

April 3, 2003

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-30962
Summary Calendar

FRANK GUILLORY, SR.,

Petitioner-Appellant,

versus

BURL CAIN,

Respondent-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 99-CV-1352

Before HIGGINBOTHAM, SMITH, and CLEMENT, Circuit Judges.

PER CURIAM:*

Frank Guillory, Sr., Louisiana inmate # 347892, was convicted by a jury of two counts of first-degree murder and was sentenced to serve concurrent life sentences without benefit of probation, parole, or suspension of sentence. Guillory was granted a COA and now appeals the denial of his 28 U.S.C. 2254 petition.

Guillory alleged for the first time on direct appeal that he had been denied due process and equal protection because the

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

method of selecting the grand jury foreperson in St. Landry Parish, Louisiana, was discriminatory. The state appellate court concluded in 1996 that Guillory, who is white, did not have standing to assert a claim for "alleged discrimination against another race in the selection of a grand jury foreman" and affirmed the convictions and sentences. Guillory did not seek further review in the Louisiana Supreme Court.

Guillory reiterated the grand jury foreperson claims in his first state post conviction application. He argued that although he was white, he had standing to assert a challenge to the exclusion of blacks as grand jury forepersons in St. Landry Parish. The application was denied pursuant to LA. CODE CRIM. PROC. art. 930.4, which provides that "[u]nless required in the interest of justice, any claim for relief which was fully litigated in an appeal from the proceedings leading to the judgment of conviction and sentence shall not be considered."

Guillory raised the grand jury foreperson claims in a second state post conviction application and added claims that trial counsel provided ineffective assistance because counsel did not move to quash the indictment and did not challenge the method of selection of the grand jury foreperson. The application was denied pursuant to LA. CODE CRIM. PROC. art. 930.4 as repetitive and art. 930.8 as untimely.

By the time Guillory reached the district court, the Supreme Court had decided in Campbell v. Louisiana, 523 U.S. 392, 401

(1998), that a white defendant has standing to assert claims such as Guillory's. The district court rejected application of the doctrine of procedural default, concluded that Campbell announced a new rule of constitutional law that was not retroactively applicable to cases on collateral review, and denied 28 U.S.C. § 2254 relief.

A COA was granted on the issue whether Campbell announced a new rule of constitutional law that is retroactively applicable to cases on collateral review.

Guillory's claims have not been adjudicated on the merits. See Mercadel v. Cain, 179 F.3d 271, 274-75 (5th Cir. 1999). Therefore, our review is de novo. See id. at 275.

Article 930.4A, LA. CODE CRIM. PROC., is not a procedural bar in the traditional sense and is not a decision on the merits. Bennett v. Whitley, 41 F.3d 1581, 1583 (5th Cir. 1994). The article 930.4 bar does not preclude the district court from addressing the merits of the claims. Id.

In Peterson v. Cain, 302 F.3d 508, 513-14 (5th Cir. 2002), cert. denied, 123 S. Ct. 886 (2003), we held that Campbell did not announce a new rule of constitutional law. Accordingly, the district court's basis for the rejection of Guillory's grand jury foreperson claims was erroneous. Accordingly, the judgment of the district court is VACATED, and Guillory's claims that he was denied due process and equal protection due to the method of selection of the grand jury foreperson in St. Landry Parish are

REMANDED for consideration in light of our opinion in Peterson v. Cain, 302 F.3d 508, 513-14 (5th Cir. 2002).

Guillory abandoned his ineffective assistance claims by failing to assert them in this court. Yohey v. Collins, 985 F.2d 222, 225 (5th Cir. 1993).

VACATED AND REMANDED.