

No. 19-8450

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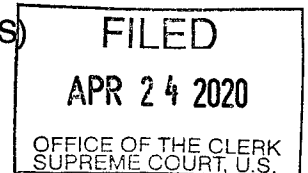
IN THE
SUPREME COURT OF THE UNITED STATES

SCOTT CARMELL — PETITIONER
(Your Name)

vs.

LORIE DAVIS, DIRECTOR — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO



UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

SCOTT CARMELL, DOJ No. 777548
(Your Name)

2661 FM 2054
(Address)

Tennessee Colony, Tx 75884-5000
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1. Whether the Court of Appeals for the Fifth Circuit erred by denying a certificate of appealability regarding the United States District Court issuing a judgment that procedurally forecloses a jurisdictional remedy, defect correction, or determination, in violation of the Fourteenth Amendment to the Constitution of the United States.

2. Whether the Fifth Circuit Court of Appeals erred by denying a certificate of appealability when jurisdiction as a fundamental systemic facet of American jurisprudence yielded to a procedural judgment of the denial of relief requested for the lack of subject matter jurisdiction, in violation of the Fourteenth Amendment to the Constitution of the United States.

3. Whether the tool of a procedural bar being used in the courts below to dismiss a case violates the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States when the frame of subject matter jurisdiction is laid before the court.

4. Whether there is a demarcation line between a filed 60(b)(4) motion, Federal Rules Civil Procedure, and a 28 U.S.C. § 2254 habeas corpus proceeding that the court's crossing thereof results in violating the Fourteenth Amendment to the Constitution of the United States.

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

- *State of Texas v. Scott Leslie Carmell*, No. F-96-1227-E, 367th District Court of Texas. Judgment entered Jan. 14, 1997.
- *Scott Leslie Carmell v. State of Texas*, No. 02-97-147-CR, Second Court of Appeals of Texas. Judgment entered Sept. 30, 2010.
- *Ex parte Scott Leslie Carmell*, No. WR-31,863-17, Texas Court of Criminal Appeals. Judgment entered Sept. 25, 2013.
- *Scott Leslie Carmell v. Lorie Davis, Director, TDCJ-CID*, No. 4:13-cv-681, U.S. District Court for the Eastern District of Texas. Judgment entered Dec. 15, 2015.
- *Scott v. Lorie Davis, Director*, No. 16-40103, U.S. Court of Appeals for the Fifth Circuit. Judgment entered Feb. 16, 2018; Rehearing denied March 20, 2018.
- *Scott Leslie Carmell v. Director, TDCJ-CID*, No. 4:13-cv-681, U.S. District Court for the Eastern District of Texas. Judgment entered July 29, 2019.
- *Scott Leslie Carmell v. Lorie Davis, Director, TDCJ-CID*, No. 19-40461, U.S. Court of Appeals for the Fifth Circuit. Judgment entered Nov. 25, 2019; Reconsideration denied Jan. 3, 2020.

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was November 25, 2019.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: January 3, 2020, and a copy of the order denying rehearing appears at Appendix C.

☒ An extension of time to file the petition for a writ of certiorari was granted to and including May 2, 2020 (date) on February 26, 2020 (date) in Application No. 19 A 949.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

- United States Constitution, Amendment XIV

- On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, or order, or proceeding for the following reasons: ... the judgment is void.

- Federal Rules of Civil Procedure, Rule 60(b)(4)

- The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

- 28 U.S.C. § 2254

STATEMENT OF THE CASE

Petitioner Carmell was convicted in the 367th District Court of Texas in January 1997. Pretrial he questioned the court's jurisdiction multiple times via documents filed and by raising the matter in a December 1996 pretrial hearing. The court never established subject matter jurisdiction.

Following conviction Carmell proceeded through multiple appeals and habeas corpus proceedings in state and federal courts. The lack of subject matter jurisdiction in the trial court and, therefore, in higher courts was not raised by his attorneys.

Following his convictions being affirmed by the Texas Second Court of Appeals on September 30, 2010, Carmell filed a petition for discretionary review in the Texas Court of Criminal Appeals. It was refused ~~in part and~~

Carmell filed an application for a writ of habeas corpus in state court. This was his second habeas action in time, but his first habeas action following this most recent direct appeal. On September 25, 2013 the Texas Court of Criminal Appeals refused to hear the jurisdictional matters, claiming that this was a second or subsequent habeas proceeding and that the jurisdictional issue was procedurally barred.

A 28 U.S.C. § 2254 petition for a writ of habeas corpus was then filed in the United States District Court, Eastern District of Texas. Although this was the first habeas action following the convictions being affirmed by the Texas court on September 30, 2010, the District Court aligned itself with the state court's procedural bar. The United States Court of Appeals for the Fifth Circuit denied issuing a certificate of appealability on February 16, 2018, regarding the jurisdictional issue.

Because a higher court acquires subject matter jurisdiction only when the lower trial court has such jurisdiction, which was never established, on January 10, 2019, Carmell's Federal Rules of Civil Procedure 60(b)(4) motion was filed in the United States District Court for the Eastern District of Texas. He did not ask the court to vacate and dismiss the lower state court's convictions for lack of jurisdiction, as would be done in a habeas proceeding; the relief requested was that the court would vacate its December 15, 2015 final opinion and judgment for being void due to its lack of subject matter

(Statement of the Case cont.)

jurisdiction. Even though vacating the underlying conviction was not requested, the court treated the 60(b)(4) motion as a successive habeas corpus action and denied relief on July 29, 2019. Appendix B. It also ordered the Clerk not to file any other documents submitted by Carmell unless the Court of Appeals granted him permission to file another habeas corpus petition.

Carmell then challenged the district court's order by filing a petition for a Certificate of Appealability in the Fifth Circuit Court of Appeals, which was denied on November 25, 2019. Appendix A. His motion for reconsideration was denied on January 3, 2020. Appendix C.

This Petition for a Writ of Certiorari now follows, which was granted an extension of time to May 2, 2020, for filing.

REASONS FOR GRANTING THE PETITION

(The facts and law presented below apply to all questions presented. Therefore only one argument follows.)

1. The United States Court of Appeals for the Fifth Circuit erred by denying a certificate of availability regarding the United States District Court issuing a judgment that procedurally forecloses a jurisdictional remedy, defect correction, or determination, in violation of the Fourteenth Amendment to the Constitution of the United States.
2. The Fifth Circuit Court of Appeals erred by denying a certificate of appealability when jurisdiction as a fundamental systemic facet of American jurisprudence yielded to a procedural judgment of denial of the relief requested for the lack of subject matter jurisdiction, in violation of the Fourteenth Amendment to the Constitution of the United States.
3. The tool of a procedural bar in the courts below violated the Due Process Clause of the United States Constitution, Amendment 14, when the frame of subject matter jurisdiction was laid before the court.

The United States Fifth Circuit Court of Appeals made a decision that has a far-reaching effect on many other people in the same or similar situation, whether in this state or not, and which is in conflict with decisions of ^{this} ~~the~~ Court and the Texas courts. That is, the lower federal courts are continually and erroneously using procedural rules to avoid analyzing and answering the issue of a subject matter jurisdiction defect.

The lower federal courts are challenged to show subject matter jurisdiction in the record from the initiation of this case forward into the higher federal courts, or vacate and dismiss the December 15, 2015 judgment of the United States District Court for the lack of jurisdiction. However, just as the district court refused to deal with the jurisdictional problem the Court of Appeals applied a procedural denial of a certificate of appealability and thereby avoid the jurisdictional issue in an appeal. Jurisdictional defects are not subject to procedural rules.

The courts are erroneously relying on procedure to Carmell's disad-

vantage and depart so far from the normal course of judicial proceedings and this Court's authority so as to deserve this Court's supervision.

Some history is helpful. Carmell, who presents a Constitutional claim, was convicted in the 36th District Court of Texas in January 1997. Prior to trial, via documents and verbally in a pretrial hearing, he challenged the trial court to establish jurisdiction, which it did not do. The court demonstrated no concern regarding the jurisdictional issue. But jurisdiction cannot be presumed. Bowles v. Wade, 913 S.W.2d 644 (Tex. App. ^{- Dallas} 1995). And although jurisdiction is required to be shown in the record, it is not. Tex. Dep't. of Parks and Wildlife v. Miranda, 133 S.W.3d 217, 226 (Tex. 2004). Carmell's attorney did not pursue this, giving the impression with other agents of the court that everything was proceeding properly.

Appellate review carried Carmell's case to this Court which remanded it to the Second Court of Appeals of Texas. Carmell v. Texas, 120 S.Ct. 1620 (2000). The Texas court granted an out-of-time appeal, his second direct appeal. Following the affirmation of his convictions he filed his state application for a writ of habeas corpus and then his federal 28 U.S.C. § 2254 petition for a writ of habeas corpus. On September 8, 2008 the U.S. Fifth Circuit Court of Appeals reversed and remanded to the Texas Court of Appeals with a conditional habeas corpus release, No. 06-40578. The Texas court granted a third direct appeal which resulted in the convictions being affirmed again. As in the trial court and the previous appeals, his attorney did not pursue or argue the lack of trial court jurisdiction. Carmell did not know of the subject matter jurisdictional defect until after this appeal.

When this third direct appeal concluded, Carmell then raised the problem of the trial court's lack of jurisdiction as a ground for relief in his state habeas corpus proceeding. The Texas Court of Criminal Appeals erroneously and procedurally barred and dismissed the subject matter

jurisdictional issue, claiming it was a second or successive habeas action; it was not. In Texas, an appeal on remand is an original action. "The case was restored to the same status it had when appellant filed the initial appeal." See Opinion, Texas Second Court of Appeals, No. 2-97-197-CR, at 14-15 (2010) (citing Thelus v. State, 863 S.W.2d 489, 490-91 (Tex. Crim. App. 1993); Ex parte Lopez, 763 S.W.2d 428-430 (Tex. Crim. App. 1989); Abbott v. State, 278 S.W.3d 929, 930-32 (Tex. App.-Waco 2009)). Thus, this was the first habeas corpus action following the conclusion of direct appeal. See Magwood v. Patterson, 177 L.Ed. 529, 608, 130 S.Ct. 2788, 2798 (2010); In re Johnson, 483 F.App'x 422, 425-26 (5th Cir. 2012).

Additionally, a challenge to a jurisdictional defect is not subject to procedural rules. Anderson II v. State, 301 S.W.3d 276 (Tex. Crim. App. 2009); Marin v. State, 851 S.W.2d 275, 279 (Tex. Crim. App. 1993). See also U.S. v. Cotton, 535 U.S. 625, 122 S.Ct. 1781, 1785 (2002) (Jurisdiction is ~~not~~ a systemic requirement that is not subject to procedural default, forfeiture, or waiver); Williamson v. Berry, 49 U.S. 445, 541 (1850) ("The want of jurisdiction is a matter that may always be set up against a judgment."). For example, in line with Williamson, Rule 60(b)(4), Fed.R. Civ. Proc., does not have a time limitation: "Subject matter jurisdiction cannot be waived - that is why it can serve as a ground to void a judgment under Rule 60(b)(4) long after the case ends." Norris v. Kerry, 869 F.3d 360, 367 (5th Cir. 2015); Sledge v. State, 391 S.W.3d 104, 108 (Tex. Crim. App. 2013). Procedural bars are simply inapplicable here.

Following the exhaustion of his state remedies, Carmell next raised this subject matter jurisdiction problem in his 28 U.S.C. § 2254 habeas corpus action in the United States District Court, Eastern District of Texas. The court aligned itself with the state court's erroneous bar and refused to hear the jurisdictional matter. Likewise, in its December

22, 2017 Opinion the Fifth Circuit Court of Appeals showed no concern about the matter when it denied a certificate of appealability.

Through all of these proceedings neither the state nor the federal courts could show subject matter jurisdiction in the trial court. Without jurisdiction the record is "utterly void and cannot be used for any purpose." Williamson v. Berry, 49 U.S. 495, 542 (1850); also Ex parte Kirby, 626 S.W.2d 533, 534 (Tex. Crim. App. 1981).

Next, Carmell filed in the United States District Court his 60(b)(4) motion to Vacate Judgment for Lack of Jurisdiction. The particular jurisdictional defect in the federal district court can be ascertained only in the context of the entire case. While presenting the underlying issue as a context in which the district court's jurisdictional defect arose, he neither attacked the underlying trial court controversy between the parties nor asked for relief from the state court judgment. He is simply asking for relief from the December 15, 2015 judgment of the United States District Court: "Vacate the December 15, 2015 final opinion and judgment for being void for lack of subject matter jurisdiction."

Whether a 60(b)(4) motion, Fed. R. Civ. Proc., is viewed as a motion or as a second or successive habeas corpus petition depends on the circumstances under which the motion is filed and the nature of the relief requested therein. Gonzalez v. Crosby, 122 S.Ct. 2641, 2648 (2005). In Adams v. Thaler, for example, the appellate court held that the 60(b) motion was not a successive habeas action because the petitioner challenged not the merits of the case but only the district court's determination that the claims were procedurally defaulted. Adams v. Thaler, 679 F.3d 312, 319 (5th Cir. 2012) (citing Gonzalez). The same is true here; Carmell's requested relief regards a procedural matter only. Carmell's motion "attacks not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the

federal habeas proceeding," namely the lack of jurisdiction. See Gonzalez, 545 U.S. at 532. There is a demarcation line between a 60(b)(4) motion that attacks the defect in the integrity of a proceeding and a § 2254 habeas action — a line that the lower court crossed when it held that Carmell's motion was a successive habeas action, thus violating his right to due process.

Rule 60(b)(4), Fed. R. Civ. Proc., allows a district court to provide relief from a judgment when "the judgment is void." A judgment may be vacated and dismissed when the court lacks subject matter or personal jurisdiction. Callon Petroleum Co. v. Frontier Ins. Co., 351 F.3d 204, 208 (5th Cir. 2003). Further, the court has a ministerial duty to inquire into the basis of its jurisdiction and that of the lower court. Alvidres-Reyes v. Reno, 180 F.3d 199 (5th Cir. 1999). "It is well-settled in jurisprudence that the jurisdiction of any court may be inquired in every other court when the proceedings in the former are relied upon and brought before the latter." Williamson v. Berry, 49 U.S. 495, 540 (1850). In Mansfield it was determined that "This court can reach the merits of the appeal only if we determine that the [lower court] had subject matter jurisdiction." Mansfield C. & L.M.R. Co. v. Swan, 111 U.S. 379, 382, 4 S.Ct. 510, 511 (1884). "The first and fundamental question is that of jurisdiction, first of" the court in which the case is presently filed, "and that of the court from which the record comes." Great Southern Fire Proof Hotel Co. v. Jones, 177 U.S. 449, 453, 20 S.Ct. 690, 691-692 (1900). See also Steel Co. v. Citizens for a Better Env't., 523 U.S. 83, 94, 118 S.Ct. 1003 (1998); Lott v. U.S., 288 F.2d 24 (5th Cir. 1960). It is for these reviewable elements that the Erie Doctrine should be applied. Erie R.R. v. Thompson, 304 U.S. 64, 64 (1938).

In conflict with the decisions of this Court, the district court did not inquire into its jurisdiction or that of the trial court below. Instead, it erroneously imposed a procedural bar by claiming that the 60(b)(4) motion was a successive habeas corpus petition, as did the Court of Appeals when it erroneously denied a certificate of availability. Carmell made a

substantial showing in the Court of Appeals of the denial of a Constitutional right. He presented more than sufficient facts and law in his petition to show that reasonable jurists would have disagreed with the district court. From the inception of Carmell's case to the present, the lower courts avoided the jurisdictional problem by ignoring it or erecting procedural barriers.

The actions of the lower courts entail a major departure from this Court's precedent cases. The Due Process Clause does not tolerate judgments in courts that will not, or cannot show subject matter jurisdiction in the record. Such actions constitute a substantial Constitutional violation and harmful deprivation to Carmell, that is, he is still imprisoned.

Under the plain error standard, it is evident in the record that both the Fifth Circuit Court of Appeals and the district court erred in their rulings. Under the clear error standard both courts violated Carmell's substantial Constitutional rights.

Considering the facts and law envinced in Carmell's 60(b)(4) motion and his petition for a certificate of appealability, the judgments are erroneous. Carmell's motion is a true, valid, and genuine 60(b)(4) motion that deserves to be heard.

Carmell is seeking relief for a redressable injury. The courts' usage of procedural bars and mischaracterization of the 60(b)(4) motion appears to be an "admission by conduct" that subject matter jurisdiction does not exist in this case.

Proceedings in courts that neither establish subject matter jurisdiction in criminal cases nor address the issue when raised by a party are of great concern to citizens, public policy, and the proper functioning of American jurisprudence. Such avoidance of this fundamental systemic right violates the due process and equal protection safeguards of the Fourteenth Amendment and deserve this Court's attention to protect and preserve the rights of all citizens of the United States.

Courts cross a demarcation line between a true 60(b)(4) motion and a §2254 habeas corpus proceeding when they erroneously allege that the motion is a habeas corpus action and then use procedural rules to avoid answering the problem of their lack of subject matter jurisdiction, which resulted in the void judgment that is attacked in the motion, thus violating the Due Process Clause of the Fourteenth Amendment.

Fundamental error, such as the lack of subject matter jurisdiction, needs to be corrected in this and all cases for justice to prevail in American jurisprudence.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Scott Carmell

Date: April 24, 2020