04-6130

Supreme Court, U.S.
FILED
AUG 23 2004
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

IN RE Russell Hill

No. _____

PETITION FOR EXTRAORDINARY WRIT
AND FOR WRIT OF HABEAS CORPUS

Russell Hill # L3506
CCA/WCCF
2999 HWY 61 NORTH
WOODVILLE, MS 39669

QUESTIONS PRESENTED

1. Whether the U.S. District Court "definition" of exhaustion of state remedies was proper on dismissal for failure to exhaust state remedies:

> "If petitioner wishes to proceed in federal court, he needs to furnish proof that his direct appeal is no longer pending in state court and that he has filed for habeas corpus in the state court and that that action has been terminated. That is what is meant by exhaustion of state remedies. This last paragraph is added in order to try to assist petitioner in understanding what he apparently is attempting to do. " (See Exhibit " F ").

Or on application for Certificate of Appealibility, could a jurist of reason find it debatable whether the district court was correct in it's procedural ruling?

A) Whether the District Court denied Hill the right to due process in this case, because the district court decision was based on an unreasonable application of clearly established law.

2. **Whether the Fifth Circuit Court has become a domicile of domineering opinions or an ineffective means to protect the rights of the petitioner and the petitioner's class, as "An American Citizen".**

A. Whether the Fifth Circuit Court erred by undertaking a full consideration of the factual or legal basis for this claim while deciding whether to grant or deny COA, which is a threshold decision that hinges on the debatability of the constitutional claim and not the ultimate resolution of that claim; while raising issues beyond the particular parties involved.

(1) Whether the factual situation presented is so extraordinary that it warrants the expenditure of the courts time for a summary reversal... a rare and exceptional disposition reserved by the court for situations in which the law is well settled and stable, the facts are not in dispute, and the decision below is clearly in error.

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INDEX TO APPENDED EXHIBITS

EXHIBIT A

State of Mississippi declines to enter an appearance of counsel.

EXHIBIT B

District court opinion and final judgment in habeas petition **HILL v. KELLY, 2:03cv248PG** (3 pages).

EXHIBIT C

Motion: Notice of Appeal and Application for Certificate of Appealibility or in the Alternative Motion to Reconsider (9 pages).

EXHIBIT D

Partial record U.S. District Court, **HILL v. KELLY, 2:03cv248PG** (2 pages).

EXHIBIT E

Fifth Circuit order of dismissal in Appeal no. **03-60481 (HILL v. KELLY).**

EXHIBIT F

District Court order of denial in Motion for Reconsideration (2 pages).

EXHIBIT G

Fifth Circuit order of denial in Petition for Rehearing in Appeal no. **03-60481 (HILL v. KELLY).**

EXHIBIT H

Fifth Circuit order of denial of Certificate of Appealibility in Appeal no. **03-60727 HILL v. KELLY U.S.D.C. no. 2:03cv248PG** (2 pages).

EXHIBIT J

Petition for Rehearing ("COA") in the Fifth Circuit Court in Appeal no. **03-60727 HILL v. KELLY** (4 pages).

EXHIBIT K

Fifth Circuit order of denial in Petition for Rehearing "COA" Appeal no. **03-60727 (HILL v. KELLY).**

PROCEDURAL HISTORY

Petitioner Hill was convicted of Armed Robbery in the Mississippi Courts on November 6, 2002. Thereafter, Hill filed a Writ of Habeas in the United States District Court of the Southern District of Mississippi (Hattiesburg Division). The habeas petition contained claims Hill had previously exhausted on appeal of Motion to Dismiss and two (2) Writs of Prohibition and Mandamus to the Supreme Court of Mississippi.

The Habeas petition was filed on April 24, 2003, and dismissed on May 13, 2003, **sau sponte**, by the District Court without prejudice for failure to exhaust available state court remedies. The court reasoned that Hill had failed to exhaust state remedies since his direct appeal to the Mississippi Supreme Court was still pending in Ms. Supreme Court case no. 2003-TS-0007; which to date is still pending. See Exhibit "N-11" and Exhibit "B"

Petitioner Hill then filed a timely Notice of Appeal and Application for Certificate of Appealability or In the Alternative, Motion for Reconsideration. See Exhibit "C". Then on July9, 2003 the Fifth Circuit dismissed Hill's appeal no. 03-60481, basically for imformality of form, despite F.R.A.P. Rule 3(c)(1)(C)(4). See Exhibit "E". Then on July 11, 2003 the District Court denied Hill's Motion for Reconsideration, See Exhibit "F". Also, the District Court denied COA on July 11, 2003 [10-1],(Exhibit "D")

Hill filed a Petition for Rehearing in the original appeal which was denied in a one liner (See Exhibit "G"). Thereafter, Hill filed an appeal of the denial of his Motion for Reconsideration [9-1]. The District Court denied COA and Hill subsequently filed to the Fifth Circuit for a COA to issue.

The Fifth Circuit denied COA in the second appeal no. 03-60727 on April 20, 2004 See Exhibit "H", Hill filed a timely Petition for Rehearing See Exhibit "J". The Fifth Circuit Court denied Hill's Petition for Reconsideration on May 19, 2004, See Exhibit "K", without opinion. Subsequently, Hill filed a Request for Written Opinion, but never received a response See Exhibit "L".

Thereafter, Hill submitted the Instant Petition for

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
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APR 20 2004
CHARLES R. FULBRUGE III
CLERK

No. 03-60727
USDC No. 2:03-CV-248

RUSSELL KEITH HILL,

Petitioner-Appellant,

versus

LAWRENCE KELLY, Superintendent,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi

O R D E R:

Russell Keith Hill, Mississippi prisoner # L3506, seeks a certificate of appealability ("COA") to appeal the district court's dismissal of his 28 U.S.C. § 2254 petition, which challenged his conviction for armed robbery, for failure to exhaust state court remedies. Hill argues that he presented his claims to the Mississippi Supreme Court in an appeal from his motion to dismiss the indictment and in two writs of mandamus. Because the Mississippi Supreme Court rejected those claims, Hill contends that further attempts at exhausting his state court remedies would be futile.

Exhibit "H"
(2 PAGES)

To obtain a COA, Hill must "make a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where, as here, the district court dismisses the habeas petition on procedural grounds without consideration of the constitutional claims, a COA may issue only if the prisoner shows "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Slack v. McDaniel, 529 U.S. 473, 484 (2000).

Hill has failed to make the required showing. Consequently, COA is DENIED.

E. GRADY JOLLY
UNITED STATES CIRCUIT JUDGE

"H"-2

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
MAY 13 2003
J. T. NOBLIN, CLERK
BY PETITIONER DEPUTY

RUSSELL HILL, #L3506

VERSUS

CIVIL ACTION NO. 2:03cv248PG

LAWRENCE KELLY and MIKE MOORE

RESPONDENTS

MEMORANDUM OPINION

This matter is before the court, sua sponte, for consideration of dismissal. Petitioner Russell Hill, an inmate at the Central Mississippi Correctional Facility, filed this petition for habeas corpus relief pursuant to 28 U.S.C. § 2254.

Background

Petitioner was convicted of armed robbery in the Circuit Court of Lamar County, Mississippi on November 8, 2002. Petitioner was sentenced to serve 30 years with five years suspended and 25 years mandatory in the custody of the Mississippi Department of Corrections. Petitioner pled not guilty to the charges and currently his appeal is pending with the Mississippi Supreme Court.

Analysis

As required by Haines v. Kerner, 404 U.S. 519 (1972), this court has liberally construed petitioner's allegations and has reached the following conclusion.

Petitioner is required to exhaust his available state remedies before he will be allowed to seek federal habeas relief. 28 U.S.C. § 2254 (b)(1)(A) & (c). More specifically, he must present his claims to the state courts in such fashion as to afford those courts a fair opportunity to rule on the merits. Picard v. Connor, 404 U.S. 270 (1977). "An applicant shall not be deemed to have

(3 PAGES) "B" Exhibit