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A.-16

In the Supreme Court of the United States

IN RE JAMES JOSEPH WILKENS, JR.
Petitioner,

On Petition for Original Writ of Habeas Corpus
and Motion for Stay of Execution

RESPONDENT'S BRIEF IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

FILED
JUL 2001
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In re JAMES JOSEPH WILKENS, Jr.,

PETITIONER

PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2241

This is a capital case. Petitioner is scheduled to be executed on July 11, 2001.

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QUESTION PRESENTED FOR REVIEW

WHETHER THE PROHIBITION AGAINST RAISING CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL IN THE FEDERAL HABEAS CORPUS PROCESS CONTAINED IN 28 U.S.C. § 2254(i) VIOLATES THE DUE PROCESS PROTECTION AFFORDED BY THE FIFTH AMENDMENT.

OPINION BELOW

This Court denied Wilkens' petition for the writ of certiorari to review the judgment of the Fifth Circuit dismissing his appeal from the denial of relief by the habeas court. Wilkens v. Johnson, 2001 WL 487736 (June 29, 2001). The court of appeals issued a published opinion in dismissing his appeal, with one judge dissenting. Wilkens v. Johnson, 238 F.3d 328 (5th Cir. 2001). A copy of the opinion is appended to this application for relief.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 2241.

In accord with 28 U.S.C. § 2242 and Rule 20.4(a) of the Rules of this Court, Petitioner provides the following information concerning this Court's exercise of jurisdiction:

Wilkens is scheduled to be executed on July 11, 2001, and is confined under the authority of Gary Johnson, Director, Texas Department of Criminal Justice, Institutional Division.

The issue presented in this petition has not previously been presented to the United States District Court, the Fifth Circuit Court of Appeals or any state court. Petitioner's claim arises as a result of counsel's failure to timely file notice of appeal from the denial of his petition for federal habeas relief by the federal habeas court, resulting in dismissal of his appeal by the Fifth Circuit Court of Appeals.

Petitioner has not raised the claim presented in this application in the district court in a petition for relief brought

pursuant to 28 U.S.C. § 2254 because the dismissal of his appeal by the circuit court left him in the position of having no recourse in the district court apart from that afforded for successive petitions.

The issue Wilkens argues relates to the constitutionality of the limitation imposed on federal habeas review in subsection (i) of 28 U.S.C. § 2254. This provision bars federal habeas courts from recognizing claims of ineffective assistance of counsel in the state or federal post-conviction process as grounds for federal habeas relief.

The district court could not entertain a successor application for relief based on Wilkens' constitutional challenge to subsection (i) because the statute limits successor applications to those claims which establish either actual innocence or demonstrate reliance on a new rule of constitutional law made retroactive by this Court to cases on collateral review. 28 U.S.C. § 2244(b)(2)(A) and (B). Neither the district court for the district in which Wilkens is now confined, nor the district court in which his petition for habeas relief was litigated, would have jurisdiction over the claim he presents to this Court because the claim cannot qualify as cognizable under the limited successor standards recognized by Subsection (b)(2) of Section 2244. Similarly, the court of appeals lacks jurisdiction under the statutory scheme to grant leave to file a successive petition based on the claim asserted by Wilkens in this application for relief and Section 2254(i) would bar consideration of the claim on the merits.

Consequently, only this Court has jurisdiction to consider the claim. Felker v. Turpin, 518 U.S. 651, 662-63 (1996).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment provides, in pertinent part:

> . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law* . . .

U.S. Constitution, amendment V (emphasis added).

Section (i) of 28 U.S.C. § 2254 provides:

> The ineffectiveness or incompetence of counsel during Federal or state collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

STATEMENT OF THE CASE

Summary of Material Facts

Petitioner Wilkens was convicted of capital murder in the shooting deaths of his former girlfriend's son and her boyfriend in December, 1986. She was also wounded, but apparently assumed to be dead when he left the scene. At the time Wilkens was on parole for robbery. At his 1988 trial, Petitioner's trial attorneys relied on an insanity defense not supported by any expert testimony. His conviction and sentence were reversed on direct appeal based on admission of psychological testimony obtained in violation of Estelle v. Smith, 451 U.S. 454 (1981). Wilkens v. State, 847 S.W.2d 547 (Tex. Crim. App. 1992).

At the retrial, the State again offered the testimony of Dr.

Allen, whose testimony at the prior trial had resulted in reversal, this time in its case-in-chief on guilt/innocence. The defense again asserted an insanity claim without benefit of supporting expert testimony on the issue of sanity. Dr. Allen's trial testimony essentially characterized Wilkens as a sociopath attempting to feign mental illness or psychosis. Although Wilkens offered substantial evidence of his own victimization as a child at the hands of sexually and physically abusive parents and lay testimony to the effect that he did not seem mentally stable while in jail the jury rejected his insanity defense and convicted him of capital murder, then returned findings authorizing a sentence of death.

Procedural History of the Case

The Court of Criminal Appeals affirmed the conviction and sentence of death imposed at Wilkens' second trial on direct appeal. Wilkens v. State, No. 71,780 (Tex. Crim. App. Nov. 1995). His claims relating to use of the tainted forensic testimony were presented and rejected by the Texas courts in his application for state post-conviction relief. Ex parte Wilkens, No. 35,925-01 (Tex. Crim. App. Jan. 12, 1998).

Thereafter, Wilkens sought federal habeas relief. The district court denied relief, but recognized the potential merit in his issue directed at the use of the tainted forensic testimony in granting a certificate affording Wilkens leave to appeal to the Fifth Circuit. Because counsel did not receive notice of the denial of relief, Wilkens did not timely file his notice of appeal.

Once informed of the error, counsel did file a motion for leave to file a late notice of appeal which was granted by the district court. However, counsel did not move to reopen the appeal, as required by Rule 4(a)(6)(A), and the Fifth Circuit panel concluded that the court lacked jurisdiction to hear the case because the notice of appeal was not timely filed in light of counsel's failure to move to reopen. The panel, with one judge dissenting, issued a published opinion. Wilkens v. Johnson, 238 F.3d 328 (5th Cir. 2001). The petition for rehearing before the panel was denied. Wilkens then sought review by writ of certiorari in this Court.

This Court denied Wilkens' petition for the writ of certiorari to review the judgment of the Fifth Circuit dismissing his appeal from the denial of relief by the habeas court. Wilkens v. Johnson, 2001 WL 487736 (June 29, 2001).

SUMMARY OF ARGUMENT

Congress has enacted legislation providing a statutory remedy for violations of federally protected rights in the course of state criminal proceedings, 28 U.S.C. § 2254. The federal habeas corpus process includes a right of appeal dependent upon the recognition by the district court or court of appeals of the existence of a potentially meritorious issue warranting appellate review. 28 U.S.C. § 2253. Congress has also provided for appointment of counsel for indigent state and federal death row inmates seeking to challenge their capital convictions and sentences based on violations of federal constitutional protections. 21 U.S.C. §

848(q)(4)(B). Yet, despite its implicit interest in affording death row inmates access to competent legal representation, Congresss has also expressly precluded recognition of ineffective assistance claims arising in state or federal collateral, post-conviction process in subsection (i) of Section 2254.

Wilkens argues that denial of basic effectiveness in representation--as in his case, when counsel failed to give timely notice of appeal or move to reopen the appeal as required by Fed. R. App. P. 4(a)(6)(A)--is inconsistent with the Fifth Amendment's guarantee of due process of law. Yet, he has been denied a remedy for counsel's failure to perform this essentially ministerial duty by the operation of subsection (i). The subsection's preclusion of relief based on appointed counsel's ineffectiveness in this case conflicts with basic notions of fundamental fairness. To the extent that subsection (i) precludes relief for even non-discretionary errors committed by counsel, the Fifth Amendment should limit the application of the subsection.

The Court should grant relief and remand this cause to the Fifth Circuit Court of Appeals for determination of prejudice and reinstatement to the appellate docket.

REASONS FOR GRANTING RELIEF

THE PROHIBITION AGAINST RAISING CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL IN THE FEDERAL HABEAS CORPUS PROCESS CONTAINED IN 28 U.S.C. § 2254(i) VIOLATES THE DUE PROCESS PROTECTION AFFORDED BY THE FIFTH AMENDMENT.

Rule 20.4(a) cautions that this Court will only order relief on an original application under "exceptional circumstances."

**6 "(1) a notice of appeal (except as authorized in Rule 4)...."

Today's entire self-examination of our appellate jurisdiction turns on the extension and reopening provisions of Rule 4(a). And, together, Rules 2 and 26(b) bring us right back to Rule 4(a), precisely where we were when we detoured to consider Wilkens's alternative invitation to do justice by *335 (mis)applying Rule 2. On this alternative entreaty, our hands are tied.

III.
CONCLUSION

To recap, the district court's judgment denying habeas relief in this case was entered on June 18, 1999. The clerk of the district court appears to have served notice of the entry of judgment that day by mail to counsel for each party, in compliance with Fed.R.Civ.P. 77(d) and 5(b). [FN30] That neither Wilkens nor his counsel ever received this notice, however, is not contested.

FN30. *See* Fed.R.Civ.P. 5(b)("Service by mail is complete upon mailing").

Also uncontested is the fact that the first notice of entry of judgment ever received by counsel for Wilkens was oral, via telephone, from staff counsel for the district court on September 7, 1999; neither is it contested that the oral notice was followed immediately by the court's faxing of a copy of the judgment, or that the fax was received by counsel for Wilkens at his law office later that day. Counsel never received notice of entry of judgment within 60 days after entry, so that extension under Rule 4(a)(5) was unavailable to Wilkens.

Additional undisputed facts demonstrate that, even though Wilkens was entitled to service of the notice of entry of judgment, and even though notice appears to have been served, neither Wilkens nor his attorney received notice of entry of judgment from the court or any party within 21 days after entry. Wilkens thus cleared the first hurdle to entitlement to reopening under Rule 4(a)(6): Subpart (B)'s 21 days provision was not an impediment to his filing a motion for reopening, and he did in fact file such a motion within the 180-day outer limit for doing so.

Not until almost a month after receiving the fax copy of the judgment from the court on September 7, 1999, however, did Wilkens's lawyer file a motion in the district court for leave to file a late NOA, which we construe as a Rule 4(a)(6) motion to reopen. About one week after that, the district court granted Wilkens's motion and counsel filed Wilkens's late NOA. This all took place well *before* the expiration of subpart (A)'s 180-day period following entry of judgment, but well *after* the expiration of subpart (A)'s seven day period following receipt of notice of entry, the earlier of the times within which Wilkens had to file his motion to reopen.

**7 Subpart (A) of Rule 4(a)(6) speaks only of receipt of notice: It says nothing at all about who must send the notice; nothing at all about how the notice must be sent, delivered, or received; nothing at all about the physical qualities of the notice--just plain, unadulterated "receives notice of the entry." Here, a written copy of the judgment was (1) sent by the court (2) via fax (3) to counsel's law office where it was printed out by his office fax machine and from there received in hand by counsel of record. Yet Wilkens's counsel filed no motion to reopen the time for filing an NOA, or any other pleading for that matter, during the ensuing period of seven days allowed by subpart (A). Thus the motion he finally did file, several weeks after receiving the written notice via fax--and the order that the district court signed and entered another eight days after that, purporting to grant that motion--were without any legal effect whatsoever.

Moreover, even if, in the alternative, we were inclined to rescue Wilkens's otherwise void NOA by invoking Rule 2 "to prevent manifest injustice," we could not. As recognized by the Advisory Committee Notes, Rule 26(b) expressly proscribes using Rule 2 to extend the time for filing an NOA. [FN31]

FN31. *See supra* n. 26.

Because Wilkens's motion of October 4, 1999 is an absolute nullity, the court's order of October 12 purporting to reopen the *336 time for filing is an absolute nullity, in turn making Wilkens's October 12 NOA an absolute nullity. As Wilkens never *timely* filed a notice of appeal, we have no jurisdiction to hear his complaint that the district court erred in denying habeas relief.

APPEAL DISMISSED.

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