ORIGINAL

No. 00-5578

Supreme Court, U.S.
FILED
MAY 30 2000
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

IN RE KADE ALLEN, PRO-SE -PETITIONER

VS.

LINDA CLARKE, WARDEN -RESPONDENT

PETITION FOR WRIT OF HABEAS CORPUS

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF HABEAS CORPUS

KADE ALLEN C-39680

P.O. BOX 689 - G-105L

SOLEDAD, CA. 93960-0689

PRO-SE PETITIONER

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QUESTIONS PRESENTED

1. DOES THE "ANTITERROISM AND EFFECTIVE DEATH PENALTY ACT" FORECLOSE THE PROVISION WHERE "THERE IS NO STATUTE OF LIMITATION" WHEN A COURT MAY CORRECT AN ILLEGAL SENTENCE AT ANY TIME, IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

2. DID CONGRESS INTEND THAT THE WRIT OF HABEAS CORPUS BE SUSPENDED FOR THOSE PETITIONERS WHO ARE ILLEGALLY DETAINED UNDER AN ILLEGAL SENTENCE WHICH IS IN EXCESS OF THE COURT'S JURISDICTION?

3. DID THE TRIAL COURT ERROR WHEN IT ACTED IN EXCESS OF IT'S JURISDICTION WHEN IT IMPOSED ILLEGAL SENTENCES ON PETITIONER. AND IF SO, WAS IT IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

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Appendix F U.S. Court of Appeals denial of the Motion for leave to proceed in the district court.

Appendix G Amendments V, VIII, and XIV, to the United States Constitution.

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JURISDICTION

Petitioner is a citizen of the United States having his principal place of residence in the State of California and California is a corporation incorporated under the laws of the United States having her principal place of business in the State of California.

The action arises under the Constitution of the United States, Article III, section 2, Clauses 1 and 2, in that the State of California has violated petitioner's 5th, 8th and 14th Amendments Rights. This court's jurisdiction is also invoked pursuant to Title 28 USC 1651(a).

Petitioner filed a §2254 Petition for Habeas Corpus, in the District Court, Central District of California on March 19, 1999.

On May 4, 1999, the District Court issued and Order To Show Cause, (See, Appendix D) in which Respondent complied. Upon pleadings being closed and at issue: The District Court dismissed without prejudice, for petitioner to move in the appropriate court of appeals for an order authorizing the district court to consider the application. (See, Appendix E)

On Feb. 7, 2000, petitioner filed a Motion For Permission To File Second Or Successive Habeas Corpus in the district court. And on March 27, 2000, the court of appeals for the Ninth Circuit denied petitioner's motion. (See, Appendix F)

In each proceeding petitioner specifically alleged violations of his state and federal constitutional right to a fair adjudication of the illegal sentence, which is in excess of that permitted by law.

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Accordingly, petitioner has exhausted all available state and federal remedies both factually and legally. Exhaustion is not a jurisdictional bar but is discretionary under decisional law. Bowan v. Johnson 306 U.S. 19, 83 L.Ed 455, 59 S.Ct 442 (1939). The rule [of exhaustion] is not one defining power but one which relates to the appropriate exercise of power." 306 U.S. @ 27. Picard v. Connor, 404 U.S. 207, 30 L.Ed 438, (2 S.Ct. 509 (1971).

Title 28 U.SC. §2254(b), enacted in 1948 to codify existing case law, provide in relevant part, "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the state, * * *." [underscoring added] No other state remedies exist or is available for petitioner to assert his claim where the trial court has acted in excess of jurisdiction, when it sentenced petitioner illegally to multiple sentences in excess.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendments V, VIII and XIV to the United States Constitution is set forth in Appendix G.

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STATEMENT OF THE CASE

By Felony Information filed by the Los Angeles County District Attorney in Case No. A081129, Petitioner was charged as follows:

Count I, with Kidnaping for purpose of robbery, in violation of Section 209, of the California Penal Code;

Count II, with Kidnapping (Simple) in violation of section 207, of the California Penal Code;

Count III - V, with Forcible oral copulation, in violation of section 288(a)(d), of the California Penal Code;

Count VI X, with forcible rape in violation of Section 261(2)(3) of the California Penal;

Count XI XII, with Attempted robbery in violation of Section 664/211, of the California Penal Code;

Count XIII, with Robbery in violation of Section 211, of the California Penal Code;

Count XIV - XV, with Assault by Means of force likely to produce great bodily injury, with a deadly weapon, in violation of Section 245(a), of the California Penal Code.

It was further alleged in Counts I-V and XI-XV, that Petitioner used a Firearm with respect to these counts.

On October 25, 1981, Petitioner was "GUILTY" on COUNTS 1 thru 12, and 14-15; and "NOT GUILTY" on COUNT 13; and sentenced to Life with Possibility of Parole on Count 1; and 31 years on COUNTS 2-15, to run consecutively.

On January 25, 1983, the California Court of Appeals, 2nd

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Appellate District, in 2d Crim No.41565, Affirmed the Judgment of Conviction.

On March 23, 1983, the California Supreme Court Remanded Petitioner's case back to the Court of Appeals, in light of Donaldson v. Superior Court, (1983) 35 Cal. 3d 24.

On May 7, 1984, the California Court Appeals Re-Affirmed Petitioner's conviction. Thereafter, the California Supreme Court denied Review.

On June 30, 1989, Petitioner filed a Petition for Writ of Habeas Corpus in the California Supreme Court. The Petition was denied Feb. 14, 1990.

On May 15, 1990, Petitioner filed a § 2254, Petition for Writ of habeas Corpus in the United States District Court. On June 6, 1990, the District Court issued an Order to Show Cause. Thereafter, on January 28, 1991, Respondent filed their Return, and Petitioner filed his Traverse thereto, on Feb. 25, 1991.

On February 28, 1991, District Court Magistrate JOSEPH REICHMAN, filed his Report & Recommendation. Thereafter on March 22, 1991, Petitioner filed his "Objections" to Magistrate REICHMAN'S Report and Recommendation.

On April 3, 1991, the District Court entered its Order denying and dimissing Petitioner's § 2254, Petition for Writ of Habeas Corpus.

On April 23, 1991, the Petitioner filed his Notice of Appeal. On July 24, 1991,Petitioner filed his Opening Brief in the United States Court of Appeals for Ninth Circuit.

Appellees' filed their Brief, and Petitioner filed his Reply Brief thereto, on September 26, 1991.

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On February 11, 1992, the United States Court of Appeals for the Ninth issued its Memorandum Affirming the conviction.

On June 6, 1995, Petitioner filed § 2254 in the District Court.

On June 8, 1995 District Court Magistrate REICHMAN, filed his Report & Recommendation, Dismissing petitioner's 2254 petition, entered on June 12, 1995.

March of 1998, Petitioner file in the Superior Court of California, County of Los Angeles, Exparte Request For Correction of Sentence.

On July 1, 1998 Superior Court, denied Petitioner's Exparte Petition To Correct the Sentence.

On August 24, 1998, Petitioner filed Writ of Habeas Corpus in the California Court of Appeal, Second Appellate District.

On September 9, 1998, Court of Appeals denied the Petition.

Petitioner next file a Petition for Writ of Mandate in the California Supreme Court, Case No. S073902 On October 7, 1998.

On Dec. 16, 1998, California Supreme Court, denied relief.

On March 19, 1999, Petitioner filed a § 2254, Petition for Writ of Habeas Corpus in the U.S. District Court.

On May 4, 1999, the District Court issued an Order to Show Cause. In July of 1999, Respondent answered by filing a Motion To Dismiss, Petitioner 2254 Habeas Petition.

On January 11, 2000, District Court issued an Order Of Dismissal Without Prejudice.

On February 7, 2000, Petitioner Filed an application, For Permission To File Second or Successive Habeas Corpus, in the United States Court of Appeals, For the Ninth Circuit. On March 27, 2000

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the Court of Appeal for the Ninth Circuit, issued an Order, denying the petition for authorization to file a second or successive habeas petition in the district court.

STATEMENT OF THE FACTS

In January of 1998, Petitioner, Kade Allen, incarcerated at Correctional Training Facility, Soledad, California, requested from his Correctional Counselor, Ms. Hall, when would he be eligible for parole. The counselor then examined petitioner's Central Prison File and told petitioner that he had a determined sentence and plus a indetermined sentence, but looking at the sentencing record, it showed that petitioner was sentenced repeatedly for the same crimes consecutively. She then advised petitioner to write the court and ask them to correct the sentencing errors so that the sentence could reflect the crimes committed and not double for the same crime. Without the errors in the sentence, petitioner would have been eligible for parole 13 years age.

Based on the information given to petitioner concerning the illegal sentence, he acted diligently to assert these fact in court because it would advanced the eligibility of his release. Petitioner sought to have the Superior Court of California, County of Los Angeles, to correct the illegal sentence and request was denied. (See, Appendix A)

Petitioner filed in the Court of Appeal, Second Appellate District and was denied relief. (See, Appendix B)

Petitioner filed a Petition For Writ of Mandate in the California Supreme Court, again invoking the appropriate extraordinary remedies available and that denied the requested relief. (See, Appendix C).

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