly amended COA provisions codified in 28 U.S.C. § 2253 were retroactively applicable to cases like petitioner's that were filed in district court prior to April 24, 1996.

On November 6, 1996, petitioner filed a response to respondent's motion urging the court of appeals to accept the district court's issuance of a CPC for the reason that the certificate of appealability provisions were not retroactively applicable to petitioner and those similarly situated. Petitioner also argued, in the alternative, that if the court of appeals deemed the COA provisions to be applicable to petitioner, the proper course would be to remand the case to the district court to allow that court to determine whether a COA was warranted.

On November 29, 1996, the court of appeals issued a show cause order in which the court stated it had determined that the COA provisions of the AEDPA applied to petitioner's case. This order directed appellant to show cause within thirty days as to why the COA should not be denied.

On December 30, 1996, petitioner filed a memorandum in support of his application for a COA and further moved for leave of court to supplement the application with further pleadings and argument. In this pleading, petitioner addressed the merits of certain of his claims, arguing that there was a sufficient basis to grant a COA on twelve of petitioner's claims raised in the district court below.

On January 9, 1997, the court of appeals entered an order denying petitioner's motion to supplement his responsive pleading in support of his request for a COA. On March 21, 1997, a panel of the court of appeals issued a two page order denying petitioner's application for a COA and dismissing the appeal. On April 11, 1997, the court entered an order appointing Gerald Sims and John Stobbs of St. Louis to represent petitioner.² Through newly appointed counsel, petitioner filed a motion to file an overlength petition for rehearing on April 30, 1997. On May 8, 1997, the court denied this motion. On

²Although they had not been formally appointed, these attorneys had previously filed pleadings in this Court on behalf of petitioner.

May 13, 1997, petitioner, through counsel filed a timely petition for rehearing and suggestion for rehearing en banc.

On June 4, 1997, the panel issued a superseding order in lieu of its previous order of March 21, 1997. In this latest order, the quashed the district court's CPC because it did not comply with 28 U.S.C. § 2253, as amended by the AEDPA, because the CPC did not specify which issues justified granting the certificate. The panel then proceeded to deny petitioner a COA and dismissed petitioner's appeal. Although this order noted that the panel had reviewed much of the record in the case, the Eighth Circuit docket entries indicate that the only portion of the district court record that this Court had in its possession before issuing its decision was a transcript of the aforementioned Batson hearing.

In light of this superseding order, the court of appeals permitted petitioner to file a supplemental petition for rehearing and suggestion for rehearing en banc, which was filed on June 25, 1997. The primary focus of petitioner's rehearing motion was the argument that the COA provisions of the AEDPA were not retroactively applicable to petitioner's case. The rehearing motion also argued that, even if these provisions are retroactively applicable, the proper course for the court of appeals would have been to remand the case to the district court to allow that court to make this determination in the first instance. This rehearing petition also briefly addressed the merits of a few of petitioner's substantive claims for relief.

On August 11, 1997, the court of appeals denied petitioner's petition for rehearing and suggestion for rehearing en banc. Chief Judge Richard Arnold, Judge McMillian, Judge Wollman, and Judge Murphy dissented from the denial of rehearing en banc. On September 4, 1997, the Eighth Circuit issued its mandate and returned the district court record, which consisted in its entirety of the Batson hearing transcript, to the district court.

Petitioner thereafter filed a petition for a writ of certiorari before this Court in No. 97-7022, raising three questions for review. This Court denied certiorari on January 20, 1998. Griffin-El v. Bowersox, 66 U.S.L.W. 3473 (1998). The Missouri Supreme Court, soon thereafter, scheduled petitioner's execution for March 25, 1998.

Petitioner then moved this Court for rehearing under Rule 44.2 arguing, inter alia, that the Court's upcoming decision in Hohn v. United States, No. 96-8986, could impact the questions he previously advanced in his certiorari petition. Petitioner also moved Justice Thomas to stay his execution. This Court denied rehearing and a stay of execution on March 17, 1998. On March 23, 1998, This Court denied petitioner a stay of execution, a CPC or COA, and a writ of habeas corpus in two separate orders.

Petitioner thereafter moved the court of appeals to recall its mandate, and rehear his first appeal. The grounds supporting this motion alleged that the court of appeals' prior decision in the initial appeal was grounded upon fundamental errors of law. Specifically, petitioner alleged that the first appeal's outcome was clearly erroneous under this Court's decisions in Lindh v. Murphy, 117 S.Ct. 2059 (1997) and Barefoot v. Estelle, 463 U.S. 880 (1983). In opposition to this motion, respondent argued that the requested relief must be denied under the express terms of 28 U.S.C. section 2244(b)(1). This motion was summarily denied on March 23, 1998 by the court of appeals in a one-line order. Rehearing and rehearing en banc was denied on the March 24, 1998. The court of appeals also denied petitioner a stay of execution.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED BECAUSE THIS CASE PRESENTS THIS

COURT WITH THE IMPORTANT ISSUE OF WHETHER A COURT OF APPEALS, IN LIGHT OF THE AEDPA'S ABSOLUTE BAN ON SUCCESSIVE CLAIM PETITIONS, RETAINS THE DISCRETIONARY POWER TO RECALL ITS MANDATE TO REHEAR A FIRST HABEAS APPEAL IN AN EXTRAORDINARY CASE.

Except for the outcome in the court of appeals, this case is in an identical procedural posture with a case that is currently before this Court awaiting decision: Calderon v. Thompson, No. 97-215, cert. granted, 118 S.Ct. 16 (1998). In that case, this court will soon decide whether courts of appeal retain the power to recall their mandates in habeas corpus appeals notwithstanding the limitations imposed upon successive claim petitions set forth under 28 U.S.C. section 2244(b)(1) of the AEDPA.

Although the one-line denial of the motion to recall the mandate in this case did not say so, in light of respondent's use of 2244(b)(1) as an affirmative defense to the motion, the court of appeals decision was likely based upon the argument that the AEDPA precluded them from granting the requested relief. Because there is a substantial likelihood that this court's upcoming decision in Calderon will reach a different conclusion, this Court should stay petitioner's execution pending the outcome in Calderon.

A strong argument can be made that the grounds for recalling the mandate in petitioner's case are much more compelling than those reasons invoked by the Ninth Circuit to recall the mandate in Calderon. In this case, it is self evident that the Eighth Circuit's prior decision was erroneous under law existing at the time it issued its summary order denying petitioner a certificate of appealability to pursue his first habeas appeal. The retroactive application of the AEDPA violated this Court's holding in Lindh v. Murphy, 117 S.Ct. 2059, 2068 (1997). In addition, the denial of the COA by the Eighth Circuit panel also clearly violated the holding of Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983) because "reasonable jurists" did differ regarding the merits of some of petitioner's constitutional claims as evidenced by the dissents of

Judges Blackmar and Welliver of the Missouri Supreme Court. State v. Griffin, 756 S.W.2d 475, 491-492 (Mo. banc 1988)(Blackmar J., dissenting).

In contrast, the only justification invoked by the Ninth Circuit to recall their mandate to reevaluate the successive claims presented in Calderon was an apparent procedural breakdown in that court's en banc review procedure. Thompson v. Calderon, 122 F.3d 28 (9th Cir. en banc 1997). There was not any allegation in Calderon, as here, that the court of appeals erroneously misapplied fundamental principles of existing habeas corpus law to reach the wrong result in the first appeal. As such, petitioner's case cries out for correction through the use of the court of appeals' traditional power to recall its mandate in the interest of justice. See 8th Cir. Rule 41A. In fact, other courts of appeal have granted similar relief in the same situation. See Ritter v. Smith, 811 F.2d 1398 (11th Cir. 1987)(granting state's 60(b) motion and reinstating death sentence where it was evident that first appellate decision granting relief was legally erroneous).

Like Calderon, this court must decide whether the court of appeals in this case was precluded from granting a motion to recall the mandate under 2244(b)(1) of the AEDPA. As in Calderon where the prisoner filed his first petition in 1990, a strong argument can be made that the AEDPA does not apply to petitioner's 1991 petition because "the new provisions of chapter 153 generally apply only to cases filed after the Act became effective." Lindh, at 2068.

Retroactivity aside, no mention is made in 2244(b)(1) or any other section of the AEDPA of any limitation imposed upon a court of appeals discretionary power to recall its mandate in an appropriate case. As this court has stated, jurisdictional repeals "by implication are not favored." Felker v. Turpin, 116 S.Ct. 2333, 2338 (1996). If the AEDPA did not repeal this court's original habeas jurisdiction by implication, as held in Felker, an even stronger argument can be made that there was no legislative intent to repeal a

long standing power of the judiciary that applies across the board to all categories of cases.

A much stronger argument could be made that the successor provisions of the AEDPA should apply to motions to recall the mandate or other extraordinary actions if a petitioner attempts to present new evidence or new claims not advanced in prior proceedings. Simmons v. Lockhart, 856 F.2d 1144, 1146 (8th Cir. 1988) As in Calderon, the policies underlying abuse of the writ should be inapplicable where, as here, a legal error in the first appeal demands that those issues previously considered in the first appeal be reexamined.

Since this case presents the same issue as is before the Court in Calderon, at a minimum, a stay of execution is warranted. This issue should thereafter be held in abeyance pending the outcome in Calderon. Elementary principles of justice demand no less.

II.

CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH LINDH AND THE DECISIONS OF OTHER COURTS OF APPEALS REGARDING WHETHER THE CERTIFICATE OF APPEALABILITY REQUIREMENT CODIFIED IN 28 U.S.C. § 2253, AS AMENDED APRIL 24, 1996, IS RETROACTIVELY APPLICABLE TO HABEAS PETITIONERS WHO FILED THEIR PETITIONS IN DISTRICT COURT PRIOR TO APRIL 24, 1996.

This capital habeas case, as noted in prior petitions, squarely presents this Court with the opportunity to resolve a conflict between the Eighth Circuit and the views of virtually every other circuit court of appeal regarding whether the certificate of appealability requirement, which went into effect with the enactment of the AEDPA, is retroactively applicable to habeas petitioners who filed their habeas petitions in district court prior to April 24, 1996. In Lindh v. Murphy, 117 S. Ct. 2059 (1997), this Court determined that the provisions of Chapter 153 of the AEDPA do not generally apply retroactively to

habeas petitions that were filed before the date of enactment. Id. at 2068. In Lindh, the Court determined, that in light of Congress' explicit specification that Chapter 154 applies retroactively to pending cases, and because there was no similar provisions in the Chapter 153 amendments, the resulting negative inference revealed that Congress intended that 153 applied to the "general run of habeas cases" only when those cases had been filed after the date of enactment of the AEDPA. Id. at 2063.

One of the amendments contained in Chapter 153 of the Act is Section 102, codified under 28 U.S.C. § 2253, which requires habeas petitioners to obtain a certificate of appealability in order to obtain appellate review of a district court's denial of relief. In the aftermath of Lindh, virtually every court of appeal has confronted the question of whether habeas and 2255 petitioners who filed their original petitions prior to enactment of the AEDPA, but perfected their appeal after April 24, 1996, must obtain a certificate of appealability to proceed on appeal.

In Tiedeman v. Benson, 122 F.3d 518 (8th Cir. 1997), a panel of the Eighth Circuit took the position that Lindh did not resolve the question of whether all of the Chapter 153 amendments to the AEDPA applied prospectively only, but instead that federal courts may make this retroactivity determination on a case-by-case basis. The Eighth Circuit panel in Tiedeman seized upon the word "generally" in one sentence from Lindh, 117 S. Ct. at 2068, as limiting this Court's holding to the specific amendment before the Supreme Court in the Lindh case, which did not involve the certificate of appealability provisions codified under 28 U.S.C. § 2253. 122 F.3d at 521. The Eighth Circuit, therefore, held that since the certificate of appealability amendments made no substantive change in the standard for permitting a habeas appeal to proceed, as was conceded by the parties in that case, that the habeas petitioner in the Tiedeman case, who filed his petition prior to April 24, 1996, would not be able to be

heard on appeal unless he first obtained a certificate of appealability as mandated by the AEDPA. Id. at 520-521.

This portion of the Eighth Circuit's decision in Tiedeman cannot be squared with Lindh and further conflicts with the decisions of the First, Second, Third, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits concerning the appropriate appellate screening device for denials of relief for petitioners under 28 U.S.C. §§ 2254 and 2255 who filed their petitions before April 24, 1996, in light of the Lindh decision. Martin v. Bissonette, 118 F.3d 871 (1st Cir. 1997); United States v. Perez, ___ F.3d ___, 1997 WL 691075 (2nd Cir. November 7, 1997); United States v. Skandier, 125 F.3d 178 (3rd Cir. 1997); Green v. Johnson, 116 F.3d 1115, 1119 (5th Cir. 1997); Arredondo v. United States, 120 F.3d 639 (6th Cir. 1997); Young Soo Koo v. McBride, 124 F.3d 869 (7th Cir. 1997); Naddi v. Hill, 106 F.3d 275, 277 (9th Cir. 1997); United States v. Kunzman, 125 F.3d 1363 (10th Cir. 1997); Hardwick v. Singletary, 122 F.3d 935, modified on rehearing en banc, 126 F.3d 1312 (11th Cir. 1997). Most of the above noted opinions from other circuits held, without any extended discussion, that this Court's holding in Lindh mandated the conclusion that the certificate of appealability provisions of the AEDPA were prospective only. However, both the Third Circuit in Skandier and the Tenth Circuit in Kunzman engaged in a more detailed analysis of this issue, in which they noted, but declined to follow the Eighth Circuit's holding in Tiedeman.

As the Third Circuit reasoned in Skandier: "[t]he essential message of Lindh, . . . is that other [courts] need not resort to a Landgraf³ analysis with its default rules of retroactive/prospective application when the intent of Congress is clear and no constitutional violation would be worked by applying the statute

³See Landgraf v. U.S.I. Film Products, 511 U.S. 244 (1994)(setting forth default rules of construction with regard to retroactive application).

as Congress intended." 125 F.3d at 181. Lindh explicitly held that the amendments to Chapter 153 generally do not apply retrospectively. This Court did not reach its decision in Lindh because of a Landgraf analysis, but because of Congress' specific command of retroactive effect for Chapter 154 implied a prospective only effect for the amendments to Chapter 153. Thus, Lindh does not rest upon any judicial default rules that hinge upon the distinction between "substantive" versus "procedural" provisions. Lindh's holding instead, rested solely upon legislative intent. As such, petitioner believes that the Tiedeman holding was clearly incorrect and that the other circuits properly followed this Court's decision in Lindh by holding that in light of Congressional intent, none of the amendments in Chapter 153, including the certificate of appealability provisions, are applicable to cases filed before April 24, 1996.⁴

Even if a reviewing court engaged in a Landgraf-type analysis in regard to the certificate of appealability provisions, petitioner believes that the court in Tiedeman nevertheless reached the wrong result. Although the certificate of appealability statute might appear on its face to only affect procedural matters, its provisions clearly impact the substantive rights of habeas petitioners on appeal. The most notable impact occurs because the certificate of appealability amendments, as interpreted by some courts, limits the number of issues that a habeas petitioner may brief on appeal. See Lackey v. Johnson, 116 F.3d 149, 151 (5th Cir. 1997). In contrast, the previous certificate of probable cause requirement permitted a habeas petitioner to brief any issue on appeal once the threshold requirement was met that at least one

⁴Another fact, overlooked by the court in Tiedeman, was that this Court in Lindh cited Hunter v. United States, 101 F.3d 1565 (11th Cir. 1996) as being in accord with the Seventh Circuit decision in Lindh. 117 S. Ct. at 2062. Since Hunter held that 28 U.S.C. § 2253 was retroactive, the citation of Hunter strongly indicates that this Court's holding in Lindh extends to § 2253 as well as the § 2254 amendments. See Hardwick v. Singletary, 122 F.3d 935, 936 (11th Cir. 1997)(overruling Hunter in part).

of the issues met the standard for the issuance of a certificate. See e.g., Harris v. Vasquez, 901 F.2d 724, 727 (9th Cir. 1990).

If the AEDPA provisions requiring a certificate of appealability are literally read to limit the issues that a petitioner may brief on appeal to those upon which a court explicitly grants a certificate, this limitation of the issues on appeal clearly adversely impacts substantive, rather than purely procedural rights. As such, it is petitioner's view that, even under the Landgraf framework, the decision in Tiedeman was incorrect.

This retroactivity issue, as pointed out in earlier actions, is also before this court in Hohn v. United States, No. 96-8986. Thus, at a minimum, a stay of execution should be granted pending the decision in Hohn. In addition, as pointed out under Argument I, infra., the retroactivity question presented by this petition also extends beyond the question that this court declined to previously review because it implicates whether 2244(b)(1) may be retroactively applied to restrict a court of appeals' power to recall its mandate in an appropriate case in a habeas action filed before April 24, 1996. Since this issue is also before the court in the Calderon case, a stay of execution is warranted for this reason as well.

This case squarely presents this Court with the opportunity to resolve the conflict between the Eighth Circuit's decisions in this case and Tiedeman and the conclusions of almost every other circuit court of appeal regarding the scope of Lindh. Rule 10(a). Clear guidance from this Court is especially important to indicate the appropriate appellate screening device that inferior federal courts must apply in considering federal habeas corpus appeals. At least in the Eighth Circuit, the inconsistent application of the amendments to 28 U.S.C. § 2253 in several pending appeals has caused a great deal of confusion and

uncertainty that needs clarification from this Court.⁵ Certiorari should be granted in this case to provide it.

III.

CERTIORARI SHOULD BE GRANTED TO ADDRESS THE QUESTION OF WHETHER A HABEAS PETITIONER HAS ESTABLISHED A SUBSTANTIAL SHOWING OF DENIAL OF A FEDERAL CONSTITUTIONAL RIGHT ENTITLING HIM TO A CERTIFICATE OF APPEALABILITY IN A CASE WHERE ONE OR MORE STATE COURT JUDGES, IN REVIEWING THE CASE, HAD FOUND THAT ONE OR MORE OF PETITIONER'S CONSTITUTIONAL CLAIMS HAD SUFFICIENT MERIT TO ENTITLE PETITIONER TO A NEW TRIAL.

This case presents a simple issue pertaining to whether a habeas petitioner should be granted permission to pursue an appeal where, during state court review, at least one state court judge found that the petitioner had presented meritorious claims of constitutional error. Despite the conclusions of two Missouri jurists that petitioner's death sentence was constitutionally tainted, the Eighth Circuit explicity denied the petitioner a certificate of appealability. This action was clearly erroneous because it flies in the face of this court's ruling that constitutional claims must be heard on appeal in habeas cases if reasonable jurists could differ as to whether petitioner's constitutional rights had been denied. Barefoot v. Estelle, 463 U.S. 880, 893 at n. 4 (1983).

Judges Blackmar and Welliver, as previously noted, dissented in part from the Missouri Supreme

⁵See and compare Sweet v. Delo, 125 F.3d 1144, 1148, n.5 (8th Cir. 1997)(hearing merits of appeal despite deficiency in certificate of appealability previously granted by court of appeals); Ramsey v. Bowersox, No. 97-1576 (unpublished order of August 18, 1996 granting rehearing and remanding case to the district court in light of Tiedeman to determine whether to grant or deny the certificate); Rodden v. Delo, No. 97-2100 (unpublished order of July 27, 1997 granting certificate of probable cause); Roberts v. Bowersox, No. 96-3789 (Eighth Circuit refused to accept district court certificate of probable cause issued before April 24, 1996).

Court's opinion on direct appeal affirming petitioner's convictions and death sentence. State v. Griffin-El, 756 S.W.2d 475, 491-492 (Mo. banc 1988) (Blackmar, J., dissenting). Both of these Missouri Supreme Court judges believed that petitioner's death sentence was unconstitutionally imposed because of the unfair exclusion of the deterrence testimony of Dr. Decker. Id. at 491. Judge Blackmar, alone, dissented on two other grounds: the first involving a state constitutional issue involving the right to jury sentencing in capital punishment cases; the other involving his view that venireman Brewer should have been excluded for cause by the trial judge.

It is well settled that either a COA or CPC should issue if reasonable jurists could differ as to whether a constitutional violation exists. Lozada v. Deeds, 498 U.S. 430, 432 (1991). It, therefore, defies any reasonable explanation as to why the Eighth Circuit did not, at the very least, grant petitioner a COA on his "deterrence" and "juror exclusion" issues in light of the aforementioned dissents by two state judges. This action by the court of appeals was a clear error of law that must be corrected. At a minimum, a COA should have been issued to allow these two questions to be fairly reviewed by the appellate court. The fact that two judges felt his claims were meritorious and should, in fact, be successful, indicates that reasonable jurists would indeed differ with regard to his claims, and petitioner should be allowed to proceed with his appeal under the Barefoot test. In light of this clear error of law, the court of appeals abused its discretion in refusing to recall its mandate.

CONCLUSION

WHEREFORE for all the foregoing reasons, petitioner prays that this court stay his execution and, thereafter, grant certiorari and remand the case with directions that the court of appeals hear petitioner's first appeal in due course.

Respectfully submitted,

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