

18-9443
No. _____

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

ARTHUR L. CAMPBELL,

Petitioner,

v.

SHERMAN CAMPBELL, Warden,

Respondent.

FILED
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SUPREME COURT, U.S.

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

PETITION FOR WRIT OF CERTIORARI

Submitted by:

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QUESTIONS PRESENTED FOR REVIEW

- I. The Sixth Circuit committed plain error, contrary to Buck v. Davis, 137 S.Ct. 759 (2017) and Miller-El v. Cockrell, 537 U.S. 322 (2003), because it did not have jurisdiction to consider the merit of Campbell's appeal from the district court's ruling on his habeas petition without issuing a certificate of appealability first.
- II. Whether reasonable jurist could debate the District Court's procedural holding that Campbell had not met the burden to trigger a later start date of the statute of limitation under 28 U.S.C. § 2244(d)(1)(D)?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Arthur L. Campbell, respectfully asks that a Writ of Certiorari issue to review the Opinion of the Court of Appeal for the Sixth Circuit entered on June 29, 2018, denying a certificate of Appealability (COA).

OPINIONS AND ORDERS BELOW

The Sixth Circuit Court of Appeals' June 29, 2018 Order denying Campbell's application for a COA, is Appendix A, App 1-6, to this petition.

The United State District Court for the Eastern District of Michigan's February 5, 2018, Opinion and Order dismissing Campbell's Petition for Writ of Habeas Corpus is Appendix B, App. 7-20, to this petition.

The Sixth Circuit's October 16, 2018, Order Denying panel rehearing is Appendix C, App. 21, to this petition.

The Sixth Circuit's November 1, 2018, Order denying rehearing en banc is Appendix D, App. 22, to this petition.

JURISDICTION

On June 29, 2018, the Sixth Circuit Court of Appeals issued an Order, bearing no judges' name, denying Campbell's application for a COA. A panel of the Sixth Circuit issued an October 16, 2018 Order declining to rehear Campbell's application for a COA. On November 1, 2018, the Sixth Circuit issued an Order denying Campbell's petition for rehearing en banc on his COA. This Court has jurisdiction over this case as an application for a 28 U.S.C. § 2253(c) COA because the petition involving Campbell's 28 U.S.C. § 2254 claims meet the description which confers the Supreme Court's certiorari jurisdiction under 1254(1) to cases in the Court of Appeals.

CONSTITUTIONAL PROVISION INVOLVED

United State Constitution, Amendment XIV:

Now shall any state deprive any person of life, liberty, or property without due process of law...;

FEDERAL STATUTES AND MICHIGAN COURT RULE

28 U.S.C. § 2244

28 U.S.C. § 2253

28 U.S.C. § 2254

Michigan Court Rule (MCR) 6.500 Post-Appeal Relief

STATEMENT OF THE CASE

Arthur L. Campbell, a Michigan prisoner proceeding in pro se, appealed a Federal district court judgment dismissing his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 raising eleven issues, and its denial of a COA pursuant to 28 U.S.C. § 2253(c).

After a first degree murder bench trial in 1986, a Detroit Recorder's Court judge convicted Campbell of second degree murder, assault with intent to murder, and possession of a firearm during the commission of a felony in Detroit, Michigan. Campbell's convictions are based on the forensic firearms evidence presented at trial. Specifically, a fired shotgun shell put in evidence by police officer James W. Finch, the complainant and the homicide detective in charge. Officer Finch testified that no reports were written regarding the fired shotgun shell he put in evidence. Appendix E, App 23-26, 10/21/86 Detroit Recorder's Court Trial Tr. excerpt.

The trial court sentenced Campbell to serve 65 to 100 years, 50 to 75 years, and 2 years, respectively. The Michigan Court of Appeals affirmed Campbell's convictions and remanded his case for resentencing on the second

degree murder conviction. Campbell was ultimately resentenced to serve life imprisonment on his second-degree murder conviction. His direct appeal concluded in 1995.

In the Spring of 2008, a rash of criminal cases exposed systemic problems in the handling of forensic firearms evidence in the Detroit Police Department (DPD) firearms lab. Among other things, an audit completed by the Michigan State Police (MSP) discovered a ten percent (10%) error rate, most of which involved negligence or fabrication. The MSP concluded that the firearms lab was riddled with completely unacceptable errors that amounted to at least recklessness if not outright bad faith.

Campbell asked the Wayne County Prosecutor's Office Conviction Integrity Unit (WCPO/CIU) to review the firearms evidence in his case, when Wayne County Prosecutor Kym Worthy commenced a review of past cases to ensure individuals were not wrongfully convicted. As a result, the CIU ordered the DPD to turn the firearms evidence over to the MSP for retesting.

On June 24, 2011, WCPO assisting prosecuting attorney (APA) Rebekah White informed Campbell of the existence of a "PROPERTY BOOK" maintained by the DPD Evidence Control. The property book -- containing the chain-of-custody of the evidence -- was disclosed to Campbell twenty six (26) years after his 1986 convictions. The revelation of the newly discovered property book impeaches Officer Finch's trial testimony that no reports were written regarding the fired shotgun shell he put in evidence. Appendix F, App. 27, to this petition, APA White's 6/24/11 Hotmail.

An August 9, 2011 letter from APA White compelled Campbell to file a state post-conviction motion for an evidentiary hearing because "the property book could not be located making retest impossible." Appendix G, App. 28,

to this petition, APA White's 8/9/12 letter.

Not only did the DPD withhold the existence of the property book from the prosecutor's office and the defense for 26 years, but the State Appellate Defender Office (SADO), who investigated Campbell's Brady claims in 2010, had no idea that property books existed either, until Campbell brought them to its attention in 2012. Appendix H, App 29, to this petition, SADO's April 9, 2012 letter.

State Post-Conviction Proceedings

On February 6, 2012, Campbell filed a pro se post-appeal motion asserting, *inter alia*, that he didn't know until 2011, that a property book containing exculpatory and impeachment evidence was withheld from the defense in violation of his due process rights under Brady v. Maryland, 373 U.S. 83 (1963).

On June 5, 2012, a trial court judge granted Campbell's post-appeal motion. The judge held that Campbell had shown "good cause" and proven "actual prejudice" pursuant to post-appeal relief under Michigan Court Rule (MCR) 6.508(D)(3), because the DPD withheld the newly discovered property book. Appendix I, App. 30-31, to this petition, trial court 6/5/12 Order.

A finding of cause and prejudice on a newly discovered evidence claim under MCR 6.508(D)(3) entitles a defendant to a new trial,¹ but the judge reversed his findings following hearings and denied a motion for a new trial sua sponte, on September 14, 2012. Appendix K, App 38, 9/14/12 Evidentiary Hearing Transcript excerpt.

The Michigan Court of Appeals denied Campbell's timely delayed application for leave to appeal on October 8, 2013. The Michigan Supreme

1. Appendix J, App. 32-37, to this petition, MCR 6.500 Post Appeal Relief, App. at 36-37.

Court denied leave to appeal on June 24, 2014, and denied reconsideration on September 29, 2014. People v. Campbell, 853 N.W.2d 335 (Mich. 2014).

Certiorari review was denied by this Court. 135 U.S. 2357 (2015).

Federal Habeas Corpus Proceedings

On July 17, 2015, Campbell filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Michigan, asserting, *inter alia*, that a newly discovered property book containing exculpatory and impeachment evidence was withheld from the defense in violation of his due process rights under Brady v. Maryland, 373 U.S. 83 (1967). Respondent Bergh asserted that consideration of the eleven grounds for relief was time-barred. Campbell responded that his petition was timely in light of the newly-discovered Brady evidence, equitable tolling through diligence in seeking relief, and equitable tolling through actual innocence.

The District Court ruling

On February 5, 2018, the District Court dismissed Campbell's habeas petition as time-barred and denied a COA. Conflating principles announced in Brady, the court determined that the 2011 disclosure of the property book – the factual predicate for the Brady claim – did not meet the burden that could trigger a later start date of the statute of limitation under 28 U.S.C. § 2244(d)(1)(D). Appendix B, App. 7-20, District Court's 2/5/18 Opinion.

The Court of Appeals rulings

On March 19, 2018, Campbell applied for a COA in the Sixth Circuit Court of Appeals, asserting that he met the burden to triggered a later start of date of the statute of limitation under 28 U.S.C. § 2244(d)(1)(D), because he was not aware of the factual basis for his Brady claim until APA White revealed the existence of the "newly-discovered 'property book'" in 2011.

He argued that because his Brady claim was filed in state court within one year of the time when he discovered the property book, he was entitled to tolling under § 2244(d)(2) until the Michigan Supreme Court denied his properly filed application for leave to appeal the trial court's reversal of its finding of cause and prejudice under MCR 6.508(D)(3), and his motion for reconsideration on September 29, 2014. Therefore, the filing of his habeas petition on July 17, 2015 was timely under 28 U.S.C. § 2244(d)(1)(D). Appendix F, App [27], APA White's 6/24/11 letter.

A Sixth Circuit order, bearing no judges' name, made several merit based decisions regarding the eleven issues Campbell raised in his habeas petition, but it failed to grant a COA before reviewing the merits of the claims raised. The Sixth Circuit's actions in this case reflect practices that improperly inverts the legal standard that a court of appeals must apply when determining whether to grant a COA. If this action is allowed to stand, courts of appeals would be deciding appeals without jurisdiction. Appendix A, 6/29/18 Order.

Petitioner Arthur L. Campbell seeks certiorari in this Court for the following reasons:

REASONS FOR GRANTING THE WRIT

- I. The Sixth Circuit committed plain error, contrary to Buck v. Davis, 137 S.Ct. 759 (2017) and Miller-El v. Cockrell, 537 U.S. 322 (2003), because it did not have jurisdiction to consider the merit of Campbell's appeal from the district court's ruling on his habeas petition without issuing a certificate of appealability first.

In the case sub judice, the Sixth Circuit ignored the fundamental rule that a court of appeals may not consider the merits of a habeas petition prior to making the threshold decision on the COA question. The Court improperly analyzed the COA analysis in Campbell's case because it first decided the merits of his petition and then justified its denial of a COA

based on its merit-based decision. This practice denies state habeas corpus litigants the fundamental due process mandated by 28 U.S.C. § 2253(c)(1) and the Fourteenth Amendment. U.S. Const. Am. XIV.

This Court resolved the question in Buck and Miller-El regarding the standard that a court of appeals must apply to the COA analysis. See Buck, 137 S.Ct. at 773; Miller-El, 537 U.S. at 335-336. Under 28 U.S.C. § 2253(c), a court of appeals does not have jurisdiction to consider an appeal from a district court's ruling on a habeas petition unless the court of appeals issues a COA. See 28 U.S.C. § 2253(c)(1); Buck, 137 S.Ct. at 773; Miller-El, 537 U.S. at 336. In that context, this Court concluded that a court of appeals errs if it considers the merits of a habeas petition prior to making the threshold decision on the COA question because in that situation, it would be "in essence deciding an appeal without jurisdiction." Miller-El, 537 U.S. at 337. A court of appeals must overcome this jurisdictional hurdle when conducting the COA analysis under 28 U.S.C. § 2253(c)(2).

When the Sixth Circuit "denies a COA after only reviewing the merit of a petitioner's claims, it improperly 'invert[ed] the statutory order of operations and place too heavy a burden on the prisoner at the COA stage.'" Buck, 137 S.Ct. at 774. A court of appeals must grant a COA prior to deciding the merits of the case.

Because the Sixth Circuit did not issue a COA, it did not have jurisdiction to consider an appeal from the district court's ruling on Campbell's habeas petition. This Court should grant certiorari or reverse the decision of the Sixth Circuit.

II. Whether reasonable jurist could debate the District Court's procedural holding that Campbell had not met the burden to trigger a later start date of the statute of limitation under 28 U.S.C. § 2244(d)(1)(D)?

Campbell's convictions are based on the forensic firearms evidence presented at his trial in 1986. Police Officer James W. Finch, the complainant and the homicide detective in charged, testified that no reports were written regarding the fired shotgun shell he put in evidence. Appendix E, App. 23-26, 10/21/86 Trial Tr.

In 2008, a Michigan State Police (MSP) audit of the Detroit Police Department (DPD) firearms lab concluded that the lab was riddled with completely unacceptable errors that amounted to at least recklessness if not outright bad faith.

When Wayne County Prosecutor Kym Worthy commenced a review of past cases to ensure individuals were not wrongfully convicted, Campbell asked that the firearms evidence in his case be reviewed. As a result, the Wayne County Prosecutor's Office Conviction Integrity Unit (WCPO/CIU) ordered the DPD to turn Campbell's firearms evidence over to the MSP for retesting.

On June 24, 2011, APA Rebekah White informed Campbell of the existence of a "NEWLY DISCOVERED PROPERTY BOOK" maintained by the DPD Evidence Control. The property book -- containing exculpatory and impeachment evidence -- was disclosed to Campbell twenty six (26) years after his 1986 convictions. Appendix F, App 27, APA White's 6/24/11 Hotmail.

An August 9, 2011 letter from APA White compelled Campbell to file a pro se state post-conviction motion for an evidentiary hearing because the DPD continued to withhold the property book in violation of his due process rights under Brady v. Maryland, 373 U.S. 83 (1963). Appendix G, App. 28, APA White's 8/9/12 letter.

On June 5, 2012, the trial court granted Campbell's motion for an evidentiary hearing. Further, the judge held that Campbell had shown "good cause" and proven "actual prejudice" pursuant to post-appeal relief under MCR 6.508(D)(3), because the prosecution withheld the newly discovered property book in violation of Brady. Appendix I, App 30-31, Trial Court's 6/5/12 Order.

The trial court's June 5, 2012 finding of "good cause" and "actual prejudice" on Campbell's newly discovered evidence claim entitled him to a new trial under MRC 6.508(D)(3)(a) and (b). Appendix J, App 32-37. However, the judge reversed his findings following hearings and denied a motion for a new trial, sua sponte, on September 14, 2012. App'x K, App 38.

Principally, Campbell contends that the trial court's June 5, 2012 finding that he had shown "good cause" and proven "actual prejudice," constitute a reversal of his 1986 convictions under MCR 6.508(D)(3), thereby restarting the entire one year limitation period for his habeas petition. Appendix I, App. 31, 6/5/12 Trial Court Order.

Pursuant to MCR 6.508(D)(3)(a) and (b), Campbell's convictions were no longer final for purposes of 28 U.S.C. § 2244(d)(1)(A), because the prosecution failed to disclose the "property book" prior to his trial in 1986, in violation of Brady. Appendix J, App. 32-37, MCR 6.500 Post Appeal Relief.

Campbell contends that the trial court judge's reversal of his finding of cause and prejudice on September 14, 2012, triggered a later start date of the statute of limitation under 28 U.S.C. § 2244(d)(1)(D). Appendix K, App 38, 9/14/12 Evi. Hr'g Tr.

Because the disclosure of the property book in 2011 formed the factual basis for Campbell's Brady claims, the AEDPA limitation clock started anew

when his appeal of the trial court judge's reversal reached a final judgment on September 29, 2014. 28 U.S.C. § 2244(d)(2). Appendix F, App 27, APA White's 6/24/11 Hotmail.

The state trial court restarted direct review in Campbell's case when it reversed its finding that Campbell "has shown 'good cause' under MCR 6.508(D)(3) as to why the [Brady] issues presented in [his post-conviction] motion were not previously raised on [direct] appeal," and proven "actual prejudice." The trial court's determination rest on it finding that Campbell made a substantial showing of the denial of a constitutional right in accordance with 28 U.S.C. § 2253(c), because the prosecution suppressed the newly discovered property book in violation of Brady. Appendix I, App. 31, Trial Court's 6/5/12 Order. See Hohn v. United States, 524 U.S. 236, 240 (1998).

MCR 6.508(D)(3)'s cause and prejudice standard is based on this Court's decisions in Wainwright v. Sykes, 433 U.S. 72, 87 (1977), and United States v. Frady, 456 U.S. 152 (1982), thus a defendant is entitled to a new trial upon a finding of cause and prejudice under MCR 6.508(D)(3).

The COA inquiry asks only if the district court's decision was debatable. A petitioner is not required to prove, before issuance of a COA, that some jurist would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail. Miller-El, 537 U.S. at 338.

There is no reasonable debate over whether Campbell's motion was granted: the state trial court "grant[ed] [Campbell's] motion for an evidentiary hearing for purposes of...addressing the impact of the missing [property book] on [his] convictions." And there is no reasonable debate over whether

the finding of cause and prejudice under MCR 6.508(D)(3) entitled Campbell to relief. ~~Appendix J, App. 36-37.~~ Cf. Murray v. Carrier, 477 U.S. 478, 485 (1986)(explaining Wainwright v. Sykes, 433 U.S. 72, 87 (1977)).

Thus, the district court's assessment that Campbell's one-year statute of limitation expired on April 23, 1997, and Campbell's claim that the statute of limitations was tolled, at least, until June 24, 2011, when he discovered the property book to support his Brady claims, is debatable.

The Sixth Circuit's inverted operation of the COA inquiry deny litigants any semblance of due process as required by the Fourteenth Amendment.

This Court should grant certiorari or reverse the Sixth Circuit's June 29, 2018 decision with instruction to grant a COA and give full consideration of the eleven issues raised ⁱⁿ his petition for a writ of habeas corpus.

CONCLUSION

Petitioner Arthur L. Campbell, for the reasons stated above, ask this Court to GRANT certiorari or REVERSED the Sixth Circuit Court of Appeals' June 29, 2018 order denying a certificate of appealability, its October 16, 2018 order denying panel rehearing, and its November 1, 2018 order denying rehearing en banc, and issues a certificate of appealability.

Respectfully submitted,

January 11, 2019

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