UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 92-2958

MURPHY JEROME CELESTINE,

Petitioner-Appellant,

VERSUS

WAYNE SCOTT, Director,
Texas Department of Criminal Justice,
Institutional Division,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
(H-92-1219)

(June 15, 1994)

Before KING, SMITH, Circuit Judges, and KAZEN,[1] District Judge.

KAZEN, DISTRICT JUDGE.*

Murphy Jerome Celestine (Celestine) is in the custody of the Texas Department of Criminal Justice, Institutional Division, ("TDC") pursuant to a judgment entered in the 209th District Court of Harris County, Texas. On February 14, 1989, Celestine entered a plea of *nolo contendere* to one felony count of aggravated robbery

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[1]District Judge of the Southern District of Texas, sitting by designation.

*Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

in Cause No. 505846. The state trial court accepted the plea, entered judgment of guilty, and assessed punishment at forty-five years' imprisonment. Celestine did not challenge the conviction on direct appeal. He thereafter filed a state application for writ of habeas corpus, which was denied by the Texas Court of Criminal Appeals "without written order."

Invoking 28 U.S.C. §2254, Celestine filed a petition in federal district court on April 20, 1992. The Director moved for summary judgment, and the district court referred the motion to a magistrate judge for recommendations. The magistrate judge recommended that relief be denied. On November 20, 1992, the district court adopted that recommendation, dismissed the action, and entered final judgment denying relief. Celestine filed a timely notice of appeal, and on January 29, 1993, the district court granted a certificate of probable cause. Concluding that a pivotal, material fact has not been adequately developed at either the previous state or federal court hearings, we remand for a further hearing.

Background Facts

After his June 24, 1988 arrest, Celestine was indicted on eight different felony counts of aggravated robbery -- Cause Nos. 505231 (counts 1 and 2), 505845, 505846, and 517394 (counts 1 through 4). Celestine's court-appointed attorney, William K. Goode, subsequently filed motions to suppress all evidence obtained directly or indirectly as a result of Celestine's arrest. On February 13, 1989, Celestine appeared for trial in Cause No.

505845. Both sides announced ready, and the trial judge ordered that the motion to suppress be carried for trial. Celestine then pleaded not guilty and waived his right to a jury trial. After hearing the State's evidence, including the testimony of one of the arresting officers, the trial court ruled in Celestine's favor on the illegal arrest and seizure issue and granted Goode's oral motion for an instructed verdict of not guilty. The trial court entered a judgment of not guilty in Cause No. 505845 on February 13, 1989.

The trial judge also signed orders dismissing the six aggravated robbery charges set out in Cause Nos. 505231 (counts 1 and 2) and 517394 (counts 1 through 4). Each of six motions to dismiss is signed by the judge with an order stating:

> The foregoing motion having been presented to me on this the 13th day of February A.D. 1989, and the same having been considered, it is, therefore, ORDERED, ADJUDGED and DECREED that said above entitled and numbered cause be and the same is hereby dismissed.

On February 14, 1989, Celestine appeared in court with attorney Goode and entered his plea of *nolo contendere* in Cause No. 505846. The plea was pursuant to a plea bargain calling for, *inter alia*, the dismissal of the six other aggravated robbery charges. The plea was accepted and Celestine was sentenced. Only later, according to Celestine, did he discover that the other charges had apparently already been dismissed before he even made the plea bargain.

Celestine thereafter filed an application for writ of habeas corpus in accordance with article 11.07 of the Texas Code of

Criminal Procedure. He asserted two grounds for relief: first, that his *nolo contendere* plea was invalid because the six charges the State agreed to dismiss had already been dismissed the previous day; second, that his plea was invalid because his court-appointed attorney was constitutionally ineffective for counselling him to enter the plea when he knew, or should have known, that the six other charges already had been dismissed.

The State's answer conceded that the six dismissal orders were dated February 13, 1989, but observed that the court's docket sheets indicated the charges were dismissed on February 14. The State noted that the court's capias documents also indicated that the charges were dismissed on February 14, but acknowledged that "the number '14' seems to alter a previous number." The state trial court ordered attorney Goode to file an affidavit responding to Celestine's allegations.

The trial court found that the facts in Goode's affidavit were true and that those facts, together with the contents of official court records, demonstrated that Goode had afforded Celestine reasonably effective assistance of counsel. Accordingly, the trial court recommended that the Texas Court of Criminal Appeals ("TCCA") deny relief. On December 11, 1991, the TCCA denied relief "without written order." *Ex Parte Celestine*, Application No. 22,711-01.[2]

[2]At our request, the parties briefed the question of whether this action of the Texas Court of Criminal Appeals affects the statutory presumption of correctness under §2254(d). We have determined that we need not reach that issue in this case.

Celestine then filed his §2254 petition in federal court, raising the same two grounds for relief that he had asserted in his state habeas application. The Director responded with a motion for summary judgment, contending that Celestine was not entitled to relief because he had entered a voluntary plea of *nolo contendere* and he had failed to establish that his court-appointed attorney was constitutionally ineffective. The Director did not directly address Celestine's contention that the six charges forming the basis of the plea agreement had, in fact, been dismissed on February 13, 1989.

The magistrate judge recommended that relief be denied, finding no support in the record for Celestine's argument. She first observed that the trial court's docket sheets indicated the charges in question had been dismissed on February 14, and that the dismissal orders themselves were file-stamped February 14. She then indicated that the Goode affidavit "confirms" the dismissal date of February 14. Because the state court expressly found that Goode's affidavit was "true," the magistrate judge concluded that this finding was presumptively correct under §2254(d) and precluded Celestine's claim that the dismissals occurred on February 13. The district court adopted the magistrate's recommendation and entered a final judgment denying relief.

Presumption of Correctness

The pertinent statute, 28 U.S.C. §2254(d), provides a presumption of correctness for fact determinations made by a state court after a hearing on the merits, evidence by a written finding.

The district court accepted the magistrate judge's conclusion that this presumption was applicable here, and that none of the statutory exceptions applied. We disagree.

The statutory presumption does not apply when material facts are not adequately developed at the state court hearing nor when the state court record is produced and the record does not fairly support the particular factual determination. §2254(d)(3)(8). The state court records unquestionably show that the six charges in question were dismissed by orders dated February 13, 1989. The record also contains capias documents reciting that the charges were dismissed on February 14 and that the documents were signed by the District Clerk on February 14. However, these documents clearly indicate that at both places where the number 14 appears, the number "4" is a strikeover and the number originally written was apparently a "3." The state court, in denying the habeas petition, did not directly address these uncontested facts. Instead that court adopted as true the conclusory statement by attorney Goode that "no causes or counts contained in causes were dismissed by the State on February 13, 1989." Goode makes that statement without even mentioning, much less explaining, the existence of dismissal orders unquestionably dated February 13, 1989.

Celestine contends that as a matter of Texas law, the six charges were effectively dismissed on February 13 regardless of when the orders were docketed. See State v. Rosenbaum, 818 S.W.2d 398 (Tex. Crim. App. 1991); State *ex rel*. Holmes v. Denson, 671

S.W.2d 896 (Tex. Crim. App. 1984) (en banc). The Director does not seriously contest that proposition. Indeed in a brief filed January 7, 1994, he essentially concedes that the six pending charges "were dismissed on the day before the guilty plea hearing" but maintains that the timing of the dismissal is "irrelevant."

The problem is, however, that attorney Goode's affidavit -- which the state court declared to be "true" -- declares unequivocally that Celestine did not broach Goode with the question of a plea bargain until February 14. As perhaps a fallback position, the Director now contends that the charges in question were dismissed on February 13 in anticipation of a possible later plea by Celestine. This argument is based on the following statement in Goode's affidavit:

> "Mr. Celestine was alert and probing with respect to the plea bargain offer, indeed asking that I literally show him the dismissal forms that were to be filed upon his proper plea of guilty or no contest."

We find this argument rather strained. The quoted statement simply says that Celestine wanted to be sure that the other charges were dismissed at the time of his plea. There is no hint in Goode's affidavit that Celestine ever discussed a plea prior to February 14 or even that Goode somehow anticipated such a discussion, much less that Goode would have alerted the prosecutor and judge the day before the plea. On the contrary, Goode avers that he approached the prosecutor to discuss a plea bargain "[p]ursuant to Mr. Celestine's request" of February 14.

Conclusion

The district court dismissed this §2254 petition, adopting a recommendation that Celestine was precluded from claiming that the six other criminal charges were already dismissed even before he began his plea negotiations. That recommendation relied on a state court finding which was deemed presumptively correct. Neither the state court nor the conclusory attorney's affidavit upon which it relied discuss or explain documents in the record that contradict the finding, i.e., orders of dismissal signed February 13 and capias documents from the Clerk, which apparently were originally dated February 13. That day, February 13, was the same day that Celestine had secured dismissal of still another charge after a non-jury trial, and it is the day before the topic of a plea bargain on the remaining six charges even arose. Moreover, the Director now maintains that the six charges may well have been dismissed on February 13 but that this fact is irrelevant. Under these circumstances, the state court finding that the charges were dismissed on February 14 obviously cannot be presumptively correct. At oral argument, the attorneys for both parties speculated on various scenarios under which the date discrepancy could be explained. We conclude that the proper approach is to remand this case to the federal district court for further hearing so that the true facts can be determined, obviating the need for any speculation. We reject Celestine's contention that he is entitled to vacate his conviction on the state of this record. The merits

of his claim cannot be determined until the complete facts are established.

We REVERSE AND REMAND for further proceedings.