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Supreme Court, U.S.
FILED
AUG 7 2000
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IN THE

UNITED STATES COURT OF APPEALS

OCTOBER TERM 2000

No. 00-6245

MOTION FOR LEAVE TO FILE
WRIT OF HABEAS CORPUS

NOW INTO COURT, comes movant Kenneth Alexander, who, in accord with routine procedure of this Honorable Court, respectfully request permission to file an action invoking the Supreme Court's jurisdiction to file a Writ of Habeas Corpus AS an Extraordinary Writ, which ever may be applicable to petitioner.

Petitioner has presented an his application a "colorable claim of factual innocence" and a constitutional violation, Fifth Amendment Due Process Clause **(all avenues of redress has been foreclosed, as petitioner seeks to have his constitutional claims reviewed on the merits).** All State Courts and the United States District and Circuit Court explicitly refused to hear petitioner's constitutional claims.

Respectfully,

Kenneth Alexander

Kenneth Alexander, #122967
Allen Correctional Center
3751 Lauderdale Woodyard Road
Kinder, Louisiana 70648

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2000

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SUPREME COURT, U.S.

In Re: Kenneth R. Alexander

****

PETITION FOR AN EXTRAORDINARY WRIT AND/OR WRIT OF HABEAS CORPUS - PURSUANT TO 28 U.S.C. § 1651(a), § 2241

****

Kenneth R. Alexander, pro se.
#122,967 (Earth B-2)
Allen Correctional Center
3751 Lauderdale Woodyard Road
Kinder, Louisiana 70648

QUESTIONS PRESENTED

I. Whether trial counsel's failure to independently investigate the circumstances surrounding Petitioner's April 4th interrogation (inculpatory statement evoked by a "confrontational ploy" and the arresting officer and interrogating officer failed to administer **Miranda** rights to petitioner on April 4th) and in failing to move for the suppression of the consequent April 5th confession on Fifth Amendment grounds (right to remain silent and circumstances surrounding April 4th interrogation carried over to taint the April 5th confession) deny Petitioner his Sixth Amendment right to effective assistance of counsel?

II. Whether trial counsel's failure to interview and subpoena witnesses whose testimony would have corroborated petitioner's version of the facts surrounding the confession, failure to file an appeal in petitioner's behalf, and failure to consult with petitioner before, during, and after trial deny petitioner his Sixth Amendment right to effective assistance of counsel?

III. Whether appellate counsel's (Don Hernandez, wasn't trial counsel) failure to raise issue that the April 4th inculpatory statement was evoked by a "confrontational ploy" and that the circumstances surrounding the April 4th interrogation (the State's failure to demonstrate satisfactorily the use of procedural safeguards in the April 4th interrogation session, as required by La. Const. Art. I, § 13 and the Fifth Amendment to the U.S. Const. and **Miranda**) carried over to taint the April 5th confession, deny petitioner his Sixth Amendment right to effective assistance of appellate counsel?

IV. Whether appellate counsel's failure to raise issue of illegal detention - arrest (which the trial court, at the Motion to Suppress, failed

STATEMENT OF THE CASE

On April 4, 1988, Petitioner, along with two other suspects, was arrested for an armed robbery. Petitioner was illegally detained for several hours - without being advised of his Miranda rights or State constitutional rights - while being subjected to compelling influences, psychological ploys, and direct questioning - solely at the instance of the authorities.

Consequently, during the interrogation, Petitioner gave an oral incriminating statement.

The next day, approximately twelve hours after the initial interrogation, detectives initiated yet another interrogation session with Petitioner, where - for the first time during this entire sequence of events - Petitioner was finally informed of his rights (state and federal). Detectives then promised Petitioner a three years' sentence if he would identify the third suspect in the robbery. Petitioner cooperated and thereby lead detectives to apprehend the third suspect in the robbery.

Petitioner's trial counsel filed **no** pre-trial motions attacking the arrest and detention of Petitioner, and **no** pre-trial motion attacking the confession.

At Petitioner's trial, the robbery victim failed to identify Petitioner, and stated that "she did not see a weapon being used upon her during the robbery." **See Jolet's testimony, Tr.T., p. 117, lines 21-24; p. 121. lines 23-26; p. 123, lines 13-17.** The two eyewitnesses, Landry and Henry, testified that "they did not see either of the three assailants with a wea-

pon". **See Landry's testimony, Tr.T., p. 104-110; See Henry's testimony, Tr.T., p. 84, lines 2-5.**

The investigating officer, Det. Cossey, testified that "none of the witnesses saw a weapon being used during the commission of the crime". Cossey also sent a "stick", that was purportedly used during the robbery, to be tested in the crime lab (victim sustained injuries to the head). That stick produced no visible blood stains, no hair, and no fingerprints were developed from this weapon. **See Cossey's testimony, Preliminary Exam. Tr., pp. 11-12; Suppression Hearing Tr., p. 30, lines 3-8, p. 33, lines 15-22.**

On June 21, 1988, after trial by jury, petitioner was found guilty of armed robbery and subsequenrly sentenced to forty years' at hard labor.

On December 27, 1991, petitioner's conviction and sentence were affirmed by the First Circuit Court of Appeal.

On April 17, 1993, petitioner filed a Post-Conviction relief application alleging erroneous jury charge and insufficient evidence. Said petition was dismissed due to petitioner's failure to sign his name.

On September 15, 1993, petitioner submitted another PCR application, alleging the same two claims that were presented in the April 17th application. Trial court dismissed for petitioner's failure to annex a copy of the judgement of conviction and sentence to the petition.

On October 11, 1993, petitioner submitted another PCR

application, after making the necessary adjustments (same two claims as prior petitions). Trial court dismissed due to petitioner's failure to add statement of all prior applications.

On December 17, 1993, petitioner submitted a fourth PCR qpplication after once again making the necessary adjustments to the petition. Trial court dismissed petition, citing repetitiveness and failure to state new claim.

On February 17, 1997, petitioner filed an application for post-conviction relief in the trial court, alleging new claims (ineffective assistance of trial and appellate counsel; and miscarriage of justice). Trial court dismissed without a hearing or a merit determination. Dismissed for procedural default.

On June 27, 1997, petitioner applied for supervisory writs in the Court of Appeal, First Circuit, from the denial of his PCR application. The court denied writ without explanation or written reasons.

Subsequently, petitioner applied for writ of certiorari in the Louisiana Supreme Court. The court denied without written reasons; citing procedural default rule.

On March 26, 1999, petitioner filed a writ of habeas corpus in the U.S. District Court, Western District, Louisiana, alleging Fundamental Miscarriage of Justice (actual innocence), Erroneous jury charge, Insufficient evidence to sustain conviction, Ineffective assistance of trial and appellate counsel.

Petitioner also presented a thorough discussion on why his claims are not controlled by the **AEDPA's 2254(d), 2254(e)(1), and 2254(e)(2).**

On May 3, 1999, Magistrate Judge Methvin recommended that petition be denied and dismissed with prejudice because of the one-year limitation period, 28 U.S.C. § 2244(d).

On May 10, 19, 1999, Petitioner filed objections to the Magistrate's report, arguing that **"if the court finds Petitioner's petition to be barred by the AEDPA's one-year statute of limitations, the court should review the petition under the Suspension Clause notwithstanding AEDPA, because Petitioner raises a claim of "actual innocence".**

On May 26, 1999, the court ordered that the petition for writ of habeas corpus be denied and dismissed with prejudice on the grounds that the claims were allegedly barred by the one-year limitation period, 28 U.S.C. § 2244(d).

On June 14, 1999, the district court granted Petitioner a certificate of appealibility on the issue of 28 U.S.C. § 2244(d)(1)(a) and (d)(2) based on the district court's conclusion that a habeas petitioner cannot evade AEDPA's limitations period by filing procedurally-defaulted pleadings in state courts.

On August 5, 1999, the U.S. Court of Appeals, Fifth Circuit , denied Petitioner's appeal.

On April 27, 2000, the U.S. Court of Appeals, Fifth Circuit, denied Petitioner's request to file a second habeas petition in the district court.

er's claims, supra, which were before the court in the first instance.

Quite correctly, § 2254(e)(2) does not apply to Petitioner's claims because the Louisiana courts never accorded him an opportunity in the state courts to introduce evidence on the point. Since petitioner was not at fault and § 2254 (e)(2) is not applicable, the crucial question is what law applies. Hence, the part of **Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745 (1963)**, that **Keeney v. Tamayo-Reyes, 504 U.S. 1, 112 S.Ct. 1715 (1992)**, overruled has no application here, because Petitioner was not at fault. **See Spreitzer v. Peters, 114 F. 3d 1435, 1456 n.9 (7th Cir. 1997).** For the same reason, § 2254 (e)(2), the only AEDPA provision that even arguably governs evidentiary hearings, has no bearing here. Hence, it is hard to see how **TOWNSEND** is superseded. When the state courts have refused to hear the claim of a state prisoner, **TOWNSEND** still mandates that the petitioner receives a hearing in federal court. The reason is the same today as it was thirty-six years ago: **See TOWNSEND, 372 U.S. at 312, 83 S.Ct. at 756-57; Burris, 948 F.Supp. at 1323.**

APPLICABILITY OF 42 U.S.C. § 2254(d)

Review of petitioner's claims is not controlled by 2254 (d)(1) because the perfunctory decision issued by the Louisiana Supreme Court did not constitute an "adjudication on the merits" and cannot be considered a careful and well-reasoned

opinion requiring deference under § 2254(d). **See Burris v. Parke, 948 F.Supp. 1310, 1321; Nobles v. Johnson, 127 F.3d 409, 416 (5th Cir. 1997); Nguyen v. Reynolds, 131 F.3d 1340, 1359 (10th Cir. 1998).**

The Louisiana courts disposed of petitioner's federal claims on procedural grounds. The State PC courts did not apply **Strickland v. Washington, 466 U.S. 688 (1984),** to the facts surrounding the ineffective assistance of counsel claims ; did not apply **Jackson v. Virginia, 443 U.S. 307 (1980),** to the facts surrounding the insufficient evidence claim; and failed to apply any "clearly established federal law" to the facts surrounding the erroneous jury charge.

APPLICABILITY OF 42 U.S.C. § 2254(e)(1)

Section 2254(e)(1), which says how federal courts must treat the findings of state courts, is irrelevant because Louisiana did not make findings of fact concerning Petitioner's current contentions.

The Louisiana Courts made no express findings of fact regarding whether petitioner exercised his fifth amendment rights when first taken to the Franklin Police station. Neither court made any implicit findings on any of Petitioner's claims, no conclusions of law from which this court could infer a factual finding.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-30252

U. S. COURT OF APPEALS
FILED
MAY 02 2000
CHARLES R. FULBRUGE III
CLERK

IN RE: KENNETH R. ALEXANDER,

Movant.

Motion for an order authorizing
the United States District Court for the Eastern
District of Louisiana to consider
a successive 28 U.S.C. § 2254 application

Before REAVLEY, DAVIS, and STEWART, Circuit Judges.

BY THE COURT:

Kenneth R. Alexander (TDCJ # 122967) moves this court for authorization to file a successive habeas corpus application challenging his 1988 conviction for armed robbery. Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a second or successive 28 U.S.C. § 2254 application must be certified by this court to contain either newly discovered evidence or a new rule of constitutional law, made retroactive to cases no collateral review by the Supreme Court, that was previously unavailable. § 2244(b)(2)(A),(B). If the movant alleges newly discovered evidence, he must show that the factual predicate for the claim could not have been discovered through the exercise of due diligence; and that such facts would be sufficient to establish by clear and convincing evidence that, but for

constitutional error, no reasonable factfinder would have found applicant guilty of the underlying offense. § 2244(b)(2)(B).

This court may authorize the filing of a successive habeas corpus application only if it determines that the movant makes a prima facie showing that the motion satisfies the applicable requirements. § 2244(b)(3)(C). Because Alexander has made no such showing, his motion is DENIED.