No. 03-6688

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2002

In re: Rodney C. Doman,

Petitioner.

Supreme Court, U.S.
FILED
AUG 26 2003
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PETITION FOR WRIT OF HABEAS CORPUS

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Petitioner proceeding *pro se*

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QUESTION PRESENTED

I. Is The Fourteenth Amendment Violated By The West Virginia Supreme Court Of Appeals' Remand Directive For A New Sentencing Trial By A Second Jury When The Statutory Procedure Provides For A Unitary Trial Only?

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In re: Rodney C. Doman,

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PETITION FOR WRIT OF HABEAS CORPUS

Petitioner Rodney C. Doman, *pro se*, respectfully moves this Honorable Court for the issuance of a petition for writ of habeas corpus directed to Thomas McBride, Warden of the Mount Olive Correctional Complex in Fayette County, West Virginia, because he is holding petitioner in custody in violation of the Fourteenth Amendment to the United States Constitution by depriving him of liberty without due process of law.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit denying mandamus relief is unreported. See (Petitioner's Appendix at 1-2) hereinafter "App. __")). The order of the District Court for the Northern District of W.Va. dismissing petitioner's petition under 28 U.S.C. § 2254 for writ of habeas corpus is unreported. (App. at 8-15). The Magistrate's Report & Recommendation, recommending that the § 2254 Petition be dismissed as premature is unreported. (App. at 18-27). The order of the W.Va. Supreme Court of Appeals denying the writ of prohibition is unreported. (App. at 28-29). The order of the Circuit Court

of Monongalia County, W.Va. denying Doman's motion for an order of certification upon certified question is unreported. (App. at 30-32). The Opinion of the W.Va. Supreme Court of Appeals affirming petitioner's conviction and reversing sentence for new trial by a second jury on sentencing only is reported at 204 W.Va. 289, 512 S.E.2d 211 (1998). (App. at 33-38). The judgment order of the W.Va. Supreme Court of Appeals reflecting its judgment is unreported. (App. at 39). The order of the Circuit Court of Monongalia County, W.Va. denying the motion for a new trial is unreported. (App. at 40-47). The verdict order of the Circuit Court of Monongalia County, W.Va. is unreported. (App. at 48-49).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1651(a), § 2241, § 2242 and § 2254. This petition complies with the above statute requirements. The reasons for seeking review here is petitioner has already applied for § 2254 relief in a district court below which dismissed his petition without prejudice based on the theory that it was mixed, i.e. exhausted and unexhausted claims. (App at 14). Petitioner exhausted available remedies in the state courts on the ground for habeas relief raised herein. See e.g. (App. at 54-58). The district court erred because the petition contained exhausted claims.[1]

---

[1] On July 7, 2003, the petitioner timely filed in the district court, *inter alia*, a Notice of Appeal, Motion for Leave to Proceed on Appeal *In Forma Pauperis*, and a Motion for Certificate of Appealability. Id. at 51. Thereafter, the U.S. Court of Appeals for the Fourth Circuit (hereinafter "circuit court"), directed petitioner to file his Informal Brief by August 11, 2003. (App. at 3). On July 25, 2003, the Informal Brief was timely filed. (App. at 50-66). On July 28, 2003, petitioner filed a Motion for Stay of State Proceedings, Pending Appeal, and Memorandum of Law. (App. at 67-73). The stay motion was filed because trial date on the W.Va. Supreme Court remand directive is set for September 16, 2003. Id.

The reasons specifically set out below justify the granting of this writ, and the exceptional circumstances warrant the exercise of this Court's discretionary powers because the relief cannot be timely obtained before September 16, 2003 (date set for trial) in any other form or from any other court.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States which provides in relevant part: "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."

STATEMENT OF THE CASE

Rodney C. Doman is a state prisoner convicted of first degree murder by a petit jury out of the Circuit Court of Monongalia County, West Virginia (hereinafter "trial court"). See (App. at 48-49). His sentence of life without the possibility of parole was reversed by the W.Va. Supreme Court of Appeals and remanded to the trial court for a new trial by a second jury on sentencing only. State v. Doman, 204 W.Va. 289, 512 S.E.2d 211, 213-14 (1998). (App at 35-36). Doman is now incarcerated without a valid sentence and in violation of his constitutional rights.

On October 7, 2002, Doman filed in the district court his 28 U.S.C. § 2254 Petition, Memorandum in support thereof, and request to proceed *in forma pauperis*. (App. at 8). The case was referred for initial review to Magistrate John S. Kaull. Id. Magistrate Kaull granted the motion to proceed *in forma*

pauperis by Order entered April 1, 2003.

On April 9, 2003, the Magistrate filed his Report and Recommendation, recommending that the § 2254 Petition be dismissed as premature because Doman's conviction, without a corresponding sentence, does not qualify as a judgment. (App. at 22-23). On April 22, 2003, Doman timely filed his Objections to said Report. (App. at 8).

Because Doman's penalty trial in state court was scheduled at that time for June 24, 2003, and the district court had unduly delayed acting on the § 2254 Petition and his motion to stay state court proceeding, on June 9, 2003, he petitioned the circuit court for a writ of mandamus. (App. at 1-2, 53 n.1). Thereafter, the district court declined to adopt the Magistrate's recommendation to dismiss the petition as premature. (App. at 11-12). The district court ruled that Doman failed to exhaust his state remedies on ground three and that the petition was a mixed one. Id. at 14. The district court erred in reaching the above conclusion for the reasons set forth in Doman's Informal Brief. (App. at 54-58).

REASONS FOR GRANTING THE WRIT

> The Remand Directive Of The West Virginia Supreme Court Of Appeals Is In Contravention Of Equal Protection And Due Process Because It Is Contrary To Hicks v. Oklahoma, 447 U.S. 343 (1980), Which Provides The Defendant A Due Process Right To Be Deprived Of His Liberty Only To The Extent Determined By The Jury.

Only this Court's intervention will prevent Doman from being subjected to a sentencing trial unsupported by statutory authority. Doman has a constitutional right to be sentenced only in accordance with the statutory procedure. W.Va. Code § 62-3-15 provides, in part, that:

APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 03-6922

In Re: RODNEY C. DOMAN,

Petitioner.

On Petition for Writ of Mandamus. (CA-02-144)

Submitted: July 10, 2003 Decided: July 17, 2003

Before WILKINSON, MOTZ, and TRAXLER, Circuit Judges.

Petition denied by unpublished per curiam opinion.

Rodney C. Doman, Petitioner Pro Se.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Rodney C. Doman has filed a petition for a writ of mandamus, alleging that the district court has unduly delayed acting on his petition under 28 U.S.C. § 2254 (2000), and his motion to stay a state court proceeding. Doman seeks an order from this court directing the district court to act. Although we grant leave to proceed in forma pauperis, we deny as moot Doman's petition for a writ of mandamus because the district court has acted on Doman's § 2254 petition and motion. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

PETITION DENIED