

January 28, 2005

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 04-40348
Summary Calendar

ERVIN JOSEPH KENNERSON,

Petitioner-Appellee,

versus

DOUG DRETKE, DIRECTOR, TEXAS DEPARTMENT
OF CRIMINAL JUSTICE, CORRECTIONAL
INSTITUTIONS DIVISION,

Respondent-Appellant..

Appeal from the United States District Court for
the Southern District of Texas
(USDC No. 3:00-CV-642)

Before REAVLEY, JOLLY and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:*

We affirm the district court for the following reasons:

1. For the reasons stated in the magistrate's report and recommendation

*Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

and the district court's opinion and order, we agree that, under principles of clearly established federal law, the state trial court's refusal to reopen the trial prior to closing arguments so that Kennerson could present the testimony of Michael Pratt violated his constitutional right to call witnesses in his defense. *Gilmore v. Taylor*, 508 U.S. 333, 343 (1993); *Chambers v. Mississippi*, 410 U.S. 284, 294 & 302 (1973); *Washington v. Texas*, 388 U.S. 14, 19 (1967); *see also Roussell v. Jeanne*, 842 F.2d 1512, 1515-16 (5th Cir. 1988).

2. We also agree that grave doubt exists as to whether the state court's error "had a substantial and injurious effect" on the verdict. *O'Neal v. McAninch*, 513 U.S. 432, 435 (1995).
3. Lastly, we agree that the state habeas court's necessary conclusions otherwise, in its denial of habeas, were either contrary to, or an unreasonable application of, clearly established federal law. The district court correctly granted Kennerson's petition for habeas relief. 28 U.S.C. § 2254(d)(1).

AFFIRMED.