

Supreme Court of the United States
No. 21-7862

Supreme Court, U.S.
FILED

OCT 20 2022

OFFICE OF THE CLERK

Mark Dewayne Halley
(petitioner)

v. Bobby Lumpkin, Director,
TDCJ-CID
(respondent)

On Petition for Writ of Certiorari to the United
States Court of Appeals for the Fifth Circuit

Petition for Rehearing to Suspend the Order Denying Certiorari
by an Individual Circuit Justice
(Sup. Ct. Rule 44.2, 58)

Petitioner, Mark Dewayne Halley in pro se, presents its petition for a rehearing in the above-entitled cause number to be granted upon a showing of intervening circumstances of controlling effect as a ground specified in Sup. Ct. Rule 44.2 to any individual Circuit Justices, still active, who concurred in the opinion in Zinerman v. Burch, 110 S.Ct. 975 (1990), or Circuit Justice Ketanji Brown Jackson pursuant to Sup. Ct. Rule 58 to suspend the order denying the writ of certiorari. See Califano v. McRae, 434 U.S. 1301, 98 S.Ct. 27, 54 L.Ed. 2d 11 (1977).

I. Ground for Relief

On October 3rd, 2022, this Court issued an order denying the petitioner's writ of certiorari affirming the Fifth Circuit Court of Appeals judgment denying the issuance of a COA ordered December 29th, 2021.

A rehearing of the decision, judgment, and order in the matter is in the interest of justice because: The controlling effect of Zinerman intervenes on counsel's failure in his duty to comport to the concomitant of § 2, (1-4) procedural safeguards that was untriggered by

the petitioner to initiate the entitlement of the effectuation to be released on bail from art. 17.151 protected liberty interest after being involved is sufficient for the petitioner to state a claim for the infringement under §1983. Counsel is liable as a state actor for not providing this pre-deprivation process of the procedural safeguards being in a position to predict, avert, and guard against the unlawful confinement. See Zimmerman v. Burch, 494 U.S. 113, 127-130, 110 S.Ct. 975, L.Ed.2d 100 (1990) (On certiorari, the United States Supreme Court affirmed.

In an opinion by Blackmun, J. joined by Brennan, White, Marshall, and Stevens, JJ., it was held that (1) the complaint was sufficient to state a claim under §1983 insofar as the man was entitled to receive the procedural safeguards provided by Florida's statutory involuntary placement procedure and the staff members had allegedly failed to initiate such procedure, and (2) liability was not precluded by the rule that state officials cannot be held liable under §1983 where the official's conduct constitute a random, unauthorized deprivation of a person's due process rights which the State is not in a position to predict or avert by providing the pre-deprivation procedural safeguards.

This case contains several crucial factual and procedural distinctions from the case of Zimmerman that warrants its determination by a different or at least altered rule.

In applying Zimmerman, the Fifth Circuit has held that a §1983 action for deprivation of procedural due process is barred if a state has adequate post-deprivation remedies if the following conditions exist:

1. Deprivation must have been unpredictable and unforeseeable.

The petitioner contends that the trial courts use of art. 17.15 rule (B)6 (prior criminal history) as the lone factor to deny art. 17.151

(a)

provision after being invoked was the result of an procedural error that deprived the petitioner of art. 17.151 protected liberty interest that was requested from it during the bond hearing

held on January 1st, 2017 was both predictable and foreseeable by clearly established law Ex parte Gill in (2013) by TCCA having the final decision in criminal matters in the State of Texas. (413 S.W.3d at 430) (We hold that Legislature intended art. 17.151 to operate in conjunction with, not subversive to, art.

17.151's rules as long as the judge's decision-making process results in the accused's release)

2. Pre-deprivation process would have been impossible to

counter the state actor's particular conduct.

The petitioner contends it was not impossible for counsel to

counter the trial court use of art. 17.15 rule to deny art. 17.151

provisions as impermissible after its been invoked during the bond

hearing through a proper investigation and discovering Ex Parte Gill.

and the concomitant of § 2A.11-14) procedural safeguards as untriggered

by the petitioner prior to bond hearing and presenting such evidence

on the petitioner's behalf during the bond hearing, after invocation.

3. The conduct must have been unauthorized in the sense

that it was not within the officials' expressed or implied authority.

(I.d. at 413 S.W.3d at 430-33) (We are troubled that a judge

may order the indefinite detention of an uncharged accused on

an offense the State is not ready to bring to trial on the basis

of his criminal history) (quotation omitted)

Caine v. Hardy 905 F.2d 858, 862 (5th Cir. 1990) (en banc) Otherwise

A § 1983 for deprivation for procedural due process is not barred

under the Parratt/Hudson doctrine.

see Plumer v. Maryland, 915 F.2d at 930 (4th Cir. 1990) (quoting

"The lesson of Zimmerman" declared by the Fifth Circuit recently "is that the Parrot / Hudson is restricted to cases where it truly is impossible for the State to provide pre-deprivation procedural due process before a person unpredictably is deprived of his liberty or property through the unauthorized conduct of a state actor." Caine v. Hardy, 905 F.2d 958, 802 (5th Cir. 1990). We agree, as we concluded that Parrot is inapplicable to Plumer's suit against the State. Under Zimmerman, as we concluded recently, we must "first ask whether the risk of an erroneous deprivation was foreseeable, and next 'whether pre-deprivation safeguards would have any value in guarding against the kind of deprivation ... allegedly suffered."

Fields v. Durham, 909 F.2d 94, 97 (4th Cir. 1990) (Fields II) (quoting Zimmerman) 110 S.Ct. at 988). Also at Id 930. The Court explained:

"The state delegated to (state employees) the power and authority to effect the very deprivation complained of here, Burch's confinement in a mental hospital, and also delegated to them the concomitant duty to initiate the procedural safeguards set up by state law to guard against unlawful confinement." The petitioner contends had counsel properly investigated to know Ex parte Gill, the concomitant of 32, (1-4) safeguards to art. 17.151 as the only exceptions to prevent its relief, and discovered them untimely by the petitioner prior to filing the motion for bond reduction on the 93rd day acknowledging the State had not indicted the petitioner. Comporting to the untimely procedural safeguards along with demonstrating Ex parte Gill after invoking art. 17.151 provision by

pointing out to the trial court the state was not ready for trial on the date the motion was filed, there is a "reasonable probability" this process could have provided the opportunity to the pre-deprivation the petitioner complains of as a remedy the state must do feasibly. see Zimmerman 444 U.S. at 131 quoting

Addington v. Texas 441 U.S. 418, 425 (1979) ("Civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.") see also United States v. Salerno

441 U.S. 739, 755, 107 S.Ct. 2095, 95 L.Ed. 2d 697 (1987) ("In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.") In Brooks v. George

County, 84 F.3d at 1105 (5th Cir. 1996) (holding that actions according to official policy cannot be considered random or unauthorized.) It is

not "striking" acts which are investigative or administrative do not carry absolute immunity."

In Webster v. City of Houston, 735 F.2d at 841 (5th Cir. 1984)

(The Fifth Circuit interpreted the Monell municipal liability standard (en banc) agreeing a municipality is liable under § 1983 for the deprivation of rights protected by the Constitution that is inflicted pursuant to official policy) see Bailey v. Pataki, 708 F.3d at 405 quoting Varney v. Bilott, 123 F.3d 75, 78-79 (2nd Cir. 1997) (The

Supreme Court held that where the law established in three other circuits and the decision of our Court foreshadowed the right, the law was sufficient "well established" that its violation stripped the defendant of his immunity.)

The petitioner contends by applying Zimmerman as "clearly

established law" to counsel's failure in his duty to comport to the commitment of the untriggered procedural safeguards of § 2.(1-4) to initiate the entitlement of release on bail from art. 17.151 protected liberty interest after being invoked to guard against the unlawful pre-trial confinement in Hale Cnty. Jail within the time time capacity specified which was the result of an un constitutional official policy of art. 17.15 (3)6 (prior criminal history) factor promulgated by the trial court to avert the erroneous deprivation was a breach of duty delegated to Counsel's authority as official policy to perform for the petitioner by appointment is not entitled to qualified immunity. Id at 841 (Official policy is defined as : (1) A decision that is officially adopted by an official to whom the lawmakers have delegated policy making authority.)

Therefore, Hale County, TX as a person is liable under § 1983 as a municipality for the procedural due process violation under the Due Process Clause of the 14th Amendment enforced by the official policy having adopted the § 2.(1-4) procedural safeguards as its own and delegated counsel, as a state actor to provide a pre-deprivation hearing, the authority to perform which cannot be considered random or unauthorized, Zimmerman applies for relief as a ground having a controlling effect to the petition case. See Bailey supra at 405. (The Supreme Court stated more than twenty years ago in Zimmerman that

(6)

"Where the state feasibly can provide a pre-deprivation hearing ... it generally 'must do so regardless of the adequacy of a post deprivation ... remedy ...'" Zimmerman, 494 U.S. at 132.

II. Jurisdictional Statement

The judgment of the United States Courts of Appeal for the Fifth Circuit was entered on December 29th 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

On May 5th, 2022, the petitioner filed a writ of certiorari seeking review of the Fifth Circuit Court's judgment, mistakenly, under 28 U.S.C. § 1257 which does not give this Court jurisdiction to review the Fifth Circuit Court's judgment, only state court judgments. In this petition for rehearing, the petitioner seeks the appellate review under Sup. Ct. Rules 10(a), (c) and request the, concurring or requested, individual Circuit Justice rehear the considerations below also having a controlling effect specified under Sup. Ct. Rule 44.2 in the interest of justice under 28 U.S.C. § 1254 (1). SEE Ayestas v. Davis 138 S.Ct. at 1089-90 (2018).

Sup. Ct. Rule 10(a)

The district court denied the petitioner's § 2254 petition on March 20th, 2019 (see Appendix C) deciding to advance the respondent's response concerning art. 17.151 stating that "Its provision is one purely of state law and does not rise to a level of a due process violation for Federal habeas review citing Manning v. Blackburn, 786 F.2d 710, 711 (5th Cir. 1986) "When there has been a violation of a state procedure, the proper inquiry is to determine whether there has been a constitutional infraction of defendant's due process rights." see Id. at 711-12 (internal quotations omitted) "It is not

the function of a federal court to review the interpretation of law by a state court. Weeks v. Scott, 55 F.3d 1059, 1063 (5th Cir. 1993).

Prior to the denial of COA, the petitioner supplemented motions to COA which were granted (see Appendix B). The and motion

demonstrated art. 17.151 expectation is mandatory through the language "must be followed" by judge meeting the standard under Const. Law § 5a5(a) arising as a cause of action protected as state-created liberty interest under the 14th Amend. Due process clause of the U.S. Constitution, see Wilkinson v. Austin, 545 U.S. at 221 (2005). (A liberty

interest under the due process clause of the Federal Constitution 14th Amend. may arise from (a) expectation or interest created by state law or policies. After the denial of COA the petitioner timely filed motion for rehearing (reconsideration) indicating the intentions of involving 28 U.S.C. § 1331 on the demonstrated state cause of action that arises directly under the 14th Amend. but was denied by Fifth

Circuit Court on March 18th 2002. (see Appendix A).

The petitioner contends because the Fifth Circuit Court Judge (Catherine Hayes) granted the 2nd motion of the demonstration gave rise to petitioner's claim being erroneous denied art. 17.151 provision to a level of a due process violation and invoking § 1331 jurisdiction on the claim, on remand, back to the district court providing the basis sufficient to state a § 1983 due process claim overruling the district courts decision advancing the respondent's response. To the contrary, the Fifth Circuit Court judgment affirming the district court decision after the demonstration and the invoking of § 1331 jurisdiction to the demonstration was the result of being denied.

The petitioner contends under Sup. Ct. Rule 10(a) the Fifth Circuit Court has so far departed from the accepted and usual course of a judicial proceeding as to call for an exercise of this Court's supervisory power to reverse the Fifth Circuit Court judgment on remand is found in — New Orleans Public Service, Inc., v. New Orleans, 782 F.2d 1240 (5th Cir. 1986) (Section 1331 provides for federal jurisdiction over questions "arising under" a federal law. As noted by the Supreme Court, "the phrase 'arise under' masks a welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system" Franchise Tax Board v. Construction Laborers Trust, 463 U.S. 1, 8, 77 L.Ed.2d 420, 103 S.Ct. 2841 (1983). However, an action may "arise under" federal law when "in order for the plaintiff to secure the relief sought he will be obliged to establish both the correctness and the applicability to his case of a proposition of federal law." Id at 9 (The most familiar definition of the statutory "arising under" limitation is Justice Holmes' statement, "A suit arises under the law that creates the cause of action." American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260, (1916). However, it is well settled that Justice Holmes' test is more useful for describing the vast majority of cases that come within the district courts' original jurisdiction than it is for describing which cases are beyond district court jurisdiction. We have often held that a case "arose under" federal law where the vindication of a right under a state law necessarily turned on some construction of federal law, see, e.g., Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921) — Tennessee v. Union & Planters Bank, 152 U.S. at 460, 14 S.Ct. 654, 38 L.Ed. 511 (1894) quoting Central Railroad v. Mills, 113 U.S. 249, 257 "The question whether a party claims a right under the Constitution or laws of the United States is to be ascertained by the legal construction of its own allegations, and not

by the effect attributed to those allegations by the adverse party" Also Id At 460 " Even under the act of 1875, the jurisdiction of the Circuit Court of the United States could not be sustained over a suit originally brought in that court, upon the ground that the suit was one arising under the Constitution, laws or treaties of the United States" stated in Metcalf v. Waterford, 128 U.S. 586, 589.

Sup. Ct. Rule 10(c)

On December 29th, 2021, the Fifth Circuit Court's judgment denied COA and affirmed the district court's application denying the petitioner's § 2254 petition on March 20th, 2019 concerning art. 17.151 provision after the agg. assault w/dw conviction as "Moot" citing Yohey v. Collins, 985 F.2d 222, 229 (5th Cir. 1988) (claims for federal habeas review and relief for pre-trial issues are mooted by Yohey's subsequent conviction.) see Fassler v. U.S. 858 F.2d 1016, 1018 (5th Cir. 1989) (citing Medina v. People of the State of California, 429 F.2d 1392 (9th Cir. 1970) (appeal from writ of habeas corpus for unconstitutional bail revocation mooted by defendant's subsequent conviction.) (see Appendix C), although the petitioner did not seek bail from art. 17.151 provision as relief after the conviction in the petition to the district court, only to review counsel's conduct concerning art. 17.151 provision during the bond hearing under the Strickland standard for its determination.

The district court applying Yohey, mooted counsel's conduct concerning art. 17.151 provision without a determination on the merits under the Strickland standard. The district court's application to counsel's conduct without determining the merits under the Strickland standard is both "unreasonable" and "contrary" to clearly established Federal law, as determined by this Court found materially indistinguishable from William v. Taylor, 529 U.S. at 391 (It is past question that the rule set forth in Strickland qualifies as "clearly established Federal law, as determined by the Supreme Court of

the United States." That the Strickland test "of necessity require a case-by-case examination of the evidence" Wright, 505 U.S. at 308 (Kennedy, J. concurring). (Internal quotations omitted) Ibid. Williams is therefore entitled to relief if the Virginia Supreme Court's decision rejecting his ineffective assistance claim was either "contrary to, or involve an unreasonable application of," that established. It was both.

The Fifth Circuit Court's judgment affirmed both the "contrary to" and "unreasonable application" of Strickland by the district court to counsel's conduct concerning art. 17.151 during bond hearing as moot after the conviction. The petitioner asserts that by demonstrating art. 17.151 is a protected liberty interest on Dec. 29th, 2021, this supplied the constitutional requirement at that time to redress the IAC claim in the 3/29/24 petition to a sufficient 3/19/83 due process claim and seek damages for counsel conduct during the bond hearing regarding the claim live, viable, and within the state of limitation period under Texas unresolved where a favorable decision in Zimmerman would in no way impugn the aggravated assault conviction having a standing for a suit which Article III § 2 demands to invoke its jurisdiction.

The petitioner contends the Fifth Circuit Court's judgment affirming the district court's "contrary to" and "unreasonable application" to the 3/29/24 IAC claim after the 3/19/83 due process claim had presented itself live, viable, and within the state of limitation unresolved prior to the denial of COA on Dec. 29th, 2021, the judgment declared counsel's conduct to be mooted from seeking damages after the conviction, and doing so, under the Supct. Rule 10(c) the Fifth Circuit Court has decided an important federal question - in direct conflict with clearly established Federal law, as determined by this Court - against which measures the lower court's application and judgment on the question of mootness seeking

secondary relief of damages after a conviction having standing is found in - Powell v. McCormack, 395 U.S. 486, 89 S.Ct. 1974, 23 L.Ed. 2d 491 (1969) (The Supreme Court held that "where one of the several issues presented become moot, the remaining live issue supply the Constitutional requirement of a case or controversy." Id at 496-97 "A case is not moot so long as any claim of relief is viable, whether the claim was primary or secondary sought.") (On certiorari, the United States Supreme Court affirmed in part, reversed in part, and remanded the case. In an opinion by Warren, Ch. J., expressing the views of seven members of the Court, it was held that (1) since the case of the plaintiff's claim for back salary remained viable, the case was not moot; (4) since the case was one arising under the Federal Constitution, the Federal courts had jurisdiction over the subject matter.); — Heck v. Humphrey, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed. 2d 383 (1994) (On certiorari, the United States Supreme Court affirmed. In an opinion by Scalia, J., joined by Rehnquist Ch. J., and Kennedy, Thomas, and Ginsburg, J.J., it was held because (1) the common law of torts is the appropriate starting point for determining whether such claim are cognizable under 1983; Civil Rights § 46 > 42 USCS 1983 - action for damages - invalidity of conviction or sentence - If the district court determines that the action, even if successful, will not demonstrate the invalidity of an outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in absence of some other bar to the suit); — Hollingsworth v. Perry, 570 U.S. 693, 133 S.Ct. 2652, 186 L.Ed. 2d 768 (2013) (Parties § 3.3 > standing to sue > Headnote: U.S. Const. Art. III. § 2 confines the judicial power of federal courts to deciding actual "cases" or "controversies." One essential aspect of this requirement is that any person invoking the power of a federal court must demonstrate

standing to do so. This require the litigant to prove that he has suffered a concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision.) (Parties § 3.3 > Standing - stages of litigation > Headnote: U.S. Const. Art. III. demands that an actual controversy persist throughout all stages of litigation. That means that standing must be met by persons seeking appellate review, just as it must be met by persons appearing in the court of first instance. (Roberts, Ch. J., joined by Scalia, Ginsburg, Breyer, and Kagan, J.J.)

Questions Presented, to Sup. Ct. Rules 10(a), (c)

1. Does the Fifth Circuit Court judgment require reversal to the demonstration of art. 17.151 expectation arising under the U.S. Constitution to overrule affirming the district court's decision; to invoke § 1331 jurisdiction on its cause of action?

2. Does the Fifth Circuit Court judgment moot the § 2254 petition redressed as a § 1983 due process claim from seeking damages for counsel's conduct during bond hearing where a favorable decision in Zimmerman would in no way impugn the agg. assault w/dw conviction?

Conclusion

For the reasons just stated, Mark Dewayne Blakey, petitioner in pro se, urges an individual Circuit Justice, active who concurred on the opinion in Zimmerman or Ketanji Brown-Jackson, that this petition for a rehearing be granted suspending the order denying the petition for certiorari, and that, the judgments of the Fifth Circuit Court of Appeals be reversed, on remand for further consideration or as appropriate.

Certificate of Good Faith

I Mark Dewayne Halley, petitioner in pro se', certify that this Petition for Rehearing is presented in good faith and not for delay, and that it is restricted to the grounds "upon a showing of intervening circumstances of controlling effect" specified in Sup. Ct. Rule 44 of the Rules of this Court.

Mark Dewayne Halley

Certificate of Compliance With Word Limits

As required by Sup. Ct. Rule 33.1(h), I certify that the documents contain 1,468 words, excluding the parts of the document that are exempted by Sup. Ct. Rule 33.1(d). (xv) Petition for Rehearing (Rule 44) 3000 words

I declare under penalty of perjury that the foregoing is true and correct,
under 28 U.S.C. § 1746

Executed on October 19th, 2022

Mark Dewayne Halley

Mark Dewayne Halley

in pro se'