

19-5644

ORIGINAL

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

KEITH STUART CUMBEE-PETITIONER

vs.

LORIE DAVIS, DIRECTOR-RESPONDENT

Supreme Court, U.S. FILED AUG 12 2019 OFFICE OF THE CLERK

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

PETITION FOR WRIT OF CERTIORARI

Keith Stuart Cumbee, pro se
Petitioner, a prisoner of Texas
Texas Department of Criminal Justice
(TDCJ) Inmate #1699482
Wayne Scott Unit, N-91
6999 Retrieve Road
Angleton, Texas 77515
No telephone, no e-mail, no fax

QUESTION PRESENTED

Despite lower court COA denial, should this Court consider, or remand for consideration, habeas claims: a. Does judicial confession in this case, without a waiver and without prior appointment of counsel for an indigent defendant, violate the Legal Assistance Clause and Due Process Clause, U.S.Const.: Amends. VI, XIV?; b. Does successive prosecution in this case, of a 2011 Marijuana Charge, violate the Double Jeopardy Clause and Due Process Clause, U.S. Const.: Amends. V, XIV?

PARTIES TO THE PROCEEDING

The parties to the proceeding include the director of the Texas Department of Criminal Justice, respondent, represented by the Honorable Attorney General of Texas, Jon R. Meador, Assistant Attorney General, P.O. Box 12548, Capitol Station, Austin, Texas 78711, and the parties to the proceeding in the state court whose judgments are the subject of this petition includes The State of Texas, the "State", and the petitioner, Keith Stuart Cumbee, also called "defendant". There are no parties to the proceeding other than those named in the petition, the State being the party in interest. Mr. Meador filed an appearance in the Fifth Circuit showing a mailing address of 300 West 15th Street, Austin, Texas 78701. Accordingly, copies have been served at such address.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Keith Stuart Cumbee, "Cumbee" is an in forma pauperis inmate in state custody, appearing pro se, and respectfully petitions this Court that a writ of certiorari issue to review the judgment below.

JUDGMENT BELOW

The single judge "ORDER", Cumbee v. Davis (5th Cir. May 31, 2019), Appeal No. 18-40534, to which this petition relates, is Appendix A to this petition. The United States District Court for the Eastern District of Texas, Tyler Division ("USDC"), Civil Action No. 6:15cv1138, entered its Final Judgment, Dkt.36, Appendix B to this petition, and Memorandum Opinion and Order of Dismissal, Dkt. 35, Appendix C to this petition ("Dkt." refers to USDC docket entries), Cumbee v. Davis (E.D. Tex. Dec 19, 2017), dismissing with prejudice, Cumbee's 28 U.S.C. §2254 petition, Dkt.1, for AEDPA limitations bar, denying COA, see Dkt.35 at 5, without addressing the merits. Appeal was taken to the United States Court of Appeals, Fifth Circuit, which denied COA motion.

Lower state court judgments, involving identical or closely related issues, for which review is sought, are both from the 7th Judicial District, Smith County, Texas. The Judgment Adjudicating Guilt, Texas v. Cumbee (7th Jud.Dist.Ct., Smith Cty., Tex. Feb 18, 2011), Cause No. 007-1820-03, is Appendix D hereto. The Judgment of Conviction by Court-Waiver of Jury Trial, Texas v. Cumbee (7th Jud.Dist.Ct., Smith Cty., Tex. Mar 18, 2011), Cause No. 007-0219-11, is Appendix E hereto.

JURISDICTION

May 31, 2019, United States Court of Appeals for the Fifth Circuit issued its ORDER, Appendix A, denying petitioner's motion for a COA and permission to proceed in forma pauperis; and within 90 days thereof, petitioner filed his petition herein. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

As set out in Appendix F hereof, Rule 14.1(f):

The following constitutional provisions are involved: U.S. Const.: Art. I, §9, cl.2; U.S.Const.: Amends. V, VI, XIV.

The following federal statutory provisions are involved: 28 U.S.C. §§2253, 2253(c)(1), 2254, 2254(a).

The following federal rules are involved: Fed.R.App.P. 1, 60(b), 81(a)(4).

The following federal Rules Governing 28 U.S.C. §2254 Cases in the United States District Court ("Habeas Rules") are involved: Habeas Rules 1, 12.

STATEMENT OF CASE: FACTS NECESSARY TO UNDERSTAND ISSUES PRESENTED

State court judgments. December 4, 2015, Cumbee filed his 28 U.S.C. §2254 petition, Dkt.1, and exhibits, Dkt.2, and the case was docketed, Dkt.3, and assigned to a Magistrate, Dkt.4. Lower state court judgments, involving identical or closely related issues, for which review is sought, are from the 7th Judicial District, Smith County, Texas: Judgment Adjudicating Guilt, Texas v. Cumbee (7th Jud.Dist.Ct., Smith Cty., Tex. Feb 18, 2011), Cause No. 007-1820-03; Judgment of Conviction by Court-Waiver of Jury Trial, Texas v. Cumbee (7th Jud.Dist.Ct., Smith Cty., Tex. Mar. 18, 2011), Cause No. 007-0219-11. The petition, Dkt.1, pled that Cumbee is being held in state custody in violation of the federal Constitution, 28 U.S.C. §2254(a).

USDC. Cumbee filed a Rule 60(b) motion, Dkt.12, with unsworn declaration, Dkt.13, and Respondent was ordered to respond, Dkt.15, to the petition, Dkt.1, and Cumbee moved to stay, Dkt.17, pending resolution of the Rule 60(b) motion, Dkt.12. Respondent filed a motion to dismiss as time-barred, Dkt.21. Cumbee filed a motion for summary judgment, Dkt.25, and response to Dkt.21. Selected exhibits, Dkt.2, are marked "EXHIBITS" (1 to 10), attached to Cumbee's Rule 60(b) motion, Dkt.12, and are referred to in Cumbee's motion for summary judgment, Dkt.25, and are the same EXHIBITS referred to below. December 19, 2017, USDC entered Judgment, Dkt. 36, and Mem.Op., Dkt.35. Cumbee filed a motion to alter or amend a judgment (and objections), Dkt.37, which USDC denied, Dkt.38, and Cumbee appealed herein, Dkt.41, to the Fifth Circuit.

Background facts. Historic records (available to Cumbee) include ten "EXHIBITS". EXHIBIT 6 is the February 18, 2011 state court judgment and EXHIBIT 10 is the March 18, 2011 state court judgment (page one only). Respondent does not deny historic records filed by Cumbee, see Respondent's motion, Dkt.21 at 4 n.2, id. at 5, "Records". Objective facts are established from historic records, that Cumbee's trial on the merits for a "new charge" (2011 Marijuana possession) was combined with a revocation hearing, Dkt.12 at 4. Though arrested January 13, 2011, Cumbee was not appointed an attorney until March 2, 2011, for the new charge, see EXHIBIT 2, January 14, 2011 appointment for motion to adjudicate prior charge, aggravated assault; EXHIBIT 3, January 21, 2011 amended motion, at 3, par. III, charging the new offense; EXHIBIT 7, March 2, 2011, Order appointing counsel for new charge, almost two months after arrest and appearances.

Cumbee was arrested January 13, 2011 on a "new charge", 2011 marijuana possession. See Dkt.2, Exhs.12 and 14. What is normal (automatic) is appointment of counsel for an indigent defendant for a new charge, which did not occur at Cumbee's appearance on the next day, January 14, 2011, although indigent defendant Cumbee requested counsel, EXHIBIT 2, the new charge pled a week later, January 21, 2011, EXHIBIT 3 at 3, par. III, the State seeking adjudication and all other actions necessary or proper, id. A week later, January 28, 2011, Cumbee appeared and his wife was appointed ~~counsel for the new charge as potential co-defendant (automatic)~~ however, Cumbee was not.

Respondent refused to provide historic records, Dkt.21 at 5. Cumbee filed what he had as exhibits, Dkt.2, to the petition, Dkt. 1. See Dkt.2, Exh.11, Orders of the Court (also attached to Cumbee's Objections, Dkt.39, at Apx. E), and Dkt.2, Exh.13, Record of Criminal Actions, both pertaining to the February 18, 2011 state judgment, EXHIBIT 6. These official records show new charge arrest January 13, 2011, pled January 21, 2011, EXHIBIT 3, at 3, par. III. A week later, January 28, 2011, Cumbee appeared, and his wife, Dawn Vanneote, was appointed counsel for the new charge; however, Cumbee was not, until March 2, 2011, id., EXHIBIT 6, the day after an information was filed, EXHIBIT 7, though pled January 21, 2011, id., EXHIBIT 3, at 3, par. III, after his January 13, 2011 arrest. February 14, 2011, with no counsel for the new charge (although appointed for his wife), Cumbee appeared, entered a judicial confession (irrevocable plea of true) to the new charge, EXHIBIT 5 (par. III refers to EXHIBIT 3, at 3, par. III), and four days later, February 18, 2011, Cumbee was adjudicated (by a State District Judge), EXHIBIT 4, convicted and sentenced concurrently, EXHIBIT 6 (12 years TDCJ), with no counsel for the new charge, though appointed for his wife.

March 2, 2011, almost two months after arrest, Dkt.2, Exhs. 12 and 14, an information charged the exact same 2011 marijuana new charge, with immediate appointment of counsel, EXHIBITS 7 and 8. March 7, 2011, Cumbee pled, EXHIBIT 9, and was again convicted and sentenced (15 mos. state jail) March 18, 2011, EXHIBIT 10. The ~~answer filed by Respondent, Dkt.21, confirms the sequence of events~~ and historic documents establishing objective facts.

REASONS TO GRANT THE PETITION
QUESTION PRESENTED RESTATED

Despite lower court COA denial, should this Court consider, or remand for consideration, habeas claims: a. Does judicial confession in this case, without a waiver and without proper appointment of counsel for an indigent defendant, violate the Legal Assistance Clause and Due Process Clause, U.S.Const.: Amends. VI, XIV?; b. Does successive prosecution in this case, of a 2011 Marijuana Charge, violate the Double Jeopardy Clause and Due Process Clause, U.S.Const.: Amends. V, XIV?

Standard of review. Threshold inquiry of a COA, 28 U.S.C. §2253, in the context of procedural dismissal is not coextensive with a merits analysis and is to be decided without full consideration of factual or legal bases adduced in support of claims. Buck v. Davis, 127 S.Ct. 759, 773, 197 L.Ed.2d 1 (2017). This Court has indicated that focus should be directed on merits of innocence claim, as in this case (first petition) rather than treating timeliness as a threshold inquiry. McQuiggin v. Perkins, 133 S.Ct. 1924, 1930-1936, 185 L.Ed.2d 2019 (2013). 28 U.S.C. §2253 does not limit this Court's authority to review violation of fundamental constitutional rights involved in this case. See Buck, 127 S.Ct. at 775. Dismissal of a first filing with prejudice and COA denial for no clear reason deprives protections of U.S.Const.: Art. I, §9, cl.2, Holland v. Florida, 560 U.S. 631, 130 S.Ct. 2549, 177 L.Ed.2d 130, 145 (2010).

Texas allows combined new offense trial/revocation. Unlike other states, Texas courts can combine trial on the merits for a new offense with a revocation. Ex parte Doan, 169 S.W.3d 205, 210 (Tex. Crim.App. 2012); Attorney General of Texas Opinion No. JM-194; both citing Moreno v. State, 587 S.W.2d 405, 412-413 (Tex.Crim.App. 1979). It is not recommended, id., for obvious reasons.

Successive prosecution. Objective facts established by historic documents, admitted by Respondent, supra at 3-5, establish that Cumbee was twice convicted, twice sentenced (double punishment), for the 2011 Marijuana Charge, the basis of the revocation. Successive prosecution violates the Double Jeopardy and Due Process Clauses, U.S.Const.: Amends. V, XIV, Brown v. Ohio, 432 U.S. 161, 165, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977); see Griffin v. United States, 502 U.S. 46, 59, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991); Ball v. United States, 470 U.S. 856, 865, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985). Although ordered to respond, Dkt.15, Respondent never explains why violations should be given deference, relying on finality (normalcy presumption) and limitations bar.

No meaningful (timely) appointment of counsel. Objective facts established by historic documents, admitted by Respondent, supra at 3-5, establish that, although Cumbee was arrested January 11, 2011 on a new charge (2011 Marijuana Charge), and his wife was appointed counsel for the new charge January 28, 2011, Cumbee was not, until March 2, 2011 (after judicial confession). It appears from the record that the only reason for not appointing counsel immediately (Cumbee made numerous appearances, indigent defendant requesting counsel), was to secure an irrevocable plea of guilt without an attorney for the new charge, as the basis of revoking probation, otherwise, Cumbee would have completed probation and adjudicated not guilty. Although ordered to respond, Dkt.15, Respondent never explains why violations should be given deference, relying on finality (normalcy presumption) and limitations bar.

Judicial confession without waiver or appointment of counsel for Cumbee, an indigent defendant, violates the Legal Assistance and Due Process Clauses, U.S.Const.: Amends. VI, XIV, Gideon v. Wainwright, 372 U.S. 355, 359, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); Argersinger v. Hamlin, 407 U.S. 25, 29-33, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972); see United States v. Cronin, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). Such rights cannot be circumvented by state procedures, Mainew. Moulton, 474 U.S. 169, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985); Cuyler v. Sullivan, 466 U.S. 335, 344, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980); see also Burgett v. Texas, 389 U.S. 109, 113-115, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967); separate opinion (Warren, C.J.), id. at 116 n.1 (bad faith of prosecutors is not irrelevant); United States v. Balsys, 524 U.S. 666, 672, 118 S.Ct. 2218, 141 L.Ed.2d 575 (1998)(right against self incrimination); Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1967), see supra at 3-5 (co-defendant appointment).

Response/USDC Orders. After filing his petition, Dkt.1, and exhibits, Dkt.2, Cumbee filed his Rule 60(b) motion, Dkt.12, with unsworn declaration, Dkt.13. USDC ordered response to the petition, Dkt.15. Cumbee filed a motion to stay, Dkt.17, to challenge the normalcy presumptions of 28 U.S.C. §2254(d)(1)-(2). Respondent filed a motion/response, Dkt.12, and Cumbee filed a motion for summary judgment, Dkt.25. By Order, Dkt.27, the Rule 60(b) motion, Dkt.12, and motion to stay, Dkt.17, were denied. Cumbee moved to amend, Dkt. 28, USDC denied, Dkt.32, with Final Judgment, Dkt.36, and Mem.Op., Dkt.35. Cumbee's motion to amend, Dkt.37, was denied, Dkt.38.

Cumbee's Rule 60(b) motion, Dkt.12, and unsworn declaration, Dkt.13, present fraud-on-the-court gateway claim to avoid AEDPA limitations bar, supported by historic documents, EXHIBITS 1-10, establishing successive prosecution/judicial confession of an indigent defendant without waiver of appointment of counsel, a breakdown in state judicial process which normally does not occur absent prosecutorial malfeasance amounting to fraud on the court. Cumbee's motion to stay, Dkt.17, noted that proceeding to habeas review, applying the AEDPA normalcy presumption, without first addressing the Rule 60(b) motion, Dkt.12, denies meaningful habeas review, applying unjustified normalcy/legality based on fraud, is fraud on the federal Judiciary. USDC denied the motions, Dkt.27.

Per USDC, Rule 60(b) "only applies to the judgments of the court in which relief is sought", Dkt.27 at 1, a clearly erroneous ruling. Dkt.12 at 9-11, briefs the issue. Neither Civil or Habeas Rules contain such a restriction and plain meaning of Rule 60(b) texturally, does not limit its scope. Simply referring to Fed.R. Civ.P. 81 shows the ruling is clearly wrong, i.e. 81(c)(1) applies to civil actions removed from state courts. 81(a)(4) applies to 28 U.S.C. §2254 cases, the purpose of which is to review state convictions, which is not the court in which relief is sought.

Habeas Rule 1 says Habeas Rules govern §2254 proceedings, and consistent Civil Rules also apply, Habeas Rule 12. Habeas is a civil action governed by Civil Rules, Fed.R.Civ.P. 1. Rule 72 governs Magistrate proceedings; Rule 73 applies by virtue of consent. Crosby, 543 U.S. at 529, makes clear, Rule 60(b) applies in habeas.

See Gonzalez v. Crosby, 545 U.S. 524, 125 S.Ct. 2641, 162 L.Ed.2d 480 (2005). Petitioner sought to appeal the interlocutory order of the USDC denying his Rule 60(b) motion, which was rejected by the Fifth Circuit, and this Court denied certiorari, Cumbee v. Davis, Case No. 18-7261, ___ U.S. ___ (Mar. 18, 2019).

Cumbee's motion to alter or amend a judgment (and objections), Dkt. 37, which USDC denied, Dkt.38, specifies that the USDC Final Judgment, Dkt.36, and Memorandum Opinion and Order of Dismissal, Dkt.35, fails to address violations of fundamental constitutional rights, dismissal for AEDPA bar and COA denial of the first time petition, a denial of access to courts of habeas review. The ORDER, Apx. A, of the Fifth Circuit, likewise, fails to address the facts and issues presented in the petition, Dkt.1. The ORDER, p.1, at A-1, 1st par., fails to mention the violations. In 2011, at the revocation hearing, a new charge was added, marijuana possession, and although Cumbee was not appointed counsel, which he requested as an indigent defendant, his wife was appointed counsel for the new charge, It was only after Cumbee entered a irrevocable judicial confession (without an attorney for the new charge), that his community supervision was revoked, and he was adjudicated guilty for the prior assault charge and the new marijuana charge, and sentenced to 12 years prison (concurrent).

It was only after the irrevocable judicial confession was entered (without an attorney), long after his arrest, that Cumbee ~~was appointed an attorney and (again) convicted for the same offense.~~ Both the USDC and the Fifth Circuit gloss over the facts and deny

COA, in depreivation of meaningful habeas review. This is precisely the type of case the Court should exercise its discretion to review the habeas claims showing violation of fundamental constitutional rights based on clear record facts, which both the USDC and the Fifth Circuit chose to overlook, although they must be observed applying the law.

CONCLUSION

Petitioner prays that the Court grant his writ of certiorari, review the merits of petitioner's habeas claims and 28 U.S.C. §2254 petition, Dkt.1, and exhibits, Dkt.2, as set forth herein, and grant such orders as the Court deems just; and, if remanded, that the appeal of the Final Judgment, Dkt.36, Appendix B, and Memorandum Opinion and Order of Dismissal, Dkt.35, Appendix C, docket as normal appeal, with briefing, in accordance with the rulings of this Court, and should COA apply, order that COA issue to consider the question presented herein and the constitutional claims set forth therein.

Petitioner prays the Court modify, reverse, in whole or in part, render judgments and orders that should have been rendered, or reverse and remand to the United States Court of Appeals for the Fifth Circuit, or grant other and additional relief regarding lower court orders, Appendix A to C, which may include remand to the USDC and may include an order that Respondent produce the record of the state court proceedings, ordering that COA issue if if is required. Petitioner further prays that the Court set aside state convictions, Appendix D and E, in violation of fundamental constitutional rights, or otherwise declaring convictions void, acquitting of all charges (with dismissal/immediate release); or, alternately, new trial. Petitioner prays for such other and further relief that he may be entitled to, as the Court may deem just.

SIGNATURE

RESPECTFULLY SUBMITTED,

Keith S Cumbee Aug 12th, 2019
Keith Stuart Cumbee, pro se
Appellant
TDCJ Inmate #01600287
Wayne Scott Unit, N-91
6999 Retrieve Road
Angleton, Texas 77515