

IN THE
SUPREME COURT
OF THE
UNITED STATES OF AMERICA

Supreme Court, U.S.
FILED
APR 13 2022
OFFICE OF THE CLERK

21A682

USDC No. 3:20-CV-3031

U.S. COURT OF APPEALS No 21-10960

Rodney Deon Bethany Sr

v.

United States of America

On Appeal From The United State District Court

For The Northern District of Texas and

The Fifth Circuit Court of Appeals

Motion for Issuance of A Certificate

Of Appealability

Rodney Deon Bethany Sr #1221925

In pro se, in neccessity

Estelle Unit

264 F.M. 3478

Huntsville, Texas 77320

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RODNEY DEON BETHANY SR

v.

No. 21-10960

UNITED STATES OF AMERICA

MOTION FOR ISSUANCE OF A CERTIFICATE

OF APPEALABILITY

COMES NOW the petitioner, Rodney Deon Bethany Sr, in pro se, in necessity, and hereby moves this court to issue a Certificate Of Appealability pursuant to 28 U.S.C § 2253 (c) (2). Mr. Bethany herein seeks a C.O.A. authorizing him to appeal the denial of his 28 U.S.C § 2254 writ of Habeas Corpus and Motion for Authorization to file a second or successive writ of habeas corpus pursuant 28 U.S.C.S. 2244. See Slack v. McDaniel, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L. Ed. 2d 542 (2000), Miller-El v. Cockrell, 537 U.S. 322, 123 S.Ct. 1029, 1039, 154 L. Ed. 2d 931 (2003).

Mr. Bethany seeks a C.O.A. based upon the court's refusal to satisfy the relief requested in his § 2254 motion. The Court, by refusing to admit the truth and/or reality of Mr. Bethany's claims stands in violation of 28 § 2243, in plain error. Moreover, Mr. Bethany avers that he seeks C.O.A. for good cause based upon the District court's deliberate indifference to Court rule, law, and/or Constitutional mandates.

When judgement is promptly set forth on a seperate document, as should be done when required by Fed. R. Civ. P., Rule 58 (b)(1)(c), the time for seeking an appeal from the final order begins to run. But in the case in which the Court and clerk fail to comply with this simple requirement, the time to appeal begins to run after expiration of 150 days from entry of the judgement in the civil docket as required by Rule 79 (a). See Federal Rules of Appellate Procedure, Rule 4(a) (7) (a) (ii), which states in pertinent part that;

"A judgement or order is entered for purpose of this Rule 4(a) if Federal Rule Civil Procedure 58(a) required a seperate document, when the judgement or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs; 150 days have run from entry of the judgement or order in the civil docket under Federal Rule Of Civil Procedure 79 (a)

STATEMENT OF JURISDICTION

"The jurisdiction to issue a C.O.A. is invoked pursuant to 28 U.S.C. § 1291; § 2253; § 2254: Federal Rule Of Civil Procedure, Rule 58: and Federal Rule of Appellate Procedure, Rule 4(a)(7)(A)(ii)."

STATEMENT OF THE CASE

- 1). On February 06, 2004, A grand jury indicted movant for robbery and aggravated robbery.
- 2). Movant pled not guilty to the charged offenses and proceeded with a jury trial.
- 3). On February 24, 2004 the jury found mocant guilty as charged and assessed punishment at confinement for life in the Texas Department of Criminal Justice, Institutional Division.
- 4). The Fifth District Court of Appeals affirmed the trial court's judgement on direct appeal.
- 5). Movant's first application alleged four grounds for relief and was denied on June 03, 2015. Writ of habeas corpus 11.07.
- 6). Movant filed an application for writ of habeas corpus, September 2018, based on Newly Discovered Evidence, Actual Innocence.
- 7). The trial court deignated issues and ordered that further investigation was necessary to determine the merits to movant's instant habeas corpus allegations; The prosecuting attorney forwarded the application to the Conviction Integrity Unit for additional review by the states attorney!!

- 8). The prosecution respectfully requested that the trial court enter an order designating issues for review and appoint counsel to assist movant.
- 9). The prosecution asked the court to order movant's trial counsel to file an affidavit summarizing the actions taken to represent movant and respond to allegations in the application.
- 10). On November 30, 2018 The 363rd Judicial District Court found that controverted, previously unresolved facts material to the legality of the movant's confinement existed. The court also found that each of the allegations set forth in the application were controverted, unresolved factual issues which required additional evidence and/or testimony to be resolved.
- 11). The trial court appointed Attorney April Smith to resolve the issues and prepare finding of facts and conclusion of law for the court. Counselperson April Smith did not represent the movant. Movant was not entitled to counsel at this time according to Judge Holmes.
- 12). On May 10, 2019, the application for 11.07 writ of habeas corpus was received and presented to the Court of Appeals of Texas.
- 13). On June 05, 2019, the Court of Criminal Appeals remanded movant's application back to the trial court to allow the trial judge to complete an evidentiary inquiry and enter finding of facts and conclusion of law.
- 14). On June 25, 2019, movant's motions requesting production of documents and appointment of counsel was denied by the Court of Appeals of Texas.
- 15). On July 20, 2020, Movant filed writ of Mandamus to the Court of Appeals.
- 16). August 28, 2020 writ of Mandamus was denied
- 17). Movant sought a Protective Writ because his state habeas application remained pending despite a June 05, 2019 order of remand from the Texas Court of Criminal Appeals for an evidentiary hearing and two reminders notices, the second one in July, 2020. Movant avers that the trial court failure to conduct an evidentiary hearing, ordered by a higher court, denies him discovery of the factual bases for his claims and the state

judges actions have created an unconstitutional process that lacked any semblance of impartiality.

- 18).On January 25,2021, United States Magistrate Judge recommended that the that the application be dismissed without prejudice for lack of jurisdiction.
- 19).On February 25, 2021, The United States District Court adopted the findings of the magistrate judge and dismissed without prejudice.
- 20).On March 05, 2021 The United States Court of Appeals Granted Motion for an extension of time to file a motion for authorization to the United States Court of Appeals for the Fifth Circuit.
- 21).On March 22, 2021, movant filed a motion to Alter and Amend Judgement pursuant to Federal Rule of Civil Procedure 59 (e)
- 22).On April 07, 2021, Fed. R. Civ. P 59(e) motion was denied.
- 23).On April 16. 2021, movant filed a Motion for Authorization to file a second or successive writ in the United States Court of Appeals for the Fifth Circuit.
- 24).On June 16, 2021, after exceeding the 30 day time limit, The United States Court of Appeals for the Fifth Circuit, denied movant's motion for an order authorizing the U.S. District Court to consider a second or successive 28 U.S.C § 2254 application, stating that an affidavit from a prosecution's witness declaring that she perjured herself during movant's trial was not a *prima facie* showing that was needed for authorization to proceed with a second writ.
- 25).On July 08,2021 movant filed an Objection to the United States Court of Appeals erroneous ruling. Section 2244 (b)(3)(e) does not permit review.
- 26).On July 10, 2021 movant filed a Rule 60(b) motion Attacking the Integrity of the Federal Court's proceedings.
- 27).Rule 60 (b) motion and Certificate of Appealability were both denied.

STATEMENT OF FACTS

Mr. Bethany filed in the District Court a 28 U.S.C. § 2254 motion, to the best of his ability as a pro se petitioner¹¹ after being Constitutionally denied due process. In his § 2254 motion, he made meritorious Constitutional claims that include, but are not limited to the following;

28. Actual Innocence based on newly discovered evidence. A post conviction post first writ of habeas corpus affidavit by the state's key witness.
29. Prosecutorial misconduct by the state for withholding evidence favorable to the defense.
30. Conflict of interest by the defendant's trial counsel for colluding with the district attorney in helping to find defendant guilty.

THE LEGAL STANDARD THAT CONTROLS

THE ISSUANCE OF A CERTIFICATE OF APPEALABILITY

In the recent Supreme Court case *Buck v. Davis*, 137 L. Ed 2d 1 (2017) the Supreme Court held that the Fifth Circuit exceeded the limited scope of the C.O.A. analysis. The C.O.A. statute sets forth a two step process: an initial determination whether a claim is reasonably debatable, and then if it is an appeal in the normal course.

Chief Justice Roberts, writing for the Court, held that the Certificate of Appealability "inquiry, we have emphasized, is not coextensive with a merits analysis". According to the Chief Justice, "the question for the Fifth Circuit was not whether Buck had shown extraordinary circumstances. Those are ultimate merits determinations the panel should not have reached. We reiterate what we have said before: A Court of Appeals should limit its examination at the C.O.A. stage to a threshold inquiry into the underlying merit of the claim, and ask only if the District Court's decision was debatable".

In *Henry v. Cockrell*, 327 F. 3d 429, 431 (5th. Cir. 2003), the Court examined that: under the Antiterrorism and Effective Death Penalty Act

(A.E.D.P.A.), a petitioner must obtain a Certificate of Appealability (C.O.A.) before he can appeal the District Court's decision. See 28 U.S.C § 2253 (C)(1). A C.O.A. will be granted only if the petitioner makes "a substantial showing of the denial of a Constitutional right." See 28 U.S.C § 2253 (C)(2).

In order to make a substantial showing, a petitioner must demonstrate that a "reasonable jurist would find the District Court's assessment of the Constitutional claim debatable or wrong". Slack v. McDaniel, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L. Ed. 2d 542 (2000). When a District Court has denied a claim on procedural grounds, then the petitioner must demonstrate that "a jurist of reason would find it debatable whether the District Court was correct in it's ruling.

As the Supreme Court made clear in its decision in the case of Miller-El V. Cockrell, 537 U.S. 322, 123 S.Ct 1029, 1039, 154 L. Ed. 2d 931 (2003), a C.O.A. is a "jurisdictional prerequisite", and "until a C.O.A. has been issued, the Federal Courts of Appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners.. When considering a request for a C.O.A., "the question is the debatability of the underlying Constitutional claim, not the resolution of that debate". id at 1042.

With the foregoing legal standard presented for this Court's consideration as the standard for issuance of a C.O.A., Mr. Bethany shows to this court his Constitutional claim and how they are debatable amongst jurists of reason.

ISSUE ONE

The Fifth Circuit Court of Appeals and the United States District Court for the Northern District at Dallas currently deprives Mr. Bethany his Constitutionally protected right to "redress of grievances". Mr. Bethany, a citizen of the United States of America, has an undeniable right to access the court. The First Amendment to the United States Constitution holds in pertinent part that, " Congress shall make no law...abridging the freedom... to petition the government for a redress of grievances". The Fifth Circuit

Court of Appeals and the U.S. District Court knowingly and willingly deprives Mr. Bethany review in his habeas case, by refusing to comply with the statutory mandates of 28 U.S.C. § 2243, 28 U.S.C. § 2244, 28 U.S.C. § 2253, and 28 U.S.C. § 2254.

28 U.S.C. § 2243 holds in pertinent part that: "When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed".

28 U.S.C. § 2244 (b) (2) (B), hold in pertinent part that, "an appellate court may authorize a successive habeas petition only if the application make a "prima facie" showing that the application satisfies the requirements of this statute.

28 U.S.C. § 2253 (c) holds in pertinent part that..."If the petitioner shows, at least that jurists of reason would find it debatable both whether the petitioner states a valid claim of the denial of a Constitutional Right, and whether the district court was correct in it's procedural ruling.

These mandates, particularized by rule and law, were enacted to protect the public's interest in the speedy resolution in criminal cases and the prompt termination of unlawful incarceration. These Federal Court rules and statutes, particularized here, do not specify and/or provide for tolerance of inordinate delay. The Fifth Circuit Court of Appeals and the U.S. District Court for the Northern District's deviation and/or violation of these mandates constitutes a violation of Mr. Bethany's Constitutional Right "to petition the government for redress of grievances".

Mr. Bethany shows that reasonable jurists would find the Fifth Circuit Court of Appeals and The U.S District Court's assessment of this Constitutional claim debatable or wrong. Mr. Bethany avers that the Fifth Circuit Court of Appeals and The U.S. District Court's orders dismissing petitioner's writ of habeas corpus and Motion for Authorization to file a second writ of habeas corpus, coupled with it's inordinate delay, warrents the issuance of a Certificate of Appealability premised on the following court decisions;

William v. Stephens, 620 Fed. Appx. 348 (5th Cir. 2015. Case No. 14-20543).

"Relevant to the instant case, such exceptional circumstances exist when the State and federal system inordinately, and unjustifiably delays review of a petitioner's claim so as to impinge upon his Due Process Rights". Quoting Deters v. Collins, 985 F. 2d 789, 795 (5th. Cir. 1993).

These are examples of reasonable jurists who have found that impingement upon Due Process Rights are debatable or wrong, to include, but not limited to inordinate delay.

ISSUE TWO

Mr Bethany was deprived of his Constitutionally protected right that is particularized by the Fifth Amendment to the United States Constitution; to wit, " no person shall be... deprived of life, liberty or property, without Due Process of law.

The Supreme Court defined due process as long ago as 1884 as, " any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of the law.

In Mr. Bethany's criminal case, the Court deviated and/or violated the mandates of the Federal Rules of Criminal Procedure, TO WIT; 28 U.S.C. § 2254 (d) In the context of evaluating the constitutionality of a trial in later habeas corpus proceedings, a trial is fundamentally unfair if there is a reasonable probability that the verdict might have been different had the trial been fundamentally and properly conducted.

Under 28 U.S.C.S. § 2254 (d), when reviewing a claim adjudicated by a state court on the merits, federal habeas court's pay deference to the state court's decision regarding that claim, unless the decision is contrary to or involves an unreasonable application of clearly established federal law, as determined by the United States Supreme Court, or is based on an unreasonable determination of the facts, in light of the evidence presented in the state court proceeding.

Factual findings of the state court have a presumption of correctness, which presumption the petitioner can only rebut by clear and convincing evidence. 28 U.S.C.S. § 2254 (e) (1). In the instant case, the trial court found that there were controverted issues that needed resolving, The Court of Criminal Appeals remand the case back to the trial court for resolution of those controverted issues and the prosecution found that the issues needed to be resolved and counsel appointed. Petitioner did not challenge the court's findings ;however, the Federal District Court dismissed the petition and disregarded 28 U.S.C.S § 2254 (d).

ISSUE THREE

When a Federal District Court denies a state prisoner habeas corpus petition on procedural grounds without reaching the prisoner's underlying Federal Constitutional claims, A Certificate of Appealability should issue pursuant to the appeal provision of The Antiterrorism and Effective Death Penalty Act of 1996 (28 U.S.C.S § 2253 (c), and an appeal of the District Court's order may properly be taken, if the prisoner shows, at least, that jurist of reason would find it debatable both whether (1) the petition states a valid claim of the denial of a Constitutional Right, and (2) The District Court was correct in it's procedural ruling, the requirement of 28 U.S.C.S § 2253 (c) (2) and a COA should issue only upon a substantial showing of the denial of a Constitutional Right does not mean that no appeal can be taken if the District Court relies on procedural grounds to dismiss a petition; thus, where the United States Supreme Court has determined that a District Court erred in treating a state prisoner's Federal habeas corpus petition, which was filed after an initial petition was dismissed without adjudication on the merits for failure to exhaust state remedies, as a "second or successive" petition subject to dismissal for abuse of the writ under rule 9 (b) of the rules governing § 2254 cases in the United States District Court's, the petitioner satisfies one of the requirements for issuance of a COA, because reasonable

jurist could conclude that the District Court's Procedural ruling was wrong; moreover, in such circumstances, where the Supreme Court reverses a Federal Court of Appeals judgement against the prisoner and remands the case for further proceedings, the question whether the prisoner is otherwise entitled to the issuance of a COA is a question to be resolved first upon remand.

ISSUE FOUR

Petitioner seeks to show that the factual predicate for his claim was a post first habeas petition affidavit. Petitioner also raised a Jencks Act violation and Strickland claim, which satisfies the "prima facie" showing required by 28 U.S.C.S. § 2244 (b) (2) (B).

Bethany has made a prima facie showing that this affidavit could not have been discovered previously with the exercise of due diligence. § 2244 (b) (2) (B). This claim rests not on the correctness on the witness's testimony, but on the state's coercive and intimidadating interactions with the witness, which could be known before the affidavit. Therefore, the merits of petitioner's asserted constitutional error at this stage, and given the importance of the witness's testimony to the state's case, petitioner has made a prima facie showing that but for the alleged Constitutional error of the state sponsoring the false testimony of the witness, no reasonable jurors could find guilt beyond a reasonable doubt. § 2244 (b) (2) (B) (ii).

Bethany also raised a Strickland claim which satisfies the prima facie showing required by § 2244 (b) (2) (B). First, petitioner alleges that his trial counsel had a conflict of interest which caused him to perform a constitutionally inefficient cross examination of the states witnesses. This Strickland claim was based on the affidavit as discussed above, this claim should have been permitted to proceed. Petitioner has again made a prima facie showing that counsel's failure to properly prepare to cross examine the state's witnesses, violating Bethany's due procedd rights and no reasonable juror could find guilt beyond a reasonable doubt.

Wherefore now, above premises considered, the petitioner Rodney Deon Bethany moves this Court to issue a Certificate of Appealability authorizing him to appeal the District Court and Fifth Circuit Court of Appeals's denial of his Constitutional and procedural claims presented herein. In the alternative this Court may grant Mr. Bethany an out of time appeal in which he may demonstrate that his conviction is based upon egregious plain errors.

Done this 08 day of April, 2022

/s/ _____

Rodney Deon Bethany sr

#1221925 Estelle Unit

264 F.M. 3478

Huntsville, Texas 77320

UNSWORN DECLARATION

I, Rodney Deon Bethany, T.D.C.J #1221925, being presently incarcerated at the Estelle Unit of the Texas Department of Criminal Justice Inst Div. in Houston County, Huntsvilee, Texas, declare under penalty of perjury, that the above and foregoing is true and correct to the best of my knowledge and beliefs.

Executed on this 08th day of April 2022

/s/ _____

Rodney Deon Bethany
#1221925 Estelle Unit
264 F.M. 3478
Huntsville, Texas 77320

CERTIFICATE OF SERVICE

I, Rodney Deon Bethany, do hereby certify that a true and correct copy of the foregoing and above "Motion for Certificate of Appealability" has been served on the following;

The Office of the clerk
Supreme Court of the United States
Washington D.C 20543

by placing same in the prison unit legal mail box for mailing through the U.S. mail, first class postage prepaid on this 08th day of April, 2022.

/s/ _____

Rodney Deon Bethany
#1221925 Estelle Unit
264 F.M. 3478
Huntsville, Texas 77320

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

March 2, 2022

Lyle W. Cayce
Clerk

No. 21-10960

RODNEY DEON BETHANY,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, *Director, Texas Department of Criminal Justice,
Correctional Institutions Division,*

Respondent—Appellee.

Application for Certificate of Appealability from the
United States District Court for the Northern District of Texas
USDC No. 3:20-CV-3031

ORDER:

Rodney Deon Bethany, Texas prisoner # 1221925, moves this court for a certificate of appealability (COA) to appeal the district court's denial of his Federal Rule of Civil Procedure 60(b) motion that he filed following the district court's dismissal of his 28 U.S.C. § 2254 application as an unauthorized successive application. In his motion, Bethany contested our prior ruling denying authorization to file a successive application in order to challenge his life sentence for robbery and aggravated robbery of an elderly person on the basis of newly discovered evidence in the form of recanted testimony, prosecutorial misconduct, and ineffective assistance of counsel.

No. 21-10960

See In re Bethany, No. 21-10130 (5th Cir. June 16, 2021) (unpublished). He reasserts the same argument in his COA motion.

To obtain a COA, Bethany must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). That is, he must establish that reasonable jurists would find the decision to deny relief debatable or wrong, *see Slack v. McDaniel*, 529 U.S. 473, 484 (2000), or that the issues he presents “are adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). To obtain a COA from the denial of a Rule 60(b) motion, he must demonstrate that reasonable jurists could debate whether the district court abused its discretion in denying him relief from the judgment. *See Hernandez v. Thaler*, 630 F.3d 420, 428 (5th Cir. 2011). Bethany has not made the requisite showing. Accordingly, his motions for a COA and for the appointment of counsel are DENIED.

/s/ James E. Graves, Jr.
JAMES E. GRAVES
United States Circuit Judge