04-6093

No. 01-11287

USDC NO. 4:00-CV-1624-A

IN THE

SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
AUG 20 2004
OFFICE OF THE CLERK

In re MARK ALAN BURGESS - Petitioner

Vs.

DOUG DRETKE, DIRECTOR

TEXAS DEPARTMENT OF CRIMINAL JUSTICE

INSTITUTIONAL DIVISION - Respondent

On petition for Extraordinary Writ for relief under Federal Habeas Corpus 28 U.S.C. § 2254 to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR EXTRAORDINARY WRIT

PRO SE LITIGANT
MARK ALAN BURGESS
TDCJ-ID #835512
WYNNE UNIT
HUNTSVILLE, TEXAS 77349

RECEIVED
AUG 31 2004
OFFICE OF THE CLERK
SUPREME COURT, U.S.

QUESTIONS PRESENTED

QUESTION NO. 1

Does a Court of Appeals deny due process of law and fundamental fairness as guaranteed by the 14th Amendment to the United States Constitution, when it fails to review the evidence contained in the trial records that clearly exposed the manifest error(s) of fact, caused by the lower court's unsupportable material misrepresentation of the evidence, and collectively followed suit throughout this judicial process?

QUESTION NO. 2

Does a Court of Appeals deny due process, equal protection and fundamental fairness as guaranteed by the 14th Amendment to the United States Constitution, when it does not apply its own current controlling case precedent to Rule 28 U.S.C. § 2101(e)?

CITATIONS OF REPORTS, OPINIONS AND ORDERS

STATE PROCEEDINGS

In an unpublished opinion, Mark Alan Burgess v. State of Texas, No. 2-98-117-CR (Tex. App. Fort Worth, April 15, 1999) the State Court of Appeals affirmed Burgess's conviction[1]

Motion for Reconsideration was denied May 13, 1999[2]

Motion for Discretionary Review, resulting in the State Court of Appeals withdrawing its April 15, 1999 opinion and substituting a modified unpublished opinion and judgement on July 1, 1999, again affirming the conviction [3]

On June 2, 2000, Application for pro se Writ of Habeas Corpus under Art. 11.07, Tex.C.Crim. P., which the Texas Court of Criminal Appeals denied without written order on August 30, 2000 (Ex Parte Mark Alan Burgess, application No. 46,253). [4]

FEDERAL PROCEEDINGS

On September 21, 2000, Application for Petition of Writ of Habeas Corpus was filed pursuant to 28 U.S.C. § 2254 in the United States District Court of Texas for the Northern District, styled Mark Alan Burgess v. Gary Johnson [now Doug Dretke], Civil Action No. 4:00-CV-1624-A (FCR at 1) [5]

Respondent filed Motion for Summary Judgement on December

8, 2000 (FCR at 55) [6]

Petitioner Burgess filed his reply in opposition on January 18, 2001 (FCR at 88) [7]

On July 30, 2001, the Magistrate Judge filed his findings, conclusions, and recommendations for denial of relief (FCR at 111) [8]

Judge signed the final judgement denying the Petition for Writ of Habeas Corpus on September 20, 2001 (FCR at 151)[9]

Petitioner Burgess filed his Notice of Appeal and Motion for Certificate of Appealability (COA) on October 1, 2001; The Court granted the COA, May 1, 2002 (5th Cir. order dated February 1, 2002 not included in record - See No. 01-31223)[10]

On February 25, 2002, Petitioner filed his pro se brief, Mark Alan Burgess v. Janie Cockrell, No. 01-11287; the State filed its letter brief response on May 1, 2002 [11]

Petitioner Burgess filed his pro se Reply Brief on May 14, 2002 [12]

By order of the Court, Counsel was appointed to prepare a Supplemental Brief on behalf of Petitioner Burgess for the Court's consideration and such was due February 20,

2003 [13]

Attorney was granted oral arguments and it was styled Mark Alan Burgess - Appellant vs. Douglas Dretke, etc., No. 01-11287, October 8, 2003 [14]

On November 11, 2003, the United States Court of Appeals denied the petition with a published opinion (Mark Alan Burgess v. Janie Cockrell, No. 01-117, USDC No. 4:00-CV-1624-A) [15]

JURISDICTION

The Court of Appeals for the Fifth Circuit denied the appeal for relief on the motion for (COA) on November 11, 2003. This petition is filed within ninety (90) days of the latter date. The Supreme Court has jurisdiction under 28 U.S.C. § 1651(a). Petitioner initially invoked federal jurisdiction under 28 U.S.C. § 2254.

CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution guarantee of the right to "petition the Government for a redress of grievances," stands for the proposition of unhindered access.

The Fifth Amendment to the United States Constitution under the Due Process clause guarantees in pertinent part, "no person shall be ... deprived of life, liberty, or property, without due process of law," stands for the proposition of the fair and meaningful opportunity to be heard.

The Fourteenth Amendment to the United States Constitution guarantees in pertinent part, "no state shall deprive any person of life, liberty or property, without due process of law; nor deny any person within its jurisdiction the equal application of controlling law in judiciary review."

The Sixth Amendment to the United States Constitution states in its pertinent part that "In all criminal prosecutions, the accused shall enjoy the right to a fast and speedy public trial, by an impartial jury of the state and district wherein

the crime shall have been committed, which district shall have been previously ascertained by law, to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have the compulsory process for obtaining witnesses in his favor, and to have 'assistance of counsel' for his defense."

STATEMENT OF THE CASE

On November 14, 1996, petitioner was arrested after a high-speed chase for two theft warrants originating out of Parker County, Texas. Petitioner was provided miranda warnings and he immediately asked for an attorney. Petitioner was then arraigned by the Justice of the Peace on theft charges. Petitioner again asked for an attorney at the courthouse, specifying attorney Mr. Russ Thomason. After confiding with petitioner, Thomason left the consultation room and stated to the officers involved that he would not be representing the petitioner.

The officers then advised Thomason of their grave concerns regarding Cone (Deceased) and requested Thomason to go back into consultation to seek information concerning the whereabouts of Cone, which in doing so at that time, Thomason became an agent of the state; Thomason failed to give proper notice to the petitioner that he was indeed acting as an agent of the state ("A defendant must know he is being questioned by the state or government before he can knowingly waive his right not to be interrogated by the state or the government

without his lawyer"; U.S.C.A. CONST. AMEND. 6 - Crim. Law Key 412.2(4)).

In any event, attorney Thomason returned with the requested information which consisted of written instructions that Thomason drew up from the information that he got from the petitioner of the direction to Cone's body. The officers asked Thomason to go back in again as an agent of the state to ask petitioner if he would show them where the directions led or to where Cone might be located, in which Thomason complied and upon returning to the officers, he advised them "Yes, he will show you." Cone's body was found, the information and the statement that the petitioner gave was provided for the jury to hear. Petitioner was found guilty and sentenced to life in prison and assessed a ten(10) thousand dollar fine.

The Court of Appeals denied the appeal for relief after granting the COA for a hearing, which was denied on November 11, 2003. This petition is requested because of the petitioner's attorney impediment in his not letting the petitioner know that he was not going to file for Certiorari until fifty (50) days had elapsed.

The Supreme Court has jurisdiction under 28 U.S.C. § 1651(a). Petitioner initially invoked federal jurisdiction under 28 U.S.C. § 2254. (Please see original explanation to the clerk for the late filing (EXHIBIT AA; also please see the reasoning for the request for this petition.)

The Supreme Court recently rendered a decision relevant

to this cause (United States v. Patane, July 2004). The decision in Patane bears great significance in relation to this case and should be included in the analysis thereof.

ARGUMENT

REASONS FOR ISSUANCE OF WRIT

REASON ONE

The United States Court of Appeals erred in the Fifth Circuit by failing to recognize (1) Petitioner's right to counsel as guaranteed by the 6th Amendment to the United States Constitution; (2) Its review based solely on the lower court's findings which is contrary to Federal law, Rule 28 U.S.C. § 2101(e).

REASON TWO

The United States Court of Appeals for the Fifth Circuit erred in failing to apply its current controlling case precedent in their analysis of Petitioner's 5th, 6th and Due Process and Equal Protection rights. The controlling Massiah Court ruling still holds true and has not been overruled. This selective application constituted a discriminatory departure from the doctrine of stare decisis which would embrace the Sixth Amendment and Equal Protection.

REASON THREE

The United States Court of Appeals for the Fifth Circuit

erred in its conclusion by stating that it based its decision on the fact that the other evidence was overwhelming; However, there can be no real determination upon how much weight was placed on the confession by the jury in reaching its decision.

PETITIONER'S ARGUMENT AND SUPPORT

Petitioner filed this petition from the United States Court of Appeals for the Fifth Circuit's denial (Hohn v. United States, 524 U.S. 236).

Had the Court of Appeals used the Chapman standard (Chapman v. California, 386 U.S. 18,24) instead of the Brecht standard (Brecht v. Abrahamson, 507 U.S. 642), perhaps the petitioner would have in hand the relief now requested and deserved by law.

If a defendant's constitutional rights were violated at trial or at sentencing, an appellant court on direct appeal generally must determine whether the error was "harmless beyond a reasonable doubt" (Chapman v. California, 386 U.S. 18,24). At least in theory, the Chapman harmless error theory and standard is difficult for the prosecution to meet.

Unlike the Chapman standard, which places the burden on the prosecution to show "beyond a reasonable doubt" that the error did not "affect" or "contribute" to the guilty verdict or the sentence, the Brecht standard places the burden on the prosecution to show that the error did not have a "substantial and injurious effect" (O'Neal v. United

EXHIBIT A

United States Court of Appeals
Fifth Circuit
FILED
November 11, 2003
Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 01-11287

MARK ALAN BURGESS,

Petitioner-Appellant,

versus

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL
JUSTICE, CORRECTIONAL
INSTITUTIONS DIVISION,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

Before REAVLEY, HIGGINBOTHAM, and BENAVIDES, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Following a jury trial, Petitioner Mark Alan Burgess was convicted of murder and sentenced to life in prison. He filed a petition for a writ of habeas corpus in district court pursuant to 28 U.S.C. § 2254, alleging that the state trial court committed various constitutional violations that tainted his conviction. The district court denied his petition, and we granted him a certificate of appealability on the issue whether the admission of

not have a "substantial and injurious effect or influence in determining the jury's verdict."[33]

V

We do not have grounds for granting relied under § 2254(d) unless we first find that the state court made an error of "clearly established" law that is not harmless. We find no such violation here. The judgement of the district court is AFFIRMED. The State's motion to strike Burgess's Supplemental Letter Brief is DENIED.

---

[33] *Brecht*, 507 U.S. at 623.