No. 03-5926

IN THE

SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
JUL 22 2003
OFFICE OF THE CLERK

In re: Kenneth R. Cobbin,

Petitioner,

vs.

Joseph Ortiz, Executive Director
Colorado State Department of Corrections

Gary K. Watkins, Superintendent
Limon Correctional Facility

and

THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents.

PETITION FOR WRIT OF HABEAS CORPUS

Kenneth R. Cobbin
Prisoner 45354
Limon Correctional Facility
49030 State Highway 71
Limon, Colorado 80826

QUESTION PRESENTED

Whether the indigent petitioner, who in no way waived his right to counsel, is now unlawfully and illegally detained and restrained of his liberty in violation of his rights under the Sixth and Fourteenth Amendments to the Constitution of the United States because he was denied the assistance of counsel to pursue his motion for a new trial and at sentencing.

STATEMENT OF THE CASE

In March 1987 the petitioner, Kenneth R. Cobbin, was charged by felony information and complaint in the District Court, City and County of Denver, Colorado, with aggravated robbery, C.R.S. §§ 18-4-302(a)(a)(1986), mandatory sentence for a crime of violence, C.R.S. §§ 16-11-309 (1986), and four counts of having previously pled guilty to felonies and being sentenced, C.R.S. §§ 16-13-101(2) (1986).

The indigent petitioner was represented by court-appointed criminal defense counsel at the birfurcated trial. Subsequent to the return of the jury verdict, the petitioner, by and through defense counsel, requested and was granted leave to file a Colorado Rule of Criminal Procedure 33 ("Crim. P. 33") new trial motion. After learning that the petitioner intended to pursue a ineffective assistance of trial counsel claim in his new trial motion, defense counsel requested leave to withdraw and that "conflict free" counsel be appointed to assist or represent the petitioner on his new trial motion and sentencing.

The state trial court, without inquiring into the nature of the "conflict," discharged defense counsel, but did not appoint new or substitute counsel to assist or represent the petitioner on his new trial motion and at sentencing. The petitioner did not make a knowing, intelligent, and voluntary waiver of his right to counsel, and the record does not show that the trial court secured a valid waiver of the right to

counsel from the petitioner.

The petitioner filed pro se motions for appointment of counsel and a new trial. At the August 12, 1988 hearing, the petitioner requested the trial court appoint counsel to assist and represent him. The trial court, stating that the petitioner had "voluntarily waived counsel," denied his request for counsel and new trial motion, and sentenced him to "life" imprisonment in the custody of the Executive Director of the Colorado State Department of Corrections. (Appendix F). Thus, the petitioner, who in no manner waived his Sixth Amendment right of counsel, was not represented by counsel in pursuit of his new trial motion and at sentencing.

In April, 2000, the petitioner filed a pro se Crim. P. 35(c) postconviction motion claiming, inter alia, that his Sixth Amendment rights were violated by the denial of counsel to pursue a new trial motion and at sentencing. On September 8, 2000, the state trial court, without addressing the denial of counselclaim, denied the motion. (Appendix E). The petitioner appealed to the Colorado State Court of Appeals.

On June 14, 2001, the court of appeals granted the petitioner's motion to supplement the record on appeal with the certified pleadings, motions, orders, and transcripts of the trial court proceedings. (Appendix D). The trial court failed to supplement the record on appeal as ordered by the apellate court.

In its May 16, 2002 opinion (Appendix B) the court of

appeals, without benefit of the state trial court record, remanded the case, stating that it could not determine from the record whether the petitioner knowingly, voluntarily, and intentionally waived his right to counsel, or had been prejudiced by the denial of counsel at a critical stage of the proceedings. (Appendix B). The appellate court recognized that counsel could have sought and argued for a proportionality review of the life sentence, but failed to recognize that counsel could have pursued a new trial motion and sought and argued that the petitioner was denied effective assistance of counsel at trial, and that his uncounseld prior felony convictions could not be used to enhance his sentence under Colorado's habitual criminal sentencing scheme.

It is significant that the appellate court specifically declined to apply "harmless error analysis," because it could not conclude that the petitioner had not been prejudiced by the denial of counsel. (Appendix B).

On September 26, 2002, the appellate court, without reviewing the entire trial court record, and without recognizing the fundamental principle that the denial of counsel at a critical stage of the criminal proceeding is presumed prejudicial, withdrew its May 16 opinion and affirmed the trial court's order denying the petitioner's Crim. P. 35(c) motion. (Appendix A). This time, the appellate court stated that the error was indeed harmless beyond a reasonable doubt because it appeared that the trial court may have conducted an abbre-

viated proportionality review. (Appendix A).

The appellate court made no mention of the fact that even if the trial court conducted an abbreviated proportion - ality review of the life sentence it did so without the petitioner being assisted or represented by counsel, thus the entire proceeding was pervaded. Again, the appellate court failed to address the appearance of the petitioner not being permitted to pursue a new trial motion or seek and argue constitutional and legal claims which would have prohibited the trial court imposing a life sentence, with the effective and competent assistance of counsel.

The Colorado State Supreme Court denied certiorari review on June 16, 2003 (Appendix C), and the United States Court of Appeals for the Tenth Circuit denied the petitioner's application for leave to file a second or successive habeas corpus application under 28 U.S.C. § 2254 on July 14, 2003 (Appendix G).

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

KENNETH R. COBBIN, Petitioner, v. ARISTEDES W. ZAVARES, Executive Director; MARK E. MCKINNA, Superintendent; ATTORNEY GENERAL OF THE STATE OF COLORADO, Respondents.	No. 03-1289 (D.C. No. 97-B-2258)

ORDER

Filed July 14, 2003

Before **TACHA**, Chief Judge, **SEYMOUR** and **KELLY**, Circuit Judges.

Kenneth R. Cobbin, a state prisoner in Colorado, moves this court for authorization to file another 28 U.S.C. § 2254 petition.

Mr. Cobbin challenges his state conviction for aggravated robbery and four habitual criminal counts for which he received the mandatory sentence of life. He argues that he was unconstitutionally deprived of his right to counsel at sentencing.

To obtain authorization to file a second or successive habeas petition the